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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, Plaintiff in Error, v. GREAT AMERICAN INSURANCE COMPANY, Defendant in Error.	Error to the District Court of the County of Jefferson State of Colorado HONORABLE ROSCOE PILE Judge

BRIEF OF PLAINTIFF IN ERROR

H. EARL MOYER
LEONARD L. BEAL

Suite 201, 1401 Saulsbury St.
Lakewood, Colorado 80215

Attorneys for
Plaintiff in Error

INDEX

Page

TABLE OF CASES CITED

Page

OTHER AUTHORITY

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Plaintiff in Error,	County of Jefferson State of Colorado
v.	
GREAT AMERICAN INSURANCE COMPANY,	HONORABLE ROSCOE PILE
Defendant in Error.	Judge

BRIEF OF PLAINTIFF IN ERROR

I. NATURE OF THE CASE

This case is an outgrowth of an original action filed in the same division of the District Court in and for the County of Jefferson, State of Colorado which was entitled A. D. IRWIN INVESTMENTS, INC., et al. v. PAUL WALDEN, INC., et al., being No. 21170. When this original action was pretried it was agreed by all counsel concerned, being the same

counsel herein, that a separate suit by the insurance carrier against the original plaintiff Irwin to determine as a matter of law whether there was coverage afforded by the policy in force, by use of complaint for declaratory judgment, would be the most logical and shortest means of resolving a necessary point of law without a full dressed jury trial covering matters of damage as well as liability of original defendant who has been adjudicated a bankrupt in United States District Court since this protracted litigation was commenced.

To this end a complaint for declaratory judgment with the insurance policy attached as "Exhibit A," was framed which in essence set forth, when read together with the answer, a stipulated set of facts. Briefs were submitted by each party and after argument based on briefs the trial judge entered his findings of facts and conclusions of law. Plaintiff in error, A. D. Irwin Investments, Inc., hereinafter referred to as Irwin, takes exception to the critical findings of facts and conclusions of law touching the area of findings and conclusions on "accident" within the meaning of the policy in question, and exclusions from coverage under the terms of said policy.

II. SUMMARY OF THE PLEADINGS

The pleadings consist of a complaint for declaratory judgment (ff. 4-20E), setting forth that Great American Insurance Company, hereinafter called the Company, had in force a liability insurance policy issued to Paul Walden, Inc., hereinafter called Walden, a specimen copy of which is attached as "Exhibit A"; said policy contained under exclusions:

> "Exclusions (J) . . . Under coverage C, to injury to or destruction of . . . (4) 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; . . ." (Emphasis supplied.)

That Irwin asserted claims for damages against Walden in Civil Action No. 21170, pending in Jefferson County District Court entitled: A. D. IRWIN INVESTMENTS, INC., et al. v. PAUL WALDEN, INC., et al., allegedly arising from installation of a heating and air conditioning system by Walden in an apartment building owned by Irwin, said damages consisting of:

a. The expense of replacing certain of the machinery which was inadequate to perform its assigned function.

b. The expense of reparing the ceilings intentionally damaged in replacing the machinery referred to in item a, above.

c. The expense of wrapping certain piping to prevent its forming condensation which condensation drips upon and damages the ceilings in the basement.

d. The expense of redecorating the ceilings damaged by the condensation referred to in item c, above.

e. The expense of repairing walls damaged by the vibration of the chiller, a part of the air conditioning equipment, which was not sufficiently mounted.

that the Company had denied coverage to Walden on basis that claims were not caused by accident, and alternatively contends that the Irwin claims are excluded, and lastly the Company contends if claims are covered, then the same are limited by policy terms; that Irwin and Walden contend the claims of Irwin are covered by said policy and are not limited to $25,000.00, the policy limit for each accident; and the complaint ends with the prayer for a judgment declaring that no coverage exists under the policy for any of Irwin's claims (f. 10).

Defendant Irwin (ff. 74A-76A) admits the allegations contained in the complaint, but alleges that there is

coverage for the various claims asserted by Irwin and that the "exclusions" are inapplicable to said claims, and concluded with a prayer for a judgment declaring that coverage exists under the policy issued by the Company for all the claims asserted by Irwin against Walden.

Defendant Walden in its answer (ff. 74-76) in effect states a like position to that stated by Irwin's answer.

III. SUMMARY OF EVIDENCE

Due to the fact that this matter was heard by the court solely by way of argument based upon the pleadings and briefs submitted to the trial court (which are contained respectively at folios 21-70 for the Company's brief, and folios 77-90 for Irwin), and in absence of record on argument, there is no additional summary of evidence necessitated for the purpose of this appeal.

IV. FINDINGS OF THE COURT

The trial court, sitting as trier of fact and law, at folios 93 and 94, adopted the facts as stipulated to by the parties by way of complaint and answer in finding in essence that Walden did air conditioning design and installation in an apartment building constructed for Irwin, which

was accomplished by Walden so as to cause damages to Irwin which were:

a. The expense of replacing certain of the machinery which was inadequate to perform its assigned function.

b. The expense of repairing the ceilings intentionally damaged in replacing the machinery referred to in item a, above.

c. The expense of wrapping certain piping to prevent its forming condensation which condensation drips upon and damages the ceilings in the basement.

d. The expense of redecorating the ceilings damaged by the condensation referred to in item c, above.

e. The expense of repairing walls damaged by the vibration of the chiller, a part of the air conditioning equipment, which was not sufficiently mounted.

The trial court further found that none of said damage occurred from an instant or a sudden, unexpected event or accident (f. 95), which folio also includes the court's finding that the plaintiff wrote a comprehensive general liability policy for the defendant, Walden, which policy insured the defendant, Walden, subject to exclusions and limitations against the claims of

defendant, Irwin, for property damage caused by accident.

The conclusions of law reached by the court (f. 96) were as follows:

That none of the damage to property of the defendant, Irwin was caused by "accident" within the meaning of that term in the policy issued by the plaintiff to the defendant, Walden.

That each and every item of property damage claimed by the defendant, Irwin, to have been caused by "accident" was the goods or products sold, handled or distributed by the defendant, Walden, or was done intentionally to remedy defects in such work or product of the defendant, Walden, and as such all items are excluded from coverage by the terms of the policy issued to defendant, Walden.

V. SUMMARY OF THE ARGUMENT

The issues that the plaintiff in error Irwin seeks review upon are:

A. There is 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.

B. The trial court erred as a matter of law in ruling (by a total construction of the trial court's judgment) that the meaning of the word "accident" under a general liability policy must be limited to "an instant, or a sudden, unexpected event or accident."

C. The trial court erred as a matter of law in considering that Irwin's damages were not caused by "accident" within the meaning of that term in the policy in question.

D. The trial court erred as a matter of law in concluding that Irwin's damages were excluded from coverage by terms of policy in question.

VI. ARGUMENT

A. There is 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.

B. The trial court erred as a matter of law in ruling (by a total construction of the trial court's judgment) that the meaning of the word "accident" under a general liability policy must be limited to "an instant, or a sudden, unexpected event or accident."

C. The trial court erred as a matter of law in considering that Irwin's damages were not caused by "accident" within the meaning of that term in the policy in question.

These three sections are combined for argument since the cases cited and argument on each are so correlated that time will be saved thereby.

This is a case of first impression in this jurisdiction on this particular point, i.e., the definition of the word "accident" in a general liability policy of insurance wherein the policy language itself is silent as to definition of this critical word. The policy provisions (f. 18c) provide:

> "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." (Underscoring supplied.)

The failure to define the word "accident" in such policies has led to

a considerable number of court decisions in practically all states and federal circuits with conflicting holdings from state to state and even irreconcilable variances in some states from decision to decision, depending upon the equities of the fact situations. Clearly there are two lines of authorities at conflict with one another (with subdivisions within the main thrust of conflicting lines of authority) and no attempt to set forth all authorities will be undertaken since a consideration of the total number of cases printed would be prohibitive in time and volume. Suffice it to be said that this Court may take any one of several positions on this point and rely on ample authority by numbers. A quick check of the West Digest System under "Insurance," 433(2), 437(2), and 435-438 will be all that is necessary.

The question then becomes, "Which definition and rule of law will be the best for this jurisdiction to adopt"?

When it was stated above that this was a case of first impression for this jurisdiction, it was to indicate the Colorado Supreme Court, for there have

been several cases handed down by the Tenth Circuit Court of Appeals, including one involving a Colorado fact situation, City of Aurora, Colorado v. Trinity Universal Insurance Co., 326 F.2d 905 (10th Cir. 1964).

The series of Tenth Circuit Court of Appeals cases ruling on this point originated in the jurisdictions of Kansas and Oklahoma where that court determined itself to be bound by the then existing state law of those jurisdictions. In the absence of a Colorado Supreme Court decision, when the point raised concerned a Colorado fact situation, that court carried forward its prior holdings from other jurisdictions into this State. This Court is not bound by such precedent. Erie v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, and it is submitted that from the awkward position that court has placed itself, its rule of law on the definition of "accident" should be rejected by this Court, as was done by the United States Court of Appeals (Sixth Circuit) in its holding in Bundy Tubing v. Royal Indemnity Co., 298 F.2d 151 (1962), when it analyzed the series of cases decided on this point by the Tenth Circuit Court.

The Tenth Circuit Court cases are comprised of Neale Construction Co. v. United States Fidelity & Guaranty Co., 199 F.2d 591; Midland Construction Co. v. United States Casualty Co., 214 F.2d 655;

Hutchinson Water Co. v. United States Fidelity & Guaranty Co., 250 F.2d 892; Albuquerque Gravel Products Co. v. American Empire Insurance Co., 282 F.2d 218, and City of Aurora, Colorado v. Trinity Universal Insurance Co., 326 F.2d 905.

In the Hutchinson case Judge Murrah in reviewing the previous cases defining accident under general liability policies came to this disturbed conclusion:

> "Apparently we did not contemplate whither this logic would lead us. For, if the policy did not cover the loss because the natural and probable consequences of the negligent act did not constitute an accident, then by the same logic, there would be no liability where the damage was the unexpected, hence unforeseen result of the negligent act. In the first instance, the damage would be foreseeable and therefore not accidental; in the latter instance, the damage would not be foreseeable and hence no liability upon the insured for his negligent acts. In either instance, the insuror would be free of coverage and the policy would be rendered meaningless."

In an effort to avoid this trap, Judge Murrah in the City of Aurora case attempted to lay down revised guidelines:

"We have repeatedly held, following the 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 unpredictable 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." City of Aurora, Colorado v. Trinity Universal Insurance Co., 326 F.2d 905.

In commenting on this refinement, we are at a loss to know what "the state law of this circuit" means. Such creature is unknown to us. It is interesting that the last half of the quotation uses Bundy Tubing v. Royal Indemnity Co., 298 F.2d 151, as authority. Most important is the observation that this refinement has the effect of trying to create two degrees of negligence: one, that produces damages that are foreseeable and therefore not an accident, and a second that produces damages that are unforeseeable and therefore an accident. This play on words must logically end in the anomaly

that if one is careless and negligent in manner to produce a foreseeable damage it is not an accident; it is for practical purposes intentional, since it is foreseeable.

This 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. Surely the best approach to this problem 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." This has been the approach of the vast majority of the courts. A small sampling of those decisions which include the unintended result of negligence in the definition of accident under the provisions of a general liability policy are as follows: Koehring Co. v. American Auto Insurance Co., 353 F.2d 993; Robert Hawthorne, Inc. v. Liberty Mutual Ins. Co., 150 F. Supp. 829, aff'd 251 F.2d 343; Bundy Tubing Co. v. Royal Indemnity Co., 298 F.2d 151; Geddes and Smith, Inc. v. St. Paul Mercury Indemnity Co., 334 P.2d 881; Halenstein v. St. Paul Mercury Indemnity Co., 242 Minn. 354, 65 N.W.2d 122; Ocean Accident & Guaranty Corp. v. Penick & Ford, 101 F.2d 492; and Brant v. Citizen's Mutual Auto Ins. Co., 4 Mich. App. 596, 145 N.W.2d 410.

In a review of the applicable cases defining the word "accident" within the terms of a general liability policy it is apparent that definitions made by the various courts have become more liberal and have departed from the earlier widely held definition which turned on the nature of the act rather than the result. An example of this strict approach is to be found in M. R. Thompson v. United States Fidelity & Guaranty Co., 248 F.2d 417, wherein the Tenth Circuit Court held:

> "Where the acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though the result may have been unexpected, unforeseen and unintended."

Compare the reasoning behind the Thompson case with the court's reasoning in Geddes and Smith, Inc. v. St. Paul Mercury Indemnity Co., 334 P.2d 881, wherein it held on page 884 that the word accident "includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Also: "accident as a source and cause of damage to property, within the terms of an accident policy, is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." Halenstein v. St. Paul Mercury Indemnity Co., 242 Minn. 354, 65 N.W.2d 122.

It is felt that the leading case on this point in view of the trend of the cases to this date is Bundy Tubing Company v. Royal Indemnity Co., 298 F.2d 151.

In that case the defendant was the manufacturer and supplier of steel tubing used in the radiant heating systems wherein the tubing was installed in concrete floors to carry hot water. The tubing cracked and failed, causing water damage in addition to resulting in an inoperative heating system. The court held at page 153:

> "In our opinion, property was damaged by the installation of defective tubing in a radiant heating system which caused the system to fail and become useless. A homeowner would never have such equipment installed if he knew that it would last only a very short time. A home with a heating system which did not function would certainly not be suitable for living quarters in the wintertime. The market for its sale would be seriously affected.
>
> "The failure of the tubing in the heating system in a relatively short time was unforeseen, unexpected and unintended. Damage to the property was therefore caused by accident."

Here, under the modern view, it is the unforeseen, unexpected and unintended result which results in a finding of "accident," even though the acts which produced such results were in performance of contract and intentional in all regards.

Applying the logic of the Bundy case to Irwin, even though the original work performed by Walden was per contract and clearly intended, the results produced by said acts were a malfunctioning heating and air conditioning system which failed to work, necessitated component replacements caused condensation damage to plaster, paint, tile and interior walls and studs, vibration damage to walls and structure, and necessitated changes in hallway ceilings and decorations to accommodate component replacements. That these results were anticipated by Irwin in a newly erected 40-unit apartment rental complex within a period of six weeks is not consonant with fact. To him, the person affected thereby, these results were obviously unforeseen, unexpected and unintended. To Irwin an "accident" had occurred to his economic damage.

D. The trial court erred as a matter of law in concluding that Irwin's damages were excluded from coverage by terms of policy in question.

The restrictions imposed in the exclusions feature of the insurance policy in question appear on their face to contradict other portions of the insurance policy in question, which portions (ff. 12, 13, 14, 18) are located on the first page of the insurance policy. The insurance policy assesses a premium on the title page of said policy for property damage liability, and then attempts to vitiate said policy by the exclusion clause which is contained in small print on the inside pages of said insurance policy. Defendant Irwin's brief sets forth the applicable laws and court decisions regarding such ambiguous interpretation of insurance policies (ff. 84, 85, 86, 87).

All of the jurisdictions are in agreement that the insurance company may not completely contract away its exposure to liability by such exclusionary provisions and virtually all interpretations of these exclusionary features limit the exclusion to the product which was constructed or manufactured in a negligent manner, or to work performed in a negligent manner. Moreover, nearly all jurisdictions recognize that such exclusions are inapplicable as to damage resulting to other property or goods which were not manufactured, sold, handled or distributed by the insured party, or by work completed by said insured party.

The plaintiff insurance company itself recognizes this view as is set forth in plaintiff's brief to the trial court, folios 55 through 68, which brief concludes by stating that the exclusion in question would bar the claim against the plaintiff insofar as the claim related to replacement or repair of any portion of the air conditioning system installed by Paul Walden, Inc. However, plaintiff misunderstands the nature of this exclusion insofar as it relates to the wrapping of the pipes in the existing system since this wrapping is not being required as a consequence of repairing damages to the system itself, but is however a means of minimizing the future damage to other property and goods which were not handled by the assured, and hence are properly covered in the insurance policy itself and are not excluded therein. The cases quoted by the plaintiff all support the theory that damages resulting to goods or products handled by the negligent party, or work completed by said negligent party are excluded; however, these same cases quoted by the plaintiff hold that the exclusionary clause is inapplicable where damages to other property results rather than damage to those goods, products or work completed by the negligent party is concerned.

Under this reasoning, the courts have allowed recovery for damage to property sustained by reason of defective goods or products, or work done in a negligent manner. The Bundy case previously referred to in this brief limited recovery for damages when it held "the value of the defective tubing or the cost of new tubing cannot be included as part of the damage. The cost of removing defective tubing and the cost of installing new tubing is recoverable."

The courts have gradually restricted the exclusionary "escape hatch" and in a large number of cases have extended the coverage under the policy to allow recovery for the cost of goods or products handled by the assured, or work completed by the assured in a negligent manner. The Geddes case allowed recovery not only for the cost of removal of defective aluminum storm doors but also for the cost of installation of the new product which was required to restore the injured party to normalcy. Geddes and Smith, Inc. v. St. Paul Mercury Indemnity Co., 51 Cal. 2d 558, 334 P.2d 881 (1959). This case is bottomed on Halenstein v. St. Paul Mercury Indemnity Co., 242 Minn. 354, 65 N.W.2d 122, in which both the defense of no accident under the terms of the policy and the defense of exclusionary clause were raised by the insurance company and rejected by the court. This case

involved plaster on walls and ceilings of a building which shrank and cracked and necessitated replacement. The court held that "injury to the plaster itself was excluded from coverage" as representing the cost of the replacement product; but allowed all other costs necessary to restore the building to its former condition, or diminution of market value, whichever is the lesser measure of the damages.

The condensation damage set forth as one of the undisputed facts in the pleadings (ff. 8, 75) is not one subject to plaster, paint and tile repair unless the same be on an annual repetitive basis for the life of the building. The obvious alternative is a revision, modification or addition to the air conditioning system to eliminate the repetitive condensation damage to other goods or property which is admittedly not barred by the operation of the exclusionary clause. This clearly is a valid measure of damage under the cases previously cited in this section, which the trial court in its Findings of Fact and Conclusions of Law failed to consider.

This proper measure of damage was not brought into play by the trial court because the trial erroneously held there was no "accident" as

required by the policy provisions, and further by the holding that the exclusionary clause barred recovery for any element of damage.

Assuming that the trial court committed error in determining that there was no "accident" under the policy provisions, then clearly, the trial court's holding that all of defendant Irwin's acknowledged damages were barred by the exclusionary clause was also in error.

VII. CONCLUSIONS

Plaintiff in error submits to the Court that there was error committed by the District Court in finding that no "accident" occurred which would render defendant in error liable under the terms of the general liability policy in question. Granting there is authority to support the holding of the trial court, it is suggested that the contrary line of authority supporting a finding of accident under such circumstances, is the more modern view and the most desirable position on this point to be embraced by this jurisdiction.

The plaintiff in error further submits that the holding of the District Court that all of plaintiff in error's damages were barred by the exclusionary clause is obviously error for those elements of damage sustained by items not being

goods, products, or work completed by the insured of defendant in error.

WHEREFORE, this plaintiff in error prays that an order be entered setting aside the judgment entered by the District Court in favor of the defendant in error, Great American Insurance Company, and against the plaintiff in error, Irwin Investments, Inc., and to direct the District Court to enter its order remanding this matter to the District Court for further proceedings pursuant to the directions of this Court.

Respectfully submitted,

H. EARL MOYER
LEONARD L. BEAL

Suite 201, 1401 Saulsbury St.
Lakewood, Colorado 80215
237-5438 237-0473

Attorneys for
Plaintiff in Error