140 Wash.App. 1026

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Henry SEAMAN d/b/a The Henry Apartments f/k/a The Hillside Place Apartments, Appellant,
v.
FARMERS INSURANCE EXCHANGE, a foreign insurance company, Respondents.

No. 58956–3–I.
|
Sept. 10, 2007.

Appeal from King County Superior Court; Honorable Michael J. Fox, J.

Attorneys and Law Firms

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Tyna Ek, Soha & Lang PS, Seattle, WA, for Respondents.

UNPUBLISHED OPINION

BAKER, J.

***1** Farmers Insurance Exchange denied payment under Henry Seaman's policy for damage to his apartment building caused by faulty construction. Seaman sued, and the trial court granted Farmers' motion for summary judgment, ruling that such damage was specifically excluded under the policy. We reverse.

I.

Henry Seaman (Seaman) has owned the Henry Apartments in Seattle since 2002. He insured the apartment building with Farmers Insurance Exchange (Farmers) from June 30, 2002 through June 30, 2005. Seaman became aware of severe decay damage to the building in the fall of 2004, and submitted a claim to Farmers. Farmers retained an engineering firm to investigate the damage. The engineers reported that defective construction had allowed water to enter the exterior walls of the building, leading to decay. Their report noted that numerous portions of the building were in a state of imminent collapse.

Farmers ultimately denied Seaman's claim, asserting that the policy did not cover collapse due to faulty, defective construction, and that the state of imminent collapse was not caused by a specified cause of loss covered by the policy. Seaman filed suit. Both parties moved for summary judgment. Seaman requested a ruling from the court that the policy covered collapse caused by negligent construction. In its motion, Farmers argued that the clause covering collapse contained an obvious typographical error, and that Seaman's interpretation of the clause rendered it nonsensical. The trial court granted Farmers' motion for summary judgment, and denied Seaman's motion for reconsideration.

Seaman appeals. We decline Farmer's invitation to reform its policy language. We reverse the summary judgment granted to Farmers below, and grant partial summary judgment to Seaman.

II.

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court.[1] Our review is de novo.[2] Summary judgment is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[3] Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment.[4] The interpretation of insurance policy language is a question of law, also reviewed de novo.[5]

1 *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

2 *Wright v. Safeco Ins. Co. of Am.*, 124 Wn.App. 263, 270, 109 P.3d 1 (2004).

3 CR 56(c); *Clements v. Travelers Indem. Co.*, 121

Wn.2d 243, 249, 850 P.2d 1298 (1993).

4 *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

5 *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 682, 801 P.2d 207 (1990).

Whether a particular action gives rise to a Consumer Protection Act[6] (CPA) violation is reviewable as a question of law.[7]

6 Ch. 19.86 RCW.

7 *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Coverage for Collapse

We construe insurance policies as contracts.[8] "The language of the contract must be afforded fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance."[9] When the insured makes the prima facie case that there is coverage, the burden is on the insurer to prove that the loss is not covered because of an exclusionary provision in the policy.[10] Exclusionary clauses are to be construed strictly against the insurer.[11] Inclusionary clauses are to be construed liberally.[12]

8 *Weyerhaeuser Co. v. Comm' l Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000) (quoting *B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427–28, 951 P.2d 250 (1998)).

9 *Panorama Vill. Condo. Owners Ass' n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 139, 26 P.3d 910 (2001) (quoting *Weyerhaeuser Co. v. Comm' l Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000)) (internal quotation marks omitted).

10 *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 758–759, 845 P.2d 334 (1993).

11 *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 340, 738 P.2d 251 (1987) (citing *Farmers Ins. Co. of Washington v. Clure*, 41 Wn.App. 212, 215, 702 P.2d 1247 (1985)).

12 *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 515–16, 940 P.2d 252 (1997).

***2** The insurance policy Seaman took out on the apartment building was in effect, via annual renewal, from June 30, 2002 to June 30, 2005. Seaman's appeal deals only with the coverage provided under the 2002–03 and 2003–04 versions of the policy.

The policy excluded loss or damage resulting from negligent construction and decay. It also excluded loss or damage arising out of collapse, except as provided in the Additional Coverage for Collapse.

Under the section entitled "Additional Coverages," is a subsection detailing liability in the event of collapse:

> d. Collapse
>
> (1) We will pay for direct physical loss or damage to Covered Property, caused by collapse of a building or any part of a building insured under this policy, if the collapse is caused by one or more of the following:
>
> (a) The "specified cause of loss" or breakage of building glass, all only as insured against in this policy;
>
> (b) Weight of people or personal property;
>
> (c) Weight of rain that collects on a roof;
>
> (d) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation. However, if the collapse occurs after construction, remodeling or renovation is complete and is caused in part by a cause of loss listed in ***d.(1)(a)*** *through* ***d.(1)(d),*** we will pay for the loss or damage even if use of defective material or methods in construction, remodeling or renovation contributes to the collapse. (Emphasis added.)

The crux of the dispute between Seaman and Farmers

involves the interpretation of this collapse provision, particularly the second sentence of d(1)(d).

Through section d(1)(c), the provision is fairly straightforward. Under d(1)(a), Farmers will pay for damage caused by collapse if the collapse is caused by one of the specified causes of loss, or breakage of building glass.[13] Under d(1)(b), it will pay if the collapse is caused by the weight of people or personal property. Section d(1)(c) provides for coverage if collapse is caused by the weight of rain that has collected on a roof.

13 The contract defines "Specified Causes of Loss" as: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

The first sentence of section (d) states that Farmers will cover collapse caused by defective construction materials or methods, if collapse occurs during construction, remodeling, or renovation.

The second sentence of section (d) begins with the transitional word "however." It then goes on to state that if the collapse occurs *after* construction, and is caused *in part* by one of the causes of loss listed *in sections d(1)(a) through d(1)(d),* Farmers will pay for the loss or damage even if defective construction materials or methods contribute to the collapse.

Seaman argues that under d(1)(d), the policy covers collapse caused by defective material or methods in construction both during construction and after construction is complete. Under Seaman's interpretation, the first sentence of section (d) states that collapse occurring during construction is covered if the collapse is caused by defective material or methods in construction.

***3** As he interprets it, the second sentence provides post-construction coverage where collapse is caused *in part* by defective material or methods in construction, and those defects contribute to collapse due to the causes listed in d(1)(a) through d(1)(d). Under Seaman's interpretation, defective construction is itself one of the causes of loss covered by d(1)(d).

Farmers asserts that section (d) contains an obvious scrivener's error which provides greater coverage than intended. According to Farmers, the second sentence of section (d) should have listed the causes of loss for which it would pay as d(1)(a) through d(1)(***c***), instead of d(1)(a) through d(1)(***d***). Farmers asserts that d(1)(d) was included erroneously.

Under Farmer's interpretation, the second sentence of section (d) provides coverage for collapse if the collapse were caused by a "specified cause of loss," by the weight of people or personal property, or by the weight of rain collected on a roof, even if use of defective material or methods in construction contributes to the collapse. It would not provide coverage if the collapse were caused by defective construction alone. Farmers insists that even a casual reading of section (d) reveals its obvious meaning.

Section (d) plainly states that if collapse occurs after construction and is caused in part by a cause of loss listed in d(1)(a) through d(1)(d), Farmers will pay for the loss and damage, even if caused by defective construction. In other words, if the loss is caused by (a) a "specified cause of loss," (b) weight of people or personal property, (c) weight of rain that collects on a roof, or (d) use of defective material or methods in construction, then Farmers will pay for the loss.

It is not readily apparent that the section, as written, contains a typographical error. We cannot assume that an average consumer, on reading this portion of the contract, would conclude it contained a scrivener's error. The question is not whether a judge or legal scholar can, with study, comprehend the meaning of an insurance contract, but instead whether the insurance policy contract would be meaningful to the layman.[14]

14 *Boeing Co. v. Aetna Cas. & Sur. Co.,* 113 Wn.2d 869, 881, 784 P.2d 507 (1990) (quoting *Dairyland Ins. Co. v. Ward,* 83 Wn.2d 353, 358, 517 P.2d 966 (1974)).

The difficulty in finding a self-evident typographical error is compounded by the fact that the identical provision referring to causes of loss d(1)(a) through d(1)(d) appears twice more in the contract, at d(2)(b) and d(3)(h).[15]

15 The additional references provide coverage for personal property, and damage to incidental structures such as awnings, gutters, yard fixtures, and sidewalks.

Farmers argues that section (d) is circular, and that no provision of an insurance contract can incorporate itself. Accordingly, section (d) should not have contained a reference to itself, as it does in the second sentence.

Section (d) is self-referential. However, this circularity

does not necessarily imply the existence of a typographical error. Rather, it creates an ambiguity.

A clause is ambiguous if it is subject to two reasonable interpretations.[16] A contract provision is ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning.[17] Whether a contract is ambiguous or not is a question of law.[18] Where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied.[19]

16 *Weyerhaeuser Co.*, 142 Wn.2d at 666 (quoting *B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427–28, 951 P.2d 250 (1998)).

17 *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 275, 883 P.2d 1387 (1994).

18 *Syrovy v. Alpine Res., Inc.*, 68 Wn.App. 35, 39, 841 P.2d 1279 (1992), *aff'd,* 122 Wn.2d 544, 859 P.2d 51 (1993).

19 *Panorama Vill. Condo. Owners Ass' n Bd. of Dirs.,* 144 Wn.2d at 141 (quoting *Dairyland Ins. Co. v. Ward*, 83 Wn.2d 353, 358, 517 P.2d 966 (1974)).

***4** The insurance industry knows how to protect itself and knows how to write exclusions and conditions.[20] As our Supreme Court has noted:

20 *Boeing Co.*, 113 Wn.2d at 887.

> "The policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become expert upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself. Because of reasons such as these, whenever the contract of insurance is so drawn as to be ambiguous, uncertain and to require construction, the courts of this country resolve the doubt in favor of the insured and against the insurer, in accordance with the rule contra proferentem." [21]

21 *Labberton v. General Cas. Co. of Am.*, 53 Wn.2d 180, 183, 332 P.2d 250 (1958) (quoting *Montana Auto Finance Corp. v. British & Fed. Fire Underwriters*, 72 Mont. 69, 232 P. 198 (Mont.1924)).

In construing the language of an insurance policy, the entire contract must be construed together so as to give force and effect to each clause.[22] Although public policy supports the fair treatment of insurers, this concern is secondary to the protection of insureds.[23]

22 *Transcon. Ins. Co. v. Washington Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988) (citing *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn.2d 432, 434, 545 P.2d 1193 (1976)).

23 *Panorama Vill. Condo. Owners Ass' n Bd. of Dirs.,* 144 Wn.2d at 138 (quoting *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 358, 997 P.2d 353 (2000)).

The contract in question contains exclusions for decay and defective construction. It also specifically excludes coverage for collapse, except as provided in the additional coverage for collapse at issue here.

Farmers argues that Seaman's interpretation of section (d) would absurdly eviscerate those exclusions. But, a layman might well read the provision as carving out a specific exception to the exclusions, and reasonably consider *all* the listed causes of loss in section (d) to be included therein.

We agree that Seaman's interpretation of the policy language is somewhat strained, but it is not unreasonable. Farmers offers no different interpretation of the language as written. It instead asks us to rewrite the provision based on its assertion of a scrivener's error.

Farmers cites to *Smith v. Continental Casualty Co.*[24] for the proposition that a typographical error in an insurance policy does not necessarily create an ambiguity in the policy. In *Smith*, a provision in an insurance contract contained a sentence beginning with the word "for." The letter "f" in "for" was not capitalized.[25] The court held that while the word "for" should have been capitalized, the use of a lowercase letter was insignificant and the typographical error in no way changed the meaning of the provision or created an ambiguity.[26]

[24] 128 Wn.2d 73, 904 P.2d 749 (1995).

[25] *Smith*, 128 Wn.2d at 82.

[26] *Smith*, 128 Wn.2d at 82.

The *Smith* case is distinguishable. Farmers argues that the inclusion of the letter (d) instead of the letter (c) is an obvious scrivener's error. But, the contract does not contain a plain error, readily evident upon cursory examination. The parties are not in a dispute over an uncapitalized letter at the beginning of a sentence. Any scrivener's error, if error there is, has required close analysis, and created an ambiguity which must necessarily be construed against Farmers.

The ambiguity in the contract can be eliminated only by substituting the letter "c" for the letter "d" in the collapse coverage provision. Essentially, Farmers is asking this court to reform its insurance policy to make it read so as to provide the exclusion it wishes it had drafted.[27] This court cannot rewrite a contract or create a new one under the guise of judicial interpretation.[28] Nor may the court reform a contract to correct a scrivener's error unless the intentions of the parties are identical at the time of the transaction, but the written agreement errs in expressing that intention.[29]

[27] *Public Employees Mut. Ins. Co. v. Mucklestone*, 111 Wn.2d 442, 444, 758 P.2d 987 (1988).

[28] *S.L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wn.App. 297, 306, 540 P.2d 912 (1975).

[29] *Reynolds v. Farmers Ins. Co.*, 90 Wn.App. 880, 885, 960 P.2d 432 (1998).

***5** It is the burden of the insurer to draft a policy in clear and unequivocal terms.[30] The insurer, as drafter of the policy, is primarily responsible for defining the scope of coverage and ordinarily will not be allowed reformation, especially when to do so would result in denial of coverage.[31] To support a reformation of contract, there must be a showing of either fraud or mutual mistake.[32] There is no showing here of fraud, and no indication of mutual mistake.

[30] *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 694, 871 P.2d 146 (1994).

[31] *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn.App. 695, 698–99, 683 P.2d 215 (1984).

[32] *Rocky Mt. Fire & Cas. Co. v. Rose*, 62 Wn.2d 896, 902, 385 P.2d 45 (1963).

That Farmers can draft its contract so as to provide the coverage it wishes to provide is evidenced by the revision it made in the 2004–2005 version of the policy which is not at issue in this case. In that version, Farmers changed the second sentence of section (d) so that coverage would be provided only for causes of collapse d(1)(a) through d(1)(c). Thus, the 2004–2005 version of the contract unambiguously and explicitly supports Farmers' interpretation, and would require no modification to do so.

We hold that the contract provision covering collapse is ambiguous, and that the ambiguity can be cured only by reforming the contract. Consequently, the contract must be interpreted in favor of Seaman. We therefore reverse the trial court's grant of summary judgment in favor of Farmers, and grant partial summary judgment in favor of Seaman regarding the coverage provided in section d(1)(d).

Definition of Collapse

The policy does not define "collapse." The engineering report noted that numerous portions of the building were in a state of "imminent collapse." In its motion for summary judgment, Farmers requested that if the trial court found that the policy did cover collapse, that it limit coverage to damage which has reached a state of "imminent collapse." Seaman asks that this court hold that when "collapse" is not defined in a policy, the term means "substantial impairment of structural integrity."

Washington has not decided the meaning of "collapse" as used in insurance policies.[33] In *Mercer Place Condominium Association v. State Farm Fire and Casualty Company*,[34] a case in which the parties stipulated to the meaning of "collapse," this court examined the interpretation of the word "collapse" in other

jurisdictions, and found that:

33 *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn.App. 597, 602, 17 P.3d 626 (2000).

34 104 Wn.App. 597, 602, 17 P.3d 626 (2000).

> A growing majority of jurisdictions have assigned the more liberal standard, "substantial impairment of structural integrity," to the use of "collapse" in insurance policies, as opposed to the minority view, which requires that the structure actually fall down.[35]

35 *Mercer Place Condo. Ass'n,* 104 Wn.App. at 602 n. 1.

While it appears that case law favors a broader definition of collapse than the actual, sudden collapse of a building, it does not offer us a useful distinction between the terms advanced by the parties in this case. Under existing case law, either "imminent collapse" or "substantial impairment of structural integrity" could serve.

Since case law is unsettled regarding the definition of "collapse," and there is insufficient information in the record to guide this court in advancing a legal definition, we remand for a determination by the trial court, where expert testimony can provide guidance.

Bad Faith and Consumer Protection Acts Claims

***6** Seaman appeals the trial court dismissal of his bad faith and Consumer Protection Act (CPA) claims.

The question of whether an insurer has unreasonably denied coverage is generally an issue of fact.[36] However, when there is no dispute as to what the parties did, whether conduct constitutes an unfair or deceptive act can be decided as a question of law.[37]

36 *Liberty Mut. Ins. Co. v. Tripp,* 144 Wn.2d 1, 23, 25 P.3d 997 (2001).

37 *Leingang v. Pierce County Med. Bureau Inc.,* 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

If an insured claims an insurer denied coverage unreasonably in bad faith, then the insured must offer evidence that the insurer acted unreasonably.[38] The insurer is entitled to summary judgment if reasonable minds could not differ that its denial of coverage was based upon reasonable grounds.[39] If, however, reasonable minds could differ that the insurer's conduct was reasonable, or if there are material issues of fact with respect to the reasonableness of the insurer's action, then summary judgment is not appropriate.[40]

38 *Smith,* 150 Wn.2d at 486.

39 *Smith,* 150 Wn.2d at 486.

40 *Smith,* 150 Wn.2d at 486.

There are material issues of fact with respect to the reasonableness of Farmer's denial of Seaman's claim. The original letter denying coverage for Seaman's claim stated that the policy provided coverage for damage caused by a cause of loss listed in d(1)(a) through d(1)(d). On appeal, as in the court below, Farmers argues that section (d) contains an obvious scrivener's error which provides greater coverage than intended. However, the denial letter made no mention of such a scrivener's error. The letter did not state that the covered causes of loss should have consisted only of d(1)(a) through d(1)(c), and that the inclusion of d(1)(d) was erroneous. Rather, Farmers denied the claim based on a interpretation which included section d(1)(d). The reasonableness of Farmer's action is properly one for the finder of fact to determine.

To prevail on a CPA claim, Seaman must show: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) that injured the plaintiff's business or property; and (5) that the unfair or deceptive act complained of caused the injury suffered.[41] All five elements must be established by a plaintiff in order to prevail under a private CPA action.[42]

41 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co .,* 105 Wn.2d 778, 784–785, 719 P.2d 531 (1986).

42 *Hangman Ridge,* 105 Wn.2d at 784.

An insured may bring a private action against their insurers for breach of duty of good faith under the CPA.[43] Moreover, a breach of an insurer's duty of good faith constitutes a per se unfair trade practice.[44] An insurer's denial of coverage is not bad faith unless it is both frivolous and unfounded.

43 RCW 19.86.090; *Salois v. Mut. of Omaha Ins. Co.*, 90 Wn.2d 355, 358, 581 P.2d 1349 (1978).

44 *Levy v. N. Am. Co. for Life & Health Ins.*, 90 Wn.2d 846, 850, 856 P.2d 845 (1978).

Viewing the facts in a light most favorable to Seaman, we hold that reasonable minds could differ that Farmers' denial of coverage was based upon reasonable grounds, and that there are material issues of fact regarding whether Farmer's denial constituted an unfair or deceptive act. We therefore remand Seaman's bad faith and CPA claims for trial.

REVERSED AND REMANDED.

WE CONCUR: AGID and GROSSE, JJ.

All Citations

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