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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

AMERICAN STATES INSURANCE COMPANY,
an Indiana corporation,

Plaintiff and Respondent,

v.

DELEAN'S TILE AND MARBLE, LLC, a Washington limited liability company;
DELEAN CONTRACTING & LANDSCAPING, LLC, a Washington limited liability
company; TABITA DELEAN dba DELEAN'S TILE & MARBLE, a Washington sole
proprietorship; MIRCEA and TABITA DELEAN, individually and dba DELEAN'S
TILE & MARBLE, a Washington sole proprietorship; and LAWLESS
CONSTRUCTION CORPORATION, INC., a Washington corporation,

Defendants and Appellants.

APPELLANTS' REPLY BRIEF

Attorney for Appellants

Michael J. Bond, WSBA No. 9154
Schedler Bond, PLLC
2448 76th Ave. SE, Suite 202
Mercer Island, WA 98040
Tel. (206) 257-5440
Email: michael@bondschambers.com

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I. REPLY ARGUMENT

A. The issue is joined.

American States concedes there was property damage arising out of Delean's construction operations. Res. Br. at 17, 18, 22. In addition, American States failed to respond to Delean's contentions that he was legally liable for that property damage (App. Br. at 11-12) and that the damages were within the scope of the coverage grant. (App. Br. 9, 12). These omissions should be treated as concessions, too. Once the insured shows that the loss falls within the scope of the policy's insured losses, it becomes the insurer's burden of proof that the loss is excluded by specific language in the policy. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (Div. 1, 1999).

For the reasons stated below, the insurer's arguments about the Multi-Unit and Tract Housing Residential Exclusion are unavailing.

B. The meaning of "any" is not relevant.

American States argues that its decision to deny coverage to the additional insured, Lawless, ends all need to separately evaluate the coverage for its named insured, Delean. To launch the argument, they say "there is no requirement in the exclusion itself that the construction operations be those of the insured claiming coverage." Res. Br. at 18. And

to make the argument American States embarks on a gymnastic analysis of the meaning of “any”. There are three fundamental flaws in American States’ approach.

First, the only claim for coverage at issue here and below is the claim of Delean. Lawless’ claim is not at issue here or below; it was voluntarily dismissed. CP 597. Delean is the Named Insured, he bought the policy; Lawless is an Additional Insured who paid nothing for the policy. One would normally think that when the Named Insured makes a claim under his insurance policy the insurer’s coverage analysis would begin with the contract rights of its Named Insured. But here not only does American States **not** examine the facts giving rise to coverage for its Named Insured, Delean, it stopped all inquiry after examining the Additional Insured’s rights.

Second, in moves only a gymnast would appreciate, American States imports cases dealing with “the”, “an”, and “any” in the context of exclusions that apply to “insureds” into the Multi-Unit Residential Exclusion, which says nothing at all about “the, an, or any insured”. The exclusion at issue in this case is stated without regard to “insureds”, those words do not appear in the exclusion; its sole object is construction operations on certain types of residential housing.

And while executing back hand springs through the cases addressing insureds, American States neglects to distinguish or examine the Supreme Court's controlling decision in *Tissell By and Through Cayce v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 795 P.2d 126 (1990), where the Court said, "Where coverage is in terms of "the insured", courts consider the contract between the insurer and several insureds to be separable; that is, there is a separate contract with each insured." This court ruled this means – when there are separate contracts – the coverage is to be separately evaluated for each insured under the policy. *Truck Ins. Exchange v. BRE Properties, Inc.*, 119 Wn. App 582, 81 P.3d 929 (Div. 1, 2003).

The coverage grant in Delean's insurance policy says: "We will pay those sums that the insured becomes legally obligated to pay as damages because of "property damage" to which this insurance applies." CP 481. Delean was entitled to have his rights under the policy evaluated on its own merits; American States' plea to ignore the facts as to Delean's claim and pay attention only to Lawless' claim for coverage should be rejected.

Third, the policy American States sold to Delean granted him the right to have his claim evaluated on its own merits. Section IV (7) of the insurance policy states "the rights and duties specifically assigned in the Coverage Part to the first Named Insured applies *separately* to each insured against who claim is made or "suit" is brought." CP 170 (emphasis

added). American States' analysis deprives Section IV (7) of all meaning, force or effect, and the court should reject that approach. Instead, the court is required to review the policy as a whole and give effect to every clause in it. *Tyrrell v. Farmers Ins. Co.*, 140 Wn.2d 129, 133, 994 P.2d 833 (2000).

C. The Multi-Unit Residential Exclusion does not apply to Delean's claim for coverage.

There are three flaws in American States' argument about the exclusion at Respondent's Brief, pages 22-25.

First, they begin their analysis with a faulty and in-reverse-order question. American States asserts, "the question is whether or not the **construction operations involved a complex** that meets the definition of a multi-unit residential building." Res. Br. at 22 (emphasis added). But starting with "a complex" and working your way back to a multi-unit residential building has it backwards. The exclusion states the insurance does not apply to "... property damage ... arising out of any construction operations ...that involve ... a multi-unit residential building." CP 182. The first question is not "did Delean's construction operations involve a complex;" the correct first question is "did Delean's construction operations involve a multi-unit residential building?" To answer the

correct first question, the court must then apply the definition that American States wrote into the policy.

Second, American States is bound by the definitions in the policy. *Australia Unlimited, Inc. v Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 198 P.3d 514 (Div. 1, 2008). It chose to define multi-unit residential building as "... townhouses ... that have more than four units ... at the same location or complex, regardless of the number of buildings." CP 182. American States admits that "construction operations do not involve owners, they involve property." Res. Br. at 25. Therefore, the only reasonable interpretation of its definition in the context of the facts of this case is this: if Delean's *construction operations* did not involve more than four of the properties then, as American States defined it, Delean's construction work did not involve a multi-unit residential building. And it is not disputed that Delean's *construction operations* involved four and not more than four of the buildings.

While conceding that Delean's construction operations caused property damage for which he was legally liable, American States blithely ignores the fact that the exclusion is stated in terms of "Construction Operations" on buildings and nothing else. The term "Construction Operations" is another defined term and the definition American States chose to place into the policy says nothing at all, for example, about

owners or the source of payment or for whose benefit the construction operations were performed. American States is barred from adding words to the policy. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 874 P.2d 142 (1994).

Exclusionary clauses are narrowly construed for the purpose of providing maximum coverage for the insured. *George v. Farmers Ins. Co.*, 106 Wn. App. 430, 439, 23 P.3d 552 (Div. 1, 2001). If American States wanted to qualify its definitions of “Multi-unit Residential Building” or “Construction Operations” to include things other than buildings or construction work, then it should have used words like “performed for the benefit of more than four units” or “where the work was paid for by insurance proceeds held by more than four unit owners” or similar language. Because the insurer defined the terms in the exclusion only by the number of townhouses involved in the “Construction Operations” and nothing else, the effort to qualify its definition with new terms or concepts such as the source of the funds or the number of neighbors should be denied.

Third, American States consistently and erroneously relies on the facts surrounding the original development, which was built under a permit issued in 2001, while wholly ignoring the facts that 1) in 2003 the property was subdivided creating 6 individually and separately owned zero lot line

parcels with no common ownership of any property and 2) that the 2006 and 2007 construction work at issue in Delean's claim did not touch more than four buildings. Blindfolded from the facts created in 2003 and the actual scope of the construction work Delean performed, American States is emboldened to assert:

- The claim involves costs to repair defective construction work at a six-unit townhouse complex (Res. Br. at 1)
- The property at issue *occupies two lots* in Seattle (*Id.* at 2, emphasis added)
- Upon receipt of Delean's claim, the adjuster confirmed that the development involved three duplex townhouses (*Id.* at 7)
- That Delean's construction work may have only involved a portion of the complex is immaterial (*Id.* at 22)
- It is of no moment that this six unit residential property is not a condominium. (*Id.* at 24)

A proper coverage analysis must rely on the facts existing at the time the acts giving rise to the claim were committed. Those facts, which are not disputed, show that Delean was hired in 2006 to perform repairs to the walkways, each of which were individually and separately owned.

Easements for access are not an ownership interest. *Crisp v. VanLaecken*, 130 Wn.App. 320, 122 P.3d 926 (Div. 2, 2005). American States cannot

simply ignore this legal fact, which should have consequences. A proper coverage analysis for claims arising in 2006 requires an analysis of the facts that existed in 2006, not the facts that existed in 2001, five years before the claim arose.

If this had been a condominium when Delean was hired in 2006, then all six unit owners would own an undivided interest in common in every part of these walkways and the walls and roof of each building. In that case, Delean's construction operations – regardless of their scope – would involve more than the four units he worked on and the exclusion would arguably apply to bar coverage. But it is not a condominium and each parcel owner owns his or her own home, its adjoining walkways and all other property within the property lines, in fee, with no common elements.

These facts should be dispositive. Delean's construction operations did not involve more than four units because they did not touch more than four buildings, each of which is separately and individually owned.

D. The exception (a) for detached single family dwellings applies.

Relying again on the original 2001 construction permit, ignoring the 2003 subdivision, and pretending that the buildings are in fact held in condominium ownership, American States argues that these are “two family dwelling[s]” and in no way physically or legally “detached”. Res. Br. at 27, 26. The simple facts are that in 2003 each dwelling was legally

detached from the others and the dwellings on parcels A and B are not physically attached to the dwellings on parcels C and D.

American States is wrong when it argues that Delean's "theory" means the exception would always trump the exclusion if there was more than one building in a complex. Res. Br. at 27. By the plain terms of American States' definition, which says the number of units is calculated "regardless of the number of buildings," the number of buildings is not relevant. What is relevant is whether Delean's *construction operations* involved more than four units, and they did not.

The exclusion applies, initially, to bar coverage only if the construction operations involved more than four units, and in that case American States chose to create an exception where the work was done for the owner of a detached single family dwelling and the contractor did not build the place to start with. While American States cites another dictionary definition of "detached", it also asserts "the parties appear to agree on the commonly understood meaning of the term "detached.'" Res. Br. at 26. Another commonly understood meaning of this term, and the only one offered in the context of building construction is: "not sharing any wall with another building." App. Br. at 22. The undisputed facts show that there is a one inch airspace and a legal property line between the two inner walls of each building and, consequently, it is a fact that none of

the buildings at this development share a wall with another building. CP 229.

E. The attorney fees incurred to sue Delean are recoverable.

RAP 10.3(a)(6) says a party's arguments should include a citation to legal authority. Citing no authority, and Appellant can find none, American States invites the court to "ignore defendant's argument that the ABC rule supports recovery because the argument was not presented to the trial court below as part of defendants' cross motion." Res. Br. at 29.

By agreement of the parties, both sides sought summary judgment in one hearing and limited the briefing to each party's motion and a response brief with no replies. Res. Br. 13-14. The ABC rule was presented to the trial court and considered. CP 591-594.

Beyond asking the court to ignore the argument, American States fails to otherwise explain why the ABC rule set forth in *George v. Farmers Ins. Co.*, 106 Wn. App. 430, 23 P.3d 552 (Div. 1, 2001) should not be applied in this case. The hasty, ill advised and wrongful decision to deny coverage to Delean gave Lawless no choice other than to sue to recover its costs to repair Delean's admittedly defective work. That suit was a natural and proximate result of the denial of coverage for Delean, and all indications show that the litigation was conducted in "good faith and with reasonable grounds to believe that it would have a successful outcome."

Id., 106 Wn. App at 445. Under *George v. Farmers Ins. Co.*, the litigation costs are properly payable.

F. The “costs” are all costs to repair.

American States also quibbles with the calculation of the damages that flowed from its wrongful denial of coverage. Res. Br. at 30.

The attorney fees incurred in the suit against Delean were \$42,285.35. The forensic examination/expert costs totaling \$19,751.52 were incurred to investigate the extent of the property damage, develop the repair plan and monitor its execution. CP 45. All of these expenses flowed from American States’ wrongful refusal to afford coverage to Delean and they should be recoverable here.

II. CONCLUSION

Assignment of Error No. 5 is withdrawn.

For all the forgoing reasons, the court should reverse the Order Granting Summary Judgment, declare that the claim was covered under the insurance policy, direct entry of judgment for the full amount of the consent judgment entered in the underlying case, and award attorney fees and costs in accordance with *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991).

Respectfully submitted this 23rd day of April, 2013.

Michael J. Bond

Michael J. Bond, WSBA # 9154
Attorney for Appellants