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### Summary of Fourth St. Place v. Travelers Indem. Co., 127 Nev. Adv. Op. 86

Daniella LaBounty  
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### **Summary**

The Court reviewed a district court grant of summary judgment in favor of the insurer in an insurance coverage action.

### **Disposition/Outcome**

The Court affirmed the district court's grant of summary judgment, concluding that the policy at issue does not provide coverage because the damage was not included in the policy's covered causes of loss. Though the Court adopted the doctrine of efficient proximate cause for Nevada, it did not apply in this case.

### **Factual and Procedural History**

Appellant Fourth Street Place, LLC ("Fourth Street") purchased an "all-risks" insurance policy ("Policy") from The Travelers Indemnity Company ("Travelers"), to provide coverage for an office building owned by Fourth Street. The policy period was from March 19, 2004 to March 19, 2005, and the policy covered any and all risks except those expressly limited by the policy. The Policy's "Covered Causes of Loss" provision included limitations on rain damage and exclusions pertaining to faulty workmanship.

Fourth Street hired a contractor to repair and renovate the office building in November 2004. Subcontractor Above It All was hired to repair the roof, and on November 20, 2004, it removed the waterproof membrane on the roof to replace it the following week. That evening, Las Vegas received substantial rainfall that continued through the weekend. Above It All returned the following day to cover exposed portions of the roof with tarps, but the tarps were later blown away by wind. The building sustained significant water damage and the majority of the building's tenants vacated because the building was uninhabitable.

After the storm, Fourth Street submitted an oral notice of claim to Travelers about the rain damage. Travelers inspected the building. On December 14, 2004, Travelers sent a letter denying the claim, as the damage did not result from a covered cause of loss. Fourth Street petitioned for reconsideration. On March 15, 2005, Travelers sent another letter denying coverage.

Fourth Street sued Travelers in district court, seeking damages and declaratory relief, claiming Travelers breached the Policy and denied coverage in bad faith. Travelers filed a motion for summary judgment, arguing that the policy precluded coverage for rain damage unless the building was first damaged by wind or hail. Additionally, Travelers argued it was entitled to judgment as a matter of law as to the issue of bad faith, because the denial of coverage

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<sup>1</sup> By Daniela LaBounty

was reasonable and there was no knowledge or reckless disregard of the lack of reasonable basis for the denial of coverage.

Fourth Street opposed the motion and filed a countermotion for partial summary judgment on the issue of its entitlement to coverage. Fourth Street argued the tarps should have been considered part of the roof. Thus, when the wind blew them away, the building sustained actual damage to its roof by the wind. Fourth Street also asked the district court to apply the doctrine of efficient proximate cause. Travelers responded that the doctrine of efficient proximate cause was inapplicable because the Policy's "faulty workmanship" exclusion excluded Above It All's failure to cover properly the exposed portions of the roof.

The district court granted judgment on Travelers motion for summary judgment and denied Fourth Streets countermotion. Fourth Street filed a motion to amend the findings of fact and the judgment. The district court granted the motion to amend the findings of fact and denied the motion to amend judgment. Fourth Street appealed.

## **Discussion**

On appeal, Fourth Street argued the damage was sustained because of Above It All's failure to properly cover the roof while being repaired. Fourth Street further argued the Policy's limitations did not apply because the tarps used to cover the roof were considered part of the building. Therefore, when the wind blew away the tarps, the building was first damaged by wind, then rain, creating an exception to the rain limitation. Fourth Street also argued that the "faulty workmanship" exclusion did not include work currently in progress, and, even if the rain limitation applied, Above It All's failure to properly cover the building was the efficient proximate cause of the damage. Thus, the Policy should have covered the damages sustained to the building.

The Court first considered whether the cause of the damage was a covered cause of loss. Looking to the language of the Policy to determine its coverage, the Court noted that the Policy should be read whole, from a layman's perspective, and the terms should be viewed in plain and ordinary language.<sup>2</sup> If a term is ambiguous, it will be construed against the insurer.<sup>3</sup> Ambiguity depends on the "reasonable expectations of coverage as drafted."<sup>4</sup> Finally, terms must be viewed as part of the entire policy to give effect to the whole meaning of the policy.<sup>5</sup>

The Policy defined "Covered Causes of Loss" as "Risks of Direct Physical Loss," unless the loss fell within the "Limitations" or "Exclusions" sections of the Policy. The "Limitations" section precluded coverage for rain damage, unless the damage was first sustained by wind or hail. Since Above It All failed to cover the roof properly during repairs, the "faulty workmanship" exclusion in the policy precluded coverage. Thus, the Court concluded the damage did not result from a covered cause of loss under the Policy.

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<sup>2</sup> Am. Excess Ins. Co. v. MGM, 102 Nev. 601, 604, 729 P.2d 1352, 1354 (1986).

<sup>3</sup> Powell v Liberty Mut. Fire Ins. Co., 127 Nev. \_\_\_, \_\_\_, 252 P.3d 668, 672 (2011).

<sup>4</sup> *Id.* at \_\_\_, 252 P.3d at 672 (*quoting* United Nat'l Ins. Co. v. Frontier Ins. Co., 120 Nev. 678, 684, 99 P.3d. 1153, 1157 (2004)).

<sup>5</sup> Nat'l Union Fire Ins. v. Reno's Executive Airport, 100 Nev. 360, 364, 682 P.2d 1380, 1383 (1984).

The Court next addressed Fourth Street's argument that the rain limitation did not apply because temporary devices, such as tarps, should be considered part of the roof. Therefore, when the wind blew away the tarps, the roof sustained actual damage prior to the rain damage. Since Nevada case law and the Policy lacked any specific definition of "roof," the Court looked to the functional definition the Oregon Supreme Court adopted: "a roof should be sufficiently durable to meet its intended purpose: to cover and protect a building against weather-related risks that reasonably may be anticipated."<sup>6</sup>

During the repairs, Above It All failed to protect the exposed areas of the roof until after it began to rain, at which time Above It All returned to place tarps on the exposed areas. By that time, significant damage had already occurred. Because the tarps were placed on the roof only after the rain began, the tarps were not sufficiently durable to protect the building from reasonably anticipated weather-related risks. Therefore, the Court found that the tarps did not constitute part of the roof for the purposes of the Policy's rain limitation.

The Court also considered whether repairs and alterations were covered in the Policy. Based on the Policy's language, the Court determined that any repairs or alterations are only covered once complete. Furthermore, even if the Policy provided coverage for incomplete repairs or alterations, this would not create an exception to the rain damage limitation in the policy. Therefore, the district court did not err in concluding the rain damage sustained by the building was not included in the "Covered Causes of Loss."

The Court then pondered whether the damage was covered under the "Exclusions" portion of the Policy. The "Exclusions" section stated that the policy did not cover loss or damage caused or resulting from "faulty workmanship," unless that faulty workmanship resulted in a covered cause of loss. Because the term "workmanship" was not defined in the Policy, Fourth Street argued the "Exclusions" section was ambiguous, and that the ambiguity should be construed in its favor to only exclude from coverage damages caused by, or resulting from, a flawed finished product.

The Court rejected this rationale, noting that the term "workmanship" can mean processes, product, or both within the context of an insurance policy. Furthermore, the "faulty workmanship" provision must be interpreted within the context of the whole policy and with reference to its surrounding terms. Since the "faulty workmanship" phrase was located within a subsection of the Policy that lists items which are both processes and products, the Court concluded that the insurer intended the subsection to exclude coverage damage caused by both a flawed process and a flawed product. This interpretation was in harmony with the concept of an "all-risk" policy, which insures risks that are not normally contemplated and provides recovery for losses of a fortuitous nature.<sup>7</sup> Therefore, the Court concluded that the faulty workmanship provision was merely broad, not ambiguous, and reiterated that Above It All's faulty workmanship did not result in a covered cause of loss because of the rain damage limitation.

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<sup>6</sup> *Dewsnup v Farmers Ins. Co.*, 239 P.3d 493, 499 (Or. 2010).

<sup>7</sup> *See Victory Peach Grp., Inc. v. Greater New York Mut. Ins. Co.*, 707 A.2d 1383, 1385 & n.1 (N.J. Super. Ct. App. Div. 1998).

Finally, the Court considered the adoptability and applicability of the doctrine of efficient proximate cause. Under this doctrine, that which sets in motion the chain of events leading the loss is deemed the efficient proximate cause, or legal cause, of the loss.<sup>8</sup> Thus, the doctrine of efficient proximate cause requires both a covered loss and a non-covered loss. This prevents the absurd result of coverage being denied although an insured peril proximately caused the loss, simply because a subsequent exempted peril was part of the chain of causation. Because the Court agreed with this reasoning, it decided to adopt the doctrine for Nevada. However, doctrine was inapplicable in the instant case because neither cause of Fourth Street's loss, the rain or the faulty workmanship, was a covered cause of loss.

### **Conclusion**

The Policy did not cover Fourth Street's loss because the damage was not caused by a covered cause of loss. Moreover, although the Court adopted the doctrine of efficient proximate cause for Nevada, the doctrine was inapplicable in this case because neither causes of loss were covered under the Policy. Consequently, the Court affirmed the district court's grant of summary judgment.

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<sup>8</sup> Chlor Alkali v Nat'l Union Fire Ins. Co., 863 F.Supp. 1226, 1230-32 (D. Nev. 1994).