

NO. 69634-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE COMPANY,
an Indiana corporation,

Plaintiff/Respondent

v.

DELEAN'S TILE AND MARBLE, LLC, a Washington limited liability
company; DELEAN'S 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,

Defendant/Appellants

RESPONDENT'S BRIEF

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I. INTRODUCTION

This is an insurance dispute over coverage for costs to repair defective construction work at a six-unit townhouse complex in Seattle. Plaintiff American States Insurance Company issued general liability policies which exclude property damage arising from construction operations at any townhouse complex of more than four units. The trial court ruled, correctly, that the exclusion eliminated coverage.

II. COUNTERSTATEMENT OF THE ISSUES

Issue No. 1: Did the trial court properly conclude that the “multi-unit and tract housing residential exclusion” applied, where the exclusion eliminates coverage for “construction operations” involving a “multi-unit residential building,” a term the exclusion defines to include townhouses that have more than four units at the same complex, and the underlying claim involved construction repairs to a six-unit townhouse complex?

Issue No. 2: Did the trial court properly conclude that exception (a) to the exclusion was inapplicable, where the exception applies only to detached single family dwellings, and the duplex units in each townhouse at this complex were attached to each other both physically and legally?

Issue No. 3: If the “multi-unit and tract housing residential exclusion” does not apply, does the contractual liability exclusion

nonetheless eliminate coverage for the attorney's fee and cost portion of the judgment Lawless obtained against Delean?

Issue No. 4: Did the trial court properly conclude that American States had no contractual duty to defend Lawless in the absence of a "suit"?

III. COUNTERSTATEMENT OF THE CASE

A. COUNTERSTATEMENT OF FACTS

1. The Property Involves A Six-Unit Townhouse Complex

The property at issue occupies two lots in Seattle at 125-127-129 26th Avenue East. (CP 307-309, 443-444, 565) It was designed, permitted and built in 2001 as "three duplex townhouses with underground parking." (CP 443-444) Its zoning at the time was L-2. (CP 443). This was a multi-family zone established under Seattle Municipal Code (SMC) 23.30.010. (CP 298) SMC 23.45.006, as it existed in 2001, provided the development standards applicable to this townhouse complex. (CP 300).

A soils report prepared for the developer in 2001 referred to the project as a "multi-unit residential structure." (CP 304) The soils report states that "[T]he multi unit residential construction will consist of three, three-story buildings joined by courtyards." (CP 305)

According to the building permit, each duplex townhouse building is a "two-family dwelling." (CP 443-444). And as constructed, each

duplex townhouse appears to the observer as a single structure with continuous siding, a common roof, and a continuous guttering system. (CP 567) There is an inner courtyard area between the three buildings consisting of connected walkways and stairways used by all owners. (CP 565) The buildings and inner courtyard area are elevated above the street level and fenced or walled off from adjacent properties. (CP 565-566, 570, 572, 574, 582, 586) For pedestrian access to all six units, there is a single stairway from the public sidewalk on 26th Avenue East that leads into the complex's inner courtyard area. (CP 565, 570, 572, 574, 576) Each unit has a single entrance, which is accessed by traversing the common courtyard walkways. (CP 567) The garage area for the complex is located underneath the building which bears the street address 125 26th Avenue East. (CP 567, 588) As built, the garage is not a separate structure; instead it is an integrated part of the building above it, as evidenced by a continuous span of siding between the upper portions of the building and the garage area. (CP 567, 588) When the property owners walk out their respective front doors, they access the garage via a stairway from the courtyard area. (CP 567, 588).

The two lots on which the townhouse complex was built were short platted in 2003. (CP 307-309). The short plat divided the two lots into seven parcels, denominated Parcels A to G. (CP 307-309) The six

townhouse units occupy Parcels A to F. (CP 88) The short plat specifies that these “are not separate buildable lots,” but that instead the purpose of the short plat is “for the creation of separate lots of record for the construction and transfer of title of townhouse as authorized under SMC 23.45.006.” (CP 300, 308) Then effective SMC 23.24.045 premised the unit lot subdivision on access, easement and joint use and maintenance agreements between all units in the complex. (CP 313) The short plat reflects these code requirements by specifying mandatory easements and maintenance agreements. (CP 308)

A Declaration of Covenants, Conditions, Restrictions and Easements and Party Wall Agreement (CC&Rs) applicable to all six parcels was recorded in 2003. (CP 315-333) The CC&Rs identify Parcels A to F by their street addresses and refer to them collectively as the “Property”. (CP 315-316). The CC&Rs provide in pertinent part:

1 6 9 “Property” shall mean and refer to all of the Parcels and real property described in Exhibit A.

1 6 10 “Structure” shall mean any building, fence, wall, driveway, walkway, patio, swimming pool, or any other improvements of a Parcel including landscaping improvements (other than planting of flower or small ornamental shrubs, plants and trees).

(CP 318; Emphasis added.)

The CC&Rs establish easements for walkways, parking, shared storage space, utilities, ingress/egress, and mailboxes, and specify that all six parcels are equally responsible to share the costs of maintaining these easement areas. (CP 316-322, 325-327) The CC&Rs also impose limitations on what an owner can do with an individual townhouse unit. They prohibit various exterior improvements, alterations, repairs, paint changes, excavations, changes in grade or other work which alters the exterior of any Parcel or the Structures without prior written approval of three-fourths of the Owners. (CP 324). They prohibit a broad range of exterior decorations. (CP 324-325) They require all Owners to share equally in various exterior maintenance work, including maintenance involving easement areas. (CP 325-327) They prohibit any structural alteration of any party walls, which are the walls built as part of the original construction of the Structures upon the Property which are placed on the dividing line between the Parcels. (CP 323-324)

2. **Delean's 2006 Repairs Were Undertaken For The Benefit Of The Entire Six-Unit Townhouse Complex**

In 2006 the six townhouse unit owners made a claim against the original developer for construction deficiencies and recovered insurance proceeds to effectuate repairs. (CP 338) The six unit owners collectively entered into and all signed a construction contract as a "Homeowners

Association” with defendant Lawless Construction Corporation, Inc. (“Lawless”) for the repair work. (CP 341-355). Lawless’s July 12, 2006 Scope of Repair, which was Exhibit A to the contract, is addressed to the “Homeowners Association” and states that the work includes repairs to the “main courtyard and 6 east elevation unit decks,” as well as the garage, storage rooms, and the staircase to the garage. (CP 357-358)

Lawless subcontracted with defendants’ Delean¹ to repair some of the damage. (CP 360-378). The August 6, 2006 subcontract incorporates provisions of the contract between the owners and Lawless and makes them binding on Delean. (CP 360-361) Delean’s scope of work encompassed tile work in the deck areas, including courtyard and easement areas. (CP 367, 337). It included lapping membranes against the siding of the building walls. (CP 380-383) It included waterproofing the penetrations from the buildings’ downspouts. (CP 386-387) It also included tile work on the staircase to the common parking garage. (CP 384-385, 392, 473-474) Delean’s final invoice was sent in May 2007. (CP 389)

¹ American States adopts the protocol set forth in appellant’s brief of referring collectively to the various Delean defendants simply as “Delean.” See appellant’s brief, p. 3, fn. 1.

3. **American States' Consideration of the Claim Involving Delean's Work At The Property, and Lawless's Suit Against Delean**

After the unit owners complained of water intrusion in the areas where Delean had worked, Lawless asked Delean to perform repairs. (CP 433-441) Because of a payment dispute, Delean did not complete repairs. (CP 388-390)

On September 16, 2010, Lawless's attorney tendered a claim to American States as an additional insured under the Delean policies. (CP 406-407) The letter stated that the claim "involves water intrusion and resultant damage at a condominium complex in Seattle," that the homeowners were not represented, and that the matter was not in litigation. (CP 406-407)

On September 22, 2010, American States' claim representative checked permit records for the City of Seattle's Department of Planning and Development and confirmed that the development involved "three duplex townhouses with underground parking." (CP 401, 443-444) She contacted and discussed the claim with Mitch Delean. (CP 401, 446) She also called Lawless's attorney regarding the claim. (CP 401, 448). On September 29, 2010, she wrote to Lawless's attorney formally denying the tender, and invited him to submit any documentation that might materially

alter the company's coverage position. (CP 401, 450-454). The attorney did not provide any documentation in response to this invitation. (CP 401)

Instead, on October 4, 2010, Lawless filed a lawsuit against Delean. (CP 459-462). The lawsuit, like the September 16, 2010 letter, alleged that the property was a "condominium project" known as "the 26th and John Condominiums." (CP 460) American States provided Delean a reservation of rights defense. (CP 402, 464-470) It defended Delean throughout the litigation, up through and including Delean's entry into a stipulated covenant judgment settlement with Lawless and entry of judgment against Delean. (CP 402) The judgment, in the amount of \$151,533.05, was entered on April 2, 2012. (CP 394-397)

4. The American States Policies

American States Insurance Company issued four policies between July 9, 2006 and July 9, 2010. (CP 402, 476-527). Tabita Delean dba Delean's Tile & Marble is the named insured during the first policy term, and Delean's Tile & Marble, LLC is the named insured during the remaining terms. (CP 402, 477-478, 490-491, 504-505, 517-518) Subject to several limitations not material to the issues presented by the parties' summary judgment motions before the trial court, Lawless is an additional insured under the policies. (CP 272, 487-488, 501-502, 514-515, 527)

All of the policies contain an exclusion for property damage

arising out of any “construction operations” that involved a “multi-unit residential building.” (CP 485, 499, 512, 525). The exclusion provides, in pertinent part:

MULTI-UNIT AND TRACT HOUSING RESIDENTIAL EXCLUSION

* * *

This insurance does not apply to:

Multi-Unit and Tract Housing

“Bodily injury”, “property damage” or “personal and advertising injury liability” arising out of any “construction operations” whether ongoing operations or operations included within the products-completed operations hazard that involve a “housing tract” or “multi-unit residential building.”

This exclusion does not apply to:

- a. *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; ...*

* * *

- B. *The following exclusion definitions are added to the **Definitions** Section:*

“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.

“Multi-unit residential building” means 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.

“Owner” means the person or persons that own the individual residential dwelling or unit but does not include a limited liability company, sole proprietor, partnership, joint venture, corporation, unincorporated association, trust, or the developer of the property or real estate manager or any entity related to either.

“Housing tract” means a residential development or subdivision consisting of more than eight (8) of any combination of dwelling units, detached single family dwellings, or lots all built, owned, or developed by the same or related general contractors, developers, persons, limited liability companies, partnership, joint ventures, corporations, unincorporated associations or trusts. A development or subdivision built upon multiple tracts and/or built in multiple phases shall be considered to be one “housing tract”.

(CP 485, 499, 512, 525) For the court’s convenience, a copy of this endorsement is attached to this brief as Appendix A.

All of the policies also contain the following exclusion:

2. Exclusions.

This insurance does not apply to:

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or*
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”, provided:
 - (a) Liability to such party for, or for the cost of, that party’s defense has also been assumed in the same “insured contract”; and**

- (b) *Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.*

(CP 482, 496, 509, 522) For purposes of this exclusion, the policies include the following definition:

- 9. *“Insured contract” means:*
 - a. *A contract for a lease of premises...;*
 - b. *A sidetrack agreement;*
 - c. *Any easement or license agreement ...;*
 - d. *An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;*
 - e. *An elevator maintenance agreement;*
 - f. *That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement. ...*

(CP 483, 497, 510, 523) The insuring agreement in all policies specifies, in pertinent part:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

(CP 481, 495, 508, 521) For purposes of this agreement, the policies include the following definition:

- 18.** *"Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:*
- a.** *An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or*
 - b.** *Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.*

(CP 484, 498, 511, 524)

B. COUNTERSTATEMENT OF PROCEDURE.

American States filed this declaratory judgment lawsuit on December 9, 2011 to obtain a ruling on coverage. (CP 1-38) On September 24, 2012, by agreement, the parties filed cross-motions for

partial summary judgment. (CP 48-263, 264-527) Response briefs were filed on October 19, 2012. (CP 528-539, 544-588) The trial court denied defendants' motion and granted American States' cross-motion. (CP 540-543) Its November 2, 2012, summary judgment order declared that the "multi-unit and tract housing exclusion" endorsement to the policies eliminated coverage, that American States had no contractual duty to defend Lawless under the policies with respect to the townhouse owners' requests to repair construction deficiencies at the property, and that American States had no duty to reimburse Lawless for any attorney's fees or expenses it incurred in connection with Lawless's lawsuit against Delean. (CP 541-543)

IV. ARGUMENT

A. STANDARD OF REVIEW

The parties agree that the standard of review of the trial court's summary judgment ruling is *de novo*. *Welch v. Southland Corp.*, 134 Wn.2d 629, 632, 952 P.2d 162 (1998); *Safeco Ins. Co. v. Auto Club Ins. Co.*, 108 Wn. App. 468, 472, 31 P.3d 52 (2001).

B. THE MULTI-UNIT RESIDENTIAL EXCLUSION UNAMBIGUOUSLY REMOVES ALL COVERAGE FOR THE CLAIM

The primary issue presented by this appeal is whether the "Multi-Unit and Tract Housing Residential Exclusion" included in all of the

policies eliminates coverage. The trial court correctly held that the exclusion unambiguously applied and that accordingly American States had no duty to indemnify Delean with respect to the judgment obtained by Lawless. Because the question presented was one of indemnity rather than one of defense, the trial court was not constrained by allegations in pleadings, but instead properly considered all facts relating to the claim.²

1. **The Plain Language of The Exclusion is Clear and Must Be Enforced As Written**

Insurance policies are construed as contracts. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). The court should consider the policy as a whole, and give it a “fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.” *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998) (quoting *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 124 Wn.2d 618, 627, 881 P.2d 201 (1994)). If the policy language is clear and unambiguous, the court must enforce it as written; it may not modify

² Indemnity, or an insurer’s “duty to pay,” depends on the actual determination of facts surrounding the claimed injury relative to the policy provisions, whether presented by the pleadings, or during trial. *Yakima Cement Products Co. v. Great American Ins. Co.*, 14 Wn. App. 557, 563, 544 P.2d 763 (1975), rev. denied, 86 Wn.2d 1011 (1976).

the language or create ambiguity where none exists. *Quadrant*, 154 Wn.2d at 171.

The language of the multi-unit residential exclusion in the American States policies could not be clearer, and the trial court correctly rejected the insureds' attempts to distort the language just to find coverage. *Grange Insurance Co. v. Brosseau*, 113 Wn.2d 91, 100, 776 P.2d 123 (1989) (if the policy's plain language does not provide coverage, the court may not rewrite the policy to do so). In pertinent part, the exclusion eliminates coverage for:

"property damage" ... arising out of any "construction operations" ... that involve a "...multi-unit residential building."

The terms "*construction operations*" and *multi-unit residential building*" are defined in the endorsement 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.

"Multi-unit residential building" means 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.

(Emphasis added.) Washington law is clear that, if a term is defined in a policy, the term must be interpreted in accordance with that policy

definition. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 427, 38 P.3d 322 (2002). Thus, these policy definitions control.

American States agrees with the insureds that the exclusion may be broken down into its constituent parts for purposes of analysis, but it disagrees with the insureds' breakdown of the exclusion. *Appellant's Brief*, p. 13. Moreover, analysis must ultimately consider the exclusion as a whole. *Boeing Co. v. Aetna Casualty & Surety Co.*, 113 Wn.2d 869, 876-877, 784 P.2d 507 (1990) (entire policy must be construed together so as to give force and effect to each clause); RCW 48.18.520 (policy shall be construed according to the entirety of its terms and conditions).

American States breaks down the language for analysis as follows:

1. "property damage"³
2. "arising out of"
3. "any"
4. "construction operations"
5. "multi-unit residential building"

a. "Arising Out Of"

The "*arising out of*" clause provides the exclusion's causation requirement. The term "arising out of" is broad, and it is not unambiguous. "Arising out of" does not mean "caused by" and it does not require

³ The existence of "property damage" is not disputed.

proximate cause between the excluded activity and the damages. Rather, there is no coverage if the damages “flow from,” “have origin in,” “result from,” or “grow out of” the excluded activity. *Toll Bridge Authority v. Aetna Ins. Co.*, 54 Wn.App. 400, 404-407, 773 P.2d 906 (1989). *Accord*, *Mutual of Enumclaw v. Jerome*, 122 Wn.2d 157, 162, 856 P.2d 1095 (1993); *Beckman v. Connolly*, 79 Wn.App. 265, 273-274, 898 P.2d 357 (1995); *Munn v. Mutual of Enumclaw Ins. Co.*, 73 Wn.App. 321, 325, 869 P.2d 99 (1994); *Krempl v. Unigard Sec. Ins. Co.*, 69 Wn.App. 703, 706-707, 850 P.2d 533 (1993); *City of Everett v. American Empire Surplus Lines Ins. Co.*, 64 Wn. App. 83, 89, 823 P.2d 1112 (1991); *Avemco Ins. Co. v. Mock*, 44 Wn. App. 327, 329, 721 P.2d 34 (1986). The “*arising out of*” requirement is clearly satisfied.

b. “Any”

The exclusion states that it applies to “*any*” construction operations. There is no requirement in the exclusion itself that the construction operations be those of the insured claiming coverage.

“Any” is a broad and inclusive term. It means “one indifferently out of more than two: one or some indiscriminately of whatever kind,” and “one, some, or all indiscriminately of whatever quantity ... one or more: not none ... all.” *Spratt v. Crusader Ins. Co.*, 109 Wn.App. 944, 951, 37 P.3d 1269, *review denied*, 147 Wn.2d 1003, 53 P.3d 1007 (2002), *citing*

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1993). *See also*, *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002) (“any” means “every” and “all”).

The exclusion's use of the inclusive term “any”, rather than the restrictive term “the,” readily distinguishes this matter from cases such as *Truck Ins. Exchange v. BRE Properties*, 119 Wn.App. 582, 81 P.3d 929 (2003), and *Unigard Mut. Ins. Co. v. Spokane Sch. Dist. No. 81*, 20 Wn.App. 261, 579 P.2d 1015 (1978), which hold that exclusions drafted in terms of “the insured” apply only to the particular insured claiming coverage. In these cases, Washington courts have held that the “separation of insureds” condition requires that the term “the” be read as applying separately as to each insured. As the *Unigard* court explained:

[W]here 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.

20 Wn.App. at 266.

By contrast, exclusions defined in terms of “an” or “any” insured apply to all insureds under the policy. *Mutual of Enumclaw Insurance Co. v. Cross*, 103 Wn.App. 52, 10 P.3d 440 (2000); *Caroff v. Farmers Ins.*

Co., 98 Wn. App. 565, 989 P.2d 1233 (1999).⁴ In *Cross*, after reviewing the split of authority in other jurisdictions as to the effect of a severability clause on an otherwise unambiguous exclusion phrased in terms of “an” or “any” insured, the court concluded:

We agree with the cases that have held that clear and specific language in an exclusion prevails over a severability clause, i.e., that an exclusion is not negated by or rendered ambiguous by a severability clause. We hold that the MOE policy exclusion bars coverage for all insureds based on the intentional actions of any one insured.

103 Wn.App. at 62. Similarly, the *Caroff* court reasoned:

We are aware of the cases holding that a severability clause limits an exclusion for certain acts by “an” or “any” insured to the person who did the excluded act so that an insured who did not engage in the excluded activity will be covered. But, as a Massachusetts court recognized, this interpretation makes the words “an” and “any” in the policy superfluous. Our rules of construction do not permit us to read an insurance policy that way because we must give effect to every provision and cannot create ambiguities in the language.

98 Wn.App. at 537 (internal citations omitted).

⁴ See also, *Leanderson v. Farmers Ins. Co.*, 111 Wn. App. 230, 237, 43 P.3d 1284 (2002) (homeowner’s policy exclusion for injury or damage arising from business pursuits of “an insured” broadly excluded coverage for all insureds for all injury or damage caused by any insured under the policy, rejecting argument that the policy creates separate insurance contracts for each insured); *Farmers Ins. v. Hembree*, 54 Wn. App. 195, 200-202, 773 P.2d 105 (1989) (holding that an exclusion for “an insured” is not restricted to intentional acts of the particular insured sought to be held liable, but broadly excludes coverage for all intentionally caused injury or damage by an insured, which includes anyone insured under the policy).

The multi-unit residential exclusion, unlike the exclusions at issue in *BRE* and *Unigard*, is not defined in terms of “the” insured. To the contrary, it is broadly written to apply to “any ‘*construction operations*’ ... *that involve ... a “multi-unit residential building.”* Given the inclusive nature of the term “any,” and the absence of any language that limits the exclusion only to the operations of the particular insured claiming coverage, the trial court correctly recognized that the exclusion applies in identical fashion to both Delean and Lawless, and that the separation of insureds condition does not negate the exclusion’s plain application.

c. “Construction Operations”

The term “*construction operations*” is defined to include “*constructionrenovation ... to a townhouse ... building or any other type of multiple unit residential structure maintenance or repair.*” Delean’s work at the townhouse complex included, among other things, repair work on decks, courtyard walkways, building downspouts and siding transition areas, and stairs to the common garage. (CP 337, 367, 380-387, 392, 473-474) The CC&Rs applicable to this property make clear that these areas are part of the “structures” comprising the “property.”⁵ (CP 318) Accordingly, the repair work that Delean performed

⁵ The CC&Rs define “Property” to include all six parcels, and “Structure” to include any “walkway” and “any other improvements of a Parcel.” (CP 318)

at the townhouse complex clearly qualifies as “*construction operations*” under the endorsement.

d. “Multi-Unit Residential Building”

The definition of “*multi-unit residential building*” includes “*townhouses ... that have more than four (4) units ... at the same ... complex.*” The townhouse complex consisted of six units. The definition’s “*regardless of the number of buildings*” clause makes it immaterial that the complex involved more than one building. The six units contained in three duplex townhouses at the same complex meet the policy’s definition of “*multi-unit residential building.*”

Defendants’ argument that Delean’s work only actually touched four of the units ignores the definition’s requirement that a six-unit duplex townhouse development be treated as a single building for purposes of the exclusion. Under the exclusionary language, the issue is not where at the townhouse complex the construction operations occurred, the question is whether or not the construction operations involved a complex that meets the definition of “*multi-unit residential building.*” The complex meets that definition because it consisted of “*townhouses*” of “*more than four units.*” That Delean’s construction work may have only involved a portion of the complex is immaterial.

The insureds' argument also ignores the circumstances under which the property was permitted and developed, and how it was built. The six townhouses were permitted and built together as a single development project, and legally joined together as a single complex by the access, easements, use and maintenance agreements imposed by code requirements and the CC&R's. (CP 304-305, 315-333) The CC&Rs make all units jointly responsible to share and maintain the courtyard walkways and stairway areas that access the shared garage. (CP 325-327) Physically, the townhouse complex is configured such that the inner courtyard/plaza and garage areas used by all units are an integral part of the property. (CP 565-567) No property owner can reach his or her front door, or the garage, without traversing the courtyard walkways, and the garage is used in common by all six owners. (CP 567) Even the original developer's soils consultant referred to the property as a "multi-unit residential structure" in a report that consultant submitted to the City as part of the original construction permitting process. (CP 304-305)

Likewise, Delean's construction operations were performed for the benefit of all six units and were paid for by a fund common to and shared by all of them (i.e., proceeds from insurance). (CP 338, 360-378) All six unit owners signed the construction contract with Lawless to perform the repair work in 2006. (CP 341, 357) Indeed, the construction contract and

Scope of Work both recite that Lawless's contract is with the "Homeowners Association." (CP 341, 357) Under the circumstances, the trial court correctly concluded that the repair work involved a "*multi-unit residential building*" as defined in the endorsement.

It is of no moment that this six-unit residential property is not a condominium, notwithstanding the fact that Lawless referred to the property repeatedly (but erroneously) as a "condominium" in its tender letters to Delean and to American States, and even in its lawsuit against Delean. (CP 24, 406, 433, 435, 440). The exclusion expressly applies to multi-unit townhouse properties as well as multi-unit condominium properties. The question, again, is not directed to where at the property the construction operations occurred, the question is whether or not the construction operations involved a complex that meets the definition of "*multi-unit residential building*." A townhouse complex of six units is expressly contemplated as a type of multi-unit residential property to which the exclusion is addressed.

Defendants' confusing argument that American States' position requires the addition of words to the exclusion, so that it reads that coverage does not apply to "*property damage*" ... *arising out of any "construction operations" ... that involve the owners of a "... "multi-unit residential building,*" is either based on a misunderstanding of American

States' position, or on a deliberate attempt to confuse the issue. By its terms, the exclusion applies to residential complexes of more than four units. Whether or not those units have the same or different owners is unimportant. Moreover, "*construction operations*" do not involve owners, they involve property. There is no need to add the clause "the owners of" to the exclusion to render it effective. The exclusion, as plainly written, applies on its own terms.

2. Exception (a) To The Exclusion Does Not Apply

Defendants' effort to evade the clear application of the exclusion by invoking exception a. involves a tortured reading of that provision. That exception provides that the exclusion does not apply to "*repair performed for the "owner" of a detached single family dwelling ...*" No reasonable reading of this exception supports its application here.⁶

Defendants argue that the six duplex townhouse units comprising this complex are "*detached single family dwellings*" because each unit occupies its own zero lot line parcel and the property line was located between the adjoining walls of each unit, where there is a one-inch air

⁶ The burden is on the insureds to establish the exception. *Queen City Farms, Inc. v. Central National Ins. Co.*, 126 Wn.2d 50, 70-72, 882 P.2d 703 (1994) (burden is on the insured to show that a loss falls within the terms of the policy).

space. They argue that this makes each half of the duplex legally detached from the others. This argument is unreasonable on its face.

The parties appear to agree on the commonly understood meaning of the term “detached:”

“Detached” = standing by itself: separate, unconnected, isolated.

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 615 (2002).⁷ No reasonable person consulting this dictionary definition would ever conclude that the duplex townhouse structures at issue are “detached” single family dwellings. From the exterior, each duplex townhouse appears as a single building, with continuous siding, a common roof, and a continuous guttering system. (CP 567) Additionally, the wall placed on the dividing line between the two sides of each duplex townhouse is a shared “party wall.” (CP 323) The CC&Rs impose numerous conditions and limitations on the property owners with respect to these party walls, including a prohibition against any structural alteration. (CP 323-324) The CC&Rs thus legally bind the two sides of each duplex to each other. Under the circumstances, there is no basis to contend that the duplex units in each building are detached either physically or legally.

⁷ Undefined terms are to be given their “plain, ordinary and popular” meaning as defined in a standard English dictionary. *Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 427, 38 P.3d 322 (2002).

Defendants' argument that each of the three buildings is nonetheless detached from each other is creative, but unavailing. This might be an argument worth addressing if the exception said "detached duplexes," but the exception refers only to a "detached single family dwelling." As the original construction permit makes clear, each building is a "two-family dwelling." (CP 443-444)

Moreover, defendants' proposed construction of the language would make the exception swallow the exclusion since the exclusion expressly applies to townhouses "regardless of the number of buildings." Under defendants' theory, the exception would always trump the exclusion if there was more than one building in a complex. Such a reading of the exception is unreasonable on its face.

The context within which a term is used in a policy is appropriately considered in determining a word's meaning. *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 951, 37 P.3d 1269 (2002). The context within which this exception applies is an exclusion which, by its terms, applies to various types of "*multi-unit residential buildings*" that expressly include "*townhouses*." The suggestion that the term "*detached*" encompasses duplex townhouses – which are otherwise encompassed by the exclusion to begin with – results in an unreasonable and strained reading of the exception which disregards the context within which it is set forth.

Finally, defendants' assertion that Delean performed repairs for the "owners" of the dwellings within the meaning of the exception ignores the definition of "owner" included in the endorsement. That definition states that "owner" does not include an "unincorporated association." The six townhouse unit owners not only referred to themselves as a "Homeowners Association," they acted as an unincorporated association in contracting with Lawless to perform the 2006 repairs using a common fund. Since Lawless's "Main Contract" with the unincorporated association was part of Delean's subcontract, the "owner" requirement of the exception is not established.

C. THE CONTRACTUAL LIABILITY EXCLUSION ELIMINATES COVERAGE FOR THE ATTORNEY'S FEE AND COST PORTION OF THE JUDGMENT AGAINST DELEAN

Having ruled that the multi-unit residential exclusion applied, the trial court did not reach the question of whether the contractual liability exclusion eliminated coverage for a portion of the judgment that Lawless obtained against Delean. The exclusion specifies:

This insurance does not apply to ... 'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.

(CP 482, 496, 509, 522) This Court likewise need not address this issue if it affirms the trial court's ruling on the multi-unit residential exclusion.

American States argued below that the contractual liability exclusion in the Delean policies eliminated coverage for the attorney fee and cost portion of the judgment because the parties' subcontract was the only basis for imposition of the liability. (CP 282-285) *See Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001) (in Washington, attorney fees may be recovered only when authorized by statute, a recognized ground of equity, or agreement of the parties). Defendants cross-moved on this same issue, arguing that the exclusion was inapplicable because the “*insured contract*” exception to the exclusion applied. (CP 63-64) In their brief to this court, defendants do not address the parties' trial court motions directed to this exclusion. Accordingly, defendants have waived their right to argue this point on appeal.

Instead, defendants make an argument that appears obliquely directed to this exclusion, without actually mentioning it. Their argument is that the “ABC rule” supports recovery of the attorney's fees Lawless incurred in the suit it filed against Delean. *Appellant's brief*, pp. 23-24.

This Court should ignore defendants' argument that the “ABC rule” supports recovery because the argument was not presented to the trial court below as part of defendants' cross-motion. (CP 63-64). Rather, defendants made the argument only in response to American States' motion on the contractual liability exclusion. (CP 537) The argument

therefore does not stand alone on appeal to support an affirmative ruling in defendants' favor that the attorney's fees and costs are covered.

Substantively, defendants' argument regarding the "ABC rule" misses the mark because it completely ignores the exclusion itself, which only raises the question of whether the fee and cost portion of the judgment Lawless obtained against Delean was excluded. (CP 282-285) Whether Lawless has a claim directly against American States for recovery of those same fees and costs based on application of the ABC rule is a completely separate question that has nothing to do with the exclusion of coverage as it applies to Delean.

With respect to the contractual liability exclusion, \$53,972.08 of the \$151,553.05 judgment Lawless obtained against Delean was for attorney's fees and costs.⁸ The contractual liability exclusion eliminates coverage for this portion of the judgment because it is a liability that Delean was obligated to pay Lawless solely because Delean assumed the liability in the parties' subcontract. Absent the attorney fee provision in

⁸ Lawless's Judgment against Delean is in the gross amount of \$151,553.05. (CP 394-397) In its Counterclaim, Lawless alleges that its total damages at the time of the confession of judgment were \$174,198.91. (CP 45) The \$151,553.05 judgment represents 87% of Lawless's total damages, consistent with Lawless's expert's report which allocated 13% of the total fault to Lawless. (CP 399) Of the \$174,198.91 total damages, \$42,285.35 constituted attorney's fees and \$19,751.52 constituted forensic examination/expert costs. (CP 45) Accordingly, 87% of \$62,036.87, or \$53,972.08, reflects the attorney's fees and costs portion of the judgment.

the written subcontract, Lawless's recovery against Delean in the underlying action would have been limited to cost of repairs. *See generally, Eastlake Construction Co. v. Hess*, 102 Wn.2d 30, 686 P.2d 465 (1984) (cost of repair is proper measure of damages for breach of a construction contract).

International Marine Underwriters v. ABCD Marine, LLC, 165 Wn.App. 223, 267 P.3d 479 (2011), is directly on point. *ABCD Marine* held that an insured's contractual assumption of liability under a hold harmless clause, under circumstances similar to those here, is excluded by a policy's "contractual liability" exclusion. 165 Wn.App. at 232.

The exception to the exclusion restores coverage for liability "assumed in a contract or agreement that is an "insured contract." (CP 482, 496, 509, 522) This claim clearly does not involve either subparagraphs a. through e. of the "insured contract" definition. Subparagraph f. is likewise inapplicable. Under that subparagraph, "insured contract" includes:

That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

(CP 483, 497, 510, 523) Lawless never faced tort liability to the unit owners for the deficient construction work at the project because Washington does not recognize a cause of action for negligent construction on behalf of individual homeowners. *Stuart v. Coldwell Banker*, 109 Wn.2d 406, 417-422, 745 P.2d 1284 (1987); *Atherton Condo Assn. v. Blume*, 115 Wn.2d 506, 526-527, 799 P.2d 250 (1990). Rather, Lawless's liability to the owners was exclusively contractual. Thus, the "insured contract" exception for tort liabilities does not apply.

This case is thus readily distinguishable from *Truck Ins. Exchange v. BRE Properties*, 119 Wn.App. 582, 81 P.3d 929 (2003), which defendants relied on in their cross-motion to argue that the "insured contract" exception applied. *BRE*, unlike this case, involved a personal injury claim. Because a personal injury claim is a tort liability, and because, as here, "insured contract" in *BRE* was defined to include tort liabilities, the exception was established. Here, by contrast, the sole basis for Delean's liability for attorney's fees and costs was the subcontract's indemnity/hold harmless provision.⁹

⁹ Defendants also argued below that *Boeing v. Aetna*, 113 Wn.2d 869, 784 P.2d 507 (1990) supported application of the exception. The argument is unfounded. *Boeing* involved a claim for environmental contamination damages, and nowhere addressed a policy's "contractual liability" exclusion, or the nature of a contractual attorney fee award.

The “*insured contract*” exception is also inapplicable because Lawless itself is an insured, and Lawless was never sued. Paragraph (2) of the exclusion specifies that attorney’s fees and litigation expenses are encompassed by the “*insured contract*” exception only if they are “*incurred by or for a party other than an insured,*” and “*for the defense of a party against a civil or alternative dispute resolution proceeding.*” (Emphasis added.) Since Lawless is an insured, the requirement that the fees and expenses be incurred by a party “*other than an insured*” is not met. *International Marine Underwriters v. ABCD Marine, LLC*, 165 Wn.App. 223, 232, 267 P.3d 479 (2011) (insured is not a “third party” for purposes of the insured contract exception to the contractual liability exclusion). Additionally, no proceeding requiring a defense was ever brought against Lawless.

If this court concludes that the multi-unit residential exclusion is inapplicable, it should nonetheless conclude that \$53,972.08 of the total \$151,553.05 judgment is excluded by the contractual liability exclusion.

D. AMERICAN STATES HAD NO CONTRACTUAL DUTY TO DEFEND LAWLESS IN THE ABSENCE OF A “SUIT”

The trial court agreed with American States that the insurer had no contractual duty to defend Lawless with respect to the unit owners’ claims. (CP 542-543). American States’ argument was that the policies’ insuring

agreements only obligated it to provide a defense to a “*suit*,” and no “*suit*” was ever filed against Lawless. (CP 285-287)

In the trial court, and in its brief to this court, defendants avoided addressing the substance of the contractual duty to defend question presented by American States. Instead, they attempted to cloud the question by injecting new issues regarding the duty to investigate, bad faith and compliance with claim handling regulations. These issues were not before the court on summary judgment. Lawless did not cross-move on the duty to defend issue, nor did Lawless’s motion ask the court to rule that American States had a duty to investigate, or that American States was estopped to deny a duty to defend based on alleged bad faith. (CP 50-65) To the contrary, Lawless told the trial court that “Lawless’s claims for breach of contract and bad faith arising from its status as an insured under the policy are not at issue in this motion for partial summary judgment.” (CP 54) Thus, the only issue before the trial court was the question posed by American States’ motion regarding whether a contractual duty to defend existed. The trial court agreed with American States that there was no contractual duty to defend because there was no “*suit*,” and expressly reserved ruling on whether there would be a duty to defend under a tort theory of bad faith. (CP 543)

This court should likewise reject Lawless's attempt to make issues regarding failure to investigate, bad faith or claim handling part of this appeal. These claims were pled by Lawless in its counterclaim, but have since been dismissed. (CP 595-597) Arguments on these points do not raise issues of fact on the contractual duty to defend issue which, as presented to the trial court, only involved the issue of whether there was a "suit."

With respect to that question, the policies define "suit" as "a civil proceeding," including arbitration proceedings and other alternative dispute resolution proceedings in which damages are claimed. (CP 484, 498, 511, 524) It has never been disputed that no "suit" as defined in the policies was ever brought against Lawless by the six townhouse unit owners, or anyone else. Lawless acknowledged it in his attorney's September 16, 2010 letter to American States, which advised that the owners were not represented by counsel and "would prefer to have the repairs done without litigation." (CP 407) He also acknowledged it in an answer to a request for admission in this case. (CP 336) Both the policies, and Washington law, support the conclusion that an insurer's duty to defend does not extend to a pre-suit "claim." *Lawrence v. Northwest Cas. Co.*, 50 Wn.2d 282, 286-287, 311 P.2d 670 (1957) (duty to defend arose only upon filing of a suit alleging a covered claim).

Similarly, American States had no contractual duty to pay Lawless's attorney's fees incurred to prosecute Lawless's lawsuit against Delean. The duty to defend suits against an insured does not require an insurer to fund an insured's prosecution of a lawsuit against another party – in this case, the insurer's named insured. *United States Fire Ins. Co. v. Roberts & Schaefer Co.*, 37 Wn.App. 683, 690, 683 P.2d 600, 604 (1984) (counterclaims, cross-claims and third-party claims not covered by insurance require the services of independent counsel). *See also American Capital Homes, Inc. v. Greenwich Ins. Co.*, 2010 WL 3430495, *7 (W.D.Wash. 2010) (insurer had no obligation to pay for insured's affirmative suit that it filed).

The trial court properly held that, in the absence of a "suit," American States had no duty to defend Lawless with respect to any aspect of this matter. This court should affirm.

V. CONCLUSION

The trial court's summary judgment order reflects a correct application of Washington law. It should be affirmed.

DATED this 22 day of February, 2013.

SOHA & LANG, P.S.

By: 
Mary R. DeYoung, WSBA # 16264
Attorneys for Plaintiff/Respondent

APPENDIX A

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

MULTI-UNIT AND TRACT HOUSING RESIDENTIAL EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A.** The following exclusion is added to Paragraph 2., Exclusions of **Section I COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY** and **COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY**:

2. Exclusions

This insurance does not apply to:

Multi-Unit and Tract Housing

"Bodily injury", "property damage" or "personal and advertising injury liability" arising out of any "construction operations" whether ongoing operations or operations included within the products-completed operations hazard that involve a "housing tract" or "multi-unit residential building".

This exclusion does not apply to:

- a. 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; or
- b. Your "construction operations" within the boundaries of what is or will become a public street or roadway or public right of way; or
- c. Remodeling, maintenance or repair within the interior of an individual unit within a condominium, townhouse or cooperative building provided that the work is for the "owner" of the unit and 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 or conversion of an

apartment building to a condominium, townhouse or cooperative building.

- d. Maintenance or repair within the interior of an apartment building 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.

- B.** The following definitions are added to the **Definitions** Section:

"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.

"Multi-unit residential building" means 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.

"Owner" means the person or persons that own the individual residential dwelling or unit but does not include a limited liability company, sole proprietor, partnership, joint venture, corporation, unincorporated association, trust, or the developer of the property or real estate manager or any entity related to either.

"Housing tract" means a residential development or subdivision consisting of more than eight (8) of any combination of dwelling units, detached single family dwellings, or lots all built, owned, or developed by the same or related general contractors, developers, persons, limited liability companies, partnerships, joint ventures, corporations, unincorporated associations or trusts. A development or subdivision built upon multiple tracts and/or built in multiple phases shall be considered to be one "housing tract".

NO. 69634-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMERICAN STATES INSURANCE COMPANY,
an Indiana corporation,

Plaintiff/Respondent

v.

DELEAN'S TILE AND MARBLE, LLC, a Washington limited liability
company; DELEAN'S 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,

Defendant/Appellants

DECLARATION OF SERVICE

Mary R. DeYoung, WSBA #16264
Attorneys for Plaintiff/Appellant
American States Insurance Company
Plaintiff/Respondent

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