2007 Opinion No. 16
IN THE SUPREME COURT
OF THE STATE OF IDAHO
Docket No. 31714
Cite as: 07.3 ISCR 66

CHARLES MELICHAR and KAREN MELICHAR, husband and wife,
Plaintiffs-Appellants,
v.
STATE FARM FIRE AND CASUALTY COMPANY,
Defendant-Respondent,
and
WESTERN BUILDING MAINTENANCE, INC., an Idaho corporation,
Defendant.

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, for the County of Ada. Hon. George D. Carey, District Judge.

District court's order granting directed verdict in favor of respondent is *affirmed.*

APPEARANCES:

Angstman Law, PLLC, Boise, for appellants. Wyatt B. Johnson argued.

Elam & Burke, P.A., Boise, for respondent. Jeffrey A. Thomson argued.

Boise, December 2006 Term
Filed: January 26, 2007
Stephen W. Kenyon, Clerk

JONES, Justice

This case involves an alleged breach of a homeowner's insurance policy. Appellants, Charles and Karen Melichar, sued Respondent, State Farm Fire and Casualty Company ("State Farm"), for breach of contract, breach of implied warranty, and breach of express warranty after State Farm failed to pay for mold related damages to their home resulting from an accident. The district court issued a directed verdict in favor of State Farm. We affirm.

I.

The Melichars are homeowners in Boise. They previously maintained homeowner's insurance through State Farm. Two of the Melichars' past homeowner's policies are relevant to this case. The first relevant policy had a policy period of July 12, 2001, to July 12, 2002 ("first homeowner's policy"). The second relevant policy had a policy period of July 12, 2002 to July 12, 2003 ("second homeowner's policy"). The two polices were identical except that the second homeowner's policy contained a mold exclusion endorsement, which excluded coverage of mold related losses occurring during the policy period.

On March 25, 2002, while the Melichars were vacationing in Arizona, their son checked on their house and discovered the toilet had overflowed, which caused water damage to the property ("March accident"). Laurie Burlile, the Melichars' daughter-in-law, called the Melichars that day to advise them of the situation. The Melichars immediately contacted State Farm and informed it of the problem. State Farm proceeded to open a claim and determined that the damages were covered under the Melichars' policy. The Melichars' insurance agent advised them that the released water needed attention immediately. In response, the Melichars asked if State Farm "had anybody that did that kind of thing." State Farm informed them that it had someone who could take care of it, and the Melichars verbally authorized State Farm to begin work on the house. At the time, State Farm maintained a "Premier Service Program," which provided insureds who did not wish to procure their own contractor the option of selecting a participating State Farm-approved Premier Service Program contractor to perform repair work.

The next day, March 26, 2002, Laurie met at the Melichars' home with a State Farm insurance adjustor who recommended hiring a disaster company. When Laurie voiced no preference for a particular company, the adjustor contacted Western Building Maintenance ("Western"), a State Farm-approved Premier Service Program contractor, to perform the repairs. Western arrived shortly thereafter, and either a representative of Western or State Farm asked Laurie to sign an "authorization to repair" form. Laurie signed the form using her mother-in-law's signature, "Karen Melichar," and Western began performing repairs.

The Melichars returned home on April 6, 2002, to find ongoing construction and repairs. Upon their return, they found a letter from State Farm, dated March 27, 2002, explaining the Premier Service Program ("March 27 letter"). The letter stated that the Melichars selected Western as the Premier Service Program contractor to

perform the repairs on their home. On April 29, 2002, Charles Melichar signed an "authorization to repair" form, which acknowledged that the Melichars agreed to use the State Farm Premier Service Program and authorized Western to repair the damages resulting from the March accident.

Near the end of July 2002, the Melichars informed State Farm and Western of their concern regarding an outbreak of mold in their home. State Farm arranged for an industrial hygienist, Summit Environmental, Inc., to perform a mold and fungal evaluation of the house. Summit Environmental conducted the evaluation and prepared a report stating that portions of the home were impacted with mold growth, and recommended mold remediation. In August, Western began conducting the mold remediation and on December 13, 2002, Summit Environmental issued a post remedial report which stated that the mold was fully remediated. State Farm paid all expenses associated with the repairs and remediation resulting from the March accident up to this point.

On or about December 24, 2002, the Melichars noticed that the floor near the washing machine was beginning to ridge and buckle. On December 26, they notified State Farm of the problem, and upon inspection State Farm learned that Western had improperly inserted a drain hose from the Melichars' washing machine into a wall cavity where there was no drain pipe. As a result, water from the washing machine had drained into the wall cavity causing structural and mold damage to the Melichars' property ("December accident"). On December 27, 2002, State Farm sent the Melichars a letter stating that the December accident resulted in a second loss that was subject to the Melichars' second homeowner's policy and, because it contained a mold exclusion endorsement, no coverage would be provided for "testing, remediation, or any other repairs in reference to mold or mildew damage in respect to the second loss." State Farm subsequently paid or offered to pay for the non-mold related damages arising from the December accident. However, when State Farm failed to pay for mold related damages resulting from the December accident, the Melichars sued, alleging breach of contract, breach of implied warranty, and breach of express warranty.[1]

The case went to trial and, upon the conclusion of the Melichars' case-in-chief, State Farm moved for a directed verdict. The district court granted State Farm's motion, finding that the damages sought – the cost associated with remediation of mold-related damage resulting from the December accident – constituted a second loss subject to the second homeowner's policy, which excluded coverage for such damages. The court further held that the Melichars presented no evidence that State Farm breached either an express or implied warranty.

II.

We will address four issues in this opinion: (1) whether State Farm's failure to pay for remediation of the mold damage associated with the December accident constituted a breach of contract; (2) whether State Farm's failure to pay for such remediation constituted a breach of warranty; (3) whether the district court's award of costs to State Farm should be reversed; and (4) whether either party is entitled to an award of attorney fees or costs on appeal.

A.

When reviewing a district court's decision to grant or deny a directed verdict, this Court applies the same standard as does the trial court. *Gunter v. Murphy's Lounge, LLC*, 141 Idaho 16, 27, 105 P.3d 676, 687 (2005). This Court does not defer to the district court's findings, but rather conducts an independent review of the evidence. *Id.* This Court "must determine whether, admitting the truth of the adverse evidence and drawing every legitimate inference most favorably to the opposing party, there exists substantial evidence to justify submitting the case to the jury." *General Auto Parts Co., Inc. v. Genuine Parts Co.*, 132 Idaho 849, 855, 979 P.2d 1207, 1213 (1999). A directed verdict will only be granted in favor of the moving party if the evidence presented is so clear that "all reasonable minds would reach only one conclusion: that the moving party should prevail." *Powers v. American Honda Motor Co., Inc.*, 139 Idaho 333, 335, 79 P.3d 154, 156 (2003).

B.

The district court did not err in directing a verdict in favor of State Farm with respect to the breach of contract claim because under the policies' terms, the loss resulting from the December accident was subject to the second homeowner's policy. The Melichars argue that the district court erred in finding that two separate losses occurred under the policies' terms because it is reasonable to interpret all the damages in this case as a single, continuing loss resulting from the March accident, which State Farm is obligated to repair and replace under the first homeowner's policy. The Melichars' interpretation is contrary to the clear and unambiguous terms of the Melichars' homeowner's policies.

i.

Whether an insurance policy is ambiguous is a question of law, which this Court freely reviews. *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 739, 101 P.3d 226, 232 (2004). A policy "is ambiguous if 'it is reasonably subject to conflicting interpretations.'" *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). Any ambiguities in an insurance policy must be construed against the insurer. *Farmers Ins. Co. of Idaho v. Talbot*, 133 Idaho 428, 435, 987 P.2d 1043, 1050 (1999). However, where the policy language is clear and unambiguous, "coverage must be determined in accordance with the plain meaning of the words used." *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 235, 912 P.2d 119, 122 (1996).

The parties dispute the meaning of the term "loss" within the context of the homeowner's policies. Although the term "loss" is not defined in the "definitions" section of either policy, the types of losses that will be covered under the policies are addressed in the "losses insured" section:

> **COVERAGE A – DWELLING**
> We insure for *accidental direct physical loss* to the property described in Coverage A, except as provided in **SECTION I – LOSSES NOT INSURED.**

(italics added). The plain language of this section unambiguously establishes that the term "loss" is contemplated by the policies to mean the resulting *physical* and *direct* damage caused by an accident.

Additionally, the Melichars contend that the term "occurs" is ambiguous because it is undefined in the policies and is subject to multiple interpretations. The Melichars' homeowner's policies provide:

> **1. Policy Period.** This policy applies only to loss under Section I or **bodily injury** or **property damage** under Section II which *occurs* during the period this policy is in effect.

[1] The Melichars initially filed suit against both State Farm and Western. Prior to trial however, the Melichars accepted Western's offer of judgment pursuant to Idaho Rule of Civil Procedure 68 for $50,000. Western was subsequently dismissed from the suit.

(italics added) The term "occurs" is not further defined in the policies, but the mere fact that a term is undefined in a policy does not make that term ambiguous if it has a settled legal meaning. *National Union Fire Ins. Co. of Pittsburgh, P.A. v. Dixon*, 141 Idaho 537, 540, 112 P.3d 825, 828 (2005). It is well settled in Idaho that "the time of the *occurrence* of an 'accident,' within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged." *Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc.*, 103 Idaho 377, 379, 647 P.2d 1249, 1251 (1982) (emphasis added) (quoting *National Aviation Underwriters, Inc. v. Idaho Aviation Ctr. Inc.*, 93 Idaho 668, 670, 471 P.2d 55, 57 (1970)). In *Millers Mut. Fire Ins. Co.*, this Court adhered to the reasoning that "[t]o stretch the scope of 'accident' backward in time to reach the date of the earliest beginning of any prior event which might be regarded as having a causal relation to the unlooked-for mishap would introduce ambiguity where none now exists." 103 Idaho at 380, 647 P.2d at 1252 (quoting *Home Mut. Fire Ins. Co. v. Hosfelt*, 233 F.Supp. 368, 370 (D. Conn 1962)). Thus, even though the term "occurs" is not defined in the policy, our case law makes clear that an accident occurs during the policy period in which the policy holder was actually damaged, and not the period in which the event giving rise to the loss occurred.

ii.

The district court correctly concluded, after applying the policies' terms to the facts and circumstances in this case, that there were two separate losses – the first covered by the first homeowner's policy and the second covered by the second homeowner's policy. It is undisputed that the water released into the Melichars' home as a consequence of the March accident physically and directly caused damage to the Melichars' home and the July mold outbreak. Both the event directly causing the loss, the overflowing toilet, and the resulting loss itself, the structural and mold damages, occurred during the policy period of the Melichars' first homeowner's policy, which was effective from July 12, 2001, through July 12, 2002. Because the first homeowner's policy did not include a mold exclusion endorsement, State Farm paid for the repair and replacement of all the resulting damages, including the cost of mold remediation. It is also undisputed that the July mold outbreak was fully remediated prior to the December accident. In fact, the sole relief the Melichars seek in this case, and the only alleged covered expense the Melichars contend State Farm has failed to pay, is the cost associated with remediation of the mold damage that occurred as a result of the December accident.

Contrary to the Melichars' assertions, the damages resulting from the December accident were subject to the second homeowner's policy. The physical and direct cause of the December mold outbreak was the water released in December from the improperly plumbed washing machine. The record reveals that sometime in December, as Western was concluding the remediation of the July mold, it improperly inserted a drain hose from the Melichars' washing machine into a wall cavity where there was no drain pipe, resulting in a water release, and a subsequent mold outbreak. Both the event directly causing the loss, the improper placement of the hose, and the resulting loss itself, the mold outbreak, occurred during the policy period of the second homeowner's policy, which was effective from July 12, 2002, through July 12, 2003. Undoubtedly, the December accident would not have occurred had Western not been present in the Melichars' home to repair the damages resulting from the March accident. However, while the water released as a result of the March accident may have been an *indirect* cause of the December accident, it certainly was not the *physical* and *direct* cause.

In sum, the Melichars' argument that the December loss is a single, continuing loss resulting from the March accident because it is causally related is incongruous with both the policies' terms and this Court's holdings in *National Aviation Underwriters* and *Miller Mut. Fire Ins. Co.* The district court correctly concluded that the December accident resulted in a separate loss subject to the Melichars' second homeowner's policy, which excluded coverage for such damages. Therefore, State Farm did not breach either homeowner's policy by failing to pay for mold related damages resulting from the December accident.

C.

The district court did not err in granting State Farm's request that a directed verdict be entered against the Melichars with respect to the breach of warranty claims. The Melichars argue that State Farm breached an express warranty contained in the March 27 letter by failing to require Western, pursuant to a pre-existing contract it had with Western, to provide the Melichars with a written warranty covering its work. The March 27 letter, which the Melichars received from State Farm regarding the Premier Service Program, provided that "[y]our contractor will warranty their workmanship labor on building or structural repairs, for a five year period." Relying on this language, the Melichars assert that State Farm expressly warranted that Western would provide them with a written warranty covering their work. That Western did not provide a warranty to the Melichars in this case is uncontested. However, State Farm did not warrant the repairs; it only indicated that the contractor would give a five-year warranty. Although the Melichars did not receive a warranty, for reasons that are disputed, their remedy was to pursue the contractor for improperly reconnecting the washing machine hose. The Melichars have already succeeded in that pursuit, having accepted an offer of judgment from Western for $50,000 in the early stages of this lawsuit, and they cannot now pursue State Farm because they did not recover as much as they thought they were entitled from Western. Thus, the district court did not err in entering a direct verdict against the Melichars with respect to the breach of express warranty claim.[2]

The Melichars further contend that State Farm breached the implied warranty of workmanlike performance. This Court has held that where a party provides personal services, a "warranty is implied that the services will be performed in a workmanlike manner." *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 36, 539 P.2d 584, 588 (1975). Additionally, this Court adheres to the rule that "privity of contract is required in a contract action to recover economic loss for breach of implied warranty." *Salmon Rivers Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 354, 544 P.2d 306, 312 (1975). In this case, Western provided the personal services necessary to repair the Melichars' home, not State Farm. Nevertheless, the Melichars argue that State Farm is liable for the implied warranty of workmanlike performance based on agency theory.

As a general rule, independent contractors are not agents. *See Pinson v. Minidoka Highway Dist.*, 61 Idaho 731, 737, 106 P.2d 1020, 1022 (1940); 41 Am. Jur. 2d *Independent Contractors* § 3 (1995). Whether a person employed to do certain work is an independent contractor or an employee turns on the amount of control the employer reserves over the individual. *See Id.* Where an employer controls the performance of the person employed to do

[2] Because we hold that the March 27 letter did not create an express warranty from State Farm to the Melichars, we need not address the Melichars' concern as to whether the letter was part of their policy or a stand alone contract.

certain work, as well as the result to be achieved, the servant is an agent, and the employer will be liable for its authorized acts. *Id.* at 737, 106 P.2d at 1022. However, where the employer has no control over how the servant performs the contract, but retains control only as to the result to be achieved, the servant is an independent contractor. *Id.* The burden of proving a principal-agent relationship falls upon the party asserting agency. *Transamerica Leasing Corp. v. Van's Realty Co.*, 91 Idaho 510, 517, 427 P.2d 284, 291 (1967).

The evidence in the record establishes that State Farm lacked control over how Western performed the repairs of the Melichars' home. The only agreement between State Farm and Western states that "[t]he parties expressly agree that the Contractor shall be an independent contractor for all purposes in performance of this Agreement and that none of its employees or agents shall be considered an employee of State Farm for any purpose." Furthermore, representatives from State Farm testified that it did not control the work of Western, and one of Western's co-owners testified that State Farm did not control when it worked, nor did it ever direct Western's work. Given this evidence, the Melichars failed to establish that an agency relationship existed between State Farm and Western and, therefore, the district court did not err in granting State Farm's request that a directed verdict be entered against the Melichars with respect to breach of the implied warranty of workmanship performance claim.

D.

The district court awarded State Farm costs in the amount of $15,854.35 based upon the court's finding that State Farm was the prevailing party. The Melichars request on appeal that the district court's award of costs be vacated if the district court's holding is reversed. Because we affirm the district court, the Melichars' request is denied.

E.

Both parties request attorney fees on appeal. The Melichars request attorney fees pursuant to Idaho Code § 41-1839(1). Because State Farm has not failed to pay an amount "justly due," we decline to make an award. State Farm requests attorney fees on appeal pursuant to Idaho Code § 41-1839(4), which provides the authority for an award of attorney fees when a court finds that the case was "brought, pursued, or defended frivolously, unreasonably or without foundation." Idaho Code § 41-1839(4) provides a basis for an award of attorney fees to either the insured or the insurer. Nothing in the record suggests that this appeal was frivolous or unreasonable. Therefore, State Farm's request for attorney fees is denied.

III.

The decision of the district court is affirmed. Neither party is awarded attorney fees on appeal. State Farm is entitled to costs on appeal.

Chief Justice SCHROEDER, and Justices TROUT, EISMANN and BURDICK **CONCUR**.