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69634-3

No. 69634-3-1

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

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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.*

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**APPELLANT'S BRIEF**

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I. Assignments of Error

*Assignments of Error*

No. 1. The trial court erred in granting Plaintiff's Motion for Summary Judgment.

No. 2. The trial court erred in declaring that the "Multi-unit and Tract Housing Exclusion" eliminated coverage for all fees, costs and damages to repair construction deficiencies which were at issue in the litigation captioned *Lawless Construction Corporation v. Delean Tile and Marble, LLC, et al.* King County No. 10-2-35122-1.

No. 3. The trial court erred in declaring that the American States insurance policies provided no coverage to the Delean defendants with respect to the April 2, 2012 judgment entered in the lawsuit captioned *Lawless Construction Corporation v. Delean Tile and Marble, LLC, et al.* King County No. 10-2-35122-1.

No. 4. The trial court erred in declaring that the American States insurance policies provide no coverage to Lawless Construction Corporation with respect to the expenses it incurred to address and repair construction deficiencies for townhouse properties located in Seattle.

No. 5. The trial court erred in declaring that American States owed no contractual duty to defend Lawless Construction Corporation.

No. 6. The trial court erred in denying the Defendant's Motion for Partial Summary Judgment.

*Issues pertaining to assignments of error*

No. 1. Does the multi-unit residential building exclusion apply to claims arising out of construction operations where the construction operations did not involve more than four buildings? (Assignments of Error 1, 2, 3, and 6)

No. 2. Does the multi-unit residential building exclusion apply where the construction operations were performed on exterior walkways? (Assignments of Error 1, 2, 3, and 6)

No. 3. Does the multi-unit residential building exclusion apply to repair of detached single family dwellings where under the plain, ordinary and popular meaning of "detached" there are no shared walls? (Assignments of Error 1, 2, 3, and 6)

No. 4. If the insurance company wrongfully denied coverage for the claims, are the attorney fees and expert costs incurred in the underlying suit recoverable damages? (Assignment of Error 4)

No. 5. Were there genuine issues of material fact as to the insurance company's failure to properly investigate the claims before denying all coverage under the policy? (Assignment of Error 5)

II. Statement of the case.

A. The facts of the case.

This is a declaratory judgment action brought by Plaintiff, American States Insurance Company. CP 1, 2. The defendants are a tile setter named Delean<sup>1</sup> and a general contractor named Lawless Construction Corporation (hereinafter, Lawless). CP 2. The claim at issue arose from Delean's construction work commencing in 2006 at a site located in Seattle. CP 13.

The complex involved in this case was built pursuant to a permit the City of Seattle issued in 2002. CP 443, 444. According to the developer, Ed Gallaudet, the project was the "26th and John" development, and he obtained permits to build six single family homes in three structures, each containing two single family homes adjacent to one another. CP 224.

On August 25, 2003 the City of Seattle approved a subdivision of the property. CP 307-309. As a result of the subdivision, each parcel owner owns the entire dwelling and all property to the property lines. CP 225. Each of the six units is an independent, zero lot line parcel with easements for access to the sidewalks, driveway and a parking garage. CP 224.

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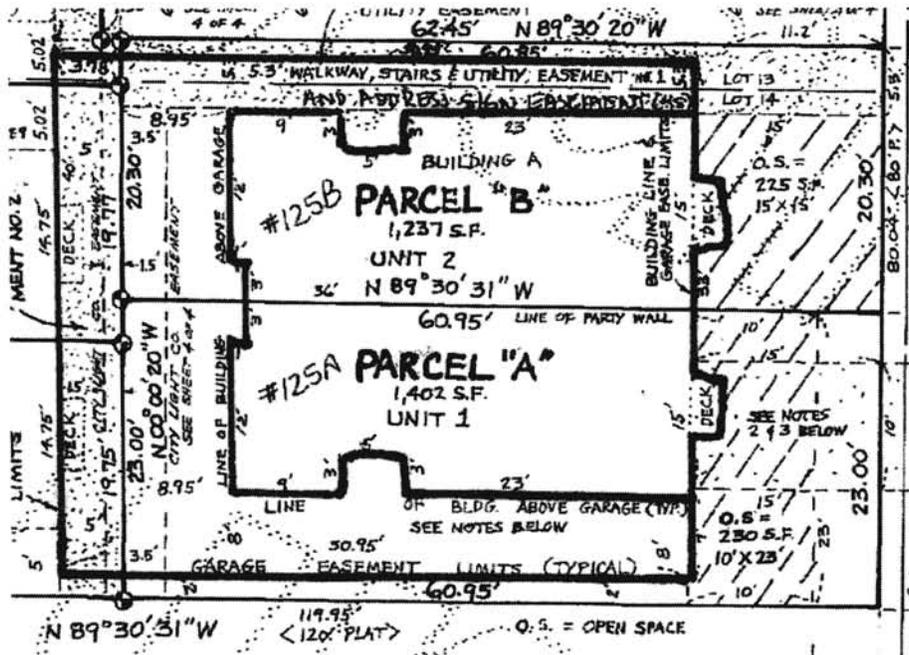
<sup>1</sup> Pronounced 'day-lee-on'. As shown in the caption, Mr. Delean operated variously as a limited liability company or a sole proprietorship. The first American States insurance policy, effective 2006-2007 was issued to Tabita Delean d/b/a Delean Tile and Marble. CP 402. The policies in effect from 2008 to 2010 were issued to Delean Tile and Marble, LLC. CP 402.

There are a total of six individual parcels among the structures, and no common areas are shared by the six residences. CP 224. The garage is owned by and within the property lines of two of the units, Parcels A and B. CP 225. This is not a condominium. CP 224.

Lawless and Delean did not build the original project. CP 68.

The original construction was defective, the owners of all six units filed suit against the builder, and Mr. Mark Lawless served as an expert witness in the litigation. CP 68. That suit was settled, and by contract dated April 28, 2006 the homeowners hired Lawless Construction to make repairs to a project called the "Garage on 26<sup>th</sup> Ave." CP 341. Lawless subcontracted the repairs to the courtyard walkway work at issue here to Delean. CP 68.

Delean's construction operations were entirely within the limits of an easement for the walkways that surrounded two of the townhouse units at parcels A and B. CP 67. A map with the limits of Delean's work, which is shown in bold lines, is attached as Appendix A. CP 88. A portion of the map is reproduced below:



Delean's construction operations touched only four of the town houses: the homes on Parcels A, B, C, and D. CP 68. No construction operations were performed on the buildings on Parcels E or F. CP 88.

Delean was hired to waterproof the exterior walkways, but his work was defective, allowing rain to infiltrate beneath the walkways. CP 68, 69. The walkways were located above the garage and the water intrusion into the garage structure caused property damage, including rot to the joists, sheathing and drywall. CP 69.

Delean's contract with Lawless, among other terms, required Delean to buy insurance, to make Lawless an additional insured under his liability insurance policy, and to indemnify and hold Lawless harmless for claims arising from his performance. CP 69, 364, 366. Delean was insured with

American States Insurance, and for purposes of the motion under review American States does not dispute that Lawless was an additional insured. CP 272.

Not satisfied with the work because the walkways still leaked, the homeowners demanded that Lawless return and repair the damage. CP 429-431. Lawless in turn demanded that Delean finish his contracted work and repair his defective work, without success. CP 69. Lawless and Delean also made claims under their respective insurance coverage with American States. CP 70.

Following receipt of the claim, the American States adjuster looked at a City of Seattle web site and found that the project was built in 2002 under a permit for construction of six townhouses in three buildings. CP 214, 443, 444. There is no evidence the adjuster examined or considered the permit issued in 2006 for the work at issue in this case. CP 291. Relying only on the 2002 permit file, the adjuster concluded, “public records show this is a condominium of 6 units in 3 buildings.” CP 454. Based on that information, and other factors not at issue here, American States denied coverage, relying on a policy exclusion set forth below:

**Exclusions**

This insurance does not apply to:

Multi-Unit and Tract Housing

.... “property damage” .... arising out of any “construction operations” whether ongoing operations or operations included within the products-completed operations hazard that involve a .... “multi-unit residential building”.<sup>2</sup> CP 182.

“Multi-unit residential building” is defined under the policy to mean:

....condominiums, townhouses, apartments, dormitories or similar structures that have more than four (4) units built or used for the purpose of residential occupancy, at the same location or complex, regardless of the number of buildings. CP 182.

American States contended the “multi-unit residential building exclusion” bars all coverage for the claim arising from Delean’s defective work. CP 214.

Abandoned by Delean and American States, Lawless returned to the site and repaired Delean’s defective work and the resulting property damage. CP 70. The investigation and repair costs totaled \$131,914.08. CP 70.

Lawless sued Delean to recover its investigation and repair costs, alleging claims for breach of contract and warranty, successor liability and personal liability. CP 36-38. American States retained counsel to defend Delean. CP 70. Although Delean faced personal liability in excess of \$174,000, including attorney fees, the insurer held firm to their argument

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<sup>2</sup> The quotation marks denote a term that is defined under the policy.

On November 2, 2012 the Honorable Laura Gene Middaugh granted American States' motion on all three issues, declaring there was no coverage under the policy for the claims, and the court denied Lawless's motion for partial summary judgment. CP 591-594. The counterclaim was voluntarily dismissed on December 14, 2012. CP 597.

A timely Notice of Appeal was filed on November 29, 2012. CP 589.

### III. Argument

#### **A. Summary of argument.**

It is not disputed that, but for the multi-unit residential building exclusion, the claim against Delean was a covered claim. The adjuster erred by assuming the construction at issue occurred at a six unit condominium and in doing so failed to consider the legal ownership of the property or Delean's actual construction operations.<sup>3</sup>

Under the insurance policy there were two insureds, Lawless and Delean; but American States treated the claims as if there was only one insured, *i.e.*, Lawless; and they said because Lawless contracted with all six unit owners, the multi-unit residential building exclusion barred coverage for Delean. A correct analysis must address the coverage rights

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<sup>3</sup> In fairness, the adjuster could have been misled when the tender of the claim incorrectly mislabeled the facility as "condominiums". CP 406. But the mislabeling does not obviate the insurer's obligation to adequately investigate the facts of the claim. The mislabeling was of no moment apparently as the term condominium does not appear in the adjuster's notes. CP 214.

of each insured separately. Delean was entitled to full coverage under the plain language of the policy because his construction operations did not involve a multi unit residential building as American States defined it.

American States defined a multi-unit residential building as “structures that have more than four (4) units built or used for the purpose of residential occupancy” and Delean did not work on “more than four units”. It is undisputed that his work touched not more than four of the residential structures in this development. The exclusion turns on the construction operations on buildings in 2006 and the number of units involved in those construction operations. American States’ reliance on the fact that there were six owners of six units in three buildings as originally built in 2002 is misplaced.

American States defined “construction operations” in terms of work on buildings and Delean’s faulty work giving rise to the claim was in the courtyard walkways and not the buildings.

The exclusion by its terms does not apply to repairs performed for the owners of detached single family dwellings and all work here was performed for the owners of detached single family dwellings.

Lastly, Lawless was compelled to sue Delean as a result of American States’ wrongful refusal to accept the claims against his company and Delean for coverage under the insurance policy. The attorney fees

incurred in prosecuting that suit are damages that American States should pay.

**B. The standard of review is *de novo*.**

The standard of review of an order on summary judgment is *de novo*, and the court should engage in the same inquiry as the trial court.

*Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (Div. 1, 1990). Summary judgment is properly granted when the evidence on file demonstrates 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).

**C. Delean was liable for construction defects.**

American States submitted ample evidence showing Delean was liable for defective construction of the walkways. In its moving papers, American States showed that the unit owners complained of water intrusion in the areas where Delean had performed its work and Lawless asked Delean to perform repairs. CP 268. But a payment dispute developed between Lawless and Delean and as a result Delean did not complete repairs. CP 268. The evidence showing liability included the investigative reports and photographs of property damage, which were attached as Exhibit A to the Declaration of Tamara Dragseth, the American States adjuster. CP 433-441. In addition, American States filed

Lawless's discovery responses showing that Delean breached his contract duty to install a waterproof tile deck system; he failed to follow the project specifications and thereby violated the contract, portions of the building code, state law and Seattle Residential Codes. CP 473, 474.

The American States insurance policy, in relevant part, grants insurance as follows: "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. In this case there was property damage and Delean was legally liable for his faulty work. American States does not dispute these facts or conclusions. Instead, to deny the claim it relies only on the exclusion for construction operations that involve a "multi-unit residential building".

**D. The plain language of the exclusion controls the coverage.**

The rules governing insurance claims are well known. The policy is to be construed as a whole, and it "should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance." *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 95, 776 P.2d 123 (1989) (quoting *Sears v. Grange Ins. Ass'n*, 111 Wn.2d 636, 638, 762 P.2d 1141 (1988)). Undefined terms should be given their plain, ordinary, and popular meaning. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 881, 784 P.2d 507 (1990). Especially

pertinent here, if a policy defines a term, that definition applies. *Austl. Unlimited, Inc. v Hartford Cas. Ins. Co.*, 147 Wn. App. 758, 766, 198 P.3d 514 (2008).

The exclusion – with its definition of “multi-unit residential building” inserted into the exclusion – states:

This insurance does not apply to:

.... “property damage” .... arising out of any “construction operations” whether ongoing operations or operations included within the products-completed operations hazard that involve a .... “townhouse that has more than four (4) units built or used for the purpose of residential occupancy at the same complex, regardless of the number of buildings.”

Separating the exclusion into its constituent terms, it says the insurance does not apply to:

1. property damage,
2. arising out of construction operations,
3. that involve a townhouse that has more than four units,
4. used for residential occupancy,
5. at the same complex, regardless of the number of buildings.

The court should determine coverage “by characterizing the perils contributing to the loss, and determining which peril the policy covers and which it excludes.” *Truck Ins. Exchange v BRE Properties, Inc.*, 119 Wn. App 582, 81 P.3d 929 (Div. 1, 2003). In *Truck Ins. Exchange*, the peril

contributing to the loss was unsafe working conditions that caused injury to a worker on the project. Here, the peril contributing to the loss was Delean's faulty construction operations that caused property damage.

**E. The coverage is to be separately evaluated for each insured.**

The grant of coverage under the policy is to "the insured" and, consequently, the American States policy is separable so that there are two separate insureds under the policy, Lawless and Delean. *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 120, 795 P.2d 126 (1990). Section IV (7) of the policy states that "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. This means that the coverage analysis is to be separately evaluated for each insured under the policy. *Truck Ins. Exchange v BRE Properties, Inc.*, *supra*.

This creates separate contracts between the insurer and each of the insureds. The result is that an excluded act of one insured does not bar coverage for additional insureds who have not engaged in the excluded conduct. *Id.*, 119 Wn. App. at 589

In *Truck Ins. Exchange*, the court held that an exclusion for claims brought by the subcontractor's employees did not apply to the general contractor because it was not the claimant's employer.

The decision in *Unigard Mut. Ins. Co. v. Argonaut Ins. Co.*, 20 Wn. App 261, 579 P.2d 1015 (Div. 3, 1978) illustrates the application of the rule requiring the insurer to separately evaluate the coverage of each of multiple insureds. In that case the parents bought the insurance policy and their child was an insured. The policy excluded coverage for intentional acts. The child set fire to a school, his act was intentional and the insurer properly denied coverage for his acts. But as to the parents, the court held the parents were entitled to coverage. The decision states:

In such instances, where coverage and exclusion is defined in terms of "the insured," the courts have uniformly considered the contract between the insurer and several insureds to be separable, rather than joint, i. e., there are separate contracts with each of the insureds. **The result is that an excluded act of one insured does not bar coverage for additional insureds who have not engaged in the excluded conduct.** *Id.*, 20 Wn. App at 266. (emphasis added)

Note that the "additional insured" is not an "additional insured" as used in the additional insured endorsement here; it is the named insured, i.e. the parents who paid for the policy.

Here, Delean bought and paid for the insurance policy, he is the insured and an exclusion that may be applicable to a different insured such as Lawless is not, under the facts, applicable to Delean. Because Delean did not engage in the excluded conduct – i.e., perform construction operations involving more than four units – the exclusion does not apply.

Delean is in exactly the same position as the parents in *Unigard*, he did not engage in the excluded conduct, and he was, therefore, entitled to coverage under the policy.

American States incorrectly concluded that since Lawless contracted with six unit owners, the multi-unit residential building exclusion barred coverage for Delean. And the trial court was caught by the same snare after failing to examine what activity gave rise to the peril. Delean's construction operations gave rise to the peril and those construction operations did not involve more than four units; the plain language of the exclusion states that it applies only if his construction operations involved more than four units. The court should hold that the exclusion does not apply to Delean's work.

**F. American States is barred from adding words to the exclusion.**

It is a basic principle that an insurer will not be allowed "to add language to the words of an insurance contract that are not contained in the parties' agreement." *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 913, 874 P.2d 142 (1994); *American Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 430, 951 P.2d 250 (1998)("We will not add language to the policy that the insurer did not include."). In such a situation, a court will reject an attempt to limit the coverage grant of a policy because the insurer "could easily have drafted

[appropriate] language” if it had intended that effect. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 68 n.2, 882 P.2d 703 (1994), 891 P.2d 718 (1995).

American States argues its exclusion applies because “the work was performed for the benefit of all six owners” and “all six owners signed the contract with [Lawless]”. CP 281. But the multi-unit residential building exclusion and its definition say nothing about “owners” of buildings; its subject is “building” not “owner”. American States’ argument works only if one adds the words “the owners of” to the exclusion, as in “the owners of a townhouse that has more than four units,” but the cases cited in the preceding paragraph hold the insurer cannot add words to the policy.

In any event, that argument fails because there is only one owner of each walkway, and that is the owner of the parcel containing the walkway. The owner of parcel E does not own anything in parcel A, they have an easement for access and not ownership. In real property law, an easement provides the right to use real property of another without owning it. *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012), citing *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). The term "easement" means a right, distinct from ownership, to use in some way the land of another, without compensation. *Crisp v. VanLaecken*, 130 Wn.App. 320,

122 P.3d 926, (Div. 2, 2005). The ordinary meaning of owner is not “possessor of easement rights”.

That American States knew how and when to refer to “owners” when it meant to include owners is shown by its explicit use of “owner”, and its definitions of “owner” and “housing tract”. The first exception to the exclusion, which is discussed *infra*, refers to the “owner”, a defined term. The insurance company defined “housing tract” to mean “any combination of dwelling units....all built, **owned**, or developed by the same or related general contractors....” (emphasis added).

The court should 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). If American States had intended its multi-unit residential building exclusion to be determined by the number of owners then it would have used those words as it did when making an exception to its exclusion and in defining “housing tract”. Its failure to define the multi-unit residential building exclusion in terms of ownership must be accorded due respect. Under a plain reading of the policy, the exclusion applies not to owners but to construction operations on buildings and only if those operations involved more than four units.

**G. The fact that there were six units in the complex is not relevant.**

The fact that there were a total of six units in the complex would be relevant only if this complex was a condominium. In a condominium, all the owners of each condominium have an ownership interest in the common areas. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 243 P.3d 1283 (2010) (Condominium owners hold "an undivided interest in the common areas and facilities in the percentage expressed in the declaration." RCW 64.32.050(1)). Common areas include (a) the land on which the building is located; (b) the foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building; and (c) the basements, yards, gardens, parking areas and storage spaces. RCW 64.32.010 (6). By statute, in condominium properties each unit owner's personal ownership extends no further than the finished surface on the walls, floors and ceilings inside his or her unit. RCW 64.34.204 (1) states:

Condominium Act  
Unit boundaries.  
Except as provided by the declaration:

(1) The walls, floors, or ceilings are the boundaries of a unit, and all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and **all other portions of the**

**walls, floors, or ceilings are a part of the common elements.**

If the project Delean was working on had been a condominium, then the exterior walkways would be common elements, and the owners of all six units would own an undivided interest in the walkways; in that case, Delean's construction operations arguably would involve more than four unit owners. But it is not a condominium; the developer, Mr. Galluadet, subdivided the property into individually owned parcels in 2003 and thereby avoided creating condominium ownership. Consequently, each parcel owner owns all the property between the parcel's property lines, including the walls, the walkways around his or her home, and the land beneath that parcel. And that means that Delean's construction operations did not involve the two other residential buildings where he did no construction.

**H. The claim against Delean did not arise from construction operations that involved a residential structure.**

American States defined "Construction operations", and if a policy defines a term, that definition applies. *Austl. Unlimited, Inc. v Hartford Cas. Ins. Co., supra*, 147 Wn. App. at 766. American States defined "Construction operations" as follows:

"Construction operations" means pre-construction, construction, post-construction, reconstruction, renovation, remodeling,

conversion of the building to a condominium, townhouse, cooperative building or **any other type of multiple unit residential structure**, maintenance or repair. CP 182. (Emphasis added).

As defined, the only construction operations that are within the exclusion are those operations on or in a residential structure. But here the construction operations giving rise to the claim were Delean's work outside the residential structure and on the exterior walkways. As American States defined the terms of its exclusion, it does not apply to Delean's defective work in the walkways.

**I. The exclusion does not apply according to Exception "a".**

The exclusion's Exception "a" says the exclusion does not apply to:

Remodeling, maintenance or repair performed for the "owner" of a detached single family dwelling provided that the work does not involve the repair or replacement of either "your work", or the work of any other insured under this policy, that was part of the original construction of the building;... CP 182.

Citing no legal authority for its proposition, American States argues this language is not applicable because "under no reasonable scenario can duplex townhomes constructed in a multi-family zone be considered to be "detached" single family dwellings." CP 281. Its argument is flawed because no such limiting language appears in the insurance policy.

The insurance policy does not define the term "detached", and in such cases the court may use standard dictionaries in order to determine the

plain, ordinary and popular meaning of the words. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 66, 882 P.2d 703 (1994).

Merriam Webster defines "detached" as follows:

"standing by itself : separate, unconnected *especially* : **not sharing any wall with another building** < a *detached* house>".  
<http://www.merriam-webster.com/dictionary/detached>. (Emphasis added).

None of the buildings at this development share a wall with another building. As shown in the construction drawing at CP 229, there is a one inch air space between the inner walls of buildings A-B, C-D, and E-F, and as a result of the subdivision of the property in 2003 there is a property line between each building and no common ownership of any wall between the buildings. Each wall is separately owned and each unit is legally detached from all the others. As stated before, this is not a condominium where, for example, every owner legally owns an undivided interest in all walls in all the buildings.

There is no dispute that these are single family dwellings. CP 225.

While buildings A and B have contiguous siding and roofing, in any event there is no physical connection at all between the two buildings on parcels A and B and the two buildings on parcels C and D. Under all conceivable meanings of the words "detached single family dwelling", buildings C and

D are single family dwellings that are physically *and* legally detached from buildings A and B.

If, in view of the facts of this case, “detached” refers to the physical *or* legal conditions, then “detached” under these facts is ambiguous. A provision in an insurance policy is ambiguous if it is susceptible to at least two different reasonable interpretations. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., supra*, 123 Wn.2d at 897. Unresolved ambiguities are construed against the insurance company and in favor of the insured. *Queen City Farms, Inc. v. Central Nat’l Ins. Co., supra*, 126 Wn.2d at 68. The court should resolve the ambiguity in favor of coverage here.

It is undisputed that Delean and Lawless were not the original builders of the townhouse complex and the work they were hired to perform in 2006 was not the repair of their own work.

By the plain language of the exception to the exclusion, the multi-unit residential building exclusion does not apply because Delean was making repairs for the owners of detached single family dwellings and he was not repairing his own original construction work.

**J. The attorney fees Lawless incurred are damages that American States should pay.**

American States’s attempt to avoid paying the full amount the judgment because the attorney fees are not covered misses the mark.

According to Mr. Harris's treatise, under Washington's "ABC rule" "an insured can recover reasonable litigation expenses incurred during a prior third party litigation when that action was a natural and proximate consequence of the insurer's wrongful refusal to provide insurance benefits." THOMAS V. HARRIS, WASHINGTON INSURANCE LAW, Third Edition, §9.02 at 9-11 (Mathew Bender, Rev. Ed.). In *George v. Farmers Ins. Co.*, 106 Wn. App. 430, 445-46, 23 P.3d 552 (Div. 1, 2001), the court held that the insurer may be liable for "reasonable expenses incurred in a prior litigation against a third party when that action was a natural and proximate consequence of the defendant's [insurer's] wrongful act or omission."

As between American States and Lawless, Delean should be treated as a third party. Lawless was compelled to sue Delean only because American States wrongfully refused to grant coverage for the claims against Delean; the attorney fees incurred in that suit should be recoverable damages.

**K. Issues of fact preclude summary judgment as to Lawless's rights under the policy.**

Lastly, the trial court concluded that American States owed no contractual duty to defend the claims against Lawless (and by inference Delean) until a lawsuit was commenced because, as American States

argued, the policy states a “duty to defend the insured against any “suit” seeking those damages” and there was no suit. If by “defend” American States means, “hire a lawyer” then its position might have merit. But Lawless was not asking for a lawyer. As one of its insureds he was asking only that American States investigate the claim that was made and settle it because liability was reasonably clear and property damage was alleged. The insurance policy granted Lawless those rights.

As one of its insureds, American States owed to Lawless a duty of good faith and a duty of reasonable care; and the duty permeates the insurance arrangement. *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.* 165 Wn.2d 122, 129-130, 196 P.3d 664 (2008).

The policy states, “we may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.” The relationship of American States to Lawless is a special fiduciary relationship that involves an enhanced fiduciary obligation. *McGreevy v Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 36-37, 904 P.2d 731 (1995). As a fiduciary, American States’ exercise of discretion is not unfettered. It owed duties of reasonable care, including the obligation of good faith and fair dealing inherent in all contracts. *Murray v Mossman*, 56 Wn.2d 909, 911-12, 355 P.2d 985 (1960); *Kirk v. Mount Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998).

The Washington Administrative Code, sections 284-30-330 (4) and (6), describe two unfair insurance claims handling practices that occurred in this case:

- Refusing to pay claims without conducting a reasonable investigation.
- Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to promptly pay property damage claims to innocent third parties in clear liability situations.

The evidence showed that the claims adjuster made no investigation of the actual construction operations or the permit governing the work and relied, instead, only on a permit issued to another contractor four years before Lawless hired Delean to work at the site. That permit expired in 2004, two years before the permit governing the work involved in this case was issued in 2006. CP 89, 90, 91. Moreover, the homeowners were innocent third parties, liability was reasonably clear, and American States refused to effectuate a prompt, fair and equitable settlement. In its zeal to deny coverage, American States failed to properly investigate the facts of the claim and these failures were a breach of the duties of reasonable care and good faith under the contract of insurance.

There were genuine issues of material fact as to the breaches by American States of its obligations to Lawless; and summary judgment

dismissing any portion of Lawless's claims for breach of the policy was error.

**L. Partial summary judgment should have been granted to Lawless.**

For all the forgoing reasons, the trial court erred in denying Lawless's Motion for Partial Summary Judgment. The exclusion on which American States relied in denying coverage was not applicable to Delean's work because his construction operations did not involve more than four units. And the attorney fees Lawless incurred in suing Delean are damages that American States should pay because they were incurred only after it wrongly denied coverage for the claims.

**M. Lawless is entitled to attorney fees and costs on appeal.**

Under the court's holding in *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991), Lawless would be entitled to recover all costs and fees incurred in this action as the prevailing party. In accordance with RAP 18.1(b), Lawless requests an award of attorney fees and costs.

**IV. Conclusion**

The central issue in this case is quite simple. If not for the exclusion, the insurance policy covered the claim against Delean. As the insurer defined it, the exclusion applies only if the construction operations that

gave rise to the claim involved more than four units. The undisputed fact is that Delean's construction operations did not involve more than four units and, consequently, the multi unit residential building exclusion simply does not apply to the claim. The adjuster erroneously treated this as a multi-family condominium in which all the owners in the complex own an undivided interest in the walkways which, in that case, would be common area property. But legally and factually it is not a condominium and the walkways are not common area properties.

For all the forgoing reasons, the court should reverse Judge Middaugh's Order Granting Summary Judgment, reverse the Order Denying Lawless's Motion for Partial Summary Judgment, declare that the claims were covered under the insurance policy, direct entry of judgment for the full amount of the consent judgment entered in the underlying case, hold that there were genuine issues of material fact as to American States's breach of contract for failure to defend Lawless, and award Lawless attorney fees and costs in accordance with the *Olympic Steamship* rule.

Respectfully submitted this 23 day of January, 2013.

  
Michael J. Bond, WSBA # 9154  
Attorney for Appellants



COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

AMERICAN STATES  
INSURANCE COMPANY, an  
Indiana corporation,

Plaintiff/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/Appellants.)

No. 69634-3-I

CERTIFICATE OF SERVICE  
APPELLANT'S BRIEF

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STATE OF WASHINGTON  
2013 JAN 24 PM 1:46

I, Michael J. Bond, certify and declare as follows:

I am over the age of 18 and am otherwise competent to make this declaration. This declaration is made upon personal knowledge setting forth facts I believe to be true.

On January 23, 2013 I served a copy of the Appellant's Brief and this Certificate of Service by deposit in US Mail postage prepaid addressed to:

Mary R. DeYoung  
Soha and Lang  
1325 4<sup>th</sup> Ave. Ste 2000  
Seattle, WA 98101-2570

DATED: January 23, 2013 at Mercer Island, Washington.

A handwritten signature in black ink that reads "Michael J. Bond". The signature is written in a cursive, slightly slanted style.

Michael J. Bond, WSBA #9154