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A. D. Irwin Investments, Inc. v. Great Am. Ins. Co.

NO. 23560

IN THE SUPREME COURT OF THE STATE OF COLORADO

A. D. IRWIN INVESTMENTS, INC., a Colorado corporation,	)	Error to the District Court of the
Plaintiff in Error,	)	County of Jefferson State of Colorado
v.	)	
GREAT AMERICAN INSURANCE COMPANY,	)	HONORABLE ROSCOE PILE
Defendant in Error.	)	Judge

ANSWER BRIEF OF DEFENDANT IN ERROR

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ANSWER BRIEF OF DEFENDANT IN ERROR

I. STATEMENT OF THE CASE

This case stems from a declaratory judgment suit, Civil Action No. 30145, in the District Court in and for the County of Jefferson, State of Colorado, brought by the defendant in error, Great American Insurance Company, to determine as a matter of law whether there was coverage afforded its insured, Paul Walden, Inc., hereinafter called Walden, for certain claims of A. D. Irwin Investments, Inc., hereinafter called Irwin, or whether such

claims would be barred by an exclusionary clause of the policy. The court below, upon a stipulated set of facts, held that none of the alleged damage to property of Irwin by Walden was caused by "accident" within the meaning of the policy issued by Great American to Walden, and in addition, that each and every item of property damage claimed by the defendant, Irwin, to have been caused by "accident" was to goods or products sold, handled or distributed by the defendant, Walden, or was done intentionally by Irwin to remedy defects in such work products of the defendant, Walden, and as such, all items were therefore excluded from coverage by the terms of the policy issued to the defendant, Walden.

The facts upon which the declaratory judgment suit was decided in the court below are that Walden undertook, pursuant to a contract to install certain air conditioning equipment in an apartment building being constructed by Irwin. Irwin alleged that as a consequence of negligence on the part of Walden, various kinds of damage were sustained: First, that Walden failed to insulate the pipes so that in the summer, condensation was formed on the piping which in turn continually dripped upon and damaged the ceilings in the basement. Irwin has allegedly repainted the basement ceilings from time to

time only to have the damage reappear as the condensation continues; Second, claims were asserted by Irwin for the cost of tearing out the basement ceilings to reach and wrap the pipes to correct the condensation problem and also for the cost of the final repairing and repainting of the ceiling in the basement; Third, it was asserted by Irwin that certain motors installed by Walden were undersized and that said motors had to be replaced when some of them began to burn out from having run too continuously in order to fulfill their required function; Fourth, claims were asserted by Irwin to repair the access holes made in the ceilings of the apartments in order to reach the motors to replace the same; and finally, the last claim asserted by Irwin was for vibration damage to the foundation allegedly caused by the improper mounting of the refrigeration equipment by Walden.

II. SUMMARY OF THE ARGUMENT

A. THERE IS NO LIABILITY UNDER THE POLICY ISSUED BY DEFENDANT IN ERROR TO WALDEN TO PAY ANY OF THE FIVE CLAIMS OF IRWIN FOR THE REASON THAT THE SAME WERE NOT CAUSED BY "ACCIDENT."

B. CERTAIN CLAIMS OF IRWIN ARE EXPRESSLY EXCLUDED FROM COVERAGE BY THE TERMS OF THE POLICY ISSUED TO WALDEN.

III. ARGUMENT

A. THERE IS NO LIABILITY UNDER THE POLICY ISSUED BY DEFENDANT IN ERROR TO WALDEN TO PAY ANY OF THE FIVE CLAIMS OF IRWIN FOR THE REASON THAT THE SAME WERE NOT CAUSED BY "ACCIDENT."

The policy issued by defendant in error to Walden provides as follows:

> "Coverage C--Property Damage Liability--Except Automobile. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

Though the Colorado Supreme Court has not had occasion to consider the meaning of the term "accident" within the context of a liability insurance policy, the Tenth Circuit Court of Appeals has on numerous occasions interpreted the meaning of such provision. The most recent case to be considered by that court was the City of Aurora, Colorado v. Trinity Universal Insurance Co., 326 F.2d 905 (10th Cir. 1964). In that case the City of Aurora was operating an inadequate sewage system which during a rainstorm caused sewage and water to back up from the main into several residences. The city sought coverage

under a policy limited to coverage for damages caused by "accident." The court, in affirming the trial court's judgment of non-coverage, based upon a finding that the negligently caused flooding was the natural and probable consequence of heavy rains, which were foreseeable by a prudent person, stated in part:

> "We have repeatedly held, following State law of this Circuit, that a loss which is the natural and probable consequence of a negligent act is not 'caused by accident,' within the meaning of policies of this kind. * * * At the same time, we have been careful to recognize that negligently caused loss may be accidental, within the meaning of the policy, if in fact an immediate or concurrent cause of the loss is an unprecedented or unforeseeable event. In these circumstances, the loss is not the natural and probable consequence of the negligent act, and is hence caused by accident."

In Neale Construction Co. v. United States Fidelity and Guaranty Co., 199 F.2d 591 (10th Cir. 1952), a case arising in Kansas, the question was whether a claim for breach of a construction contract resulting in defective construction fell within the coverage of a comprehensive general

automobile liability policy issued to Neale Construction Company. The court, in holding that no accident had taken place, stated at page 592:

> "But even if there was broken spinning wire and the breaking thereof was unintentional, it nonetheless was not an accident as that term is used in the policy. The term 'accident' as used in policies of insurance has been variously defined. A good definition is found in Gilliland v. Ash Grove Lime and Portland Cement Co., 104 Kan. 771, 180 P. 793, 794, as follows:
>
> "'An accident is simply an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force.'
>
> "The natural and ordinary consequences of a negligent act do not constitute an accident. If one negligently erects a roof by the use of weak or inadequate rafters, the roof is liable to collapse but its fall is not an accident because such is the ordinary result of such construction. Here certain standards were required for these installations. Because of the negligent manner in which the wires

were spun certain damage resulted such as permitting the cables to sag and even creating the hazard of broken spinning wires, but these results were the usual, ordinary and expected results of such negligent construction. Such results were in no sense sudden, unexpected or unanticipated. When the means used and intended to be used produce results which are their natural and probable consequences, there has been no accident although such results may not have been intended or anticipated."

In the case of Hutchinson Water Co. v. United States Fidelity and Guaranty Co., 250 F.2d 892 (10th Cir. 1957), a Kansas case, the insured water company sought a declaratory judgment that it had coverage under a policy with the insurer for the claim of a customer that the water company had negligently failed to provide sufficient water to fight a fire. The policy under which coverage was sought was limited to the liability of the insured caused by accident. The court found that to be an accident within the meaning of the policy there must be an undesigned, sudden and unexpected event, usually of an afflictive or unfortunate character and often accompanied by a manifestation of force. Further, the court held that

the natural and ordinary consequences of a negligent act do not constitute an accident.

In another of the Tenth Circuit cases, Albuquerque Gravel Products Co. v. American Employers Insurance Co., 282 F.2d 218 (10th Cir. 1960), the insured was sued for negligent construction of a loading ramp built across a water course which in turn had diverted a stream onto the premises of the claimant. The insurer denied coverage and the insured sued to recover its defense costs and settlement made with the injured property owner. The policy was limited to damage caused by accident and the court held that since the floods were normal consequences of heavy rain and were foreseeable by a prudent person, that such floods were not accidents. The court, in its reasoning, pointed out that if the result is the normal consequence of a negligent act, it is not accidental.

Finally, in the case of Midland Construction Co., Inc. v. U. S. Casualty Co., 214 F.2d 665 (10th Cir. 1954), the court held that where the insured was hired to repair the claimant's roof and in the course of making such repairs, made an opening through which rain entered and damaged the stock of merchandise therein, that the shower which occurred

was not unusual or an unanticipated event and, therefore, was not an "accident" within the meaning of the policy. The court stated, in part, on page 666:

> "The meaning of the word 'accident' cannot be defined with pinpoint accuracy or definiteness. We sometimes speak of an event which is the usual, natural, and expected result of an act as an accident. But in legal parlance an accident under the terms of an insurance policy, such as we have here, is variously defined as an unusual and unexpected event, happening without negligence; an undesigned, sudden, and unexpected event; chance or contingency; happening by chance or unexpectedly; an event from an unknown cause or an unexpected event from a known cause. It may be that an unprecedented, torrential downpour of rain may under certain conditions be considered an accident, but afternoon showers--and this seems to have been an ordinary rain--are not unusual or unexpected. Common experience teaches that they happen frequently and are of common occurrence. A farmer may go forth in the morning with not a cloud in the sky to cut his alfalfa and yet have rain fall before evening. This is of such common occurrence

> that its happening cannot be said to be unexpected, unusual, or unanticipated, or beyond the ordinary experience of man."

Analysis of the above Tenth Circuit cases indicates that the basic proposition, as announced in the City of Aurora case, supra, is that a negligently caused loss is an "accident" when the basic cause of the loss is unprecedented or unforeseeable. The plaintiff in error, at page 14 of his brief, in referring to the Aurora case, supra, states that the test of whether an accident can be caused by a negligent act can only lead to a myriad of cases since the test is so incapable of application, and then goes on to state that the best solution is to simply state the rule of law that a negligent act which produces an unintended, unexpected and unforeseen damage is an accident, or conversely, that it is not an accident. It is interesting to note that this is exactly what the City of Aurora case, supra, has done, in that the court in that case stated that the negligently caused loss may be an "accident" within the meaning of the policy when in fact an immediate or concurrent cause of the loss is an unprecedented or unforeseeable event, because in such a case, the loss is not the natural and probable consequence of the negligent

act, and, therefore, is caused by accident. It is also interesting to note that the language of the court is that of accidental cause rather than accidental result, as the plaintiff in error would lead the Court to believe.

Plaintiff in error relies most heavily on the case of Bundy Tubing v. Royal Indemnity Co., 298 F.2d 151 (6th Cir. 1962), as grounds for saying that the series of Tenth Circuit decisions are wrong. Plaintiff in error construes the language of that case to mean that one should look at the result to determine if there is an "accident" rather than looking to the cause. However, the language of that case is as follows:

> "The failure of the tubing in the heating system in a relatively short period of time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident."

Obviously, the foregoing language indicates that the court is talking about the cause, namely the failure of the tubing, as being unforeseen, unexpected and unintended, and consequently, defendant in error finds it hard to construe such language as meaning that the unforeseen, unexpected and unintended result constitutes a

finding of "accident." The court, in that case, having determined that the failure of the tubing in a relatively short time was unforeseen, unexpected and unintended, came to the conclusion that it was an "accident." The same conclusion could also have been reached under the reasoning of the City of Aurora case, supra. Defendant in error submits that the Bundy case cannot be used for the proposition that even though the cause is not unforeseen, unexpected and unintended, it is still an "accident" within the meaning of the policy.

Considering the above in light of the facts of the present case, it is obvious that both the claim of vibration damage and the claim of condensation damage lack the elements of the unintended, unexpected or unforeseen which is required for there to be an "accident" within the meaning of the general liability policy in question. Also, the failure to adequately secure machinery, the installation of undersized motors, and the installation of unwrapped piping all were scientifically bound to have resulted in the very type of damage that is being claimed, and hence they were foreseeable and outside coverage under the policy in question.

Numerous other jurisdictions have also taken the view adopted by the Tenth Circuit Court. In the case of Bennett v. Fidelity and Casualty Co. of New York, 132 So. 2d 788 (Fla. 1961), a suit resulting from inundation of property as a result of alleged negligent reconstruction by the insured of a dam or dike in a drainage ditch, the court held that such was not an "accident" within the meaning of the policy, and hence, the insurer was not required to defend. It states, at page 790:

> "In literally hundreds of cases the courts of this nation have attempted to define the meaning of the word 'accident.' Many of the courts in their definitions have emphasized the element of the 'unexpected,' while other courts appear to recognize the popular concept of the word in their definitions so that a collision, though the result of negligence, may be considered an 'accident.' While it is not necessary for us to determine this question here, we are inclined to the view held by the latter Courts that simple negligence as a (causative) force does not necessarily preclude a happening from being classed as an accident. Nevertheless, we are of the view that the element of the 'unexpected' remains as an important element in any true legal definition of the term."

And in the case of American Casualty Co. of Reading, Pa. v. Minnesota Farm Bureau Service Co., 270 F.2d 686 (8th Cir. 1959), the insured sought to hold its insurer liable for any judgments against the insured for damages arising from vibrations, ammonia fumes, and powder or dust released from plaintiff's plant. Damage had continued over a period of some six years. The court stated:

> "We do not think that a happening which is known and open and which continues for a period of approximately six years can be considered accidental."

In the case of Kuckenberg v. Hartford A & I Co., 226 F.2d 225 (9th Cir. 1955), the insured contractor in the course of building a highway did blasting which caused rubble to fall upon a railroad track. It was agreed that the blasting caused unanticipated amounts of rubble to fall and that some of the damage was due to rocks being knocked off the bank during scooping operations and that some of the damage was due to trees falling down the hillside from which the natural coverage had been removed. The trial court found that the damage done was a reasonably anticipated, ordinary and expected result of the insured's operations and, therefore, did not result from accident. The

Circuit Court affirmed, stating that the fact that the injury was more extensive than anticipated does not suffice to make the damage accidental. The insured, to gain coverage under a policy limited to damage caused by accident, would have to establish that he could not reasonably anticipate his conduct would cause substantial harm of the type which occurred. In the case of M. R. Thomason v. U. S. Fidelity and Guaranty Co., 248 F.2d 417 (5th Cir. 1957), the insured contractor had inadvertently cleared the wrong property inflicting damage on the owner thereof. The insured sought coverage under a policy covering damage caused by accident. The court held that there was no coverage because it was not sufficient that the injury be unusual and unexpected, but rather the cause itself must have been unexpected and accidental. The court stated at page 419:

> "* * * Where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen and unintended. There was no insurance against liability for damages caused by mistake or error. The cause of the injury was not an accident within the meaning of the policy."

In the case of M. Schnoll & Son, Inc. v. Standard Accident Insurance Co., 190 Pa. Super. 360, 154 A.2d 431 (1959), the insured, while painting gables, dripped paint on siding of 52 houses and was required to repaint the same. The policy covered liability caused by accident and the question was whether the dripping of paint was an accident within the meaning of the policy. The court held that accidents are not occurrences which are the ordinary or expected result of performance of an operation, and drippings are the ordinary and expected result of painting. The court states at page 432:

> "* * * To hold that the resulting damage was caused by accident within the meaning of the policy would be, in effect, to constitute appellant a guarantor of perfect performance. Such liability was never intended."

The court further stated at page 433:

> ". . . the result in the incident case was in no sense sudden, unusual, unexpected, unforeseeable or unanticipated."

In the case of East Meadow Plumbing Contractors, Inc. v. Zurich Insurance Co., 41 Misc. 2d 670, 246 N.Y.S.2d 159 (1963), a general contractor was

forced to rip up floors and correct plumbing work improperly done by the insured plumber. The plumber sought coverage under a policy requiring that the damage be caused by accident. The court found no accident and hence no liability on the insurance company, citing with approval a case which held that for there to be an accident the event must occur without foresight or expectation from an unknown cause or be an unusual effect of a known cause, and therefore, not expected. The court also cited another case to the effect that to be an accident, an event must occur upon the instant rather than be something which continues, progresses or develops.

Finally, in the case of U. S. Fidelity and Guaranty Co. v. Briscoe, 239 P.2d 754 (Okla. 1951), the insured contractor unloaded cement over a four-month period releasing the same into the atmosphere in such a manner as to cause injury and property damage to third persons who brought actions against the contractor. The contractor sought coverage under a policy which required that the damage be caused by accident. The court held there was no accident, stating that if the contractor performs or does a voluntary act, the natural, usual and to be expected result of which is to bring injury or damage upon himself, then

the resulting damage so occurring is not an accident in any sense of the word, legal or colloquial. The court further stated that such an event as an accident within the insurance policy herein sued upon is a distinctive event that takes place by some unexpected happening, the date of which can be fixed with certainty. The court further stated that to be an accident the incident or occurrence must have arisen from an event capable of being identified with respect to time, place and circumstances and that in the case at bar there was not the least lingering semblance of any sudden event, any unforeseen occurrence, or any unexpected happening which took place during the unloading or handling of the cement by the contractor during the four-month period.

See also: New York Casualty Co. v. Barbieri, 196 Misc. 203, 90 N.Y.S.2d 107 (1949); Cametal Corp. v. National Automobile & Casualty Ins. Co., 11 Cal. Rptr. 280 (1961); Foreman v. Jordan, 131 So. 2d 796 (La. 1961); Rosalia v. Hartford Accident & Indemnity Co., 48 Misc. 2d 862, 266 N.Y.S.2d 3 (1965); Industrial Sugars, Inc. v. Standard Accident Ins. Co., 338 F.2d 673 (7th Cir. 1964); Town of Tieton v. General Ins. Co., 380 P.2d 127 (Wash. 1963); C.Y. Thomason Co. v. Lumberman's Mutual Casualty Co., 183 F.2d 729 (4th Cir. 1950); United Pacific Ins. Co. v. Schaecher, 167 F.Supp. 506 (N.D. Cal. 1958); and Hardware Mutual Casualty Co. v. Gerrits, 65 So. 2d 69 (Fla. 1963).

On the basis of the principles of the foregoing cases, defendant in error respectfully submits that the damage in question was not caused by "accident" as the cause was not unprecedented or unforeseeable, nor was a specific event involved, but rather a long continued condition, and finally, failure to adequately secure the machinery, installation of undersized motors, and installation of unwrapped piping all were scientifically bound to have resulted in the very type of damage that is being claimed, and hence, no coverage exists under the policy.

Defendant in error also wishes to point out that though plaintiff in error at page 8 in his brief makes the argument that there was insufficient evidence as a matter of law to support the trial court's findings of fact that none of Irwin's damages occurred from an instant or sudden, unexpected event or accident, such argument is superfluous in light of the fact that plaintiff in error joined with the defendant in error in the court below in requesting that court to make the declaratory judgment on the basis of the stipulated facts. Defendant in error now finds it hard to believe that plaintiff in error would contend that such judgment was on the basis of insufficient facts.

B. CERTAIN CLAIMS OF IRWIN ARE EXPRESSLY EXCLUDED FROM COVERAGE BY THE TERMS OF THE POLICY ISSUED TO WALDEN.

Exclusion (j) of the policy lists several items which are excluded from coverage. Part (4) of Exclusion (j) provides as follows:

> "(4) any goods, products or containers thereof manufactured, sold, handled or distributed to premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises; * * *."

It is the contention of the defendant in error, Great American Insurance Company, that the effect of this exclusion would be to eliminate from coverage the claims by Irwin for the following items:

1. The expense of replacing any of the air conditioning equipment;

2. The expense of wrapping any piping to prevent its forming condensation which drips upon or damages the ceilings in the basement; and

3. The expense of repairing the ceilings intentionally damaged in

replacing any of the air conditioning equipment. The following authorities are cited in support of the above proposition:

In the case of Kendall Plumbing, Inc. v. St. Paul Mercury Insurance Company, 139 Kan. 528, 370 P.2d 396 (1962), the insured plumber had contracted to install a heating and air conditioning system for the plaintiff. The starter on the system shorted and damaged the system. There was an exclusion in the plumber's policy such as exists in the policy of Paul Walden, Inc. relative to goods handled and work completed by the insured. The insured paid his contractee for the damage and brought suit against his insurer for re-imbursement. The court states at page 397:

> "* * * It is clear that the policy was intended to cover only damage to property or items which had not been handled by appellant. Goods or products handled by it, or work completed by it, were specifically excluded."

The court goes on to hold that as a result of the exclusion no coverage would exist for the plumber for the damage sustained by the system installed by it.

In the case of Heyward v. American Casualty Company of Reading, Pa., 129 F.Supp. 4 (E.D. S.C. 1955), the insured heating contractor had a plumbing and heating contract with a housing authority to do all heating and plumbing for a large housing project. A gas line laid by the insured exploded and the plumber was sued by a person injured in the explosion. The court, at page 8, discusses the exclusions like the one in the instant case relating to products handled by the insured. The court states:

> "* * * This Exclusion means that the policy will not protect the insured if he has to repair or replace some product or work which proved defective and caused an accident."

In the case of Volf v. Ocean Accident and Guarantee Corp., Ltd., 50 Cal. 2d 373, 325 P.2d 987 (1958), the insured contractor had put stucco on a house built for one Hoover. The stucco cracked. The question was whether the claim for replacement of the stucco was covered under a general liability policy which had the usual goods or products sold or handled exclusion like the one in the instant case. The court states that the injury is excluded "for it was to a product 'manufactured, sold, handled, or distributed . . . by the

named insured' as well as to 'work completed by . . . the named insured.'"

In the case of Aetna Casualty and Surety Company v. Hottel, Inc., 289 F.2d 457 (D.C. Cir. 1961), the insured had installed an air conditioning system in an apartment building which system allegedly broke down repeatedly as a result of negligent maintenance by the insured. When the apartment owner sued the insured he third-partied in his carrier, Aetna, seeking indemnity and defense costs from it. The court states at page 458:

> "* * * But the terms of Coverage B cannot be applied in this case. The policy states certain 'Exclusions,' one of which is: 'This Policy does not apply . . . (h) under Coverage B, to injury to or destruction of . . . any goods, products . . . manufactured, sold, handled or distributed . . . by the named insured, or work completed by or for the named insured out of which the accident arises . . . .' Brandywine's (apartment owner) complaint against Hottel (insured) alleges no injury to or destruction of any property except the air-conditioning system which Hottel, the named insured, installed. If an 'accident' within the meaning of Coverage B is alleged,

which is quite doubtful, it 'arises . . . out of' this property and is therefore within Exclusion clause (h)."

In the case of McGann v. Hobbs Lumber Company v. Aetna Casualty & Surety Co., 145 S.E.2d 476 (W. Va. 1965), McGann had hired Hobbs, the insured contractor, to construct a residence. Six months after completion of the residence the foundation wall collapsed and Hobbs joined his insurer as a third party defendant when it denied coverage to him. The policy had the usual exclusion (j), which provided that the policy did not apply to any goods, products, manufactured, sold, handled or distributed or premises alienated by the named insured or work completed by or for the named insured out of which the accident arises. The court states at page 479:

"* * * It must be kept in mind that the policy in question is a liability policy, not one insuring the property or work of the insured. Covered is any damage caused by the products or operations used or completed by the insured. In other words, if any product used in the operations of the insured or any work completed by the insured causes damage to any property of another for which the insured may be legally liable, the insurer is

liable under this policy. This appears to lend coverage to Hobbs in this case, and it would, except for Exclusion (j) (4) contained in the policy. At this point Hobbs contends that such exclusion is in direct conflict with (D), listed under the General Liability Schedule and quoted above. We do not agree with this contention . . .. As noted above, Exclusion (j) (4) clearly provides that this policy does not apply to premises alienated by the insured or to work completed by the insured out of which the accident arises. It is undisputed that the damaged premises here involved was that alienated by the insured and was work completed by the insured out of which the accident arose."

In the case of Vobill Homes v. Hartford Accident and Indemnity Company, 179 So. 2d 496 (La. 1965), writ refused 248 La. 698, 181 So. 2d 398 (1966), one Birge sued Vobill, the insured, for the cost of repairing defects in a house constructed by Vobill pursuant to a contract with Birge. The defects were allegedly due to faulty construction. The policy under exclusion (j) (4) provided that it did not apply to any goods, products or containers thereof manufactured, sold, handled or distributed or premises alienated by the named

insured or work completed by or for the named insured out of which the accident arises. The court agreed with the contention of the insurer that the claims were excluded by the quoted exclusion and stated that:

> "For this reason it has uniformly been held that a liability policy with an exclusion clause such as the present does not insure any obligation of the policyholder to repair or replace his own defective work or defective product."

And further states:

> "The interpretation to this effect of the exclusion clause has also consistently been recognized by other decisions which did allow coverage for damages to other property or for other accidental loss resulting from the defective condition of the work product (even though recovery for the injury to the work product itself was excluded by the clause in question)."

In addition, the court states at page 498:

> "In the present suit, the house defects for which recovery is sought by Vobill's customer falls squarely within the risk specifically excluded from coverage under the

> policy issued to Vobill by the insurer Hartford herein, which excluded from coverage any injury to the work product itself by reason of its own defectiveness. The trial Court correctly held that Hartford's policy did not insure Vobill against the loss sued for."

In the case of Liberty Building Company v. Royal Indemnity Company, 2 Cal. Rptr. 329, 177 Cal. App. 2d 583 (1960), stucco had cracked on buildings built by the insured due to a soil condition. The policy of the insured had the usual exclusion providing that the policy did not apply to injury to or destruction of goods or products manufactured, sold, handled or distributed or premises alienated by the named insured or work completed by or for the named insured out of which the accident arises. The court stated at page 331:

> "* * * This Exclusion means that if the insured becomes liable to replace or repair any 'goods or products' or 'premises alienated' or 'work completed' after the same has caused an accident because of a defective condition, the cost of such replacement or repair is not recoverable under

the policy. However, if the accident also caused damage to some other property or caused personal injury, the insured's liability for such damage or injury becomes a liability of the insurer under the policy, and is not excluded. For example, if a contractor builds a house and as a result of an improper mixture of the stucco, water is absorbed into the walls and the stucco cracks and falls off and a child is injured by the falling stucco, the injury to the child would not be excluded under Exclusion (f) but the replacement cost of the stucco would be excluded. Also, if the water absorbed into the walls should reach the interior walls and injure a valuable painting hanging there, the damage to the painting would be recoverable under the policy while the damage to the walls would not. The principal here applicable is well stated in Heyward v. American Casualty Company of Reading, Pa., D. C., 129 F.Supp. 4. At Page 8 the Court said: 'This Exclusion means that the policy will not protect the insured if he has to repair or replace some product or work which proved defective and caused an accident. The Exclusion has no reference to liability for damage to other property

> or personal injury arising out of such accident.' In accord are Volf v. Ocean Accident and Guarantee Corp., Ltd., 50 Cal. 2d 373, 325 P.2d 987; Geddes & Smith, Inc. v. St. Paul Mercury Indemnity Co., 51 Cal. 2d 558, 334 P.2d 881."

The Bundy case, supra, relied on by plaintiff in error is also authority for the defendant in error's above proposition. At page 153 of that case they state:

> "The Exclusion clause eliminated recovery for 'any goods or products manufactured, sold, handled or distributed. * * *' Under this clause no recovery may be had for the value of the defective tubing or the cost of new tubing to replace it."

Based on the reasoning of the above cases, it is obvious that the expense of replacing any of the air conditioning equipment, including motors, is excluded from coverage as the policy does not protect the insured if he has to repair or replace some product he installed or work he did which proved defective. Also, the necessity of damaging the ceiling in order to get to the air conditioning equipment

would have arisen regardless of whether the equipment proved defective, as the owner would have had to service such equipment. In addition, it is obvious that the responsibility for not making access holes in the ceiling in order to reach such equipment rests with Irwin or his general contractor and not with the mechanical contractor.

IV. CONCLUSION

It is respectfully submitted that the damage sustained by the plaintiff in error, Irwin, was not caused by "accident" within the meaning of the policy, and is, therefore, not covered by the policy issued to Walden. Further, Exclusion (j) of the policy would bar any claims against the insurer for the expense of replacing any of the air conditioning equipment, including motors, as the policy does not protect the insured if he has to repair or replace some product he installed or work he did which proved defective.

Respectfully submitted,

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