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Washington Court of Appeals holds that a liability insurance policy's contractual liability exclusion precludes coverage for an insured's contractual obligation to indemnify another party for injury to the insured because the insured is not a "third person" under the definition of "insured contract"

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In December, Division One of the Washington Court of Appeals examined the definition of "insured contract" under a liability policy and concluded as a matter of first impression that an insured did not qualify as a "third person" under that definition for purposes of indemnity coverage.

In *Int'l Marine Underwriters*[1] *v. ABCD Marine, LLC*, 165 Wn. App. 223, 267 P.3d 479 (2011), Northland Services, Inc. ("NSI") hired ABCD as an independent contractor to perform welding services. ABCD (through senior partner Albert Boogaard) entered into a written agreement that required ABCD, among other things, to

> indemnify and hold harmless . . . NSI of and from all losses, damages, claims and suits for bodily injury and personal injury, whether direct or indirect, arising out of or relating to its operations or use of [NSI's] Property, except such bodily and personal injuries caused directly from the sole intentional negligence of NSI.

IMU provided Comprehensive Marine Liability and Ship Repairers Legal Liability coverage to ABCD. The policy included what is commonly referred to as a "contractual liability exclusion":

> [IMU does not cover] "[b]odily injury" . . . for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. **This exclusion does not apply to liability for damages:**
>
> a. Assumed in a contract or agreement that is an **"insured contract,"**. . . .

(Emphasis added.) In turn, "insured contract" was defined as

> That part of any other contract or agreement pertaining to your business . . . under which you [ABCD] assume the tort liability of another [NSI] to pay for "bodily injury" . . . to a **third person** or organization . . . .

(Emphasis added.)

[1] "IMU."

While working for NSI, Boogaard was seriously injured by a forklift driven by an NSI employee. Boogaard sued NSI for his personal injuries. NSI counterclaimed for indemnity under the above agreement. Boogaard tendered NSI's indemnity claim to IMU, and IMU brought a declaratory judgment action against ABCD and Boogaard to determine whether the exception for "insured contracts" applied to the contractual liability exclusion in the IMU policy. Although IMU conceded that the agreement was an "insured contract," it argued that Boogaard was not covered by the exception to the exclusion because he was not a "third person" as that term was used in the definition of "insured contract." The Washington Court of Appeals agreed and affirmed the trial court.

Rejecting Washington cases submitted by both sides because none of them addressed the meaning of "third person" in the relevant clause, the Court of Appeals looked to a Fourth Circuit case for guidance. In *Cowan Sys., Inc. v. Harleysville Mut. Ins. Co.*, 457 F.3d 368 (4th Cir. 2006), the Court held that an employee of the insured (Cowan) in a similar situation was a "third person" for purposes of the exception to the contractual liability exclusion:

> Cowan, as the insured, assumed the tort liability of "another party," i.e., Linens N Things. In this case, Linens N Things' liability was based on a breach of its duty to Shaffer [Cowan's employee], who was a "third person." Shaffer was not [Linens N Things'] employee and so was a "third person" with respect to it. Moreover, Shaffer was not a party to the . . . Agreement [between Cowan and Linens N Things][2] and therefore was also a "third person" with respect to the contractual indemnification in that agreement.

In rendering its opinion, the Fourth Circuit held that the question of whether one is a "third person" should be answered from the frame of reference **of the liable party**—Linens N Things.

Applying *Cowan*, the Washington Court of Appeals held that although Boogaard was not an employee of NSI, he nevertheless had a first party relationship with NSI because both Boogaard and NSI were parties to the Agreement. In addition, because Boogaard was a general partner of the named insured on the relevant policy, Boogaard was also a first party to IMU.[3] "Thus, unlike the injured party *Cowan*, Boogaard is not a 'third person' to the Agreement or to the insurance policy." Therefore, the exception to the exclusion did not apply, and the exclusion precluded coverage for the indemnity agreement.

I disagree with the Washington Court of Appeals' decision. In *Cowan*, the Fourth Circuit did not focus on the injured person's relationship to the **insurance policy**. Rather, it focused on the injured party's relationship with the **negligent party/indemnitee**. Although the *IMU* opinion repeatedly states that the agreement was between **ABCD** and NSI, the Court indicates that Boogaard was a

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[2] Alterations added by the Court.

[3] Aside from the fact that *Cowan* did not address the relationship between the "third person" and the **policy**, I do not understand the Court's comment that because Boogaard was a general partner of the named insured (and therefore an "insured") on the relevant policy that he was therefore a first party to IMU. This logic fails, because an employee of a named insured also qualifies as an "insured," yet the Fourth Circuit found that the employee in that case was a "third person," despite the fact that he stood in the same position as Boogaard in terms of being an "insured." Boogaard, as another "insured" under the policy, should not have been treated differently, and the *Cowan* Court's opinion does not lend support for the Washington Court of Appeals' reasoning.

party as well, though it is unclear in the opinion as to whether he was actually named in the agreement. If only ABCD, and not Boogaard, was a party to the agreement, then the Court erred in "imputing" party status to Boogaard merely because he signed the agreement on behalf of ABCD. And if Boogaard was not a party, then the Washington Court of Appeals' decision was not in accord with the Fourth Circuit's ruling in *Cowan* that an injured party is a "third person" so long as the injured person is not a party to the indemnity agreement.

In addition, the Court of Appeals' interpretation of the phrase "third person" does not comport with Washington's rules of contract interpretation requiring courts to construe any ambiguities in the insured's favor. The pertinent language in the definition of "insured contract" included "that part of any other contract . . . under which [ABCD] assume[s] the tort liability **of another** [NSI] for "bodily injury" . . . to a **third person or organization** . . . ." (Emphasis added.) The placement of "another" (NSI) and "third person" (Boogaard) in relation to each other can reasonably be interpreted to mean that Boogaard was a "third person" in relation to **NSI**.

Finally, there is nothing in the definition of "insured contract" that excludes coverage when the "third person" happens to also be the insured. IMU could have easily excluded insureds from the meaning of "third person" but did not. In effect, the Court of Appeals added wording to the policy that did not exist. On another note, had NSI been named as an additional insured under the policy (something ABCD failed to do pursuant to the agreement), NSI would have been entitled to similar protection but under a different "hat." In my humble opinion, the benefit of the doubt should have been given to the insured in favor of coverage.

Stephanie is a Principal at Cairncross & Hempelmann and leads the firm's Insurance Coverage group and is also a member of the Litigation group. Her practice is primarily focused on disputes between policyholders and their insurance companies. She spent 12 years as a property and casualty commercial insurance broker, managing complex accounts for policyholders in the hospitality, construction, transportation, and real estate arenas prior to obtaining her law degree and joining the firm, of Counsel. During that time, she obtained the Chartered Property Casualty Underwriter ("CPCU") professional designation. Stephanie's background in both the legal and brokerage side of the insurance arena give her a unique perspective on the resolution of insurance coverage disputes.