7-25-2016

Fisher v. Garrison Property and Cas. Ins. Appellant's Brief Dckt. 44117

IN THE SUPREME COURT OF THE

STATE OF IDAHO

SHAMMIE L. FISHER,	)	Docket No. 44117
	)	(Dist. Ct. Case No. CV OC 1508979)
Plaintiff-Appellant,	)	
	)	
v.	)	**APPELLANT'S BRIEF**
	)	
GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY,	)	
	)	
Defendant-Respondent.	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT FOR ADA COUNTY

HONORABLE PATRICK H. OWEN, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves the interpretation of a homeowners policy issued by Respondent to Appellant for real property located at 2510 N. 34th Street, Boise, Idaho. The structure and attached fixtures were completely destroyed by the tenant, and Appellant sought to be reimbursed for the losses under the Policy. Respondent denied Appellant's claim, citing exclusions under the Policy. This District Court granted summary judgment in favor of Respondent, holding that the exclusions applied and that there was no coverage for the losses. Appellant appeals that decision, and seeks an order from this Court that, based upon the uncontested facts and the plain language of the Policy, there is coverage for the losses and the exclusions do not apply.

B. Statement of Facts

Appellant Shammie Fisher owns real property located at 2510 N. 34th Street, Boise, Idaho. On or about November 5, 2008, USAA Casualty Insurance Company issued Appellant a Homeowners Insurance Policy for the residence located at 2510 N. 34th Street, which at that time was her primary residence. The Policy was renewed annually by USAA and/or for Garrison Property and Casualty Company (hereafter "Garrison"). The Policy in effect from the period March 8, 2013 to March 8, 2014, is attached to the Amended Complaint as Exhibit A (R. at 11).

The Policy states in the Declarations that the Described Location is 2510 N. 34th Street, Boise, Ada County, Idaho. *See* Policy, Declarations (R. at 13). At the time the Policy was issued,

the Described Location was used principally for dwelling purposes. Amended Complaint, at ¶. 7 (R. at 7); Aff. of Shammie Fisher at ¶ 2 (R. at 84).

In February of 2012, Appellant signed a contract for lease to own ("Lease") of the Property with Ron Reynosa ("Reynosa"). The Lease was for a 1 year term, ending on March 31st, 2013, with the option for a 6 month extension ending on Sept 1, 2013. *See* Aff. of Shammie Fisher, at ¶ 3-4, and Ex. A (R. at 84; 88). Within the first two months, Appellant was notified that the entire home had been leveled by Mr. Reynosa, destroying both the structure and the fixtures therein. *Id.* at ¶ 5 (R. at 84). Photographs of the property before and after the destruction are attached as Exhibit C and D, to the Affidavit of Shammie Fisher. (R. at 116; 118). Appellant had no knowledge that Mr. Reynosa intended to destroy the home when he leased the Property. *Id.* at ¶ 6 (R. at 84).

Reynosa subsequently defaulted on the Lease and left town, informing Appellant in September 2013 that he did not intend to rebuild the home he had destroyed. *Id.* at ¶ 7 (R. at 84).

On or about September 27, 2013, Appellant submitted a Proof of Loss seeking coverage under the Policy for the losses to the dwelling and the personal property therein. By letter of December 5, 2013, Garrison denied coverage for the loss. Amended Complaint, at ¶. 14 (R. at 46); Answer to Amended Complaint, at ¶ 14 (R. at 74).

Both parties filed motions for summary judgment before the District Court, arguing that the facts were not in dispute. The District Court found that the loss was covered under the Policy

(R. at 228-29), but held that the exclusion for faulty or inadequate construction or renovation applied and granted summary judgment in favor of Respondent. The District Court erred in holding that the exclusion applied because that exclusion is intended to apply to situations where an insured is involved in some way or has knowledge of plans to repair or remodel property.

This case is not one where the insured hired or contracted with a third party to do repairs or renovations that were either incomplete or poorly done. This is a case where a lessee/buyer, who was to be living in the residence and had the option of making cosmetic improvements while residing there, tore the residence down to the foundation. This act of destruction was not part of any valid contract, was unauthorized and was done without the knowledge of the Appellant. After the destruction was discovered, the Appellant did not then enter into a "contract" with the lessee to have the damage repaired. Rather, she allowed the lessee to continue to pay rent and attempt to fix the property damage he had caused in an attempt to mitigate her damages. There is no evidence in the record that the tenant actually completed any work to fix the damage he caused or made any repairs. This is not the type of factual situation that is covered by the exclusions in the Policy.

II. ISSUES ON APPEAL

1. Did the District Court err when it determined that the insurance policy did not provide insurance coverage for Plaintiff's claimed losses to real and personal property, granting summary judgment in favor Respondent?

2. Did the District Court err in determining that there were questions of fact as to the issue of whether the intentional loss exclusion in the policy applied, and in failing to grant summary judgment in favor of the Plaintiff on that issue?

3. Did the District Court err in holding that the exclusion for faulty, inadequate and/or defective work applied in this case?

III. ARGUMENT

A. Legal Standards

In reviewing a district court's grant of summary judgment, this Court has held that "it uses the same standard properly employed by the district court originally ruling on the motion." *Rizzo v. State Farm Ins. Co.*, 155 Idaho 75, 79, 305 P.3d 519, 523 (2013) (citations omitted). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c).

In general, "policies of insurance, as other contracts, are to be construed in their ordinary meaning, and where the language employed is clear and unambiguous, there is no occasion to construe a policy differently than manifested by the plain words therein." *Porter v. Farmers Ins. Co. of Idaho*, 102 Idaho 132, 136, 627 P.2d 311, 315 (1981). However, the Idaho Supreme Court has clearly explained certain special rules to be applied relative to construction of policies of insurance:

> Interpretation of an ambiguous document presents a question of fact. On the other hand, interpretation of an unambiguous document is a question of law. Further, insurance policies are a matter of contract between the insurer and the insured. So, interpretation of an unambiguous insurance contract is a question of law subject to free review. But, where there is an ambiguity in an insurance contract, special rules of construction apply to protect the insured. Under these special rules, insurance policies are to be construed most liberally in favor of recovery, with all ambiguities being resolved in favor of the insured. Finally, the meaning of the insurance policy and the intent of the parties must be determined from the plain meaning of the insurance policy's own words.

Hall v. Farmers Alliance Mut. Ins. Co., 145 Idaho 313, 179 P.3d 276 (2008). The foregoing rules apply to construction of the applicable Policy provisions. In this case, the clear language of the Policy provides coverage for Appellant's loss.

There is no dispute as to the Policy in place at the time of the loss. *See* Amended Complaint, at 5, Ex A; Answer, at ¶ 5 (R. at 11-31; 33). The Named Insured in the Policy is Shammie L. Fisher and the Described Location is 2510 N. 34th Street, Boise, Ada, ID. Policy Declarations, at 3. The Dwelling Policy provides coverage for the following:

> We cover:
>
> 1. The Dwelling on the Described Location shown in the Declarations, used principally for dwelling purposes, including structures attached to the dwelling;

Policy, at 2 (R. at 21). The District Court noted that Respondent had not offered any opposition to the argument that the loss of her residence was a direct loss covered by the Policy, and thus granted summary judgment on the issue of whether the direct loss of the residence was covered

by the Policy. Decision, at 6-7 (R. at 228-29). This decision is not at issue in this appeal.

The District Court then correctly noted that, once it is established that the loss is covered, the burden shifts to the Respondent to demonstrate that an exclusion applies. Decision, at 7 (R. at 229). Accordingly, Respondent bears the burden of proving that its asserted exclusions are applicable in this case:

> Furthermore, an insurance policy will generally be construed so that the insurer bears the burden of proving that the asserted exclusion is applicable.

Perry v. Farm Bureau Mut. Ins. Co., 130 Idaho 100, 103, 936 P.2d 1342, 1345 (Ct. App. 1997) (citing *Viani v. Aetna Ins. Co.*, 95 Idaho 22, 501 P.2d 706 (1972); *Harman v. Northwestern Mutual Life Ins. Co.*, 91 Idaho 719, 429 P.2d 849 (1967)). Respondent did not meet that burden in this case.

Additionally, if language the of the exclusion is "ambiguous," in that it lends itself to more than one possible interpretation, the court "must resolve any doubt in favor of the insured, strictly construing the contract against the drafter." *Farmers Ins. Group v. Sessions*, 100 Idaho 914, 916, 607 P.2d 422, 424 (1980) (citing *Abbie Uriguen Olds., Buick, Inc., v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); *Stephens v. New Hampshire Ins. Co.*, 92 Idaho 537, 447 P.2d 14 (1968)).

In this case, Respondent did not meet its burden of demonstrating that either exclusion cited by it applied to the facts in this case, and summary judgment should have been granted in

favor of Appellant and against Respondent on the issue of coverage for the losses.

B. The Intentional Loss Exclusion Does Not Apply and the District Court Erred in Failing To Grant Summary Judgment in Favor of Appellant on that Issue

The first exclusion raised by Respondent as a basis for denying coverage for the dwelling and fixtures is the exclusion for intentional loss, which provides:

> We do not insure for loss caused directly or indirectly by any of the following.
> . . .
> h. **Intentional Loss**, meaning any loss arising out of any act committed:
> (1) by or at the direction of you or any person or organization named as an additional insured; and
> (2) with the intent to cause a loss.

Policy, at 7-8 (R. at 26-27).

In this case, there is absolutely no evidence that Ron Reynoso destroyed the dwelling and fixtures at the Insured Location "at the direction" of Appellant or that Appellent directed the destruction of her property with "intent to cause a loss." The undisputed facts demonstrate that Ron Reynoso leased the property with the intent to purchase it, that he represented to the Appellant that he would live in the dwelling during the time he leased it as his primary residence, that he would make certain improvements to the dwelling such as updating the flooring, bathroom and kitchen countertops and other cosmetic "improvements" and would be attempting to resell the property at a later date. *See* Fisher Aff., at ¶ 6, 9, and Ex. A (R. at 84-85; 88-102). There is absolutely no evidence that Ron Reynoso was authorized to tear down or otherwise

destroy the dwelling or fixtures or that Appellant was aware he intended to do so. *Id.* at ¶ 6, 9 (R. at 84-84). Likewise, there is no evidence that Appellant directed him to destroy the property with the intent to cause a loss. Accordingly, the exclusion for intentional loss does not apply.

As to the intentional loss exclusion, the District Court erred in denying Appellant's motion for summary judgment because the material facts regarding Appellant's directing or authorizing the acts which caused the loss were not in dispute. Specifically, the District Court erred in holding that "whether Reynoso's activities were authorized by Fisher presents genuine issues of material fact which preclude summary judgment on the issue of whether the intentional loss exclusion applies." Decision, at 9 (R. at 231).

In looking at whether Reynoso's acts were authorized, it is important to determine when the acts causing the loss occurred. The loss was the unauthorized tear down of the property. Thus, in determining whether the exclusion applies, the District Court should only have focused on the evidence of direction of Appellant with the intent to cause a loss *prior* to the total destruction of the residence. Prior to the destruction of the residence, the only evidence in the record regarding Appellant's direction to Reynoso was her Affidavit and the Purchase and Sale Agreement. The Purchase and Sale Agreement's provision regarding improvements Mr. Reynoso intended to make to the property provided only that "Buyer intends to make certain improvements to the property upon possession, with the intent to sell the property for a profit . . . the Buyer is required to give a monthly update for plans/upgrades." Purchase and Sale

Agreement, Addendum, at 1, ¶ 9 (R. at 96). The only evidence in the record concerning the "improvements" to the property contemplated by the parties comes from the Affidavit of Shammie Fischer, wherein she stated that the "improvements" contemplated by the parties included such things as new flooring or upgrades to the kitchen and bathroom floors and counters. Fisher Aff., at ¶ 9 (R. at 85). There was no discussion or agreement for the Buyer to demolish or rebuild any portion of the premises or remodel the structure. *Id.* This is consistent with the fact that the Buyer indicated that he intended to use the property as his primary residence during the term of the lease/purchase. *See id.*; Purchase and Sale Agreement ("Purchase and Sale Agreement"), at 4, ¶ 19 (R. at 91). The Purchase and Sale Agreement authorized Reynoso to make some cosmetic improvements if he so chose while residing in the Property. However, the purpose of the Real Estate Purchase Agreement was to sell the Property and to Lease it to Reynoso prior to a sale. The purpose of the contract was not for Plaintiff to hire Reynoso to perform repair or remodel services. Authorizing a tenant to make cosmetic improvements to a property while living in it is very different from hiring someone to make repairs or improvements to the Property. Making the cosmetic improvements was not required under the contract between Plaintiff and Reynoso, nor was Reynoso to be compensated for any improvements he made. He was merely authorized under the contract to make cosmetic improvements if he chose to for his own benefit. Accordingly, the undisputed evidence in the record regarding Appellant's authorization of Reynoso's acts in tearing down and destroying the residence *prior* to the loss

demonstrate that she did not authorize any remodel or renovation that required tearing down or destroying the residence or that she directed that the acts causing the loss be done.

Additionally, the District Court did not even address the second part of the exclusion, which requires not only that the action be taken at the direction of the insured but that it be taken "with the intent to cause a loss." There can be no claim in this case that the mere fact that Appellant had authorized Ron Reynoso to make "certain improvements" to the dwelling that were cosmetic in nature translates to her directing the actions of Ron Reynoso with the "intent to cause a loss." In fact, the undisputed facts demonstrate that Ron Reynoso leased the property with the intent to purchase it, and that he represented to the Appellant that he would live in the dwelling during the time he leased it as his primary residence. The fact that Appellant reasonably believed Ron Reynoso was going to live in the dwelling as his primary residence demonstrates that she did not direct that he destroy it with the intent to cause a loss under the Policy. There is simply no evidence that Plaintiff directed, or even authorized, him to destroy the property with the intent to cause a loss.

The only way the District Court could have found a factual dispute as to whether the acts of Reynoso causing the loss were authorized with the intent to cause a loss is if it was looking at acts occurring *after* the complete tear down of the residence: *after* the acts causing the loss. In that regard, Respondent had argued that *after* Appellant found out about the total destruction of the residence, she allowed Ron Reynoso to continue to pay rent and allowed him time to follow

through on his promises to rebuild the residence (which he did not do). This, Respondent contends, is evidence of her directing the acts of Ron Reynoso with the intent to cause a loss. It is not. Whether or not Appellant acquiesced in Reynoso attempting to rebuild the property in an attempt to mitigate her damages, *after* the acts causing the loss were complete, is not relevant or material to the question of whether the loss arose out of any act committed "by or at the direction" of the Appellant with "with the intent to cause a loss." The subsequent promises to rebuild the residence and fix the damage Reynoso had caused are not the loss. The loss was the destruction of the residence as demonstrated by the before and after pictures at Ex. C and D of the Affidavit of Shammie Fischer. There is simply no evidence that the destruction of the residence occurred at the direction of or even with the knowledge of Appellant with the intent to cause a loss and thus the District Court should have granted Appellant's motion for summary judgment on the issue of the application of the intentional loss exclusion.

C. The District Court Erred in Holding that the Exclusion For Faulty, Inadequate and/or Defective Work Applied in This Case

The District Court held that the exclusion for faulty or inadequate repair, renovation of remodeling applied in this case and concluded that there was no coverage for Appellant's loss, granting summary judgment in favor of the Respondent. The Idaho Supreme Court does not appear to have interpreted a clause like this, and thus, the issue was a matter of first impression in Idaho. The District Court therefore relied upon decisions from other jurisdictions in reaching its

conclusion. However, the decisions relied upon by the District Court are distinguishable, and the District Court erred in ignoring decisions from other jurisdictions which were on point and provided persuasive authority in support of Appellant's claim that the exclusion did not apply.

Given the burden imposed upon the insurance company to prove that the exclusion applies, *see Perry v. Farm Bureau Mut. Ins. Co.*, 130 Idaho at 103, 936 P.2d at 1345, and given the persuasive authority from other jurisdictions interpreting the same exclusion and finding that it did not prevent claims such as the Appellant's, the District Court erred in granting summary judgment in favor of Respondent. Rather, based upon the undisputed facts of record and based upon the language of the exclusion, the District Court should have found that the exclusion did not apply and should have granted summary judgment in favor of Appellant, not Respondent.

The exclusion for faulty or inadequate repair, renovation or remodeling, provides:

> We do not insure for loss to property described in Coverages A and B caused by . . .
>
> c. **Faulty, inadequate or defective;**
>
> . . .
>
> (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> (3) materials used in repair, construction, renovation or remodeling; or
>
> (4) maintenance;
>
> of part or all of any property whether on or off the Described Location.

Policy, at 8 (R. at 27). The exclusion for faulty, inadequate or defective maintenance does not apply at all in this case as there are no claims involving maintenance of the dwelling. Likewise, there are not claims based upon faulty, inadequate or defective materials used in construction. Rather, the claim in this case is that Ron Reynoso tore down Plaintiff's dwelling and destroyed it and the fixtures in it, without authorization or direction to do so. The District Court incorrectly concluded that those acts were faulty, inadequate or defective workmanship, repair, construction, renovation or remodeling, and that the exclusion applied.

The Idaho appellate courts do not appear to have addressed the issue of whether a faulty workmanship, construction or renovation clause in an insurance policy acts as a bar to a claim based upon the unauthorized demolition of a residence by a renter. Thus, this is a case of first impression in Idaho. Other courts, however, have interpreted exclusions in policies with the same language to apply only to situations where the work was performed by the insured or someone authorized by the insured. This makes sense because it is generally understood that actions involving construction, renovation, remodeling, grading, compaction and maintenance are not performed by persons other than an owner of real property or by someone hired by them to do such work.

The California Court of Appeals was asked to interpret a similar exclusion in *Home Savings of Am. v. Cont'l Ins. Co.*, wherein a lender sought recovery under an insurance policy for the destruction of a residence by the insured for redevelopment purposes. 104 Cal.Rptr. 2d 790

(Ct.App. 2001). In *Home Savings*, an insured transferred title and moved out. The home was then demolished for redevelopment. The lien holder sought damages under the policy for the destruction of its security. The insurer argued that the exclusion for faulty or inadequate renovation, development or remodeling applied. The court held that the exclusion did not apply, and explained:

> [W]e find that simply excluding damages flowing from faulty construction is insufficient to exclude the loss caused by a third party's intentional destruction of a secured residence.

Id. at 803. Similarly, in this case, excluding damages for inadequate remodel of the residence is insufficient to exclude the loss caused by a third party, Ron Reynoso's, intentional destruction of the residence.

Similarly, in *Husband v. LaFayette Ins., Co.*, a court held that in order for the exclusion for faulty or inadequate renovation or remodel to apply, the alterations must be undertaken **by the insured or someone authorized by the insured**. 635 So.2d 309, 311 (La.App. 1994). Specifically, the court agreed with the following conclusion of the trial court:

> **This court interprets the exclusion contained in the pertinent policy provisions to apply to situations where the insured or someone authorized by the insured contracts for alterations to the property** and is dissatisfied with the quality of the performance under that contract. The insurer by this exclusion intended to prevent the expansion of coverage under the policy to insuring the quality of a contractual undertaking by the insured of someone authorized by him.
> **However, in this case the alterations were undertaken without authorization and in direct conflict with the terms of the lease,**

and therefore fall outside the exclusion of the policy.

Id., 635 So. 2d at 311 (emphasis added). In this case, the exclusion for faulty or inadequate remodel or repair does not apply because the destruction of the insured dwelling by Ron Reynoso was not done at the direction or with the authorization of the insured. Fisher Aff, at ¶ 9 (R. at 85).

The First Circuit Court of Appeals has also cited the same language from *Husband* and has held that "the faulty workmanship policy exclusion was 'intended to prevent the expansion of coverage under the policy to insuring the quality of a contractual undertaking by the insured or someone authorized by him.'" *Fidelity Coop. Bank v. Nova Cas. Co.,* 726 F.3d 31, 38 (1st Cir. 2013) (quoting *Husband v. Lafayette Ins. Co.*, 635 So. 2d 309, 311 (La.Ct.App. 1994)). In *Fidelity*, a prior owner of property had made a roof repair. After the property was sold, there was a major storm and the roof leaked causing extensive water damage. The insurer argued that the exclusion for faulty workmanship or repair precluded coverage because the drain on the roof repair was too small and thus the damage was caused by faulty workmanship. The court noted that "the undisputed evidence on record [was] that the roof was repaired prior to the Knowles' ownership, and that the Knowles did not repair, renovate or replace the roof or its drain . . . ." *Id.* Because the work on the roof was not a contractual undertaking by the insured or someone authorized by the insured, the exclusion did not apply.

Similarly, in this case, the exclusion for faulty workmanship, renovation or repair is

"intended to prevent the expansion of coverage under the policy to insuring the quality of a contractual undertaking by the insured or someone authorized by him." *Id.* Because there was no contractual undertaking by Appellant to have her home remodeled by Reynoso, and because Reynoso destroyed the home without her authorization, the exclusion does not apply.

Finally, the Supreme Court of New York has reached the same conclusion as to the meaning of the policy exclusion for "faulty, inadequate or defective . . .design, specifications, workmanship, repair, construction, renovation or remodeling, grading, compaction . . . ." *11 Essex St. Corp. v. Tower Ins. Co. of New York*, 2005 N.Y. Misc. LEXIS 3556, 234 N.Y.L.J. 115 (S.Ct. New York 2005). In *11 Essex St. Corp.*, the defendant argued that the "faulty workmanship" exclusion (identical to the exclusion in this case) applied to preclude coverage for damage to the building of its insured, which was allegedly caused by negligent construction at an adjacent work site. *Id.* at 3556, *2. In holding that the exclusion did not apply, the court cited *Husband* as follows:

> Following the principles of construction, this court is persuaded that the faulty workmanship exclusion applies to situations only "where the insured or someone authorized by the insured contracts for alterations to the property and is dissatisfied with the quality of the performance under that contract."

Id. at 3556, *5 (quoting *Husband v. Lafayette Ins. Co.*, 635 So. 2d 309, 311 (La.Ct.App. 1994)). Thus, because the work at the adjacent site that allegedly caused the damage was not done by the insured or someone authorized by the insured, the exclusion did not apply.

The cases cited above demonstrate that the plain meaning of the faulty or inadequate repair or renovation exclusion is to apply only to situations where the insured or someone authorized by the insured contracts for alterations to the property and is dissatisfied with the quality of the performance under that contract. There is no need for additional language in the exclusion stating that the work be done by or at the direction of the insured.

In reaching its decision that the faulty workmanship, construction or renovation exclusion did apply, the District Court ignored the reasoning in the cases cited above, and instead relied upon two decisions from other jurisdictions, one from the Washington Court of Appeals that did not address the issue in this case, and one from a federal district court in California, which dealt with facts entirely different from those in this case. The District Court erred in following the decisions in those cases, and ignoring the on point analysis in the majority of courts addressing this issue in reaching its decision that the exclusion applied.

In *Capelouto v. Valley Forge Ins. Co.*, 900 P.2d 414 (Wash. App. 1999), a Washington Court of Appeal case relied upon by the District Court in reaching its decision, the issue of whether the work performed was authorized by or contracted for by the plaintiff was not even addressed. In *Capelouto*, the plaintiff sought coverage for damage to his property that was caused by work done on a sewer system off his property. The court held that the exclusion for faulty, inadequate or defective construction applied to "damage cause by a contractor's use of an inadequate pump on a sewer replacement project off the insured premises." *Id.* at 417. The

plaintiff in *Capelouto* did not argue that he had not contracted for or authorized the work done on the sewer line in opposition to the application of the exclusion. Rather, the issue raised by plaintiff in that case and addressed by the court was whether the use of inadequate equipment fell under the exclusion. The court held that it did. At no point did the court address the issues before the Court in this case, nor did the court address the decisions and analysis cited in this case. Thus, the *Capelouto* decision does not provide any guidance as the issue in this case, and should not have been relied upon by the District Court in reaching its decision that the exclusion applied under the facts of this case.

The District Court also erred in relying upon *Stephens v. Liberty Mut*, 2008 U.S. Dist. LEXIS 12243, 2008 WL 480287 (N.Dist. Cal. 2008), because that case also did not contain any analysis of the issue of whether the faulty, inadequate or defective construction applied to situations where an unauthorized third party destroyed real property and involved facts distinguishable from this case. In *Stephens*, the plaintiff sought coverage for damage to its property caused by the demolition of an adjacent building and the construction of a new parking garage on that site. *Id.* at *2. The plaintiff in *Stephens* was made aware of the demolition plans and had hired its own licenced contractor to participate in a "peer review" committee regarding the project. *Id.* at * 4. Plaintiff's engineers gave input into the demolition work before it occurred and commented to the design team working on the project stating "we believe the design team has appropriately responded to our comments . . . ." *Id.* at *5. Thus, the plaintiff in

Stephens was aware of the work prior to its occurring and had a role in how the work was to be done. This is significantly different from the facts in this case, where Appellant did not know of the demolition until *after* it had occurred and she had suffered a loss.

Additionally, while the court in *Stephens* held that the "question here is whether coverage is excluded under the 'faulty construction' and 'third party negligence' exclusions," it concluded with no analysis whatsoever, that "[r]esolving that question does not depend upon determining whether plaintiffs or Olympic Club authorized the construction or hired the contractor, or whether the alleged damage occurred before the policy period began." *Id.* at *40. The court made this conclusory holding without addressing any of the cases from other jurisdictions addressing the issue, including *Home Savings of Am. v. Cont'l Ins. Co.,* 104 Cal.Rptr. 2d 790 (Ct.App. 2001), which was a California state court decision and clearly would be persuasive authority for the California federal district court ruling on California state law. Due to the failure of the federal district court to address the issues raised by Appellant in this case, and because the facts differ substantially between this case, the District Court erred in relying upon that decision in reaching its conclusion that the exclusion for faulty or inadequate workmanship, construction or renovation exclusion applied. The District Court should have following the reasoning in the majority of jurisdictions interpreting the exclusion, and found that the exclusion does not apply under the facts in this case.

D. Summary and Conclusion

At its most basic level, what the District Court held in this case was that "the loss here was caused directly by faulty inadequate or defective work as set forth in the exclusion," and there is not coverage for Appellant's loss. Decision, at 14 (R. at 236). Putting all of the case law and argument aside, this conclusion simply does not make sense under the facts of this case and results in a tortured interpretation of the insurance policy and what it means for a homeowner to endeavor to make repairs to a property or to remodel or do construction on a property.

In this case, the homeowner was not involved in any way in the complete destruction of her property. Appellant was unaware of the destruction caused by her tenant until after it was complete. At that point, she was a victim of his tortious act. She did not have a breach of contract claim against him for faulty work or remodeling or construction because there was no agreement that he perform any such work. The exclusion for faulty work contained in the insurance policy contemplates that the insured does work to remodel, build or repair a premises or hires someone else to do it. The Policy need not contain language to that effect because it is understood that work to repair, remodel or construct property is always done at with the knowledge or participation of the owner. When an unauthorized third party destroys property, that it not remodeling, building or repair, under any reasonable interpretation of the insurance policy.

Holding that after the total destruction, allowing the tenant to have time to attempt to

repair the damage he caused similarly cannot be seen as an insured doing work to repair, build or remodel the premises. Moreover, there is no evidence in this case that the tenant actually did any work after the destruction was caused, with the knowledge of the Appellant, which caused the loss. This is not a case where the tenant attempted to rebuild and did a poor job, this is not a case where the Appellant hired the tenant to rebuild her property and he failed to do it. This is a case where the tenant destroyed the property, and Appellant attempted to mitigate her damages by continuing to collect rent from him while he made promises that he would fix the damage, which he did not. To hold as the District Court did in this case takes away all incentive of a homeowner to attempt to mitigate its damages, and results in the unreasonable conclusion that if an unauthorized third party does damage to property, it is excluded from coverage as an attempt to remodel or work on the property. This simply defies common sense and logic.

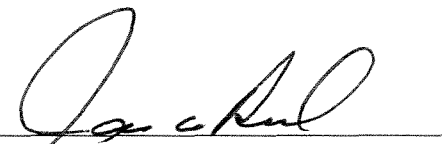
Given the burden on the insurance company to clearly demonstrate the application of the exclusion, there is no way that Respondent can meet that burden in this case. The exclusion for faulty or inadequate work does not apply, and summary judgment should have been granted to Appellant by the District Court.

IV. CONCLUSION

Based upon the foregoing, the Appellant respectfully requests the judgment of the District Court be reversed, and that judgment be entered in favor of the Appellant on the issue of insurance coverage under the Policy for her losses.

DATED this 25th day of July, 2016.

KAUFMAN REID, PLLC

By 

James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of July, 2016, two true and correct copies of the foregoing were served upon all parties listed below by:

☐ U.S. Mail ☐ Fax ☒ By Hand ☐ Overnight

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