68634-8

68634-8

NO. 68634-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE,

Appellant,
v.

AMERICAN STATES INSURANCE COMPANY,
a foreign insurerer,

Respondent.

REPLY BRIEF OF APPELLANT

James M. Beecher, WSBA #468
HACKETT, BEECHER & HART
Attorneys for Appellant
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
(206) 624-2200
E-mail: jbeecher@hackettbeecher.co

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. REPLY TO AMERICAN STATES' ARGUMENTS FOR DENIAL OF COVERAGE

(Respondent's Brief, p. 19 - 25)

American States presents two arguments that its policy was not the "kind of insurance" triggered by the Master Agreement. It first mentions (in passing) its only argument presented to the trial court, i.e. – its umbrella liability policy is not a "kind of "general liability coverage. It then presents for the first time a new argument, i.e. – that the Master Agreement did not require the completed operations coverage that was granted in its policy.

1. American States' argument that its Commercial Umbrella Liability Policy is not a "kind of" commercial general liability insurance.

This is the only argument that was presented to the trial court in support of American States' Motion for Summary Judgment on the coverage issue.[1] On appeal American States hardly mentions this argument, and provides no authority in support. Further it does not challenge Appellant's briefing on this argument.

2. American States' argument that the Master Agreement narrowed the duration of the policy's coverage.

For the first time on appeal, American States argues that any coverage granted to Public Storage expired before Ms. Lewark's injury for

---

[1] CP 723 - 724, 809 - 811 and 816 - 820.

the reason that the Master Agreement required Davis Door to maintain the coverage "during the entire progress of the work."

This is an entirely new legal argument based on an analysis of language that was neither called to the trial court's attention nor supported by any briefing below.[2] It should not be considered on appeal.

RAP 9.12 prevents American States from raising its new analysis of thecontract language because it was not presented to the trial court.

> "On review of an order granting a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wash. App. 501, 509, 182 P.3d 895 (2008), review denied, 165 Wash.2d 1017, 199 P.3d 411 (2009). Because Silverhawk did not present its analysis of the contract to the trial court, this court will not consider it. (emphasis supplied)
>
> *Silverhawk, LLC v. Keybank National Association,* 165 Wash. App. 258, 265 (2011).

Had American States' new analysis been properly raised, it would have been subject to the following rejoinders.

a. Nothing in the American States *policy language* suggests that its additional insured only has coverage during "ongoing operations." And American States makes no such claim.

---

[2] The entirety of American States' briefing on the issue of coverage for Public Storage is found at CP 723 - 724, 809 - 811 and 816 - 820.

b. The Master Agreement required Davis Door to purchase liability coverage for Public Storage that could not be *cancelled* during the progress of the work. This does not limit the scope of the coverage that was actually purchased by Davis Door. That coverage was expressed on the Certificates of Insurance in favor of Public Storage continuously issued by American States from 2006 through 2010.[3] (CP 549 – 558)

c. When Public Storage became an additional insured because of its "written contract" with Davis Door, the scope of its coverage was defined by the *policy* – not the contract.

> While the additional insured endorsement does refer to a "written contract". The endorsement makes no attempt to incorporate that contract or to define the scope of the coverage by specific reference to any provision in the underlying written contract. Therefore, the insurance policy, including the additional insured endorsement, must be construed according to its own terms.
>
> *Dillon Companies v. Royal Indem. Co.*, 369 F.Supp.2d 1277, 1286 (2005) (emphasis supplied).

> We also reject Maryland Casualty's citation to the underlying service contract to determine whether Marathon's own negligence was intended to be covered by the endorsement. Under Wyoming law, the policy must be interpreted and enforced according to its own

[3] These Certificates of Insurance contain a box for "Descriptions of . . . exclusions added by endorsement . . ." However, these Certificates failed to reveal that the primary policy was specifically endorsed to exclude completed operations for Public Storage. It was not until after it had settled the Lewark claim that Public Storage found that the umbrella continuously in place contained no such exclusion. (CP 711)

terms. See *Farmers Ins. Exch.* 844 P.2d at 1101-02; see also *Container Corp. of Am. v. Maryland Cas. Co.,* 707 So.2d 733, 735 (Fla. 1998) (contractual language in indemnity contract between subcontractor and general contractor not dispositive of insurance coverage issue; language of insurance policy controls).

> *Marathon Ashland Pipe Line LLC v. Maryland Casualty,* 243 F.3d 1232, 1240 (2011) footnote 5 (emphasis supplied).

d. American States cites not authority that its policy coverage is reduced by the terms of a contract to procure additional insured coverage.

II. REPLY TO AMERICAN STATES' ARGUMENT THAT ITS COVERAGE IS EXCESS OF PUBLIC STORAGE'S SELF INSURED RETENTION

(Respondent's Brief pp. 25 – 29)

American States misinterprets its own "other insurance" provisions. It overlooks the language emphasized below:

> E. OTHER INSURANCE
>
> 1. This insurance is excess over, and shall not contribute with any other insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance written specifically as excess over this policy.
>
> 2. When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." **If no other insurer defends, we will undertake to do so, but we will be entitled to your rights against all other insurers, and you shall execute and deliver instruments and papers, including assignments of rights, and do whatever else is necessary to secure such rights**.

3. **When this insurance is excess** over other insurance, we will pay our share of the "ultimate net loss" that exceeds the sum of:

   a. The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

   b. The total of all deductable and self-insured amounts under all such other insurance.

CP 433; emphasis added

First, it should be noted that subsection 2 requires American States to defend "if no other insurer defended." No other insurer defended (CP 718) and Public Storage did not forfeit its right to a defense. It is entitled to reimbursement for the cost of defense..

Also, in subsection 2 American States protects itself by requiring assignment of "your rights against all other insurers." However, Public Storage had "no rights against any other insurer." In fact, it had no insurance for any claim expense under $500,000.

Finally, subsection 3 only comes into play "When this insurance is excess over other insurance." There is no other insurance applicable to this loss, so subsection 3 does not apply. Only if the cost of the Lewark claim had triggered Public Storage's own policy would the deductible and SIR clause come into effect. Public Storage had no "other insurance" for this loss.

III. REPLY TO ARGUMENT THAT FAILURE TO TENDER PRECLUDES EXTRA-CONTRACTUAL LIABILITY

(Respondent's Brief p. 29 - 39)

American States argues that it is excused from extra-contractual liability because Public Storage did not tender its defense under coverage that was unknown to Public Storage. For this proposition, American States relies entirely on two Washington cases. Each is distinguishable on its facts and the equities.

Unlike the present case, in *Mutual of Enumclaw v. USF Ins. Co.,* 164 Wn. 411 (2008) policyholder Don Dally was well aware of his USF policy, but elected to tender only to two of his other insurers without giving notice to USF.[4] USF first became aware of the claim against Dally well after it was settled.[5]

To the contrary in this case American States knew about the claim and knew (or should have known) it insured Public Storage against the claim for at least 3-½ months before Public Storage settled with Ms. Lewark. (CP 414 and 534) Here it was the insured that was unaware of its liability coverage until after it settled the Lewark claim. (CP 711)

Likewise, in *Unigard v. Leven,* 97 Wn. App. 417 (1999), Leven received a letter from the DOE designating him personally as a PLP in

---

[4] Opinion at p. 416, ¶ 5.

[5] Opinion at p. 417, ¶ 7.

October 1990, but failed he to notify Unigard until May 1997 of his personal designation as a Potentially Liable Party.[6] Leven sought reimbursement of his personal attorney fees incurred during that seven-year period arguing that Unigard knew about the contamination claim by virtue of having earlier settled environmental claims against corporations he controlled in 1989.[7] As in *Mutual of Enumclaw v. USF,* the insured (Leven) knew about the claim and the coverage, but the insurer (Unigard) did not know a claim had been made against Mr. Leven personally.

The cases relied upon by American States should not apply when it is the insurer that knows that it owes coverage, but its insured is apparently unaware of its rights to coverage. Under these circumstances, the fiduciary responsibilities of an insurer should require it to at least inquire whether its insured wants its participation.

IV. REPLY TO AMERICAN STATES' ARGUMENT RE: DISCOVERY

(Respondent's Brief pp. 39 – 43)

It is agreed that resolution of discovery disputes is generally within the discretion of the trial court. However, trial courts must exercise "informed discretion."

---

[6] Opinion at pp. 422 - 423.

[7] Opinion at p. 421

Here discretion was not at all informed by American States' vague Privilege Log. (CP 58 -70) There is simply no way to evaluate the claims of privilege asserted by studying that Log.

In light of the sketchy descriptions in the Privilege Log, *in camera* review as called for in *Escalante v. Sentry Ins.*, 49 Wn. App. 375 (1987) is necessary to reach an informed decision re: disclosure.[8]

V. REPLY TO AMERICAN STATES' ARGUMENT AGAINST AWARD OF ATTORNEY FEES AND EXPENSES

(Respondent's Brief p. 44)

American States asserts that Public Storage's breach of a policy condition forfeits its right to an award of fees under the authority of *PUD No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789 (1994).

PUD No. 1 presented an extreme case where the insureds had "improperly assigned the proceeds of the policies, [and] settled without consent of the insurers in violation of the coverage terms." These policies had limits of $13 Million, plus $6.5 Million in prejudgment interest.[9] Though the settlement was enforced against the insurers because they

---

[8] American States' brief mistakenly argues that Lewark never asked for an *in camera* review. (Respondent's Brief p. 39, footnote. 41.) However, requests for *in camera* review are found in Lewark's briefing on the Motion at CP 288 – 290.

[9] Opinion at p. 796.

could not prove actual prejudice, the court said it could not justify an attorney fees award "under these circumstances.[10]

This conclusion in the *PUD No. 1* case has not been applied in any subsequent appellate opinion. Later cases have uniformly awarded attorney fees to insureds that have been awarded policy benefits when an insurance company was unable to show prejudice by breach of a policy condition.

For example, see *Mutual of Enumclaw v. T & G Construction,* 165 Wn.2d 255 (2008) where the insured was awarded attorney fees even though it had negotiated a $3.3 Million settlement without obtaining the insurer's consent. The court stated at p. 273:

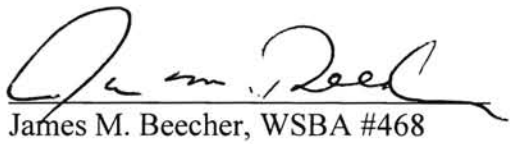
> ¶ 28 T & G seeks RAP 18.1 and *Olympic Steamship* attorney fees. *See, Olympic S.S. Co., v. Centennial Ins. Co.,* 117 Wash.2d 37, 52-53, 811 P.2d 673 (1991). As we have recently reiterated, "[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees." *Colo. Structures, Inc., v. Ins. Co. of the W.,* 161 Wash.2d 577, 597-98, 167 P.3d 1125 (2007) (alteration in original) (quoting *Olympic S.S.,* 117 Wash.2d at 54, 811 P.2d 673). The trial court properly awarded *Olympic Steamship* attorney fees finding that T & G had to litigate to receive the benefits of coverage.

---

[10] Opinion at p. 815

Respectively submitted this 30th day of October 2012.

HACKETT, BEECHER & HART



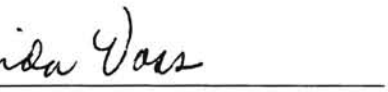
James M. Beecher, WSBA #468
Attorneys for Appellant

DECLARATION OF SERVICE

Linda Voss declares under penalty of perjury under the laws of the State of Washington that on the date noted below she sent for delivery, via ABC Legal Messengers Inc., a copy of Reply Brief of Appellant to:

David M. Jacobi
WILSON SMITH COCHRAN DICKERSON
905 Fifth Avenue, Suite 1700
Seattle, WA 98161

Signed in Seattle, Washington on October 30, 2012.



Linda Voss
Hackett, Beecher & Hart