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No. 067906-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FIRST NATIONAL INSURANCE COMPANY OF AMERICA,
Plaintiff/Respondent,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,
Defendants/Appellants.

**BRIEF OF RESPONDENT FIRST NATIONAL INSURANCE
COMPANY OF AMERICA**

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I. Preliminary Statement and Questions Presented

First National issued a liability insurance policy to Automated Home Solutions, Inc., a corporation dissolved in January 2004, for the period June 2004 to June 2005. According to the DeCourseys, V&E Medical Imaging had acquired Automated Home Solutions, Inc.'s assets and trade name in 2003. In 2005, V&E performed electrical work on the DeCourseys' home. In 2006, V&E sued the DeCourseys for non-payment; the DeCourseys counterclaimed alleging that V&E's work was defective. Neither V&E nor Automated Home Solutions, Inc. (hereafter "AHS, Inc.") tendered the counterclaim to First National. V&E defaulted and allowed the DeCourseys to obtain an uncontested arbitration award, later reduced to judgment. When the DeCourseys sought to have First National pay the award, First National sued for a declaration of no coverage. The trial court granted First National's motion for summary judgment.

This appeal calls upon the court to decide these questions:

- Late notice/prejudice issue: Even though the policy required "immediate" tender of suit papers, the insured never tendered the DeCoursey suit to First National, which learned of the suit only after the DeCourseys had obtained a judgment by default. Because of the default, First National could not raise dispositive defenses, could not challenge doubtful damages, could obtain only limited judicial review, and could not meaningfully investigate coverage defenses. Was First National actually prejudiced by the failure to tender the suit?

- Identity of insured issue: The only entity insured under the First National policy is Automated Home Solutions, Inc. The DeCourseys obtained a judgment against V&E, a separate corporation that had acquired AHS, Inc.'s assets. Is First National required to satisfy a judgment against V&E, an entity not insured under the policy?
- Evidentiary issue: This court will not consider an issue unsupported by argument or authority. The DeCourseys claim error in the trial court's rejection of their evidence of the Bordelon telephone logs, but present neither argument nor authority on this issue. Can this court consider this claim?
- Pleading issue: The DeCourseys claim that the trial court erred by not striking First National's answer to their counterclaim, filed more than twenty days after the counterclaim. The Civil Rules provide that a party may plead in response to a claim at any time before the hearing on a motion for default; First National met that requirement. Did the trial court abuse its discretion by not striking First National's answer?

II. Statement of the Case

A. The construction work.

From about November 2004 to April 2005 V&E Medical Imaging, Inc. dba Automated Home Solutions performed electrical work on the DeCourseys' house in Redmond.¹ V&E was hired either by Home Improvement Help (HIH), a contractor on the DeCourseys' project, or by the DeCourseys directly.² The job did not go well and V&E sued the

¹ CP 2, 8-10, 15, 196, 200-201.

² CP 8-10, 15-16.

DeCourseys, as “V & E Medical Imaging Services, Inc. dba Automated Home Solutions,” to recover its claimed contract price.³ The DeCourseys answered and counterclaimed alleging that V&E’s contract was not with them but with HIH, and that V&E’s work was defective and had caused damage to their home.⁴

B. AHS, Inc.’s corporate history.

According to the DeCourseys, Automated Home Solutions, Inc. was incorporated in 2001 and sold its assets, including its trade name “Automated Home Solutions,” to V&E in 2003.⁵ AHS, Inc. dissolved in January 2004.⁶ When V&E sued the DeCourseys in March 2006, more than two years had passed since AHS, Inc.’s dissolution.⁷

C. The DeCoursey/V&E suit.

In the suit brought by V&E the DeCourseys also sued HIH and their real-estate agent who had allegedly recommended HIH without

³ CP 2, 7-10.

⁴ CP 2, 12-74, 451.

⁵ CP 199, 483, 484, 485.

⁶ CP 427-428.

⁷ CP 7-10, 428-429.

disclosing his financial interest in the firm.⁸ The DeCourseys settled with HIH but pursued the real-estate agent, and prevailed at trial and on appeal, recovering a judgment of over \$1 million.⁹

According to the DeCourseys, before their trial against the real-estate agent, they agreed with V&E to have the DeCourseys' suit arbitrated.¹⁰ This agreement was apparently oral. But then around June 2009 V&E went out of business and its counsel withdrew.¹¹ In March 2010, on the DeCourseys' motion, the court ordered the DeCourseys and V&E to arbitration under RCW Ch. 7.06 in May 2010.¹² V&E did not appear at the arbitration, and the arbitrator awarded the DeCourseys, acting pro se, \$50,000 plus over \$41,000 in attorney fees and costs.¹³ Within a few weeks the DeCourseys had the arbitration award entered as a judgment against "V&E Medical Imaging Services, Inc., aka Automated Home Solutions, a Washington corporation (also known and doing

⁸ CP 12-74, 398-399.

⁹ CP 400, 401, 420.

¹⁰ CP 197, 202, 452.

¹¹ CP 444-445, 451, 466, 491-494.

¹² CP 362-363.

¹³ CP 359, 365.

business under the names ‘Automated Home Solutions’, ‘Automated Home Solutions, Inc.’ and others).”¹⁴

D. AHS, Inc.’s insurance with First National.

AHS, Inc. had obtained through the Bordelon agency an insurance policy with First National effective June 2004 to June 2005.¹⁵ The only insured shown on the policy was “Automated Home Solutions, Inc.”¹⁶ The policy included general liability coverage and various first-party coverages.¹⁷ The general liability coverage applied to damage claims because of “property damage” (defined as physical injury to tangible property) caused by an “occurrence” (an accident) and specifically excluded coverage for damage to the insured’s own work.¹⁸ As a condition of coverage, the general liability coverage included a cooperation clause requiring AHS, Inc. to give notice of a suit and to forward any suit papers to First National “immediately.”¹⁹

¹⁴ CP 423-424.

¹⁵ CP 3, 199-200, 244, 249-349.

¹⁶ CP 249, 250, 252.

¹⁷ CP 249-349.

¹⁸ CP 311, 314, 323, 324.

¹⁹ CP 319-320.

E. Lack of notice.

When the DeCourseys counterclaimed against V&E in 2006, V&E, represented by counsel, did not inform First National of the suit or forward the suit papers.²⁰ Nor did V&E or AHS, Inc. inform First National of the arbitration in 2010.²¹ V&E, by then out of business and not represented, defaulted at the arbitration.²² The arbitrator awarded the DeCourseys \$50,000 – the statutory maximum awardable in arbitration – and, even though the DeCourseys were proceeding pro se, over \$40,000 in attorney fees.²³ The arbitration award was entered as a judgment on June 29, 2010.²⁴

F. Insurance Commissioner involvement.

After they had obtained their judgment against V&E, the DeCourseys wrote to the Insurance Commissioner, complaining about First National's failure to pay the judgment. The Insurance Commissioner

²⁰ CP 7-10, 12-74, 867.

²¹ CP 242-243, 227-228, 867-868.

²² CP 424, 444-445, 451, 522.

²³ CP 522.

²⁴ CP 524-425.

forwarded their letter to First National in mid-July 2010.²⁵ This was First National's first notice of the suit against "V&E Medical Imaging dba Automated Home Solutions."²⁶

G. The declaratory suit.

To resolve the coverage question of its responsibility to pay the judgment, First National sued for declaratory judgment.²⁷ In its complaint First National claimed it had no duty to pay the judgment because its insured, AHS, Inc., had failed to tender the DeCourseys' suit and First National had been actually prejudiced by that failure. In addition, First National asserted that the DeCourseys' underlying suit against AHS, Inc. came more than two years after AHS, Inc.'s dissolution when AHS, Inc. no longer had the capacity to sue or be sued.²⁸ The DeCourseys appeared through counsel, denied First National was entitled to its requested relief, and counterclaimed for a declaratory judgment in their favor.²⁹

²⁵ CP 234, 233.

²⁶ CP 227-228.

²⁷ CP 1-5.

²⁸ CP 1-5.

²⁹ CP 193-194, 195-203.

H. The summary-judgment motions.

First National arranged for a summary-judgment hearing date with DeCourseys' counsel.³⁰ Their counsel then withdrew at the DeCourseys' request.³¹ First National filed its summary-judgment motion in accordance with the schedule; the DeCourseys, acting pro se, also moved for summary judgment.³²

First National's motion asserted that AHS, Inc. had breached the policy's cooperation clause by failing to give First National any notice of the DeCoursey suit and that First National – which received notice from the Insurance Commissioner only after entry of judgment – was prejudiced as a matter of law for several reasons.³³ As a result, the motion claimed, First National was relieved of any coverage obligations.³⁴

In their motion, the DeCourseys claimed that by failing to timely answer their counterclaim, First National had admitted all the facts asserted in their counterclaim and therefore the court should enter

³⁰ CP 575, 789-790.

³¹ CP 205-206, 611.

³² CP 207-208; 209-226; 446-465.

³³ CP 212-215, 217-225.

³⁴ CP 225-226.

judgment on the pleadings.³⁵ The DeCourseys further insisted that their judgment was against V&E, not AHS, Inc., and that the First National policy in fact insured V&E rather than AHS, Inc. This was true, they asserted, because, even though the policy identified AHS, Inc. as the only insured, First National could not have insured a dissolved corporation and therefore must have insured V&E.³⁶ As to the notice issue, the DeCourseys asked that the court “disregard [First National’s] self-serving statement that [it] was not properly notified by its client,” but did not present any controverting evidence showing that the insured had timely tendered the suit to First National.³⁷

The parties responded to the cross-motions. In its response First National asserted that if – as the DeCourseys claimed – the underlying judgment was against V&E, the policy provided no coverage because V&E was not an insured.³⁸ First National further asserted that the DeCourseys had failed to present any evidence that V&E or AHS, Inc. had

³⁵ CP 447-448, 453-456.

³⁶ CP 456-461. *See also*, CP 647-660 (DeCoursey opposition to First National’s summary-judgment motion) and CP 744-747 (DeCoursey reply).

³⁷ CP 463.

³⁸ CP 584-588.

ever tendered the suit to First National, and challenged, on hearsay grounds, the admissibility of the Bordelon telephone logs the DeCourseys had offered.³⁹ First National answered the counterclaim;⁴⁰ the DeCourseys moved to strike the answer.⁴¹ First National opposed the motion to strike.⁴²

I. The summary-judgment hearing.

The trial court heard oral argument on the cross-motions for summary judgment.⁴³ The court pressed the DeCourseys to identify any facts or authority showing that First National knew it was insuring V&E rather than AHS, Inc.; they were unable to do so.⁴⁴ The court similarly pressed the DeCourseys to identify admissible evidence showing a factual dispute about whether First National received timely notice of the suit. They were unable to do so.⁴⁵ Likewise, the DeCourseys did not identify

³⁹ CP 591-593.

⁴⁰ CP 578-582.

⁴¹ CP 601-613.

⁴² CP 854-589.

⁴³ RP 1-47.

⁴⁴ RP 22-27.

⁴⁵ RP 28-34.

any dispute about substantial prejudice to First National.⁴⁶ And the court stated that the evidence that First National had challenged – the Bordelon telephone logs – was not admissible and could not be considered.⁴⁷

After taking the matter under advisement, the court granted First National's motion and denied the DeCourseys' motion for summary judgment and their motion to strike.⁴⁸

The DeCourseys asked the court to reconsider.⁴⁹ The court denied those motions.⁵⁰

J. Appeal.

The DeCourseys' appeal followed.⁵¹

III. Argument

A. The record presents no factual issue that V&E and AHS, Inc. failed to give First National notice and that First National was prejudiced as a matter of law.

1. V&E and AHS, Inc. failed to give First National notice of the DeCoursey suit.

⁴⁶ RP 18-44.

⁴⁷ RP 30-32; CP 592, 467, 519-520.

⁴⁸ CP 994-885, 889-893; RP 44.

⁴⁹ CP 894-898, 901-904.

⁵⁰ CP 911-914.

⁵¹ Appellants' Brief at 9.

a. *First National presented uncontroverted evidence that neither V&E nor AHS, Inc. tendered the suit.*

The record presents no factual dispute that neither V&E nor AHS, Inc. timely tendered the DeCourseys' suit to First National, as the insurance policy explicitly requires.

The First National liability policy requires as a condition of coverage that the insured cooperate with First National. The most significant elements of the insured's duty of cooperation are that the insured give First National notice of an occurrence "as soon as practicable" and that it forward any suit papers "immediately":

Duties in The Event Of Occurrence, Offence, Claim or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses: and
 - (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

- b. If a claim is made or "suit" is brought against any insured, you must:
 - (1) immediately record the specifics of the claim or "suit" and the date received; and
 - (2) notify us as soon as practicable.

You must see to it that we receive written notice of the claim or “suit” as soon as practicable.

- c. You and any other involved insured must:
- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit” and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.
- d. No insured will, except at that insured’s own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.⁵²

The reason for this policy condition is self-evident: the insurer must be afforded an opportunity to defend the insured in order to defeat or minimize the claim if coverage is to apply. As our Supreme Court, quoting this court, has said, “[a]n insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.”⁵³ An

⁵² CP 319-320 (emphasis added).

⁵³ *Mutual of Enumclaw Ins. v. USF Insurance Co.*, 164 Wn.2d 411, 421, 191 P.3d 866 (2008), quoting *Griffin v. Allstate Ins.*, 108 Wn. App. 133,

insurer's duty to defend and duty to pay do not arise until a claim for defense or indemnity is tendered.⁵⁴ An insured may chose not to tender a claim for a variety of reasons.⁵⁵

Here, no dispute exists that neither V&E nor AHS, Inc. tendered the DeCoursey suit to First National. First National provided declarations detailing the lack of tender.⁵⁶ Those declarations showed that around April 16, 2010, an agent at Bordelon Insurance reported to an adjuster at First National that there was a claim against AHS, Inc.. According to the report, the agent had been contacted by the DeCourseys who inquired if AHS, Inc. had an insurance policy. On instruction from the insured's agent, Lester Ellis, Bordelon had released no policy information to the DeCourseys. A First National adjuster contacted Ellis from whom he learned that AHS, Inc. was probably being sued but Ellis did not know by whom and he had not been served yet. Ellis mentioned receiving

140, 29 P.3d 777, 36 P.3d 552 (2001) and *Unigard Ins. v. Leven*, 97 Wn. App. 417, 427, 983 P.2d 1155 (1999).

⁵⁴ *USF Ins. Co.*, 164 Wn.2d at 421.

⁵⁵ *USF Ins. Co.*, 164 Wn.2d at 421-422.

⁵⁶ CP 227-243, 867-868.

arbitration notices but specifically instructed First National not to investigate. Ellis made no mention of the impending arbitration date.⁵⁷

First National sent the DeCourseys a June 4, 2010 letter asking them about their claim.⁵⁸ The DeCourseys responded on June 10, requesting information about AHS, Inc.'s insurance policies but made no mention of the lawsuit or the arbitration award that they had obtained only a few weeks earlier.⁵⁹ At that time neither V&E nor AHS, Inc. had tendered any claim or suit to First National.⁶⁰

First National's first notice of a possible lawsuit came on July 14, 2010 – two months after the DeCourseys had obtained their uncontested arbitration award and three weeks after the award had been reduced to judgment – when First National received a call from the Insurance Commissioner's office advising that the DeCourseys had made a complaint, and had sent the Insurance Commissioner's office a copy of First National's June 4 letter along with a copy of the arbitration award.⁶¹

⁵⁷ CP 242-243.

⁵⁸ CP 227, 230.

⁵⁹ CP 227-228, 231.

⁶⁰ CP 228, 867-868.

⁶¹ CP 867, 228.

The commissioner's office sent a July 15, 2010 letter attaching the DeCourseys' letter.⁶² On July 20 First National contacted Ellis who asserted he knew nothing about the lawsuit.⁶³ First National received a copy of the judgment from the Insurance Commissioner on July 23, 2010.⁶⁴ As of that date, neither V&E nor AHS, Inc. had tendered the claim or authorized First National to take any action. Rather, First National was unable to obtain any information about the suit from Ellis, who claimed to have thrown in the trash whatever he had received by mail.⁶⁵ Only after receiving a copy of the judgment on July 23 was First National able to obtain the pleadings from the court file.⁶⁶

The DeCourseys controverted none of First National's detailed showing. To the contrary, they conceded at oral argument that they had no information showing that the suit had been tendered to First National:

Mr. DeCoursey: . . . We are not in convivial relationship with V&E or with any of the people there. I cannot speak for them. Why they did this. I don't have access to whether or not they tendered the insurance to the

⁶² CP 233-234.

⁶³ CP 228.

⁶⁴ CP 228, 867.

⁶⁵ CP 228.

⁶⁶ CP 229.

First National. Washington law doesn't require that I serve First National in order to show that they were communicated to. There's a whole area that's dark to us because of these things.⁶⁷

In a post-hearing "Memorandum of Additional Authorities" the DeCourseys claimed that the Declaration of Travis Tonn, submitted by First National, showed that the claim had been tendered to First National.⁶⁸ But Tonn's declaration in fact refuted that any suit had been tendered. After stating that he had been contacted by Mr. Sefton of Bordelon, who had little information, Tonn stated:

I telephoned Lester Ellis, the contract person for AHS on April 23, 2010. I then learned that AHS was possibly being sued, but that Mr. Ellis did not know by whom and had not been served yet. At the time, First National had no information on whether there was an active lawsuit. Mr. Ellis mentioned that he had received arbitration notices but specifically instructed us not to investigate.⁶⁹

That V&E and AHS, Inc. failed to tender the DeCourseys' suit to First National was undisputed.

⁶⁷ RP 21.

⁶⁸ CP 879.

⁶⁹ CP 242-243.

b. *The DeCourseys' challenges to the lack-of-notice evidence fail.*

In this court the DeCourseys attack First National's evidence offered in support of summary judgment as "flawed."⁷⁰ But each of their lines of attack is unfounded.

(i) The claimed hearsay statements are not hearsay because they are not offered for the truth of the matters asserted.

The DeCourseys complain that the trial court applied the hearsay rule to their evidence (the improperly authenticated Bordelon telephone logs challenged by First National – a point they do not support with argument or authority and that the court therefore cannot consider⁷¹) but not to First National's evidence.⁷² They claim that the matters reported to First National by Bordelon and Ellis are hearsay. They are incorrect.

⁷⁰ Appellants' Brief at 19-26.

⁷¹ *State v. Tinker*, 155 Wn.2d 219, 224, 118 P.3d 885 (2005) (without adequate, cogent argument and briefing, appellate courts should not consider an issue on appeal); *Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138 (2011) ("An appellate brief should contain argument in support of every issue presented for review, including citations to legal authority and references to relevant parts of the record. RAP 10.3(a)(6). Lacking either, we will not consider this issue."); *Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1995) (pro se litigants are subject to the same procedural and substantive laws as represented parties).

⁷² Appellants' Brief at 21.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁷³ First National offered the evidence of what it was told by Bordelon and by Ellis not for the truth of what they said but for what notice – or lack of notice – it provided. Because it was not hearsay, the trial court properly considered that evidence.

(ii) The claims about what could have or should have happened do not create a material question of fact.

In discussing First National’s declarations, the DeCourseys claim to have “impeached” the declarants by pointing to what the DeCourseys think could have or should have or might have happened:

- The DeCourseys claim that “it is reasonable that Bordelon would not only phone in the news of the [DeCourseys’] letter but also fax in a copy to First National.”⁷⁴
- The DeCourseys speculate that First National “possibly had a copy” of their letter.⁷⁵
- The DeCourseys claim First National “could have called the courthouse in King County.”⁷⁶

⁷³ ER 801(c).

⁷⁴ Appellants’ Brief at 23.

⁷⁵ Appellants’ Brief at 31.

⁷⁶ Appellants’ Brief at 31.

- The DeCourseys surmised that the declarants do not have personal knowledge of the facts that the declarants do know about.⁷⁷

Only facts, not speculation, can create a legitimate factual dispute. As our Supreme Court has stated, “a fact is an event, an occurrence or something that exists in reality. . . . It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.”⁷⁸ The DeCourseys’ assertions in their appellate brief are not evidence. Even if they were, the DeCourseys’ speculation about what could have, should have, or might have happened does not provide facts and thus does not create a question of fact about what did occur.

(iii) The DeCourseys make factual assertions not supported by the record.

In their discussion of First National’s evidence, the DeCourseys on occasion misstate the facts on critical points. For example, they state that Bordelon told First National in April 2010 that the arbitration was “imminent”⁷⁹ when in fact that is not the case.⁸⁰ And they claim that First

⁷⁷ Appellants’ Brief at 22.

⁷⁸ *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

⁷⁹ Appellants’ Brief at 22.

⁸⁰ See CP 242-243.

National had their letter in April 2010⁸¹ when in fact the record shows without contradiction that their letter was not sent to First National until February 2011.⁸² Their brief also confuses notice of a potential claim with notice of a suit or arbitration, asserting a contradiction where none exists.⁸³ These and other misstatements cannot create a material question of fact.

In short, the DeCourseys' challenges to First National's evidence are unfounded. The DeCourseys failed to present any evidence showing a tender.

(iv) The claim that the DeCourseys are not bound by the insurance policy terms was not raised below and in any event is incorrect.

In a related attack on First National's evidence the DeCourseys appear to claim that they are not bound by the insurance policy terms.⁸⁴ They did not raise that issue below (and consequently the trial court had

⁸¹ Appellants' Brief at 31.

⁸² CP 235.

⁸³ Appellants' Brief at 22.

⁸⁴ Appellants' Brief at 26.

no reason to address the issue) and therefore may not raise it here.⁸⁵ But in any event they are incorrect in their assertion.

As judgment creditors of First National's insured who are now seeking to enforce their judgment against the insurance policy, the DeCourseys' claim is derivative. They seek to enforce the insured's rights against First National and are therefore subject to any defense, including breach of the cooperation clause, that First National could raise against its insured. They "stand in the insured's shoes" and are "chargeable with any breach of condition as well as failure of proof of facts on which liability depends."⁸⁶

2. First National was actually and substantially prejudiced by the failure to tender the suit because First National lost the right to investigate, to raise strong defenses, to appeal the judgment, and to investigate coverage defenses.

Even though the policy requires the insured to tender a suit so that First National can protect its as well as its insured's interests, the insured's breach of the cooperation clause would not relieve First National of its coverage obligations unless the failure to give notice resulted in actual prejudice to First National. To show actual prejudice, an insurer must

⁸⁵ See RAP 2.5(a).

⁸⁶ *Burr v. Lane*, 10 Wn. App. 661, 670-671, 517 P.2d 988 (1974). See also *Atlantic Cas. Ins. Co. v. Oregon Mut. Ins. Co.*, 137 Wn. App. 296, 304-305, 153 P.3d 211 (2007).

show a concrete detriment, such as a specific advantage lost or disadvantage created, that has an identifiable prejudicial effect on the insurer's ability to evaluate, prepare or present its defenses to coverage or liability.⁸⁷ Our Supreme Court has identified a number of factors that may inform the prejudice analysis:

- Were damages concrete or nebulous?
- Was there a settlement or did a neutral decision maker calculate damages; what were the circumstances surrounding the settlement?
- Did a reliable entity do a thorough investigation of the incident?
- Could the insurer have proceeded differently in the litigation?⁸⁸

While the existence of prejudice is a fact question, under appropriate facts our courts have found prejudice as a matter of law. For example, this court has found prejudice as a matter of law when: 1) before giving notice the insured agreed to pay certain costs, to toll the statute of repose, and to be bound by arbitration, thereby depriving the insurer of certain defenses;⁸⁹ or 2) the insured, after giving notice but without

⁸⁷ *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *review denied*, 131 Wn.2d 1002 (1997); *USF*, 164 Wn.2d at 429 (approving *Canron* formulation of the prejudice rule).

⁸⁸ *USF*, 164 Wn.2d at 429-430.

⁸⁹ *MacLean Townhomes LLC v. American States Ins. Co.*, 138 Wn. App. 186, 189, 156 P.3d 278 (2007).

notifying the insurer, settled a claim for wrongful termination (not covered) and defamation (covered) by characterizing all money as being paid for defamation, suggesting a fraudulent settlement;⁹⁰ or 3) the insured did not notify the insurer until after an adverse judgment had been entered, precluding the insurer from investigating and evaluating the case.⁹¹

Here, the *USF* factors and the case law all point to the existence of prejudice as a matter of law for several reasons.

a. First National was prejudiced because it lost the ability to assert AHS, Inc.'s loss of corporate capacity for suit as a dispositive defense.

If the suit was in fact against AHS, Inc., then the lack of notice deprived First National of AHS, Inc.'s defense of lack of corporate capacity for suit. The DeCourseys' claims against AHS, Inc. were brought more than two years after AHS, Inc.'s formal dissolution.⁹² Under Washington law, in order for a claim against this corporation to survive

⁹⁰ *Northwest Prosthetic & Orthotic Clinic, Inc. v. Centennial Ins. Co.*, 100 Wn. App. 546, 997 P.2d 972 (2000); see *USF Ins.*, 164 Wn.2d at 430 n. 15 (noting that *Northwest Prosthetic* would have come out the same way under the Supreme Court's formulation of the prejudice rule).

⁹¹ *Felice v. St. Paul Fire & Marine Ins.*, 42 Wn. App. 340, 711 P.2d 1066 (1985), review denied, 105 Wn.2d 1014 (1985).

⁹² CP 370-396; 427-428.

dissolution, it must be brought within two years of the dissolution date.

The statute provides:

The dissolution of a corporation either (1) by the filing with the secretary of state of its article of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period or duration shall not take away or impair any remedy available against such corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceedings thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.⁹³

AHS, Inc. was dissolved on January 20, 2004. Under the statute, the two-year period applied. The DeCourseys did not bring their claims against AHS, Inc. – if at all – until April 19, 2006, more than two years after the dissolution. At that point, the DeCourseys’ remedy against AHS, Inc. did not survive. AHS, Inc. no longer had the capacity to sue or be sued.⁹⁴ Had First National been given notice, it could have successfully asserted the “survival of remedy” statute as a defense on behalf of AHS,

⁹³ RCW 23B.14.340. (emphasis added).

⁹⁴ See e.g. *Louisiana Pacific v. ASARCO*, 5 F.3d 431 (9th Cir. 1993) (dissolved Washington corporation had no capacity to sue or be sued two years after dissolution).

Inc. to obtain a dismissal. Loss of that defense alone establishes substantial prejudice.⁹⁵

If the suit was in fact against V&E Medical Imaging, as the DeCourseys claim, then First National's policy provided no coverage at all because V&E was not insured under the policy.⁹⁶

b. First National was prejudiced by V&E's agreement to arbitrate, thereby limiting judicial review.

According to the DeCourseys, V&E also agreed to submit the matter to arbitration.⁹⁷ It is unclear from the court file whether that submission was because the parties agreed that the claims were within the mandatory arbitration limits of RCW 7.06 or whether the parties were agreeing to arbitration without regard to the limits of RCW Ch. 7.06, as authorized by MAR 1.2 and 8.1.⁹⁸ If it was the latter, the insured, without First National's consent, limited the scope of judicial review, removing

⁹⁵ See *Unigard Ins. v. Leven*, 97 Wn. App. 417, 431, 983 P.2d 1155 (1999), review denied, 140 Wn.2d 1009 (2000) (loss of defense established prejudice).

⁹⁶ See *West Coast Pizza v. United Nat'l Ins.*, 166 Wn. App. 33, 271 P.3d 894 (2011); CP 249, 250, 252.

⁹⁷ CP 197, 202, 452.

⁹⁸ See CP 362 (order compelling arbitration under RCW Ch. 7.06) and CP 368 and 424 (judgment stating that arbitration was under MAR 8.1).

judicial remedies First National otherwise would have had.⁹⁹ That action likewise prejudiced First National as a matter of law.¹⁰⁰

c. First National was prejudiced by the loss of opportunity to defend against suspect damages.

Because V&E or AHS, Inc. left the claim undefended, the amount of the damages awarded (\$50,000 – the mandatory arbitration maximum – plus over \$40,000 in attorney fees) went unchallenged.¹⁰¹ With their motion for removal to Superior Court, the DeCourseys submitted a “Budget Projection for Remediation of Construction Anomalies.”¹⁰² That budget projection lists a total of \$6,760 for “electrical” work.¹⁰³ A defense to the DeCourseys’ action could have challenged how less than \$7,000 in electrical-remediation work could justify a \$50,000 judgment, and how the DeCourseys, acting pro se, would be entitled to over \$40,000 in attorney fees.

⁹⁹ See *MacLean Townhomes*, 138 Wn. App. at 189.

¹⁰⁰ *MacLean Townhomes*, 138 Wn. App. at 191.

¹⁰¹ CP 365 (arbitration award based on V&E’s failure to attend).

¹⁰² CP 245, 430-442.

¹⁰³ CP 245, 442.

d. First National was prejudiced by the loss of the double-recovery defense.

If First National had been given the opportunity to defend, the defense could have challenged the DeCourseys' claim as seeking a double recovery. The DeCourseys obtained a full recovery for construction-defect damages in their suit against their real-estate agent for breach of fiduciary duty. They claimed successfully that their real-estate agent had breached his fiduciary duty by recommending that they hire HIH to make their home improvements without disclosing his financial interest in HIH. As damages they recovered the full amount of damages for the construction defects, apparently including damages for defective work by V&E, a subcontractor to HIH.¹⁰⁴ The arbitration award appears to award the DeCourseys damages already recovered from the real-estate agent.

e. First National was prejudiced by the loss of ability to investigate, defend and appeal.

Here, as in *Northwest Prosthetics*, one cannot be confident that the litigation accurately established the value of the DeCourseys' claim. Because no defenses were raised at the arbitration,¹⁰⁵ First National also lost the ability to mount an effective appeal. The loss of all of these

¹⁰⁴ CP 398-420.

¹⁰⁵ CP 365.

defenses also demonstrates the significance of First National's loss of the ability to investigate and defend through counsel of its own choosing.

f. First National was prejudiced by the loss of potential coverage defenses.

Not only was First National prejudiced by the loss of liability defenses, but it was also prejudiced by loss of the ability to investigate and assert coverage defenses. To begin with, it was not clear whether the liable party was V&E or AHS, Inc.¹⁰⁶ First National insures only AHS, Inc. and therefore cannot be liable for any judgment against V&E.¹⁰⁷ Even assuming AHS, Inc. were the proper judgment debtor, it is by no means clear that the First National coverage would apply here. The First National policy provides coverage for "property damage" caused by an "occurrence."¹⁰⁸ Improper work, without more, is not property damage (defined as physical injury to tangible property) nor is it generally caused by an occurrence (defined as an accident). The policy also excludes coverage for property damage to AHS, Inc.'s own work.¹⁰⁹ And, of

¹⁰⁶ CP 423 (description of judgment debtor).

¹⁰⁷ CP 249, 250, 252.

¹⁰⁸ CP 311, 323, 324.

¹⁰⁹ CP 314 (exclusion for property damage to "your work").

course, any property damage must occur during the policy period if it is to be covered.¹¹⁰

In addition, at least part of the DeCourseys' counterclaim against V&E arose from its alleged failure to complete its work.¹¹¹ A breach-of-contract claim consisting of a failure to complete work is not covered.¹¹²

The arbitration award is a mere statement of the amount awarded. There is no record to show the factual basis for the award. First National is prevented from investigating the factual basis for the award to determine whether it is within the policy's coverage. The DeCourseys' after-the-fact assertions about the basis for the award cannot substitute for the actual record.

g. First National was prejudiced by the loss of potential coverage defense for the attorney-fee award.

The \$41,000 attorney-fee award also raises coverage questions that First National cannot investigate adequately. For example, if the attorney-fee award is based on breach of contract rather than tort, it would likely not be covered. With no record, First National can never know.

¹¹⁰ CP 311 (“This insurance applies to . . . ‘property damage’ only if . . . [t]he . . . ‘property damage’ occurs during the policy period . . .”).

¹¹¹ CP 19, 22, 70.

¹¹² See e.g. *Harrison Plumbing v. New Hampshire Ins.*, 37 Wn. App. 621, 681 P.2d 875 (1984).

Here the facts show substantial prejudice to First National far more extensive than that found adequate to establish prejudice as a matter of law in *MacLean Townhomes*, *Northwest Prosthetic*, and *Felice*. And the *USF* factors all point ineluctably to prejudice as a matter of law:

- The uncontested damage award was for damages both nebulous and highly suspect.
- The damages were not precisely calculated by a neutral decision maker in a contested hearing. Instead the arbitrator appears to have rubberstamped amounts claimed by the DeCourseys.
- No reliable investigation of the claim exists.
- First National could have and would have proceeded differently by raising numerous defenses – including dispositive defenses – to the claim.

The DeCourseys disputed none of this prejudice either below or in their appellate brief. Their limited argument under the heading “FNI was not prejudiced by lack of notice” merely reargues their theory, unsupported by competent evidence, that First National may have been given notice.¹¹³ This does not create any factual dispute about the existence of prejudice. Because the failure to tender prejudiced First National as a matter of law, this court should affirm the dismissal of the coverage claims.

¹¹³ Appellants’ Brief at 30-32.

B. In the alternative, this court can affirm the summary judgment of no coverage because First National does not insure V&E, the judgment debtor.

1. First National presented uncontroverted evidence that the policy does not insure V&E.

Even though the DeCourseys' judgment specifically refers to "Automated Home Solutions, Inc." as another name for the judgment debtor, the DeCourseys insist that they obtained their judgment against V&E, not AHS, Inc.¹¹⁴ That is the judgment they demand that First National satisfy. But even though the First National policy unambiguously insures Automated Home Solutions, Inc. – and only that entity¹¹⁵ – and even though the DeCourseys knew that Automated Home Solutions, Inc. is not the legal business name of V&E and is a different corporation,¹¹⁶ the DeCourseys insist that the policy in fact insures V&E. This is so, they claim, because V&E acquired the Automated Home Solutions trade name. But the question here is not who owned the trade name; rather it is who is the legal entity insured according to the First

¹¹⁴ CP 423-424, 456-461, 647 ("DeCourseys won a judgment in arbitration against . . . V&E . . .").

¹¹⁵ CP 252.

¹¹⁶ CP 55 (allegation in their counterclaim in the underlying suit that "[T]he court will note that 'Automated Home Solutions' is not the plaintiff's legal business name . . . the plaintiff's legal name is V&E Medical Imaging Services Inc.").

National policy. And on that issue the facts – even the facts asserted by the DeCourseys – leave no doubt for several reasons.

First, the policy's declarations page shows clearly that the named insured is Automated Home Solutions, Inc.¹¹⁷ The insurance code provides that an insurance policy may be altered only by a writing made a part of the policy.¹¹⁸ No writing made a part of this policy changes the identity of the insured. And none of the DeCourseys' evidence of government records¹¹⁹ goes to the material question of the identity of the insured on the policy.

Second, according to the DeCourseys' evidence, V&E purchased the assets of AHS, Inc.;¹²⁰ it did not merge with AHS, Inc. The general rule is that the purchaser of corporate assets does not acquire the liabilities of the selling entity unless the purchaser expressly assumes those liabilities.¹²¹ AHS, Inc. therefore remained a separate entity with separate potential liabilities to which V&E did not succeed. During the period of

¹¹⁷ CP 252.

¹¹⁸ RCW 48.18.190.

¹¹⁹ See evidence cited in Appellants' Brief at 27-30.

¹²⁰ CP 484, 485.

¹²¹ *Martin v. Abbott Laboratories*, 102 Wn.2d 581, 609, 689 P.2d 368 (1984).

the First National policy, AHS, Inc. was in the two-year post-dissolution period when it remained exposed to liability, providing ample reason for it to insure.¹²²

Third, the source of the premium checks does not provide any basis for change in the policy. Moreover, the premium checks gave no notice that the identity of the named insured should be changed. Every one of the premium checks the DeCourseys placed in the record came from “Automated Home Solutions.”¹²³ That gave no notice at all that the named insured should have been V&E.

Fourth, every insured has a duty to read his policy and be on notice of its terms.¹²⁴ The identity of the insured – Automated Home Solutions, Inc. – is plain on the face of the policy. No evidence shows that anyone on behalf of AHS, Inc. or V&E claimed that the identity of the named insured was incorrect. In fact, the broker documents both before and after the issuance of the First National policy show that the insured was to be

¹²² See RCW 23B.14.340 (Survival of Remedy after Dissolution).

¹²³ CP 468, 547-551.

¹²⁴ *Dombrosky v. Farmers Ins. Co. of Washington*, 84 Wn. App. 245, 257, 928 P.2d 1127 (1996), *review denied*, 131 Wn.2d 1018 (1997).

Automated Home Solutions, Inc.¹²⁵ In short, no evidence shows a mistake.

Fifth, not only is there no evidence of a mistake in the designation of the named insured, but if, as the DeCourseys seemingly claim, the policy ought to be reformed to include V&E as the named insured, the DeCourseys must show a mutual mistake by the contracting parties – Automated Home Solutions, Inc. and First National – and must make that showing by “clear, cogent and convincing evidence.”¹²⁶ The record shows no evidence of a mistake by either of them, much less both of them. Any attempt at policy reformation must fail as a matter of law.

This court’s recent decision in *West Coast Pizza*,¹²⁷ filed after the trial court’s decision in this case, confirms this analysis. In that case, West Coast Pizza claimed that its insurance policy was intended to insure Mad Pizza, a related company not named in the policy. Even though West Coast Pizza pointed to information in the application that suggested that the number of delivery drivers was consistent with the number employed

¹²⁵ CP 697, 558, 564, 565, 568.

¹²⁶ *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 669, 63 P.3d 125 (2003).

¹²⁷ *West Coast Pizza v. United Nat’l Ins.*, 166 Wn. App. 33, 271 P.3d 894 (2011).

by Mad Pizza, this court rejected the claim because Mad Pizza was not named as an insured in the policy. The “plain, explicit language [of an insurance policy] cannot be disregarded, nor an interpretation given the policy at variance with the clearly disclosed intent of the parties.”¹²⁸

This court likewise rejected the claim that the policy should be reformed to include Mad Pizza as an insured. Reformation is only appropriate in the case of mutual mistake when the contracting parties had the same intention but the writing varies from that mutual intent. The mistake must be proved by “clear, cogent and convincing evidence,” and reformation is not proper in cases of doubt about the parties’ intent. And it is certainly not a proper remedy to bind a party to terms to which it never agreed. Because the undisputed evidence showed that the insurer had not intended to insure Mad Pizza and because at best the evidence showed only a unilateral mistake, the policy could not be reformed to include Mad Pizza as an insured.¹²⁹

Here, the record compels the same result. No evidence shows that either of the contracting parties – AHS, Inc. and First National – made a mistake. Therefore, reformation is not available. Nor does the policy

¹²⁸ *West Coast Pizza*, 166 Wn. App. at 40, citing *Davis v. North American Accident Ins. Co.*, 42 Wn.2d 291, 297, 254 P.2d 722 (1953).

¹²⁹ 166 Wn. App. at 41-42.

contain any suggestion that V&E is an insured. Because the unambiguous policy language shows that V&E is not an insured, First National can have neither any coverage obligations nor any obligations to satisfy a judgment against V&E.

2. The DeCourseys' challenge on the identity of the insured is limited to the incorrect claim that the insurance follows the trade name.

The DeCourseys challenge none of First National's arguments mentioned above. Instead, they point out purported "contradictions" and "confusion of identities" in First National's use of the names of the corporation and the trade name acquired by V&E. In fact, the DeCourseys' use in the judgment of both the dissolved corporation's name and the trade name sold to, and used by, V&E has caused some confusion. But it is undisputed that the insurance contract names the corporation as the insured.

The DeCourseys' argument shows two points of confusion. First, they incorrectly assume that a recently dissolved corporation cannot be the purchaser of an insurance policy or its named insured – this point is addressed above – and second, though they recognize that AHS, Inc. and V&E are two separate corporations, they assume that that because V&E used "Automated Home Solutions" as a trade name, a policy naming

Automated Home Solutions, Inc. must therefore insure V&E. This, too, is incorrect.

They cite several cases for what they say is the proposition that when insurance is sold to a trade name, the policy owner (the insured) is the underlying entity.¹³⁰ But the DeCourseys overlook the dispositive factor in their cited cases. In each case the insurance policy was issued to a sole proprietor doing business under a trade name; it was not sold to a trade name. In that circumstance, the business name is not a legal entity separate from the individual owner. By contrast, a corporation is a legal entity separate from its owner or owners.

Patrevito v. Country Mutual Insurance,¹³¹ cited by the DeCourseys, made precisely that point. There, the court distinguished the situation before it – an insurance policy issued to a proprietorship – from the facts of a prior case, *Polzin*, involving a policy issued to a corporation. In *Polzin*,¹³² the policy was issued to a corporation of which Polzin was a shareholder, president and chief operating officer. But, because he was a person separate from the corporation, he was not an insured under the

¹³⁰ Appellants' Brief at 12-14.

¹³¹ 118 Ill. App. 3d, 573, 455 NE 2d 289 (1983).

¹³² *Polzin v. Phoenix of Hartford Ins. Cos.*, 5 Ill. App. 3d 84, 283 NE 2d 324 (1972).

policy for underinsured motorist's coverage. By contrast, in *Patrevito* because the policy was issued to Patrevito's proprietorship which was not legally distinct from him, he was the insured. This distinction was, according to the court, "of critical significance."¹³³ *Patrevito* and the other cited authorities provide no support for the proposition that a policy issued to one corporation provides coverage for another corporation absent explicit policy language providing so.

Here, the policy was issued to a corporation, Automated Home Solutions, Inc. It – and only it – is the insured on the policy. Despite what the DeCourseys may wish, the policy does not extend coverage to V&E. This court should therefore affirm summary judgment because First National did not insure the debtor corporation.

C. The trial court properly considered First National's answer to the DeCourseys' counterclaim and properly denied their motion to strike the answer.

In a lengthy argument, the DeCourseys claim in substance that the trial court erred in allowing First National to answer their counterclaim more than twenty days after the counterclaim was filed and in failing to strike that answer once filed.¹³⁴ The DeCourseys misread the rules.

¹³³ *Patrevito*, 455 N.E.2d at 291.

¹³⁴ Appellants' Brief at 32-42.

If the DeCourseys were aggrieved by First National's failure to answer their counterclaim, their remedy was to bring a motion for default under CR 55(a):

(1) *Motion.* When a party against whom a judgment for affirmative relief is sought has failed to . . . plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.

They did not bring a motion for default. Even if they had, however, First National was authorized to answer their counterclaim at any time before the hearing on the motion:

(2) *Pleading After Default.* Any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party previously has appeared or not. If the party has appeared before the motion is filed, he may respond to the pleading or otherwise defend at any time before the hearing on the motion.

The Civil Rules did not require First National to seek court permission in order to file a late answer.

Because First National's answer to their counterclaim was filed even before any motion for default, it properly denied their counterclaim.

Under these facts, the trial court would have abused its discretion if it had stricken First National's answer, as the DeCourseys requested.¹³⁵

But the DeCourseys insist that First National's answer to their counterclaim was an "amended pleading" and therefore First National was required to bring a motion under CR 15 for leave to file an amended pleading.¹³⁶ They are wrong. The answer was the first pleading responding to their counterclaim. CR 15 does not apply and no motion was required. Indeed, as CR 55 makes clear, even if the DeCourseys had filed a motion for default, First National was entitled to file its answer to the counterclaim – without a motion – at any time before the hearing on the motion for default.

Even though this suffices to respond to the DeCourseys' claims on this issue, First National notes that the DeCourseys' claims of prejudice from the trial court's alleged delay in ruling on their motion¹³⁷ are overblown. They cannot claim prejudice when they failed to bring a motion for default. Moreover, First National's answer contained nothing

¹³⁵ See *Hansen Inds. v. Kutschkau*, 158 Wn. App. 278, 287, 239 P.3d 367 (2010) (court reviews trial court's ruling on motion to strike for abuse of discretion).

¹³⁶ Appellants' Brief at 33-42.

¹³⁷ Appellants' Brief at 36-42.

that was not disclosed to the DeCourseys by First National's complaint and its discovery answers several months before.¹³⁸

Because First National's answer was properly filed and the trial court did not abuse its discretion in denying the motion to strike, the DeCourseys' claim that the trial court was required to grant their motion for summary judgment based on First National's alleged failure to deny their counterclaim necessarily fails.

IV. Conclusion

This record presents no outcome-determinative factual dispute about whether the insured tendered the suit to First National and about whether First National was prejudiced by the lack of tender. Nor is there any factual dispute over the policy terms identifying the insured as Automated Home Solutions, Inc. This court should affirm the summary judgment either because First National was actually prejudiced by the insured's failure to tender or because the First National policy does not insure the judgment debtor, or both. And the court should award First National its costs.

¹³⁸ Compare CP 578-582 (answer to counterclaim) with CP 1-5 (complaint) and CP 527-545 (First National's discovery answers).

RESPECTFULLY SUBMITTED THIS 8 day of August, 2012

A handwritten signature in black ink, appearing to read "Russell C. Love". The signature is written in a cursive style with a horizontal line underneath it.

Russell C. Love, WSBA #8941
THORSRUD CANE & PAULICH
Attorney for Plaintiff/Respondent

No. 067906-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FIRST NATIONAL INSURANCE COMPANY OF AMERICA,
Plaintiff/Respondent,

v.

MARK DeCOURSEY and CAROL DeCOURSEY,
Defendants/Petitioners.

DECLARATION OF SERVICE

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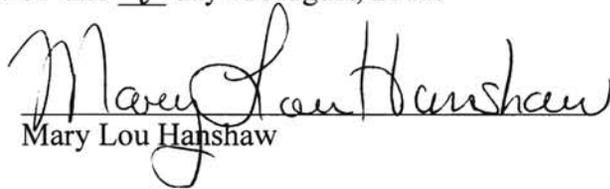
I hereby certify that on August 7, 2012, I served Carol and Mark DeCoursey via email at mhdecoursey@gmail.com with the following documents:

1. Brief of Respondent First National Insurance Company of America,
2. this Declaration of Service

Copies of the above documents were also served on the DeCourseys via U.S. Mail at:

8209 172nd Avenue NE
Redmond, WA 98052

Executed at Seattle, WA this 9th day of August, 2012.


Mary Lou Hanshaw