IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-00865-LTB-BNB

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit Corporation, LAURA HERSHEY, CARRIE ANN LUCAS, HEATHER REBEKAH RENEE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, ADRIANNE EMILY MONIQUE LUCAS, by and through her parent and next friend, CARRIE ANN LUCAS, and DANIEL WILSON,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO,

Defendant and Third Party Plaintiff,

v.

SEMPLE BROWN DESIGN, P.C.,

Third Party Defendant.

THIRD PARTY PLAINTFF CITY AND COUNTY OF DENVER'S
REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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1. The City and County of Denver ("Denver" or "City"), by and through the Denver City Attorney's Office, submits this reply to Semple Brown's Response to Third Party Plaintiff's Motion for Summary Judgment ["Response"] (Docket No. 132).

A. Semple Brown's Position

2. Semple Brown admits that it signed a contract promising to "defend…any and all claims…of any kind or nature whatsoever…in any way resulting from…or arising out of…the tortious or negligent actions or omissions of the Design Consultant…" [Ex. 1, Art. XIV (14.2)] In addition, Semple Brown admits that the "allegations in the Plaintiff's complaint concern construction and/or **design related issues**…" [Response, page 3, lines 8-9, *emphasis added*]. While the City will address Semple Brown's arguments below

these undisputed facts are the only facts necessary for this Court to find that as a matter of law Semple Brown has a contractual duty to defend the City.

3. Semple Brown argues that its promise to defend is meaningless. It argues that "defend" means exactly the same thing as "indemnify." Amazingly, Semple Brown argues that interpreting "The Design Consultant shall defend" to mean that Semple Brown must defend the City is "contrary to the plain language of the contract, and contrary to the intent of the parties." [Response at 2].

B. The Contract is Not Ambiguous; Semple Brown's Duties to Defend and to Provide Professional Expert Services For Such Defense Are Broader, Separate, and Independent of the Indemnification Obligation

1. Denver and Semple Brown executed the Design Services Agreement on August 12, 2002 [hereinafter "agreement" or contract"] (Docket No. 104-3). The contract allocated and sequenced responsibilities between the parties in the event of claims or litigation against the City relating to the design work. The first, independent obligation was for Semple Brown to defend the Plaintiffs' claims against the City. ["The Design Consultant shall defend…" Ex. 1, Art. XIV (14.2)]. Who better to defend the City as to design matters than the Design Consultant who:

a) "provide[d] *comprehensive design services*, construction contractor selection, construction contractor preconstruction *and construction contract administration*" of the whole project as well as providing "all architectural, engineering, interior design, utility coordination, and other design services…including without limitation… the preparation of all drawings and specifications, participation in preconstruction efforts and preparation of construction documents *and assistance with the administration of construction contracts…*" [Ex. 1, Recitals, page 1 (emphasis added); *see also* contract excerpts at Ex. 3 and the City's opening brief at 3-5];

b) [agreed to] "design the Project in *strict compliance* with all applicable laws, codes, ordinances, rules and regulations, and industry standards" [Ex. 1, Art. II (2.2.7)];

c) "further agree[d] to design the project in strict compliance with all applicable laws, statutes, codes, ordinances, rules and regulations, and industry standards" [Art. IX

(9.1)];

d) prepare[d] "drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structure, civil,…interior design, *ADA compliance* and such other elements as may be appropriate." [Ex. 1, Art. IV (4.1) (emphasis added)];

e) [agreed to make its design] "comply with all ADA requirements…" [Ex. B to Ex. 1, Semple Brown's Proposal at page 29; and,

f. prepare[d] the following written reports…b.(ii) *analyses of applicable code, ADA issues*, …. Ex. 1, Art. IV (4.1) (emphasis added)].

2. Semple Brown admits that it may have defense obligations but argues that the contract only requires it to defend the City after a verdict as has been reached assigning liability to Semple Brown. Response at 6. Semple Brown's interpretation is contrary to the plain meaning of the word "defend" and inconsistent with the terms of the agreement. For example, the agreement requires that Semple Brown provide professional services to defend claims against the City arising out of "alleged errors or omissions of the Design Consultant…" Ex. 1, Art. II (2.2.8).

> The Design Consultant shall provide all professional services required by the City in defending all claims against the City, which relate in any way to alleged errors or omissions of the Design Consultant or its subconsultants, without additional compensation. Ex. 1, Art. II (2.2.8).

There is no way to reconcile this language with Semple Brown's argument that the agreement only requires it to defend claims after a verdict is entered.

3. As demonstrated by the language above, Semple Brown has a duty to defend and provide expert witnesses when errors or omissions are alleged in its work. Semple Brown has a separate and more limited obligation to indemnify the City for damages apportioned to Semple Brown's work.

> …provided however, that the Design Consultant need not indemnify the City or its officers, agent and employees from damages proximately caused by and apportioned

to the negligence of the City's officers, agents and employees. Ex. 1, Art. XIV (14.2).[1]

4. Contrary to the indemnification language in the agreement, the defense language is in the present tense. The agreement says Semple Brown "shall defend", not "pay for a defense later."

5. In ascertaining the meaning of a contract, the contract must be considered in its entirety, and, whenever possible, each clause must be given effect. *Federal Leasing, Inc. v. Amperif Corp.*, 840 F.Supp. 1068, 1074 (Md.1993) (all contract provisions should be construed to give them meaning, rather than to make them meaningless). Semple Brown effectively asks the Court to delete its promise to defend from the Design Services Agreement or interpret it so that it is meaningless.

6. The only way to give meaning to the provisions of the agreement relating to defense and indemnification is to treat them as separate and distinct obligations in which the defense obligation is triggered by allegations of design defects. To read these provisions any other way would make Semple Brown's promise to defend virtually worthless.

7. The language of the agreement is not ambiguous and a reasonably prudent person could not understand the defense paragraphs to suggest two possible meanings. In its

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[1] Semple Brown asserts at Response page 5, 7 that to the extent that there are ambiguities in an indemnity agreement, they are to be resolved against the party seeking indemnity, citing *Williams v. White Mountain Construction Co., Inc.,* 749 P.2d 423, 426 (Colo.1988) and *Heppler v. J.M. Peters Co*., 87 Cal.Rptr.2d 497, 509 (Cal.App.4Distr.1999). Semple Brown then insinuates that the duty to defend should likewise be construed against the party seeking the defense. That is not what the cases hold. They do not address the duty to defend. *Williams* addresses only the issue of whether there was an oral indemnity agreement. The cases in fact limit the interpretation against the party seeking indemnification to cases in which that party would be held completely harmless for its own negligent acts, which is not the case here. Ex. 1, Art. XIV (14.2).

Answer, Semple Brown repeatedly refused to admit or deny allegations stating that "The Agreement speaks for itself." Answer and Jury Demand to the Third Party Complaint and Jury Demand, ¶¶ 6-11 and 25 (Docket No. 116). Because Semple Brown has admitted that the language of the Design Services Agreement "speaks for itself," it is not necessary to consider any matters outside of the contract to interpret it. *Federal Leasing, Inc. v. Amperif Corp.*, 840 F.Supp. 1068, 1075 n.12 (Md.1993) (no ambiguity found and no outside material required for contract interpretation of agreement that "speaks for itself").

8. Semple Brown cites four cases for its position that Colorado does not follow the Complaint Rule as to the duty to defend. Ironically, three of the cases are not even from Colorado courts (*Rodriguez,*[2] *Heppler (discussed below)*, and *Tateosian (discussed below*). Response at 8-11.

9. Semple Brown argues at length that the Colorado Court of Appeals rejected the "Complaint Rule" as it relates to the duty to defend, citing *D.R. Horton v. D&S Landscaping, LLC*, 2008 WL 2522232 (Colo.App.) (opinion not released for publication in permanent law reports). Semple Brown argues that the *Horton* court: 1) "did not elect to treat the duty to defend as distinct from the duty to indemnify", 2) "nor did it impose a duty to defend upon the subcontractor,"; and 3) "declined to follow the broad duty to defend rule employed in the insurance context." Response at 9-10. The *Horton* opinion does not have the meaning Semple Brown ascribes to it. The Court of Appeals was never asked, nor did it opine, as to the meaning of the duty to defend in that particular contract,

[2] *Rodriguez v. Savoy Boro Park*, 759 NYS2d 107 (NYAD2Dept.2003) (in that particular contract under New York law, a subcontractor's duty to defend was no broader than its duty to indemnify).

which language is different than that now before this Court. The issue of defense of any underlying claim was not raised by any party and was not before the court. As a result, the *Horton* court made no ruling on the "duty to defend" as it had not been asked to enforce that part of the contract. Instead, the court laid out (in its Background section (id. at I.)) the only issues before the court. They clearly do not include the meaning of the "duty to defend". The court only addressed indemnity issues—not defense. The decision rested on the lack of evidence of an obligation to *indemnify*. As the *Horton* court said, "central" to its ruling (id. at III.) was the fact that the indemnitee's Rule 30(b)(6) witness "did not have knowledge about the matters relating to the claims" but instead referred to former employees whose whereabouts were known to Horton. Horton had made no effort to obtain these witnesses to either testify as to the Rule 30(b)(6) issues, or to inform the Horton Rule 30(b)(6) witness of the information. The court criticized Horton for proceeding to deposition with an unprepared and unknowledgeable witness and then refused to overturn the lower court's decision which relied on such witness' testimony for its finding against Horton of lack of an indemnification obligation (id. at III and IV). In contrast, the issue before this Court is whether or not there are sufficient allegations in the Plaintiffs' Complaint to trigger Semple Brown's duty to defend.

10. Semple Brown's reliance on *Tateosian v. State of Vermont,* 945 A.2d 833 (Vt.2007) is misplaced. There the court found that the underlying complaint did not trigger the duty to defend or indemnify because the indemnitee (the State of Vermont) did not allege any negligence by the indemnitor, which allegation if made could have triggered the duty to defend and indemnify, depending on the particular language of the agreement. The *Tateosian* court found the language of the contract ambiguous. The

court refused to find any defense or indemnification obligation where the indemnitee admitted that it was solely at fault. (Here the contract makes the City liable for its own negligence as to the indemnification obligation). The *Tateosian* court agreed that the duty to defend issue must be resolved at the outset of a case, just like in the insurance context. The court also held that the language of the contract must be interpreted to give effect to the parties' intent as expressed in their writing. The court expressly identified several other cases in which courts hold that the contract duties stemming from contractual indemnity do not differ from those involved in insurance law. *See, e.g., Pancakes of Hawaii, Inc. v. Pomare Props. Corp*., 85 Hawai'i 286, 944 P.2d 83, 88-89 (Ct.App.1997) (holding that in contractual duty-to-defend cases, as in insurance cases, the duty to defend must be determined at the beginning of the suit on the pleadings); *St. Paul Fire & Marine Ins. Co. v. Crosetti Bros., Inc*., 256 Or. 576, 475 P.2d 69, 71 (1970) (noting that defendant's contractual duty to defend was identical to that of an insurer); *English v. BGP Int'l, Inc*., 174 S.W.3d 366, 372 n. 6 (Tex.Ct.App.2005) (concluding that an indemnitor's contractual promise to defend involves same principles as insurer's duty to defend). *See also Federal Leasing, Inc. v. Amperif Corp.*, 840 F.Supp. 1068, 1074 (Md.1993) (contractor had unambiguous duty to defend under non-insurance contract and failed to create a genuine issue of material fact which would preclude summary judgment on the duty to defend).

11. Semple Brown ineffectively cites *May Dep't Stores Co. v. University Hills, Inc.,* 824 P.2d 100 (Colo.App.1991) to argue its position that its duty to defend the City against Plaintiffs' claims does not arise until there is a judgment in a lawsuit between the City and Semple Brown holding the latter liable for negligence. Semple Brown further

argues that the case holds that ambiguous provisions are to be construed against the party seeking indemnity. Response at 6, 7. The *May* case does not support either position. The case does not address a duty to defend. It only holds that the duty to indemnify is not excused simply because there is an allegation that the indemnitee may have been at fault. The *May* court further holds, consistent with the City's position here, that interpretation of the agreement must be determined from the contract itself, that it must be enforced according to the plain and generally accepted meaning of its language, and that it must be interpreted to give effect to all of its provisions so that none are rendered meaningless. *May* at 824 P.2d 100, 101.

12. Semple Brown takes the position (citing *Stegall v. Little Johnson Associates, Ltd*., 996 F.2d 1043 (10thCir.1993) that whether or not an indemnity provision includes a duty to defend is a question of fact precluding summary judgment. Response at page 7, n.1. Again, that is not what the case says. It instead holds that the determination of whether or not a contract is ambiguous is a question of law for the court, and only if the court determines that the contract is ambiguous and depends on extrinsic evidence, does the interpretation of the contract become a question of fact.

> The determination whether a contract is ambiguous is a question of law. [cites omitted]. If the court determines a contract is ambiguous and its construction depends on extrinsic evidence, then interpretation of the contract becomes a question of fact. 996 F.2d at 1048.

13. Semple Brown further asserts in its Response at 5, 7 that to the extent that there are ambiguities in an indemnity agreement, they are to be resolved against the party seeking indemnity, citing *Williams v. White Mountain Construction Co., Inc.,* 749 P.2d 423, 426 (Colo.1988). Semple Brown then insinuates that the duty to defend should likewise be construed against the party seeking the defense. That is not what the case

holds. It does not even address a duty to defend. *Williams* addresses only the issue of whether there was an oral indemnity agreement. *Williams* in fact limits the interpretation against the party seeking indemnification to cases in which that party would be held completely harmless for its own negligent acts, which is not the case here. Ex. 1, Art. XIV (14.2) ("Design Consultant need not indemnify the City or its officers, agent and employees from damages proximately caused by and apportioned to the negligence of the City's officers, agents and employees."). Similarly, *Heppler, a California case* (Response at 5, 8), does not even address the issue of "duty to defend" language in a contract but only deals with the later arising issue of indemnification. *Heppler v. J.M. Peters,* Cal.Rptr. 2d 497 (Cal. App.4 Dist.1999).

C. The Springer Affidavit and Exhibits

1. The Court should not consider the Springer affidavit (Exhibit A) and Exhibit B because the contract is not ambiguous, as discussed above in Section B. When a contract is not ambiguous, its meaning (including the duties to defend and provide expert witnesses) can and must be made from the four corners of the contract itself.

2. Further, Exhibits A and B refer only to events that occurred more than a year after the Design Services Agreement was executed in 2002 and so cannot shed light on the intention of the parties at the time they executed the contract. As such, they are irrelevant to this motion.

3. However, if the Court is to consider the Springer affidavit and exhibits, they actually support a finding of liability against Semple Brown for design errors and omissions in connection with this case.

4. The affidavit admits that Semple Brown was responsible for designing the

elevator, which is only one of the many alleged design defects in this litigation.

5. Exhibit B states that the *request for administrative modification was made by and approved by Semple Brown and Rolf Jensen (a subconsultant working under its direction).* Exhibit B: cover page ("Prepared for Semple Brown Design PC"); signature page ("Request for Administrative Modification for Fire Protection and Life Safety Requirements for Newton Auditorium-Prepared by Rolf Jenson and Associates, Architect of Record Approval: Semple Brown Design Architects.

6. As Exhibit B shows, the modification sought by Semple Brown and its subconsultant did not modify any federal requirements under the Americans with Disabilities Act but instead requested modifications of requirements of local laws for fire safety and life safety, the only subject over which the City would have any authority. The City could not and did not agree to a modification to violate federal laws. As described in the City's opening brief, it was Semple Brown's job to know the design laws and requirements and to assure that all design related laws were complied with in its design work and that of the subconsultants it hired, including federal, state and local laws. *See* Exhibits 3 and 4.

7. The affidavit also states that Semple Brown did not construct the facility and opines that the building was not constructed as designed. These assertions ignore Semple Brown's design and construction administration responsibilities under the contract as set forth in Exhibit 3, which makes Semple Brown the City's representative in this arena and requires that Semple Brown monitor for construction defects and all other noncompliance, and to formally inform the City of its findings. *See* Exhibits 3 and 4.

8. Semple Brown has not submitted evidence that shows it advised the City at the

required time that the work by the construction company violated the terms of the Americans with Disabilities Act or any other laws. Having failed to do so, this becomes just another example of Semple Brown's negligence, errors and omissions, which make it responsible for providing a defense as well as experts to refute Plaintiffs' allegations as part of the defense, and indemnification.

D. Mayor's Committee for People with Disabilities, Dept. of Public Works, Etc.

1. At page 12 of its Response, Semple Brown argues that it is not liable for alleged design defects because of contract obligations relating to the Mayor's Committee for People with Disabilities and Denver's Dept. of Public Works. The argument won't stand up.

2. The actual text shows that the Design Consultant was only required to "coordinate with" these agencies [Ex.1, Art. I(1.8)] and to allow for a "courtesy review." The contract expressly states that such agency contact shall not "relieve the Design Consultant of its obligation to comply with all applicable codes, regulations and other requirements in performing hereunder." [Ex. 1, Art. IV (4.4)].

E. Conclusion

For these reasons, Denver requests partial summary judgment on its Third Party Complaint against Semple Brown, i.e. a declaration that under the 2002 Design Services Agreement Semple Brown had and has a duty to defend the City in this lawsuit. [Ex. 1, Art. XIV (14.2)]. Further, as part of that defense obligation, the court should declare that Semple Brown is required to provide all professional services necessary to defend the Plaintiffs' claims against the City which relate to alleged errors and omissions of Semple Brown or its subconsultants, without additional compensation. [Ex. 1, Art. II (2.2.8)].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, I electronically filed the foregoing **REPLY IN SUPPORT OF CITY AND COUNTY OF DENVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT** via CM/ECF which will send notification of such filing to the following:

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