

Source: [Legal](#) > [States Legal - U.S.](#) > [Washington](#) > [Find Cases](#) > **WA State Cases, Combined** 

Terms: **macpherson and enumclaw** ([Edit Search](#) | [Suggest Terms for My Search](#))

 Select for FOCUS™ or Delivery



*2007 Wash. App. LEXIS 2024, \**

**Mutual of Enumclaw Insurance Company** , *Appellant*, v. **Macpherson Construction & Design, Inc.**, *Respondent*.

No. 57820-1-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2007 Wash. App. LEXIS 2024

July 16, 2007, Filed

**NOTICE:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**PRIOR HISTORY:** [Mut. of Enumclaw Ins. Co. v. MacPherson Constr. & Design, Inc., 2007 Wash. App. LEXIS 2053 \(Wash. Ct. App., July 16, 2007\)](#)

### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant insurer sought a declaration that its commercial general liability policy did not cover a claim against appellee insured, a general contractor, by a third party for damages arising out of the faulty workmanship of a subcontractor. The trial court (Washington) granted partial summary judgment in favor of the insurer, ruling that an exclusion in the policy precluded coverage under the policy's general terms. Both parties appealed.

**OVERVIEW:** The insurer argued that the trial court erred in ruling that an exclusion in the policy applied to preclude coverage for the claim under the policy's general terms. The appellate court held that there existed disputed issues of material fact concerning whether the liberalization clause applied to provide coverage to the contractor for the arbitration award amount. Neither party demonstrated that it was entitled to judgment as a matter of law on that issue. Inter alia, in order to sustain its burden on summary judgment, the contractor had to demonstrate, as a matter of law, that each requirement of the liberalization clause was satisfied. As there was a genuine issue of material fact regarding whether its premium would increase under the proposed plan, the contractor failed to satisfy that burden. Thus, the trial court erred by awarding summary judgment to the contractor on that issue. The appellate court also held that the insurer failed to demonstrate that it was entitled to summary judgment regarding the application of the liberalization clause. A policy exclusion precluded coverage for the arbitration award pursuant to the umbrella policy's general terms.

**OUTCOME:** The trial court's ruling that an exclusion in the policy applied to preclude coverage for the claim under the policy's general terms was affirmed. The summary judgment ruling regarding the application of the liberalization clause was reversed. The matter was remanded to the trial court for proceedings consistent with the opinion. The contractor's request for an award of attorney fees on appeal pursuant to [Wash. R. App. P. 18.1](#) was denied.


**CORE TERMS:** coverage, summary judgment, liberalization, subcontractor's, premium, endorsement, work performed, insured, transition, matter of law, arbitration award, broaden, umbrella policy, simplified, policy exclusions, issues of material fact, policy-holder, genuine, general contractor, insurance policy, faulty, "liberalized, decrease, evidence presented, reasonable persons, substitution, general terms, failed to demonstrate, premium rates, named insured"

## LEXISNEXIS® HEADNOTES

 [Hide](#)

[Insurance Law](#) > [Excess Insurance](#) > [Umbrella Policies](#) 


[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [General Overview](#) 

**HN1**  An umbrella policy provides coverage for amounts exceeding commercial general liability (CGL) policy limits, and protects against gaps in the underlying policy. [More Like This Headnote](#)

[Insurance Law](#) > [Claims & Contracts](#) > [General Overview](#) 


[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [General Overview](#) 

[Insurance Law](#) > [Industry Regulation](#) > [State Insurance Commissioners & Departments](#) > [General Overview](#) 


**HN2**  A liberalization clause allows the policyholder to benefit from terms not included in its policy, which would allow for broader coverage than that allowed pursuant to the terms included in its policy, under particular circumstances. Generally speaking, a policy is "liberalized" pursuant to such a clause when the insurer has submitted to the Office of the Insurance Commissioner (OIC) forms or "other provisions" which purport to extend or broaden the policyholder's insurance to provide such coverage, without additional charge to the policyholder, and when the OIC approves such provisions "to be effective" while the holder's policy is in force. Insurers wishing to offer a new or extended coverage plan are required to file documents with the OIC, which reviews the proposed plan to ensure that it complies with the requirements of Wash. Rev. Code ch. 48.19, the chapter regulating the Washington insurance industry. [Wash. Rev. Code § 48.19.040](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Summary Judgment](#) > [Appellate Review](#) > [Standards of Review](#) 

[Civil Procedure](#) > [Summary Judgment](#) > [Evidence](#) 

[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#) 

[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Legal Entitlement](#) 


**HN3**  An appellate court reviews de novo an order on summary judgment, and engages in the same inquiry as the trial court, based solely on the precise record before the trial court. Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. [Wash. Super. Ct. Civ. R. 56\(c\)](#). If, after viewing all of the evidence, reasonable persons could reach only one conclusion, summary judgment is appropriate. [More Like This Headnote](#)

[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#) 




[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Genuine Disputes](#) 


[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Legal Entitlement](#) 

[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Materiality](#) 


**HN4**  Where different inferences can be reasonably drawn from evidentiary facts, summary judgment is not warranted. Thus, a motion for summary judgment must be denied if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. The trial court is not permitted to weigh the evidence or resolve any material factual issues in

ruling on a motion for summary judgment. A trial is not useless but absolutely necessary where there exists a genuine issue as to any material fact. [More Like This Headnote](#)


[Civil Procedure](#) > [Summary Judgment](#) > [Burdens of Production & Proof](#) > [Movants](#)   
[Civil Procedure](#) > [Summary Judgment](#) > [Burdens of Production & Proof](#) > [Nonmovants](#)   
[Civil Procedure](#) > [Summary Judgment](#) > [Evidence](#) 



**HN5**  The party moving for summary judgment always has the burden of proving, by uncontroverted facts, that no genuine issue as to any material fact exists, whether or not that party would have the burden of proof on the issue at a trial on the merits. Once the moving party satisfies its initial burden, the burden then shifts to the nonmoving party to show that a triable issue exists. All material evidence and all reasonable inferences therefrom must be construed most favorably to the nonmoving party. [More Like This Headnote](#)


[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [Completed Operations](#) 




**HN6**  Under Washington case law, an exclusion for damage caused by the completed work of the insured encompasses damage caused by work completed by a subcontractor. [More Like This Headnote](#)


[Civil Procedure](#) > [Summary Judgment](#) > [Appellate Review](#) > [Standards of Review](#)   
[Civil Procedure](#) > [Summary Judgment](#) > [Evidence](#)   
[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [General Overview](#)   
[Civil Procedure](#) > [Summary Judgment](#) > [Standards](#) > [Appropriateness](#) 

**HN7**  In determining whether a moving party is entitled to summary judgment, an appellate court must view the evidence presented in the light most favorable to the nonmoving party. Accordingly, summary judgment is warranted pursuant to the reasonable person standard only if, viewing the evidence in such a light, no reasonable person would reach a conclusion other than that asserted by the moving party. [More Like This Headnote](#)


[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [General Overview](#)   
[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [Ambiguous Terms](#) > [General Overview](#)   
[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [Ambiguous Terms](#) > [Construction Against Insurers](#)   
[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [Plain Language](#) 

**HN8**  Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision. If policy language is clear and unambiguous, appellate courts will enforce it as written. However, if policy language is ambiguous, it is proper to construe the effect of such language against the drafter. Thus, ambiguity is resolved against the insurer and in favor of the insured. An insurance policy is ambiguous when it is fairly susceptible to two different interpretations, both of which are reasonable. [More Like This Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#)   
[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [General Overview](#)   
[Insurance Law](#) > [Claims & Contracts](#) > [Policy Interpretation](#) > [Plain Language](#) 


**HN9**  The interpretation of an insurance policy is a question of law reviewed de novo. Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision. [More Like This Headnote](#)

[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [Products & Workmanship](#) 


**HN10**  The work of subcontractors is necessarily included in exclusions in an insurance policy pertaining to faulty work or defective products of the contractor. [More Like This Headnote](#)

[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [General Overview](#) 


[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [Products & Workmanship](#) 

**HN11**  The risk of supplying faulty goods or services is a business expense most appropriately borne by the general contractor who has control over the quality of goods and services supplied. [More Like This Headnote](#)


[Insurance Law](#) > [General Liability Insurance](#) > [Coverage](#) > [Completed Operations](#) 

**HN12**  Under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor. [More Like This Headnote](#)

[Civil Procedure](#) > [Equity](#) > [General Overview](#) 

[Civil Procedure](#) > [Appeals](#) > [Costs & Attorney Fees](#) 



[Insurance Law](#) > [Bad Faith & Extracontractual Liability](#) > [Remedies](#) > [General Overview](#) 

**HN13**  Attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of fees is permitted by contract, statute, or some recognized ground in equity. Such a ground in equity exists when an insurer refuses to defend or pay the justified action or claim of the insured. [More Like This Headnote](#)

**JUDGES:** [**\*1**] [Dwyer](#) , J. WE CONCUR: [Schindler](#) , ACJ., [Cox](#) , J.

**OPINION BY:** [DWYER](#) 

## OPINION

¶1 [Dwyer](#) , J. — General contractor **MacPherson** Construction & Design, LLC, was insured by [Mutual of Enumclaw Insurance Company](#)  (MoE). MoE filed this action against **MacPherson** seeking a judgment declaring that **MacPherson's** insurance policy did not cover a claim asserted against **MacPherson** by a third party for damages arising out of the faulty workmanship of a subcontractor. The trial court granted partial summary judgment in favor of MoE, ruling that an exclusion in the policy precluded coverage under the policy's general terms. The trial court then granted summary judgment in favor of **MacPherson**, ruling that a liberalization clause contained in the policy applied because MoE had sought the insurance commissioner's approval of new policy language that would apply to MoE's situation, and that the claim was covered. Both parties appeal.

¶2 We affirm the trial court's ruling that an exclusion in the policy applies to preclude coverage for the claim under the policy's general terms. We also hold, however, that neither party has demonstrated that it is entitled to summary judgment regarding the application of the liberalization clause. Accordingly, [**\*2**] we reverse the trial court's summary judgment ruling on that issue, and remand this matter to the trial court for proceedings consistent with this opinion.

## FACTS

¶3 **MacPherson** is a developer and general contractor in the business of constructing homes. At all times relevant to this lawsuit, **MacPherson** was insured by MoE under both a commercial general liability (CGL) policy and a supplemental umbrella policy. <sup>1</sup> It is the coverage afforded **MacPherson** under the umbrella policy that is the subject of this appeal.

**FOOTNOTES**

<sup>1</sup> **HN1** An umbrella policy provides coverage for amounts exceeding CGL policy limits, and protects against gaps in the underlying policy. [Prudential Property & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 117, 119, 724 P.2d 418 \(1986\).](#)

¶4 In 1999, **MacPherson** was the general contractor on the construction of a house for Thomas and Anne Marie Hedges. In 2001, the Hedges discovered significant water damage to the structure of the house caused by siding that had been incorrectly installed by one of the subcontractors. The Hedges brought an action in arbitration against **MacPherson** and the matter proceeded to hearing. The arbitrator awarded the Hedges \$ 399,088.32, an amount representing both damages [**\*3**] to the house itself and damages for the loss of a favorable purchase offer on the house that had been made before the water damage was discovered. MoE filed this action against **MacPherson** in 2004, seeking a judgment declaring that “the Hedges' claims against McPherson, Inc. and **MacPherson**, LLC are not covered by the Mutual of **Enumclaw** liability policies” issued to **MacPherson**.

¶5 In January 2005, the trial court granted partial summary judgment in favor of MoE, ruling that, as a result of policy exclusions, **MacPherson** was not entitled to coverage under the general terms of either the CGL policy or the umbrella policy. The trial court also ruled, however, that there remained an unresolved question of fact as to whether **MacPherson** was entitled to coverage as a result of a liberalization clause contained in the umbrella policy. <sup>2</sup>

**FOOTNOTES**

<sup>2</sup> As herein discussed, the **HN2** liberalization clause allows the policy-holder to benefit from terms not included in its policy, which would allow for broader coverage than that allowed pursuant to the terms included in its policy, under particular circumstances. Generally speaking, a policy is “liberalized” pursuant to such a clause when the insurer has submitted to the [**\*4**] Office of the Insurance Commissioner (OIC) forms or “other provisions” which purport to extend or broaden the policy-holder's insurance to provide such coverage, without additional charge to the policy-holder, and when the OIC approves such provisions “to be effective” while the holder's policy is in force.

Insurers wishing to offer a new or extended coverage plan are required to file documents with the OIC, which reviews the proposed plan to ensure that it complies with the requirements of chapter 48.19 RCW, the chapter regulating the Washington insurance industry. [RCW 48.19.040.](#)

¶6 In July 2005, both parties filed additional motions for summary judgment regarding the issue of coverage pursuant to the liberalization clause. The trial court granted summary judgment in favor of **MacPherson**, ruling that the policy had been “liberalized” so that it provided coverage for the award amount.

¶7 The trial court then entered judgment in favor of **MacPherson**, awarding **MacPherson** \$ 399,088.32, the total amount of the arbitration award.

¶8 **MacPherson** also moved for an award of attorney fees and costs in the amount of \$ 165,900.75. The trial court awarded **MacPherson** \$ 43,447.88 in such fees and costs.

¶9 Both parties [**\*5**] appeal. MoE contends that the trial court erred by ruling that **MacPherson** was entitled to coverage pursuant to the umbrella policy's liberalization clause, thereby granting

**MacPherson's** motion for summary judgment and denying MoE's motion for summary judgment on the same issue. **MacPherson** contends that the trial court erred by ruling that an exclusion in the umbrella policy applied to preclude coverage under the policy's general terms.

¶10 We hold that there exist disputed issues of material fact concerning whether the liberalization clause applies to provide coverage to **MacPherson** for the arbitration award amount. Accordingly, we reverse the trial court's summary judgment ruling in favor of **MacPherson** on this issue. We also hold that MoE has failed to demonstrate that it is entitled to summary judgment regarding the application of the liberalization clause. Accordingly, we affirm the trial court's denial of summary judgment on this issue. Finally, we affirm the trial court's summary judgment ruling that a policy exclusion precludes coverage for the arbitration award pursuant to the umbrella policy's general terms.

## DISCUSSION

¶11 This **HN3** court reviews de novo an order on summary judgment, and **[\*6]** engages in the same inquiry as the trial court, [Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 \(1990\)](#), based solely on the precise record before the trial court. [Green v. Normandy Park Riviera Section, Cmty. Club, 137 Wn. App. 665, 678, 151 P.3d 1038 \(2007\)](#). Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. [CR 56\(c\)](#); [Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 220, 802 P.2d 1360 \(1991\)](#). If, after viewing all of the evidence, reasonable persons could reach only one conclusion, summary judgment is appropriate. [Doherty v. Municipality of Metro. Seattle, 83 Wn. App. 464, 468, 921 P.2d 1098 \(1996\)](#).

¶12 **HN4** Where different inferences can be reasonably drawn from evidentiary facts, however, summary judgment is not warranted. [Johnson v. Schafer, 47 Wn. App. 405, 407, 735 P.2d 419 \(1987\)](#), reversed on other grounds, [110 Wn.2d 546, 756 P.2d 134 \(1988\)](#). Thus, a motion for summary judgment must be denied if the record shows any reasonable hypothesis which entitles the nonmoving party to relief. **[\*7]** [Mostrom v. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 \(1980\)](#). The trial court is not permitted to weigh the evidence or resolve any material factual issues in ruling on a motion for summary judgment. [Fleming v. Smith, 64 Wn.2d 181, 185, 390 P.2d 990 \(1964\)](#). "The function of ... summary judgment is to avoid a useless trial. A trial is not useless but absolutely necessary where there exists a genuine issue as to any material fact." [Preston v. Duncan, 55 Wn.2d 678, 681, 349 P.2d 605 \(1960\)](#).

¶13 **HN5** The party moving for summary judgment always has the burden of proving, by uncontroverted facts, that no genuine issue as to any material fact exists, whether or not that party would have the burden of proof on the issue at a trial on the merits. [State ex rel. Bond v. State, 62 Wn.2d 487, 490, 383 P.2d 288 \(1963\)](#). Once the moving party satisfies its initial burden, the burden then shifts to the nonmoving party to show that a triable issue exists. [Doherty, 83 Wn. App. at 468](#). All material evidence and all reasonable inferences therefrom must be construed most favorably to the nonmoving party. [Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 \(1977\)](#).

### I. Liberalization Clause

¶14 MoE appeals **[\*8]** the award of summary judgment to **MacPherson**, contending that the trial court erred by ruling that **MacPherson's** policy was "liberalized" pursuant to the liberalization clause and, thus, provided coverage for the arbitration award amount. MoE asserts that, as a matter of law, the requirements of the liberalization clause were not satisfied. On the other hand, **MacPherson** asserts that, as a matter of law, the requirements of the liberalization clause were satisfied.

¶15 We disagree with the assertions made by both parties, and hold that neither party has demonstrated that it is entitled to judgment as a matter of law on this issue. Initially, we hold that an issue of material fact exists regarding the application of the liberalization clause, which precludes an award of summary judgment to **MacPherson**. We further hold that MoE has failed to demonstrate that, as a matter of law, any one requirement of the liberalization clause was not satisfied, which precludes an award of summary judgment to MoE. <sup>3</sup>

¶16 The liberalization clause <sup>4</sup> states:

Liberalization Clause. In the event any filing is submitted to the insurance supervisory authorities on behalf of the Company, and:

- (a) the filing is approved or **[\*9]** accepted by the insurance authorities to be effective while this policy is in force or within 45 days prior to its inception; and
- (b) the filing includes insurance forms or other provisions that would extend or broaden this insurance by endorsement or substitution of form, without additional premium;

the benefit of such extended or broadened insurance shall inure to the benefit of the insured as though the endorsement or substitution of form had been made.

¶17 (Emphasis added.)

#### FOOTNOTES

<sup>3</sup> As herein discussed, in order for **MacPherson** to demonstrate that it is entitled to summary judgment regarding this issue, **MacPherson** must show that, as a matter of law, each requirement of the liberalization clause was satisfied. On the other hand, in order for MoE to demonstrate that it is entitled to summary judgment regarding this issue, MoE need show only that, as a matter of law, any one requirement of the liberalization clause was not satisfied.

<sup>4</sup> There are no Washington cases interpreting a liberalization clause in an insurance policy, such as the one at issue here. Such clauses have been applied and upheld by a handful of courts in other jurisdictions. See, e.g., [Gerrish Corp. v. Aetna Cas. & Sur. Co., 949 F. Supp. 236 \(D. Vt. 1996\)](#); **[\*10]** [Gov't Employees Ins. Co. v. Wilson, 69 Misc. 2d 1020, 332 N.Y.S.2d 338 \(1972\)](#). The validity of the liberalization clause itself is not at issue in this case.

¶18 It is undisputed that MoE submitted a filing to the Office of the Insurance Commissioner, an insurance supervisory authority within the meaning of the liberalization clause. <sup>5</sup> The parties dispute, however, whether that filing fulfilled the additional requirements of the liberalization clause.

#### FOOTNOTES

<sup>5</sup> The filing by MoE to the OIC proposed to transition the insurance it offered to customers such as **MacPherson** from a "pre-simplified" to a "simplified" plan. As herein discussed, the pre-simplified plan contains an exclusion for damage caused by the completed work of the insured.

**HN6** Under Washington case law, such an exclusion encompasses damage caused by work completed by a subcontractor. *Schwindt v. Underwriters at Lloyd's of London*, 81 Wn. App. 293, 305-07, 914 P.2d 119 (1996). On the other hand, while the simplified plan also contains an exclusion for property damage arising out of the insured's work, that exclusion specifically excepts the work of subcontractors: "This exclusion does not apply if the damaged work or the work out of which [\*11] the damage arises was performed on your behalf by a subcontractor." The arbitration award here at issue arose out of a claim asserted by a third party for damages caused by the faulty work of a subcontractor. Accordingly, if **MacPherson** were entitled to benefit from the provisions of the simplified plan, **MacPherson's** insurance may be broadened to cover some or all of the arbitration award amount.

#### A. "Additional Premium"

¶19 Initially, the parties contest whether the filing would have extended or broadened **MacPherson's** insurance coverage without any additional premium, as required by section (b) of the policy's liberalization clause. The evidence presented to the trial court regarding this issue is as follows.

¶20 **MacPherson** presented to the trial court several written communications from MoE to the OIC, which contain statements regarding the anticipated effect of the proposed plan on premium rates. The following statements, taken from various submissions to the OIC, are representative:

- [A]s an [Insurance Services Office] member, to be consistent with the principles of the ISO transition, MoE's transition should not result in an increase to policyholders.

... The factors that we proposed will [\*12] permit MoE to move from our old ISO [General Liability] program based upon rates to the simplified ISO GL program based upon loss costs and simultaneously provide a modest decrease in our Washington GL premium level.

- Impact on policyholders will be a modest decrease [in premiums].
- Note that under all scenarios, Capped Minimum Transition, Capped Maximum Transition and Capped Mean Transition, modest decreases are indicated. These modest decreases demonstrate that MoE will not receive a premium level change when we transition to the simplified ISO GL program

... .

No scenario results in a rate increase. All scenarios present an anticipated rate decrease.

(Emphasis added.) **MacPherson** argues that the listed statements indicate that the premium level of each policy holder, including that of **MacPherson**, would decrease under the proposed plan.

¶21 In response, MoE contends that the listed statements refer to the anticipated effect of the proposed plan on the overall premium rate, rather than its anticipated effect on each individual premium rate. In support of this contention, MoE points to other statements in the correspondence relied on by **MacPherson**, which specifically appear to refer [\*13] to such an overall rate change. The following statement is representative:

The results of our analysis indicated that ... the overall premium change related to our transition to the simplified ISO GL program would range from -8.82% at the Capped

Minimum Transition to -7.36% at the Maximum Transition with -7.95% at the Capped Mean Transition.

(Emphasis added.) Accordingly, MoE contends that some individual premium rates may actually increase under the proposed plan.

¶22 MoE next contends that **MacPherson's** would be one such premium which would increase under the proposed plan. In so contending, MoE relies on a declaration from one of its employees, unaccompanied by supporting documentation, asserting that **MacPherson's** individual premium would increase significantly should the proposed plan go into effect.

¶23 Each party asks us to resolve this dispute by accepting its interpretation of the evidence over that of the other party. In other words, each party invites us to weigh the evidence by discounting the probative effect of some such evidence and accepting the probative effect of other such evidence. However, that is not the proper role of this court on summary judgment, nor is it the proper [\*14] role of the trial court. [Fleming, 64 Wn.2d at 185.](#)

¶24 Rather, <sup>HN7</sup> in determining whether a moving party is entitled to summary judgment, we must view the evidence presented in the light most favorable to the nonmoving party. [Ashcraft, 17 Wn. App. at 854.](#) <sup>6</sup> After so viewing the evidence in this case, we conclude that neither party is entitled to summary judgment on this issue.

#### FOOTNOTES

<sup>6</sup> Both parties assert that no reasonable person would agree with the other party's interpretation of the evidence. It is true that summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence. [Doherty, 83 Wn. App. at 468.](#) This "reasonable persons" standard, however, does not allow us to weigh the evidence presented, discounting the evidence of the non-moving party. Rather, we must view all of the evidence presented in the light most favorable to the non-moving party. [Ashcraft, 17 Wn. App. at 854.](#) Accordingly, summary judgment is warranted pursuant to the reasonable person standard only if, viewing the evidence in such a light, no reasonable person would reach a conclusion other than that asserted by the moving party.

Furthermore, while each party asserts that the other's [\*15] proffered evidence is irrelevant to the determination at issue, neither party moved the trial court to strike any such evidence. Accordingly, all the evidence herein discussed was before the trial court and is, therefore, in the record to be considered by us. [Green, 137 Wn. App. at 678.](#)

¶25 **MacPherson** asserts that the proffered evidence compels the conclusion that its premium would decrease under the proposed plan. However, viewing such evidence in the light most favorable to MoE, the statements herein discussed may reasonably be interpreted to refer to a change in overall premium rates under the proposed plan and, therefore, imply nothing about **MacPherson's** individual premium rate. Furthermore, the declaration by MoE's employee may reasonably be interpreted to indicate that **MacPherson's** premium would actually increase under the plan. Thus, an inference other than that asserted by **MacPherson** may reasonably be drawn from the evidence presented.

¶26 On the other hand, MoE asserts that the proffered evidence compels the conclusion that **MacPherson's** premium would increase under the proposed plan. However, viewing the evidence in the light most favorable to **MacPherson**, the statements herein discussed [\*16] may reasonably

be interpreted to indicate that the premiums of all of the policy-holders would not increase under the proposed plan. Such an interpretation indicates that **MacPherson's** would be one such premium, despite the statement to the contrary by MoE's employee. Thus, an inference other than that asserted by MoE may also reasonably be drawn from the evidence presented.

¶27 Where different inferences can reasonably be drawn from evidentiary facts, summary judgment is not warranted. [Johnson, 47 Wn. App. at 407](#). Whether **MacPherson's** premium would increase under the proposed plan is a genuine issue of material fact. Where such an issue exists, a trial is necessary. [Preston, 55 Wn.2d at 681](#).

¶28 In order to sustain its burden on summary judgment, **MacPherson** had to demonstrate, as a matter of law, that each requirement of the liberalization clause was satisfied. As there is a genuine issue of material fact regarding whether its premium would increase under the proposed plan, **MacPherson** has failed to satisfy that burden. Thus, the trial court erred by awarding summary judgment to **MacPherson** on this issue.

¶29 In order to sustain its burden on summary judgment, however, MoE need only show that, as a [\*17] matter of law, any one of the requirements of the liberalization clause were not satisfied. MoE contends both that the filing was not "approved or accepted by the insurance authorities to be effective" while **MacPherson's** policy was in force, as is required by section (a) of the liberalization clause, and that the filing did not contain provisions that would "extend or broaden" **MacPherson's** coverage by "endorsement or substitution of form," as is required by section (b) of the liberalization clause. Accordingly, we turn to a discussion of these issues.

#### B. "To Be Effective"

¶30 MoE first asserts that the filing was not approved or accepted by the OIC "to be effective" while **MacPherson's** policy was in force. We disagree.

¶31 It is undisputed that the filing submitted by MoE to the OIC was approved during the time period **MacPherson's** policy was in force.<sup>7</sup> MoE asserts, however, that the requirement of section (a) was not satisfied because insureds such as **MacPherson** would not transition to the plan automatically but, rather, would transition only when their policies were "renewed or rewritten." Thus, MoE argues that, because **MacPherson** never renewed its policy after the date the OIC approved the [\*18] simplified plan, the simplified plan never actually became effective while **MacPherson's** policy was in force.

#### FOOTNOTES

<sup>7</sup> **MacPherson's** policy was in force from October 18, 2000, until October 18, 2002. The filing submitted by MoE to the OIC was stamped "approved effective 8-1-01," within the time period **MacPherson's** policy was in force. The day before August 1, 2001, MoE sent a letter to the OIC stating that "the effective date will need to be changed from the current filed effective date of 8/01/2001 to 9/15/2001 for new business and from 11/01/2001 to 12/15/2001 for renewals." That letter was stamped "approved effective 9/15/01" by the insurance commissioner. Both September 15, 2001 and December 15, 2001 are also within the time period **MacPherson's** policy was in force.

¶32 In essence, MoE argues that subsection (a) of the liberalization clause ("the filing is approved or accepted by the insurance authorities to be effective while this policy is in force") requires that the policy provisions contained in the filing at issue must become effective while **MacPherson's** policy is

in force. **MacPherson**, on the other hand, argues that subsection (a) requires only that the approval or acceptance of the filing [**\*19**] must occur while its policy is in force.

¶33 <sup>HNS</sup> Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision. [McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 733, 837 P.2d 1000 \(1992\)](#). If policy language is clear and unambiguous, we will enforce it as written. [Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 172, 110 P.3d 733 \(2005\)](#). However, if policy language is ambiguous, “it is proper to construe the effect of such language against the drafter.” [Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 690, 871 P.2d 146 \(1994\)](#) (quoting [McDonald v. State Farm, 119 Wn.2d at 733](#)). Thus, ambiguity is “resolved against the insurer and in favor of the insured.” [Quadrant Corp., 154 Wn.2d at 172](#). An insurance policy is ambiguous “when it is fairly susceptible to two different interpretations, both of which are reasonable.” [Lynott, 123 Wn.2d at 690](#) (quoting [McDonald v. State Farm, 119 Wn.2d at 733](#)).

¶34 Here, the relevant language may reasonably be read as either party asserts. **MacPherson's** interpretation, that the language requires only that approval or acceptance occur while its policy is in force, [**\*20**] would be more clearly supported if subsection (a) simply stated, “the filing is approved or accepted by the insurance authorities while the policy is in force.” The inclusion of the “to be effective” language tends to support MoE's interpretation that the effective date must occur while the policy is in force. On the other hand, MoE's interpretation would be more clearly supported if subsection (a) stated, “the filing is approved or accepted by the insurance authorities and becomes effective while this policy is in force.” Thus, the exclusion of the “and becomes” language tends to support **MacPherson's** interpretation that only an approval of effectiveness must occur while the policy is in force.

¶35 Thus, the policy provision is fairly susceptible to two different interpretations and is, therefore, ambiguous. See [Lynott, 123 Wn.2d at 690](#) (quoting [McDonald v. State Farm, 119 Wn.2d at 733](#)). The language should be construed in favor of the insured, **MacPherson**. See [Quadrant Corp., 154 Wn.2d at 172](#). So construed, the language at issue requires only that approval of effectiveness occur during the time period the policy was in force. That requirement was here satisfied.

¶36 Accordingly, MoE has failed [**\*21**] to demonstrate, as a matter of law, that this requirement of the liberalization clause was not satisfied.

### C. “Endorsement or Substitution of Form”

¶37 Moe next contends that the filing did not allow for “endorsement or substitution of form” pursuant to **MacPherson's** policy, because the forms referred to in the filing at issue were not new, but had been available to other insureds through an alternate plan known as the “Emerald Series” before the filing. Again, we disagree.

¶38 MoE contends that the liberalization clause does not apply when the forms substituted by a particular filing were available prior to the inception of the policy period, citing [State Securities Co. v. Federated Mutual Implement & Hardware Insurance Co., 204 F. Supp. 207, 223 \(D. Neb. 1960\)](#). The court in that case interpreted a liberalization clause similar to the one at issue here:

It was not the purpose, and is not the consequence, of the Liberalization Clause above quoted to introduce into fire insurance policies clauses, provisions or endorsements which, no less than now or at the time of loss, were available to the parties when the policies were issued, but were simply not used as between the contracting parties.

[State Sec. Co., 204 F. Supp. at 223](#) [**\*22**] (emphasis added).

¶39 Although **MacPherson** neglects to respond to this argument in its briefing, MoE concedes in its briefing <sup>8</sup> that the Emerald Series plan “was available primarily to artisans and subcontractors, and generally was not offered to general contractors such as **MacPherson**.”

#### FOOTNOTES

<sup>8</sup> Brief of Respondent at 41.

¶40 Accordingly, while the forms happened to be in use with other policy-holders before the filing, they were not available to **MacPherson**, a factor that distinguishes the circumstances here from those at issue in [State Securities Co.](#) Thus, despite MoE's contention to the contrary, the filing made those forms available to **MacPherson** by allowing such forms to be substituted for those already contained in **MacPherson's** policy. Thus, the filing contains provisions that would alter **MacPherson's** insurance policy by “endorsement or substitution of form.”

¶41 MoE has failed to demonstrate, as a matter of law, that this requirement was not satisfied.

#### D. “Extend or Broaden”

¶42 Finally, MoE contends that the simplified plan would not “extend or broaden” coverage, asserting that the plan would extend coverage in some respects but restrict it in others. We hold, however, that there is a genuine issue of **[\*23]** material fact regarding this issue.

¶43 Initially, there is evidence in the record that the filing in question contains a form that would provide more liberal coverage in the area relevant to this case, i.e., damage caused by the work of subcontractors. MoE contends, however, that the “extend or broaden” language must be read to require an overall extension or broadening of coverage. In support of its assertion, MoE relies on [Donoho & Sons, Inc. v. Aetna Insurance Co., 598 S.W.2d 11 \(Tex. App. 1980\)](#), wherein the court was unable to determine if a filing would extend coverage for purposes of a liberalization clause based on the record before it, and notes that the filing would extend coverage in some instances and restrict it in others.

¶44 However, even if the “extend or broaden” language may be read as MoE contends, such a reading does not entitle MoE to summary judgment. MoE has not directed this court to any evidence in the record that compels the conclusion that the filing, considered as a whole, would provide **MacPherson** with less broad coverage overall. Rather, the evidence highlighted by MoE merely suggests that the filing contained provisions that would restrict coverage in some respects.

¶45 Considering **[\*24]** such provisions, as well as the provision that would appear to broaden **MacPherson's** coverage by excepting the work of subcontractors from the exclusion applicable to the claim here at issue, the overall effect of the filing is a genuine issue of material fact. Thus, MoE has failed to demonstrate that this or any provision of the liberalization clause was not satisfied as a matter of law.

¶46 Both parties have failed to demonstrate that they are entitled to summary judgment regarding the application of the liberalization clause. Thus, the trial court correctly denied MoE's motion for summary judgment but erred by awarding summary judgment to **MacPherson**. Accordingly, we reverse and remand this matter to the trial court for further proceedings. <sup>9</sup>

#### FOOTNOTES

9 We note that, should the trial court conclude on remand that the **MacPherson's** policy is “liberalized” pursuant to the liberalization clause, such a conclusion does not necessarily support an award to **MacPherson** of the entire arbitration award amount. The trial court must also determine whether any separate exclusions in the “liberalized” plan apply to preclude coverage for all or any of the arbitration award amount. MoE asserts that, even if **MacPherson's** [\*25] policy is “liberalized” pursuant to the liberalization clause, a portion of the arbitration award is subject to a separate exclusion for products “recalled from the market.” The merits of this contention must be resolved by the trial court in the event that, on remand, **MacPherson** prevails on its assertion that the policy was “liberalized.”

## II. Policy Exclusions

¶47 On cross-appeal, **MacPherson** contends that the trial court erred by ruling on summary judgment that **MacPherson** was not entitled to coverage for the Hedges' arbitration award under the umbrella policy's general terms. Specifically, **MacPherson** asserts that the trial court erred by determining that a policy provision excluding coverage for claims arising from work performed “by the named insured” also excluded coverage for claims arising from work performed by a subcontractor. We disagree.

¶48 <sup>HN9</sup> The interpretation of an insurance policy is a question of law reviewed de novo. [Alaska Nat'l Ins. Co. v. Bryan, 125 Wn. App. 24, 30, 104 P.3d 1 \(2004\)](#). “Insurance policy language is interpreted as it would be understood by an average person and in a manner that gives effect to each provision.” [Schwindt v. Underwriters at Lloyd's of London, 81 Wn. App. 293, 298, 914 P.2d 119 \(1996\)](#).

¶49 The [\*26] umbrella policy **MacPherson** initially purchased from MoE clearly excluded coverage for property damage caused by the work done by or “on behalf of” the named insured. That policy states: “This policy does not apply ... to property damage to ... work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts, or equipment furnished in connection therewith.” (Emphasis added.) Thus, the policy exclusion specifically excluded coverage for claims arising from work performed on behalf of the named insured, such as work performed by a subcontractor.

¶50 **MacPherson** also purchased, however, a supplemental endorsement that expressly replaced the property damage exclusion contained in the original umbrella policy. The supplemental endorsement provides that policy coverage does not apply:

With respect to the COMPLETED OPERATIONS HAZARD to Property Damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of the materials, parts, or equipment furnished in connection therewith.

(Emphasis added.) In contrast to the original exclusion, the exclusion contained in the supplemental endorsement form [\*27] omits the phrase “on behalf of.”

¶51 **MacPherson** contends that the only reasonable interpretation of the endorsement form's replacement exclusion, in light of that omission, is that only claims for damage arising out of work performed by the named insured itself are excluded from coverage, not claims for damage arising out of work performed by subcontractors.

¶52 In support of this contention, **MacPherson** points to cases in several other jurisdictions holding, under endorsements similar to the endorsement at issue here, that where an exclusion omits the

phrase “on behalf of,” the exclusion does not encompass work performed by subcontractors. See, e.g., [Fireguard Sprinkler Sys., Inc. v. Scottsdale Ins. Co.](#), 864 F.2d 648 (9th Cir. 1988); [Fejes v. Alaska Ins. Co.](#), 984 P.2d 519 (Alaska 1999); [McKellar Dev. of Nevada, Inc. v. N. Ins. Co. of New York](#), 108 Nev. 729, 837 P.2d 858 (1992).

¶53 However, an argument substantially similar to the one advanced by **MacPherson** was rejected by this court in [Schwindt](#), 81 Wn. App. at 305-07. The plaintiff in that case argued that a policy exclusion precluding coverage for work done by “the Assured,” rather than “on behalf of the Assured,” must be interpreted to preclude [\*28] only work actually performed by that policy-holder rather than by subcontractors on the policy-holder's behalf.

¶54 In discounting that argument in *Schwindt*, we expressly addressed and rejected the rule adopted by those cases now cited by **MacPherson**. The *Schwindt* decision held that <sup>HN10</sup> “work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the contractor.” [Schwindt](#), 81 Wn. App. at 306. In so holding, we reasoned that the policy-holder was the party in control of, and responsible for, the quality of work performed by a subcontractor. As stated therein, the general contractor

undertook construction ... and was obligated by the contract to perform that work in a satisfactory manner. The fact that it subcontracted out some of the work on the project did not relieve it of its contractual obligation to produce a product free of defects and faulty workmanship.

[Schwindt](#), 81 Wn. App. at 307.

¶55 In support of our holding in *Schwindt*, we favorably cited two Minnesota Supreme Court cases. See, [Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co.](#), 396 N.W.2d 229 (Minn. 1986); [Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co. of Am.](#), 323 N.W.2d 58 (Minn. 1982).

[\*29] The court in those cases held that similar policy exclusions precluded coverage for the work of subcontractors, despite the absence of the “on behalf of” language. The holdings in those cases similarly reasoned that <sup>HN11</sup> the risk of supplying faulty goods or services is a business expense most appropriately borne by the general contractor who has control over the quality of goods and services supplied. [Knutson](#), 323 N.W.2d at 235; [Bor-Son](#), 323 N.W.2d at 64.

¶56 No Washington cases since *Schwindt* have invalidated either the rule established therein or the rationale supporting it. To the contrary, we recently applied the *Schwindt* rule in another case, [Mutual of Enumclaw Insurance Co. v. Patrick Archer Construction, Inc.](#), 123 Wn. App. 728, 735-36, 97 P.3d 751 (2004) (“There can be no question that the quality of the work performed, both by [the general contractor] as well as by its subcontractors, was the responsibility of [the general contractor] and no one else.”).

¶57 **MacPherson** contends, nonetheless, that the *Schwindt* rule is no longer valid, asserting that in [Wanzek Construction, Inc. v. Employers Insurance of Wausau](#), 679 N.W.2d 322, 326 (Minn. 2004), the Minnesota Supreme Court recently “dispensed” [\*30] with the rule established by the court in *Bor-Son* and *Knutson*. That contention is unavailing.

¶58 The court in *Wanzek* held that the exclusion there at issue did not preclude coverage for the work of subcontractors. However, unlike the policy exclusions at issue in *Schwindt*, *Bor-Son*, and *Knutson*, that policy exclusion explicitly excepted damages caused by the faulty workmanship of subcontractors. [Wanzek](#), 679 N.W.2d at 326. <sup>10</sup> The plaintiff in that case contended, nonetheless, that damage caused by a subcontractor's work should be excluded from coverage pursuant to the rule expressed by the court in *Bor-Son* and *Knutson*. Unsurprisingly, the court in *Wanzek* disagreed, holding simply that the express terms of the exclusion controlled. [Wanzek](#), 679 N.W.2d at 326.

**FOOTNOTES**

**10** The exclusion at issue in *Wanzek* stated: “This insurance does not apply to ... “Property damage” to “your work” arising out of it or any part of it and including in the “products-completed operations hazard.” This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” [Wanzek, 679 N.W.2d at 326](#) (emphasis added).

¶59 The *Wanzek* decision did not, however, **[\*31]** invalidate the holdings in *Bor-Son* and *Knutson*, cases in which the exclusions at issue contained neither an express exception for work performed by a subcontractor nor any other direct evidence of intent to except the work of subcontractors from the exclusions at issue. In *Schwindt* as well, we noted that there was no “evidence that the insurers did not intend to include the work of subcontractors” in the exclusion at issue. [Schwindt, 81 Wn. App. at 305](#). Accordingly, the reasoning of the court in *Wanzek* does not cast doubt on our holding in [Schwindt](#), a well-reasoned holding to which we adhere.

¶60 Accordingly, in the absence of evidence that such an exclusion was intended to operate to the contrary, “work of subcontractors is necessarily included in exclusions pertaining to faulty work or defective products of the contractor.” [Schwindt, 81 Wn. App. at 306](#). Accord [Patrick Archer Constr., Inc., 123 Wn. App. 728](#).

¶61 **MacPherson** next attempts to distinguish this case from the situation at issue in *Schwindt*, arguing that MoE intended, by omitting the phrase “on behalf of” in the endorsement exclusion, to broaden coverage to encompass damage arising out of the work of subcontractors. We disagree.

¶62 In **[\*32]** support of this contention, **MacPherson** refers to a draft insurance policy form disseminated by the Insurance Services Office (ISO), which contained language that was later adapted by MoE to create the endorsement here at issue. The ISO published a “circular” in which it stated that the intended effect of the draft form’s omission of the “by or on behalf of” language was to provide coverage for damages caused by the work of subcontractors. <sup>11</sup>

**FOOTNOTES**

**11** The circular provides:

This exclusion ... [excludes] only damages caused by the named insured to his own work. Thus,

- (1) The insured would have no coverage for damage to his work arising out of his work.
- (2) The insured would have coverage for damage to his work arising out of a subcontractor’s work.
- (3) The insured would have coverage for damage to a subcontractor’s work arising out of the subcontractor’s work.

(Emphasis added.)

¶63 However, **MacPherson** has not presented any evidence indicating that, by including language like that used in the ISO draft form, MoE intended to adopt the

intent discussed in the ISO circular. **MacPherson** merely relies on the testimony of MoE's representative that she had no knowledge of the existence of MoE documents that [\*33] express an intent contrary to the ISO circular. Such evidence is not sufficient to raise a genuine issue of material fact regarding this issue.

¶64 Furthermore, <sup>HN12</sup> under Washington law, once an operation is completed, the work of the subcontractors has merged with the work of the general contractor, *Schwindt*, 81 Wn. App. at 305, rendering the "by or on behalf of" language superfluous. Thus, the removal of the superfluous "on behalf of" language in the supplemental endorsement does not support the conclusion that MoE intended to broaden the coverage provided by the policy.

¶65 Accordingly, **MacPherson** has not provided sufficient reason to herein depart from the rule clearly expressed and applied by this court in *Schwindt*. Thus, the exclusion here at issue, which excludes coverage for claims arising from work performed by **MacPherson**, also excludes coverage for claims arising from work performed by subcontractors.

¶66 We affirm the trial court's summary judgment ruling on this issue.

### III. Attorney Fees

¶67 Our reversal of the judgment in favor of **MacPherson** also requires vacation of the attorney fee award in **MacPherson's** favor.

¶68 <sup>HN13</sup> Attorney fees are not recoverable by the prevailing party as costs of litigation unless [\*34] the recovery of fees is permitted by contract, statute, or some recognized ground in equity. *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995), overruled on other grounds by *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001). In *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991), our Supreme Court held that such a ground in equity exists when an "insurer refuses to defend or pay the justified action or claim of the insured."

¶69 **MacPherson** has not yet proved that it is entitled to coverage pursuant to the policy at issue. Accordingly, we vacate the award of attorney fees in favor of **MacPherson**. Should **MacPherson** prevail on remand, it may re-apply to the trial court for an award of fees.

¶70 **MacPherson's** request for an award of attorney fees on appeal pursuant to [RAP 18.1](#) is denied.

¶71 Affirmed in part, reversed in part, and remanded.

Schindler, A.C.J. and Cox, J. concur.







Source: [Legal](#) > [States Legal - U.S.](#) > [Washington](#) > [Find Cases](#) > **WA State Cases, Combined** 

Terms: **macpherson and enumclaw** ([Edit Search](#) | [Suggest Terms for My Search](#))

View: Full

Date/Time: Tuesday, August 28, 2007 - 8:21 PM EDT

\* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

\* Click on any *Shepard's* signal to *Shepardize*® that case.



[About LexisNexis](#) | [Terms & Conditions](#)

[Copyright ©](#) 2007 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.