

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ATLANTIC CASUALTY
INSURANCE COMPANY, a North
Carolina corporation,

Plaintiff,

v.

JOHNNY’S QUALITY EXTERIORS,
INC., a Washington corporation;
RIGOBERTO CARRASCO and
ENEDINA CARRASCO, husband and
wife, and the marital community
comprised thereof,

Defendants.

CASE NO: 1:14-CV-3120-TOR

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Plaintiff Atlantic Casualty Insurance Company’s
(Atlantic Casualty) Motion for Summary Judgment (ECF No. 26). This matter was
submitted for consideration without oral argument. The Court has reviewed the
parties’ briefing and the record and files herein, and is fully informed.

//

1 BACKGROUND

2 Atlantic Casualty’s amended complaint seeks a declaration by this Court that
3 it has no duty under an insurance policy to defend or to indemnify Johnny’s
4 Quality Exteriors, Inc. (Johnny’s) for claims made against Johnny’s in a lawsuit
5 currently pending in Yakima County Superior Court. ECF No. 25.

6 Atlantic Casualty filed its motion for summary judgment on June 12, 2015.
7 ECF No. 26. Johnny’s filed an opposition to the motion. ECF No. 31. Defendants
8 Rigoberto and Enedina Carrasco (collectively, the “Carrascos”) have not
9 responded to the motion.

10 FACTS¹

11 Johnny’s obtained a commercial general liability insurance policy from
12 Atlantic Casualty for the period of September 8, 2013, until September 8, 2014.
13 ECF No. 27 at 2, 5–16. Under this policy Atlantic Casualty will pay “sums that the
14 insured becomes legally obligated to pay as damages because of ‘bodily injury’ or
15 ‘property damage’ to which this insurance applies.” *Id.* at 15 ¶ 1.a. (Endorsement
16 amending ¶ 1.a.). Under the policy, Atlantic Casualty also has “the right and duty
17 to defend the insured against any ‘suit’ seeking those damages.” *Id.* Atlantic
18 Casualty does not, however, have a “duty to defend against suits seeking damages
19

20 _____
¹ These are the undisputed material facts, relevant to the issues before this Court.

1 for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.’”

2 *Id.*

3 On March 26, 2013, Juan Isiordia, the owner of Johnny’s, entered into a
4 contract with the Carrascos to rebuild their restaurant. ECF No. 28 at 17–20, 51.

5 A subcontractor, Arteaga Construction (Arteaga), was hired in April 2013 to build
6 some walls. *Id.* at 52. The Arteaga contract’s description of the work to be
7 performed reads, in part, as follows:

8 FRAMING LABOR

9 CMU BLOCK WALL 8” 50’ X 18’8” (FRONT ONLY)
10 LABOR AND MATERIAL.

11 ...

12 *Customer will pay 60 % of the full amount when I have
13 the walls ready for trusses.

14 *And the other 40 % when the job is done.

15 *Customer will supply all the materials for framing, and
16 Arteaga construction (sic) LLC provide material for CMU wall

17 ...

18 5 years warranty

19 ECF Nos. 32-1 at 2.

20 On October 27, 2013, construction on the restaurant was still in progress and
incomplete when wind blew down the partially-constructed western wall of the
restaurant which Arteaga was building. ECF No. 28 at 25 ¶ 3.12, 52 ¶ 8, 62 at

1 Admission No. 8. Uninstalled “hardi (sic)² panel siding material” was also
2 damaged in the collapse. ECF No. 28 at 64–65 Admission Nos. 17, 18.

3 Johnny’s then negotiated with Carrasco’s insurance company, Zurich (and
4 its agent), to repair the collapsed wall (the verbal insurance repair agreement) and
5 hired Arteaga Construction as the subcontractor to perform the work. ECF Nos. 32
6 at ¶¶ 6, 9; 28 at 27, 53.

7 On February 5, 2014, Johnny’s filed a complaint against the Carrascos in
8 Yakima County Superior Court alleging breach of both the March 26 contract and
9 the verbal insurance repair agreement, as well, as seeking alternative quantum
10 meruit relief. ECF No. 28 at 6–15. On March 10, 2014, the Carrascos filed an
11 answer, asserted counterclaims against Johnny’s for breach of contract and
12 violation of the Washington Consumer Protection Act and asserted third-party
13 claims against others. ECF No. 28 at 39–47.

14 On September 19, 2014, Johnny’s filed an amended complaint in the state
15 court action. ECF No. 28 at 22–32. In that complaint, Johnny’s alleged that the
16 Carrascos failed to pay amounts due to Johnny’s under the March 26 construction
17 contract. *Id.* at 25 ¶¶ 3.8–3.11. Johnny’s also alleged that the Carrascos failed to
18 pay the amount due under the verbal insurance repair agreement. *Id.* at 27 at ¶¶
19 3.18–3.20. Johnny’s further alleged that when it made demands for the amounts

20 ² This is likely a reference to James Hardie brand siding.

1 due, the Carrascos fired Johnny's and locked all contractors out of the building to
2 prevent performance on the contracts. *Id.* at 28–29, ¶¶ 3.23–3.28. On these factual
3 allegations, Johnny's again asserted claims for breach of the March 26 contract,
4 breach of the verbal insurance repair agreement, and quantum meruit relief. *Id.* at
5 29–30.

6 On November 20, 2014, the Carrascos filed an answer to Johnny's amended
7 complaint, again asserted counterclaims and third-party claims. ECF No. 28 at 49–
8 58. The Carrascos alleged that Johnny's agreed in the March 26 contract to serve
9 as the general contractor for construction work to be completed on their restaurant.
10 *Id.* at 51 ¶¶ 3–4. The Carrascos also alleged that Johnny's hired Arteaga to
11 construct the walls of the restaurant and that Isiordia promised to properly
12 supervise the construction work. *Id.* at 52 ¶¶ 5, 7. The Carrsacos further allege
13 that the wind which occurred on October 27, 2013, was no more than “a normal,
14 seasonal wind,” and that the collapsed western wall was not properly secured,
15 braced, or shorn against such normal seasonal winds. *Id.* at 52 at ¶¶ 8–9. Finally,
16 the Carrascos allege improprieties in the manner in which Johnny's secured the
17 insurance contract to rebuild the wall, contending Johnny's submitted false and
18 inflated information to the insurance company and that Isiordia demanded payment
19 from the Carrascos of money he was not entitled to receive. *Id.* at 53 at ¶ 13, 54 at
20 ¶ 16, 18.

1 On these factual allegations, the Carrascos asserted three counterclaims
2 against Johnny's. First, the Carrascos asserted that Johnny's breached the March
3 26 contract by failing to ensure that the western wall was properly shorn and
4 braced against normal seasonal wind. *Id.* at 55 at ¶ 22. The Carrascos asserted that
5 Johnny's breached the contract by failing to adequately supervise Arteaga and is
6 liable for the cost to repair the broken wall that was warrantied for five years. *Id.*
7 at 55 at ¶¶ 22–23. The Carrascos also asserted Johnny's breached its contract by
8 failing to put the insurance repair contract in writing, by claiming moneys to which
9 it was not entitled, and by submitting false and inflated information to Zurich. *Id.*
10 The counterclaim asserts liability for “damages caused to the wall and the property
11 on which it fell” as well as damages “for the delay that the falling wall caused” and
12 loss of insurance benefits. *Id.* at 55 at ¶ 24.

13 Second, the Carrascos asserted that Johnny's violated the Washington
14 Consumer Protection Act by submitting false and inflated information to the
15 Carrascos' insurance company about the cost of repairs to the wall, and for falsely
16 and deceptively advertising, “No money up front till (sic) your job is done.” *Id.* at
17 56 at ¶¶ 26–28.

18 Third, the Carrascos asserted that Isiordia was acting as the Carrascos' agent
19 in assisting them with negotiations on the insurance claim for the wall and that
20

1 Isiordia and Johnny’s breached duties imposed upon them pursuant to that agency
2 relationship. *Id.* at 57 at ¶¶ 31–32.

3 In response to Johnny’s claim seeking legal defense and indemnification
4 from Atlantic Casualty for the Carrascos’ counterclaims, Atlantic Casualty agreed
5 to participate in Johnny’s defense against the counterclaims. ECF No. 27 at 18.
6 However, Atlantic Casualty noted that upon reviewing Johnny’s policy, Atlantic
7 Casualty had “determined that the counterclaims seek damages that may not be
8 covered under the policy” and reserved the right to further investigate the matter,
9 to withdraw from the defense at any time, and “to file a declaratory relief action to
10 have a court determine [Atlantic Casualty’s] rights under the policy and its
11 obligations to Johnny’s.” *Id.* at 18, 33; *see also id.* at 37–41, 43–44.³

12 In the matter before this Court, Atlantic Casualty seeks declaratory relief
13 clarifying its obligations to defend and indemnify Johnny’s for the counterclaims
14 asserted by the Carrascos. ECF No. 25. Atlantic Casualty has now moved the
15

16
17 ³ Washington State law has “long recognized that a liability insurer uncertain of its
18 obligation to defend its insured may undertake a ‘reservation of rights’ defense
19 while seeking declaration regarding coverage.” *Nat’l. Surety Corp. v. Immunex*
20 *Corp.*, 176 Wash.2d 872, 875 (2013).

1 Court for summary judgment declaring that Atlantic Casualty has no obligation to
2 defend or indemnify Johnny's in the state court action. ECF No. 26.

3 DISCUSSION

4 Summary judgment may be granted to a moving party who demonstrates
5 "that there is no genuine dispute as to any material fact and that the movant is
6 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party
7 bears the initial burden of demonstrating the absence of any genuine issues of
8 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
9 shifts to the non-moving party to identify specific genuine issues of material fact
10 which must be decided at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
11 256 (1986).

12 For purposes of summary judgment, a fact is "material" if it might affect the
13 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
14 such fact is "genuine" only where the evidence is such that a reasonable factfinder
15 could find in favor of the non-moving party. *Id.* at 248, 252 ("The mere existence
16 of a scintilla of evidence in support of the plaintiff's position will be insufficient;
17 there must be evidence on which the jury could reasonably find for the plaintiff.").
18 In ruling upon a summary judgment motion, a court must construe the facts, as
19 well as all rational inferences therefrom, in the light most favorable to the non-
20 moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). "[A] district court is not

1 entitled to weigh the evidence and resolve disputed underlying factual issues.”

2 *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). Only
3 evidence which would be admissible at trial may be considered. *Orr v. Bank of*
4 *Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

5 Because this case is before the Court under its diversity jurisdiction, *see* ECF
6 No. 1 at ¶ 1.5, the Court applies state law in resolving the parties’ claims.

7 *Standard Fire Ins. Co. v. Peoples Church of Fresno*, 985 F.2d 446, 448 (9th Cir.
8 1993). Washington State law recognizes that an “insurer’s duty to defend is
9 separate from, and substantially broader than, its duty to indemnify.” *Nat’l Surety*
10 *Corp.*, 176 Wash.2d at 878. “The duty to indemnify applies to claims that are
11 actually covered, while the duty to defend arises when a complaint against the
12 insured, construed liberally, alleges facts which could, if proven, impose liability
13 upon the insured within the policy’s coverage.” *Id.* at 879 (emphasis and internal
14 quotation marks omitted). “If there is any reasonable interpretation of the facts or
15 the law that could result in coverage, the insurer must defend.” *Id.* (quotation
16 marks and brackets omitted). “Although this duty to defend is broad, it is not
17 triggered by claims that clearly fall outside the policy.” *Id.*

18 “[A]n insurer may not rely on facts extrinsic to the complaint in order to
19 deny its duty to defend where . . . the complaint can be interpreted as triggering the
20 duty to defend.” *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wash.2d 751,

1 761 (2002) (internal quotation marks and emphasis omitted). “If the insurer is
2 unsure of its obligation to defend in a given instance, it may defend under a
3 reservation of rights while seeking a declaratory judgment that it has no duty to
4 defend.” *Id.*

5 An insured party, however, may rely upon facts extrinsic to the complaint to
6 establish the insurer’s duty to defend “if (a) the allegations [in the complaint] are in
7 conflict with facts known to or readily ascertainable by the insurer or (b) the
8 allegations in the complaint are ambiguous or inadequate.” *Id.* If the complaint is
9 ambiguous it is to be liberally construed in favor of triggering the insurer’s duty to
10 defend. *Id.* at 760.

11 As such, the Court’s task in determining whether Atlantic Casualty has a
12 duty to defend Johnny’s is to evaluate initially whether Atlantic Casualty has
13 demonstrated the absence of any genuine issues of material fact that the
14 counterclaims are founded upon facts alleged in the complaint which show the
15 claims clearly fall outside the policy. The burden then shifts to Johnny’s to
16 identify specific genuine issues of material fact—in the complaint or extrinsic to
17 it—which may, if proven, establish that a reasonable interpretation of those facts
18 could result in coverage.

19 In this evaluation, the Court must construe the insurance policy as a contract
20 between the parties. *Quadrant Corp. v. Am. States. Ins. Co.*, 154 Wash.2d 165,

1 171 (2005); *see also State Farm Gen. Ins. Co. v. Emerson*, 102 Wash.2d 477, 480
2 (1984) (“Insurance policies are to be construed as contracts, and interpretation is a
3 matter of law.”). The Court must consider the policy as a whole and give it a “fair,
4 reasonable, and sensible construction as would be given to the contract by the
5 average person purchasing insurance.” *Quadrant Corp*, 154 Wash.2d at 171. If
6 the policy language is clear and unambiguous, the Court must enforce the policy as
7 written; it “may not modify it or create ambiguity where none exists.” *Id.* “[A]
8 clause is ambiguous only when on its face, it is fairly susceptible to two different
9 interpretations, both of which are reasonable.” *Id.* (internal quotation marks
10 omitted). Only if a clause is ambiguous may the Court consider extrinsic evidence
11 of the intent of the parties to resolve the ambiguity. *Id.* at 171–72. The Court must
12 then resolve any remaining ambiguities in favor of the insured party. *Id.*

13 The policy at issue here imposes upon Atlantic Casualty a duty to defend
14 Johnny’s in any suit seeking “damages because of ‘bodily injury’ or ‘property
15 damage’ to which this insurance applies.” ECF No. 27 at 15 ¶ 1.a (Endorsement
16 amending ¶ 1.a.). The insurance applies only if

- 17 (1) The “bodily injury” or “property damage” is caused by an
18 “occurrence” that takes place in the “coverage territory”;
- 19 (2) The “bodily injury” or “property damage” occurs during the policy
20 period; and
- (3) Prior to the policy period, no insured . . . knew that the “bodily
injury” or “property damage” had occurred, in whole or in part.

1
2 *Id.* at 8 ¶ 1.b. There is no dispute that the events in question occurred in the
3 coverage territory, during the policy period, and were unknown to Johnny’s prior
4 to that period. As such, the Court focuses on the remainder of the first requirement
5 for application of the insurance policy, whether the facts alleged in the state court
6 action demonstrate there was “property damage” caused by an “occurrence.”

7 According to the policy, “property damage” means:

- 8 a. Physical injury to tangible property, including all resulting loss of
9 use of that property. All such loss of use shall be deemed to occur
10 at the time of the physical injury that caused it; or
11 b. Loss of use of tangible property that is not physically injured. All
12 such loss of use shall be deemed to occur at the time of the
13 “occurrence” that caused it.

14 However, “property damage” does not include breach of contract,
15 breach of any express or implied warranty, deceptive trade practices
16 or violation of any consumer protection laws.

17 “Property damage” does not include any cost or expense to repair,
18 replace or complete any work to any property that you, or any insured,
19 are otherwise obligated to repair, replace or complete pursuant to the
20 terms of any contract.

21 *Id.* at 16 ¶ 17 (Endorsement Amended Definition - Property Damage). The policy
22 defines “occurrence” as “an accident, including continuous or repeated exposure to
23 substantially the same general harmful conditions.” *Id.* at 12 ¶ 13.

1 Certain facts in the underlying state action, at first glance, appear to be
2 covered by the general provisions of the insurance policy. As alleged by the
3 Carrascos, the October 27 collapse destroyed the restaurant’s western wall and
4 damaged the Hardie panel siding material. ECF No. 28 at 52 ¶ 10, 55 ¶ 24
5 (alleging Johnny’s is liable for “the damages caused to the wall and the property on
6 which it fell”). Both the wall and the Hardie panel siding are tangible property that
7 was physically injured. As such, the facts alleged in the state court action establish
8 there was “property damage” as the policy defines the term. *See* ECF No. 27 at 16
9 ¶ 17.⁴ Atlantic Casualty therefore has a duty to defend against any such claims

11 ⁴ Atlantic Casualty contends these damages are based upon a breach of contract
12 theory of liability and therefore fall under the exception outlined in the definition.
13 ECF No. 26 at 10–14. However, the Court merely evaluates whether the *facts*
14 alleged, when liberally construed, could establish an insurance claim within the
15 policy’s coverage. *Nat’l Surety Corp.*, 176 Wash.2d at 879. The particular theory
16 of liability the Carrascos assert against Johnny’s in the state proceedings is
17 irrelevant for imposition of the duty to defend. *See State Farm*, 102 Wash.2d at
18 486 (“Thus, the duty to defend hinges not on the insured’s potential liability to the
19 claimant, but rather on whether the complaint contains any factual allegations
20 rendering the insurer liable to the insured under the policy.”).

1 unless the policy language or an express exclusion places the claim outside the
2 policy's coverage.

3 However, the Carrascos' factual allegations concerning the loss of insurance
4 benefits, making false and deceptive statements, concealing information, operating
5 under a conflict of interest, and for violating the Washington Consumer Protection
6 Act do not constitute damage to tangible property as defined by the policy. ECF
7 No. 27 at 16 ¶ 17 (Endorsement Amended Definition - Property Damage)
8 (“Property damage’ does not include breach of contract, breach of any express or
9 implied warranty, deceptive trade practices or violation of any consumer protection
10 laws.”). Any damage claims based on those facts plainly do not fall within the
11 policy's coverage. Johnny's does not dispute this. ECF No. 31 at 11 (calling them
12 “irrelevant claims . . . which are not pertinent to this motion at all.”)

13 Next, Atlantic Casualty contends that policy exclusions j(5) and j(6)
14 eliminate coverage for any property damage caused by the wall collapse. ECF No.
15 26 at 14–16. These exclusions provide:

16 2. Exclusions

17 This insurance does not apply to:

18 . . .

19 j. Damage To Property
 "Property damage" to:

20 . . .

 (5) That particular part of real property on which you or any
 contractors or subcontractors working directly or indirectly on
 your behalf are performing operations, if the "property damage"
 arises out of those operations; or

1 (6) That particular part of any property that must be restored,
2 repaired or replaced because "your work" was incorrectly
performed on it.

3 ECF No. 27 at 9.

4 Johnny's mistakenly argues that these exclusions have no application at all.
5 ECF No. 31 at 13–14. Johnny's confusingly argues that since it "performed no
6 work on the property at issue" nor did any "subcontractor working for Johnny's"
7 perform any work for Johnny's, then the exclusions do not apply. *Id.* Johnny's
8 confuses its defense to the underlying state court action, which is irrelevant to the
9 case before this Court, with the potential that it could be held liable for damages
10 under the Carrascos' factual or legal theory of liability in the state court action. In
11 this Court, it does not matter that Johnny's may have a successful defense to the
12 damage claims. This Court must determine, in the light most favorable to
13 Johnny's, whether Atlantic Casualty owes a duty to defend under the insurance
14 policy on any chance that the Carrascos' cause of action would be successful. It is
15 through this lens that this Court views the case.

16 Washington law indicates that exclusions such as these operate to bar
17 coverage for damages incurred on the construction site during and as a result of
18 construction operations. *See Vandivort Const. Co. v. Seattle Tennis Club*, 11
19 Wash. App. 303, 308 (1974) ("Endorsement No. 7(2)(iv)(a) which excludes
20 coverage for damage to 'that particular part of any property, . . . upon which

1 operations are being performed by . . . insured . . . ’ bars Vandivort's recovery. . . .
2 The plain meaning of the language covers the situation here. Vandivort was
3 performing operations on the property and the injury here for which damages are
4 claimed arose out of those operations.”); and *Canal Indem. Co. v. Adair Homes,*
5 *Inc.*, 737 F. Supp. 2d 1294, 1301 (W.D. Wash. 2010), *aff'd*, 445 F. App'x 938 (9th
6 Cir. 2011).

7 In *Canal*, the district court held that “[t]he ongoing operations exclusion bars
8 coverage for ‘property damage to [t]hat particular part of real property which you
9 or any contractors or subcontractors ... are performing operations if the property
10 damage arise out of those operations”” *Canal*, 737 F. Supp. 2d at 1301. The
11 court explained that “Washington courts have interpreted the language of an
12 ongoing operations exclusion to apply to the insureds’ entire operations.” *Id.*
13 “This exclusionary language is designed to exclude coverage for defective
14 workmanship by the insured builder causing damage to the construction project.”
15 *Id.* at 1302. *See also Harrison Plumbing & Heating, Inc. v. New Hampshire*
16 *Insurance Group*, 37 Wash. App. 621, 626 (1984) (holding that ongoing operations
17 exclusion ensures that an insured is not indemnified for damages resulting because
18 the insured furnished defective materials or workmanship). As the district court in
19 *Canal* explained,

20 this interpretation of the exclusions is entirely consistent with commercial
general liability policies. Commercial general liability policies are designed

1 generally to provide coverage for a number of risks, including employee
2 injuries while on the work site and physical damage to property other than
3 the work of the insured. The two exclusions for damages to the work of the
4 insured during construction and after completion are common “business
5 risk” exclusions, designed to prevent the commercial general liability policy
6 from being considered a performance bond, product liability insurance, or
7 malpractice insurance.

8 *Canal*, 737 F. Supp. 2d at 1302. On appeal, the Ninth Circuit agreed that the
9 insurance company had no “duty to defend against property damage claims that
10 occurred during construction pursuant to the insurance policies’ J(5) and J(6)
11 business risk exclusions.” *Canal Indem. Co. v. Adair Homes Inc.*, 445 F. App’x
12 938, 940 (9th Cir. 2011) (unpublished). The court explained that “[c]overage was
13 barred because these exclusions applied to all of Adair Homes’ ongoing operations
14 during the construction of the residence, as well as to direct damages stemming
15 from the alleged defective construction.” *Id.*

16 Here, as in *Canal*, the damage allegedly caused by Johnny’s or its alleged
17 subcontractor is precisely the type of damage excluded by exclusions j(5) and j(6).
18 These exclusions bar coverage to “[t]hat particular part of real property on which
19 you or your contractors or subcontractors working directly or indirectly on your
20 behalf are performing operations, if the ‘property damage’ arises out of those
operations” or to “[t]hat particular part of any property that must be restored,
repaired or replaced because ‘your work’ was incorrectly performed on it.” Thus,

1 by the exclusions' plain terms, the insurance policy is not applicable to damage to
2 the western wall that fell down or the Hardie panel siding it fell upon.

3 Atlantic Casualty argues that the construction of the wall is additionally
4 excluded from coverage under the policy's "Classification Limitation." ECF Nos.
5 26 at 16–18; 33 at 7–9. The policy's Classification Limitation reads:

6 This insurance does not apply to and no duty to defend is provided for
7 "bodily injury," "property damage," "personal and advertising injury"
8 or medical payment unless the insured can demonstrate the "bodily
9 injury," "property damage", "personal and advertising injury" or
10 medical payments arise out of the classification(s) shown on the
11 Commercial General Liability Coverage Declarations, its
12 endorsements or supplements.

13 ECF No. 27 at 14. The classifications identified in the policy are (1) "Carpentry—
14 construction of Residential Property Not Exceeding Three Stores (sic) in Height,"
15 ECF No. 27 at 6; (2) "Contractors-Subcntrct Build Const., Reconst., Repair,
16 Erection—1 or 2 Family Dwellings," *id.* at 7; (3) "Door, Window or Assembled
17 Millwork—Installation Metal," *id.*; (4) "Roofing—Residential and Commercial,"
18 *id.*; and (5) "Siding Installation," *id.*

19 First, Johnny's admits that its March 26 contract with Carrascos did not
20 involve construction of residential property. *See* ECF No. 28 at 60. As such, any
non-residential carpentry or contracting work done would be excluded from
coverage under the first two classification limitations. Second, there is no
indication that the construction and collapse of the wall involved metal door,

1 window, or millwork installation, or installation of siding. Johnny's has not argued
2 otherwise. *See* ECF No. 31 at 15–17.

3 Instead, Johnny's contends that the work is encompassed by the roofing
4 classification, arguing that Atlantic Casualty's assertion to the contrary "fails to
5 consider whether the wall blowing over arose out of any improper roofing
6 connections or temporary bracing involved in the roof connection process which
7 allegedly should have prevented the same." *Id.* at 15–16. Johnny's continues:
8 "Arguably, the top of the wall could not tip over if the proper roofing connections
9 for holding the same were properly installed and secured and thus there is an
10 aspect of roofing at issue." *Id.* at 16. Based upon these assertions, Johnny's then
11 argues that, as a matter of law, the classification of "roofing" in the policy "is
12 liberally construed . . . to establish that the policy covers the classification of the
13 type of work at issue." *Id.* at 17. The Court disagrees.

14 Upon a motion for summary judgment, an opposing party must identify
15 specific genuine factual issues by affidavit or otherwise that would support its
16 claim(s). Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 256. "[M]ere allegation and
17 speculation do not create a factual dispute for purposes of summary judgment."
18 *Nelson v. Prima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). Here
19 Johnny's admitted that it did not install or repair any roofing pursuant to the
20 contracts. ECF No. 28 at 62–64, Admission Nos. 6, 13, 14.

1 Johnny's speculation about whether the western wall included roofing
2 connections and whether the hypothetical connections were improperly installed is
3 insufficient to survive summary judgment. Johnny's has presented no facts to
4 support its bare assertions that "the roofing and roof framing process *may* also
5 include temporary bracing of the portions of the structure," or that "[a]rguably, the
6 tops of the wall could not tip over if the proper roofing connections" were
7 installed. ECF No. 31 at 16–17 (emphasis added). Johnny's has failed to point to
8 any factual allegations in the state court proceedings or produce any extrinsic facts
9 before this Court which raise a genuine factual dispute as to whether construction
10 of the western wall constituted roofing work. Indeed, Johnny's has failed to
11 produce even a scintilla of evidence in support of its argument that construction of
12 the western wall constitutes roofing work.

13 Nevertheless, under the terms of the policy, it is not Atlantic Casualty's
14 burden to demonstrate that the construction of the wall did not involve roofing
15 work. Rather, as plainly established by the insurance policy's terms, it is Johnny's
16 burden to demonstrate that construction of the wall in fact involved roofing work
17 or was encompassed by one of the other classifications. ECF No. 27 at 14; *see*
18 *also Quadrant Corp.*, 154 Wash.2d at 180 ("While exclusions should be strictly
19 construed, a strict application should not trump the plain language of the
20 exclusion.").

1 The insurance policy does not cover damage claims, other than damage to
2 tangible property as defined by the policy. The property damage to the western
3 wall and Hardie panel siding occurring during the course of performing operations
4 is excluded under exclusions j(5) and j(6). Moreover, even if these damages were
5 not excluded by exclusions j(5) and j(6), the policy's Classification Limitation
6 additionally does not cover the type of work from which the damages allegedly
7 emanated. As such, Atlantic Casualty is entitled to judgment as a matter of law
8 that it has no duty to defend Johnny's in the state proceedings or to indemnify
9 Johnny's for any liability related to the collapsed wall.⁵

10 **IT IS HEREBY ORDERED:**

11 1) Plaintiff Atlantic Casualty Insurance Company's Motion for Summary
12 Judgment (ECF No. 26) is **GRANTED**.

13 2) The Court **FURTHER FINDS AND DECLARES** as follows:

14 Plaintiff Atlantic Casualty Insurance Company has no duty under
15 commercial general liability coverage insurance policy No.

16
17 ⁵ Because the duty to defend is broader than and encompasses fully the duty to
18 indemnify, *see Nat'l Surety Corp.*, 176 Wash.2d at 878–79, the conclusion that
19 Atlantic Casualty has no duty to defend Johnny's establishes *a fortiori* that Atlantic
20 Casualty has no duty to indemnify Johnny's.

1 L209000199 (renewal of policy No. L209000103) to defend or to
2 indemnify Defendant Johnny's Quality Exteriors, Inc., for any
3 claims raised against Johnny's in Yakima County Superior Court
4 case No. 14-2-00560-1.

5 The District Court Executive is directed to enter this Order and Judgment
6 accordingly, provide copies to counsel, and close the file.

7 **DATED** September 17, 2015.



10
11
12
13
14
15
16
17
18
19
20

Thomas O. Rice
THOMAS O. RICE
United States District Judge