IN THE COURT OF APPEALS OF IOWA

No. 9-153 / 08-0824
Filed April 8, 2009

W.C. STEWART CONSTRUCTION, INC.,
Plaintiff-Appellant,

vs.

CINCINNATI INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

In this breach of contract action, the insured appeals the district court's entry of summary judgment in favor of its commercial general liability insurer. **AFFIRMED.**

William N. Toomey of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, and Sasha Monthei of Krug Law Firm, P.L.C., North Liberty, for appellant.

John F. Lorentzen and Stephanie L. Marett of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.

W.C. Stewart Construction, Inc. (Stewart) appeals the district court's order granting summary judgment in favor of Cincinnati Insurance Company in Stewart's breach of contract action. Stewart argues the district court erred in interpreting the parties' commercial general liability insurance policy and finding: (1) there was not an "occurrence"; (2) there was no "property damage"; and (3) there was no duty to defend. We affirm.

I. Background Facts and Proceedings

Stewart was hired as a subcontractor to perform grading services on a construction project known as "Asbury Plaza" in Dubuque for Rubloff Development, Inc. in 2001. Stewart completed its work under its subcontract, but Rubloff refused to pay the balance owed, asserting that Stewart's grading work was responsible for building movement and cracks in walls erected (presumably by other subcontractors) on the ground graded. Stewart brought suit against Rubloff for the balance due on the construction contract.[1] Rubloff counterclaimed alleging that as a result of Stewart's defective workmanship, their subcontract was breached and Rubloff had to: (a) remove paving and replace noncompliant fill, costing $112,181.08; (b) remove and replace portions of cracked walls and foundations of the building areas, costing $69,398.50; and (c) test and evaluate Stewart's work, costing $15,000.00.

Stewart notified Cincinnati Insurance of the counterclaim by Rubloff. Rubloff hired another company to determine the cause of the cracks in the

[1] The petition asserts more than $300,000 was still owed under the agreements, and also sought in excess of an additional $280,000 under a theory that the "Second Grading Contract was a contract of adhesion" improperly requiring Stewart to pay union benefits.

building walls. The resulting report concluded that the fill placed by Stewart caused building movement and cracks in the walls. Rubloff provided a copy of the report to Stewart.

Stewart tendered its defense to Cincinnati Insurance, seeking coverage under the commercial general liability (CGL) insurance policy. Stewart's CGL policy reads, in pertinent part:

> Section I – Coverages
> Coverage A. Bodily Injury and Property Damage Liability
> 1. Insuring Agreement
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.
> . . . .
> Section V – Definitions
> . . . .
> 12. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
> . . . .
> 15. "Property damage" means:
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it;

Cincinnati Insurance sent Stewart a letter stating that it was investigating the matter, but was reserving all of its rights under the policy. The letter specifically stated that Cincinnati Insurance reserved the right to deny coverage and that their investigation was not to be construed as an admission of liability or coverage. Ultimately, Cincinnati Insurance concluded that there was no coverage. In a letter to Stewart, Cincinnati Insurance informed Stewart of its decision, disputed that there was an insured event, and asserted that even if

there was an insured event, coverage was excluded by policy provisions. Cincinnati Insurance refused to provide a defense to Stewart against Rubloff's counterclaim.

Stewart provided its own defense in the Rubloff litigation and thereby incurred attorney's fees and expenses.[2] The suit between Stewart and Rubloff eventually ended in settlement with Rubloff paying Stewart $172,500.00.

Stewart filed this action alleging Cincinnati Insurance breached its contract by failing to provide a defense against the counterclaim and failing to make required insurance payments for covered property damage. Cincinnati Insurance answered and asserted numerous affirmative defenses. Stewart and Cincinnati Insurance each moved for summary judgment.

The district court granted Cincinnati Insurance's motion for summary judgment. The court determined the case was governed by *Pursell Construction, Inc. v. Hawkeye Security Insurance Co.*, 596 N.W.2d 67, 71 (Iowa 1999), and there was no "occurrence" triggering coverage. Further, relying upon *Yegge v. Integrity Mutual Insurance Co.*, 534 N.W.2d 100, 103 (Iowa 1995), as expanded by *Ide v. Farm Bureau Mutual Insurance Co.*, 545, N.W.2d 853, 859 (Iowa 1996), the district court also concluded that Rubloff's counterclaim sought benefit-of-the-bargain damages and thus the loss involved was not "property damage."

Stewart appeals and we review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4. We review the

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[2] Stewart contends its attorney's fees with respect to the counterclaim totaled $53,532.22 and its expert witness fees were $32,245.96. The district court found it "difficult to separate activities of W.C. Stewart's attorney between pursuit of its claim for collection . . . and defense of the counterclaim" such that the amount "properly attributed to the counterclaim can't be known with certainty."

court's interpretation of a contract as a legal issue unless it depended on extrinsic evidence. *Pillsbury Co., Inc. v. Wells Dairy, Inc*., 752 N.W.2d 430, 435-36 (Iowa 2008). When the court is required to construe a contract, it decides the legal effect of the agreement. *Id*. Construction of a contract is always reviewed as an issue of law. *Id*.

Stewart asserts the district court erred in concluding there was no coverage under the insuring agreement. If there has been no "occurrence" there is no coverage. *Pursell*, 596 N.W.2d at 69.

In *Pursell*, a contractor, K.P. Investments, hired Pursell Construction to build basements, footings, block works, sidewalks, and driveways for two houses the contractor was building. *Id.* at 68. Because the houses were in a floodplain, a city ordinance required the lowest level of the houses to be elevated above the floodplain. *Id.* Final inspection of the houses revealed the elevation of the houses violated the ordinance, and K.P. hired contractors:

> to raise the level of the houses approximately two feet by (1) adding dirt over the existing lower level concrete floors Pursell had constructed, (2) raising the plumbing and pouring another concrete floor on the fill dirt, and (3) constructing knee walls of wood on top of the concrete block to raise the level of the second floor of the houses. Additionally, the contractors had to make other necessary modifications such as constructing new duct work to accommodate the new elevation of the basement floors.
>
> K.P. sued Pursell on theories of breach of contract and negligence for failing to construct the lowest floor of the houses at the elevation required by the city ordinance.

Id.

In a declaratory judgment action, Pursell sought coverage under its CGL policy with Hawkeye-Security Insurance Company. *Id*. The district court concluded that Hawkeye had a duty to defend Pursell against K.P.'s claims and

that there was an "occurrence" and "property damage" as defined in the policy. *Id*.

On appeal, our supreme court stated that the "gist of K.P.'s negligence and breach-of-contract claims against Pursell is that Pursell failed to construct the lower level of the houses at the correct elevation as required by its contract with K.P. and by the city ordinance." *Id*. at 70. The court noted that the claim was "essentially one for defective workmanship" and that its task was "to decide whether this alleged defective workmanship constitutes an occurrence within the meaning of the policy." *Id*.

The *Pursell* court adopted the "majority rule" and held that "defective workmanship standing alone, that is, resulting in damages only to the work product itself, is not an occurrence under a CGL policy." *Id*. Stewart argues that because Rubloff's counterclaim asserted damages to property other than Stewart's work product, *Pursell* is not controlling. Stewart reads *Pursell* too narrowly. The faulty workmanship in *Pursell* required re-installation of plumbing and duct work with which Pursell had not been involved, just as the faulty workmanship by Stewart required reconstruction of walls Stewart had not built.

The *Pursell* court quoted the following passage from *United States Fidelity & Guarantee Corp. v. Advance Roofing & Supply Co.*, 788 P.2d 1227, 1233 (Ariz. Ct. App. 1989):

> [W]e recognize that there are some authorities that appear to conclude that the mere showing of faulty work is sufficient to bring a claim for resulting damages (of whatever nature) within policy coverage. In our opinion these authorities disregard the fundamental nature of a comprehensive general liability policy of the type involved in this litigation, and ignore the policy requirement that an occurrence be an accident. *If the policy is construed as*

> *protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond*. We find these authorities unpersuasive.

Id. at 71 (emphasis added).

After adopting the majority rule, the *Pursell* court analyzed:

> Here, K.P. seeks to recover for defective workmanship consisting of Pursell's failure to construct the basement floor levels of the two houses at the proper elevation. And the damages K.P. seeks are limited to the *very property upon which Pursell performed work*. Consequently, contrary to the district court ruling, the damages here were not the result of an "occurrence" as defined in the policy, and for that reason there is no coverage. Because there is no coverage, Hawkeye has no duty to defend Pursell against K.P.'s claims.

Id. at 71-72 (emphasis added).

Pursuant to its contract with Rubloff, Stewart performed grading and compacting work on property upon which buildings were erected. The investigator's report determined that fill placed by Stewart caused building movement and cracks in the walls. Thus, the damages Rubloff sought were to the very property upon which Stewart performed work. We find that to rule otherwise would improperly make the insurer a guarantor of the insured's work. *See id.* at 71.

The district court did not err in concluding there was no coverage under the CGL policy and properly entered summary judgment in favor of Cincinnati Insurance. We need not address the district court's additional holding that Rubloff's counterclaim sought benefit-of-the-bargain damages and thus the loss involved was not "property damage." We affirm.

AFFIRMED.