9-20-2016

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHAMMIE L. FISHER, Appellant, vs. GARRISON PROPERTY AND CASUALTY INSURANCE COMPANY, Respondent.	Case No. 44117

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and for the County of Ada, Honorable Patrick H. Owen Presiding

James G. Reid
Jennifer Reid Mahoney
Kaufman Reid, PLLC
1211 W. Myrtle St., Suite 350
Boise, ID 83702
Telephone: (2087) 342-4591
Facsimile: (208) 345-4657

Attorneys for Appellant

Jeffrey A. Thomson
Elam & Burke, P.A.
P.O. Box 1539
Boise, ID 83701
Telephone: (208) 343-5454
Facsimile: (208) 384-5844

Attorneys for Respondent

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I. STATEMENT OF THE CASE

A. Nature of the Case.

Shammie L. Fisher ("Fisher" or "Insured") appeals from the district court's grant of summary judgment dismissing her suit against Garrison Property and Casualty Insurance Company ("Garrison" or "Insurer"). The district court granted summary judgment based on an exclusion from coverage for any loss caused by faulty, inadequate or defective work.[1]

B. Course of Proceedings.

Fisher did not include in her Appellant's Brief a Course of Proceedings section. Garrison provides the following Course of Proceedings:

Plaintiff Fisher filed her Complaint and Demand for Jury Trial on May 27, 2015. (R., pp. 5-10.) The Complaint was brought against USAA Casualty Insurance Company. (*Id.*) An Answer to the Complaint was filed on July 10, 2015. (R., pp. 32-40.) The parties stipulated to allow Plaintiff to file an Amended Complaint and on July 21, 2015 the district court entered an Order Granting Motion to File Amended Complaint. (R., pp. 41-42.) An Amended Complaint was filed on July 27, 2015. (R., pp. 43-49.) Defendant USAA was substituted with Garrison. (*Id.*) The Amended Complaint alleged two causes of action: breach of contract and breach of the implied covenant of good faith of fair dealing. (*Id.*) On July 31, 2015, Garrison answered the Amended Complaint. (R., pp. 71-79.)

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[1] Fisher also erroneously appeals from an alleged grant of summary judgment in favor of Garrison that there was no coverage for her loss and the district court's denial of cross motions for partial summary judgment relating to the intentional loss exclusion. Neither are proper issues on appeal.

On September 1, 2015, Fisher filed a Motion for Partial Summary Judgment seeking a ruling that the insurance policy provides coverage for her property damage losses. (R., pp. 80-82.) In support of that Motion, Fisher filed an Affidavit (R., pp. 83-118), and a Memorandum (R., p. 119-129).

Garrison filed a Cross-Motion for Summary Judgment on December 31, 2015 (R., pp. 150-151) seeking a ruling that the property damage loss was excluded from coverage by the terms of two exclusions: intentional loss and faulty, inadequate or defective work. This Motion was supported by an Affidavit with attached exhibits (R., pp. 152-174), and a Memorandum (R., pp. 175-190). On January 15, 2016, Fisher filed her Memorandum in Opposition to Defendant's Motion for Summary Judgment. (R., pp. 191-202.) Garrison then filed, on January 25, 2016, a Reply Memorandum in Support of Defendant's Motion for Summary Judgment. (R., pp. 203-206.)

Following the hearing on the cross-motions for summary judgment, held on February 1, 2016, the district court requested additional briefing on the following issue: "Where General Exclusion 1.h. is directly tied to activities of the insured, should the court consider it significant that General Exclusion 2.c. is not directly tied to activities of the insured?" (R., pp. 207-209.) Garrison filed its additional briefing on February 12, 2016. (R., pp. 210-214.) Fisher filed a Supplemental Memorandum on February 16, 2016. (R., pp. 215-222.)

On February 25, 2016, the district court issued its Memorandum Decision and Order Re: Cross Motions for Summary Judgment as to Coverage granting summary judgment that there was coverage for the loss, denying summary judgment on whether the intentional loss exclusion

applies and granting summary judgment that Fisher's loss was excluded from coverage by the faulty, inadequate or defective work exclusion. (R., pp. 223-238.)

A Final Judgment was entered on March 25, 2016 dismissing Plaintiff's Amended Complaint with prejudice. (R., pp. 239-240.)

Fisher timely filed her Notice of Appeal on April 13, 2016. (R., pp. 241-244.) Because the Notice of Appeal included the old caption naming USAA as the Defendant/Respondent, an Amended Notice of Appeal naming the correct Defendant/Respondent ("Garrison") was filed on May 4, 2016. (R., pp. 245-248.)

C. Statement of Facts.

The facts are not in dispute. The following Statement of Facts adds additional undisputed facts and places other undisputed facts in context.

At all relevant times, Fisher was the owner of real property located at 2510 North 34th Street, Boise, Idaho. (R., p. 83, ¶ 2.) Garrison issued a dwelling policy to Fisher applying to that Described Location ("the Property"). (*Id.*, p. 52.)

Beginning in January 2012 Fisher (as seller) and Ron Reynoso ("Reynoso") (as buyer) negotiated a lease-to-purchase agreement for the Property. (R., p. 84, ¶ 3.) The agreement is reflected in: (1) a Real Estate Purchase and Sale Agreement dated January 25, 2012 (R., pp. 88-94); (2) a Counter Offer dated January 26, 2012 (R., p. 95.); (3) an Addendum dated January 28, 2012 (R., p. 96); (4) an Addendum dated February 8, 2012 (R., p. 97); (5) an Addendum dated March 13, 2012 (R., p. 98); and (6) a Rental Agreement signed January 30, 2012 (R., pp. 105-109) (collectively referred to as "Lease-Purchase Agreement").

The Lease-Purchase Agreement was for a one year term beginning on March 15, 2012 and ending on March 31, 2013. (R., pp. 96; and 84, ¶ 4.) In the event Reynoso was unable to close before January 31, 2013, Fisher agreed to a month-to-month option to extend the Lease-Purchase Agreement until a buyer closed on the Property, ending no later than September 1, 2013. (R., p. 96.) Reynoso had the right to purchase the property during the term of the Lease-Purchase Agreement for $153,000.00. (R., p. 95.) The Lease-Purchase Agreement expressly allowed Reynoso to make improvements to the Property with the intent to sell it for a profit. (R., p. 96.)

The various documents making up the Lease-Purchase Agreement contain the following relevant provisions regarding Reynoso's right to improve the Property:

> 5. Should the Buyer use any Sub-Contractors while making improvements to this property, all disbursements are to be made by TitleOne and said Sub-Contractors will be required to sign Lien-Waivers upon picking up their checks.

(R., p. 95);

> 8.) Any improvements to the property made by the Buyer during the lease period are forfeit to the Seller in the event the Buyer does not complete the purchase transaction. Seller is not responsible to reimburse Buyer any costs of improvements.
> 9.) Buyer intends to make certain improvements to the property upon possession, with the intent to sell the property for a profit which might be prior to the end of the lease period. The buyer is required to give a monthly update for plans/upgrades. Buyer may market the property for resale prior to the end of the rental period with the intent to sell the property.

(R., p. 96.)

6. OWNER'S AGREEMENT:

. . .

b. **MAJOR REPAIRS.** Tenant shall be responsible for all major repairs to the premises

c. **MINOR REPAIRS.** All repairs shall be paid by the tenant. Owner shall be notified by tenant of the repair prior to the work being done and repairs are to be accomplished in a workman like manner.

(R., p. 105.) (Bold in original.)

. . .

(9.) INSPECTION. Tenant agrees that Owner or Owner's authorized agent may enter the premises at reasonable times and intervals to inspect, repair, and maintain the same, or to show the property to any prospective buyer, or any loan or insurance agent. After notice of termination of this tenancy has been given by either party, Owner may show the premises to any prospective Tenant.

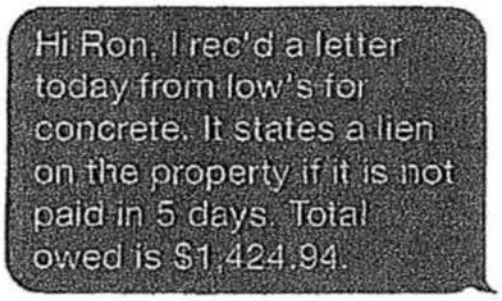
(R., p. 107.) (Bold in original.)

In response to Requests for Admission, Fisher admitted the following:

1. As early as January 25, 2015, Fisher knew that Reynoso was going to make improvements to the Property. (R., p. 164.)
2. Within the first two months after executing the contract for Lease-to-Purchase Fisher knew that the dwelling had been leveled. (*Id.*)
3. After learning that the dwelling had been leveled Fisher did not declare Reynoso to be in breach of any agreement and refrained from doing so because Reynoso promised to fix the damage he had caused and continue to make rent payments. (*Id.*, pp. 164-165.)
4. Fisher agreed to allow Reynoso time to fix the damage. (*Id.*, p. 165.)
5. Prior to submitting a Proof of Loss in September 2013, Fisher did not provide notice to Garrison that she considered the destruction of the dwelling to constitute a loss under the dwelling policy. (*Id.*)

Reynoso promised Fisher that he would rebuild the dwelling. (R., p. 84, ¶ 7.) As promised, Reynoso began rebuilding the dwelling. (R., pp. 113; 118.) Fisher monitored and was kept advised by Reynoso of the progress of the dwelling construction:

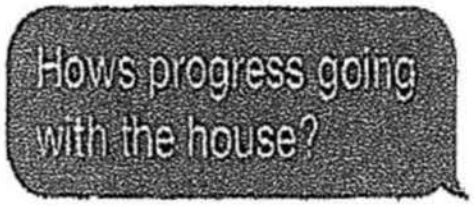
Jun 8, 2012, 7:44 PM



Sorry it will be paid
tomorrow had an issue
with a lender being on time

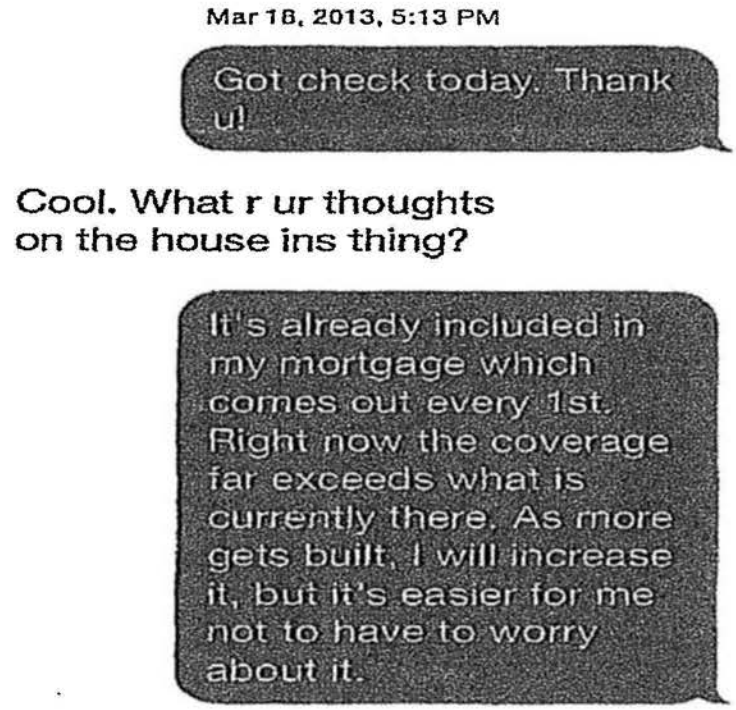
(R., pp.168-169.)

Sep 7, 2012, 2:48 PM

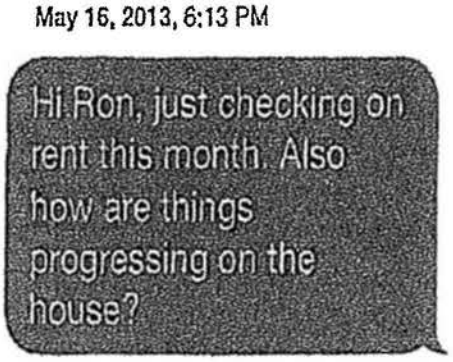


We start framing middle
next week. Car accdt put
me out of work 4 5 wks.
Was going 2 put on the
market oct 1 now mid
nov maybe sooner

(R., p. 170.)



(R., p. 171.)



t need the loan/ also
very possible. I m still
giving u 5k either way.

Was dropping 700in
mlbx in morning. Other
300 next Tues. Been
back little over a wk.
getting ready to frame
2nd flr/already
started.Plan on putting
the

roof on in 2 wks/around
Mem day. Working w

(R., p. 173.)

Jul 5, 2013, 9:25 PM

When do u get back into town? Can we get together and go over ur thoughts with the house?

Hoping late next wek.
Yes on the meeting. Can
my invstr realtr john
hueger come

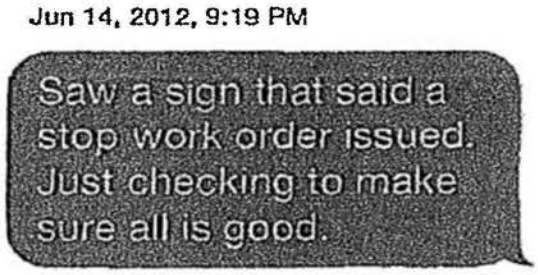
(R., 174.)

U bet! Also I noticed
tonight that some if ur
walls r missing that u out
up on the house.

The archt drew two story
walls for entry. I changed
it thru city and cut them.

(*Id.*)

Fisher inspected the Property during construction.



(R., 169.)

The one year lease term began on approximately March 31, 2013. (R., p. 84, ¶4.) Within two months after the lease term began, Fisher was notified that "the entire home had been destroyed by Mr. Reynoso, including the structures and fixtures therein." (*Id.* at ¶ 5.)

In August 2013, Reynoso informed Fisher that he was "walking away" from the house and did not intend to complete construction. (R., p. 84, ¶ 7; Appellant's Brief, p. 2.) At the time construction ceased, the dwelling was incomplete and not habitable. (R., pp. 113; 118.) Fisher did not make a claim under the dwelling policy for loss until September 27, 2013, nearly one and one-half years after the dwelling was "destroyed". (R., p. 84, ¶ 7.)

II. ISSUES ON APPEAL

The appellate rules contemplate that a Respondent set forth "additional" issues presented on appeal if the issues listed in Appellant's Brief are insufficient, incomplete or raise additional issues for review. I.A.R., Rule 35(b)(4). The district court granted Fisher partial summary judgment that there was coverage under the policy. The district court denied Fisher's Motion for Summary Judgment that the intentional loss exclusion did not apply and Garrison's Cross-

Motion for Summary Judgment that it did apply. Consequently, rather than three issues on appeal, there is only one:

> Did the district court properly grant Summary Judgment on the grounds that the exclusion for faulty, inadequate and/or defective work excluded the property damage loss?

III. ARGUMENT

A. Standards of Review.

1. Standard of Review for Grant of Summary Judgment.

In reviewing a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon the motion. *Thomson v. Lewiston*, 137 Idaho 473, 475-476, 50 P.3d 488, 490-491 (2002). This Court will review the record before the district court, including the pleadings, depositions, admissions and affidavits, if any, to determine *de novo* whether, after construing the facts in the light most favorable to the non-moving party, there exists any genuine issues of material fact and whether the successful movant below is entitled to judgment as a matter of law. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 40, 740 P.2d 1022, 1026 (1987); I.R.C.P. 56(c).

2. Standard of Review for Denial of Summary Judgment.

It is well settled in Idaho that "[a]n order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken." *Dominguez, ex rel. Hamp v. Evergreen RES., Inc.,* 142 Idaho 7, 13, 121 P.3d 938, 944 (2005) (citation omitted). This rule is not altered by entry of an appealable final judgment. *Id.*

3. Standard of Review for Contract Interpretation.

Where a contract is clear and unambiguous, the determination of the effect of a contractual provision is a question of law to be decided by the Court. *Tolley v. T.H.I. Co.*, 140 Idaho 253, 92 P.3d 503 (2004). The interpretation of the legal effect of a policy of insurance is a question of law over which this Court exercises *de novo* review. *Howard v. Oregon Mutual Ins. Co.*, 137 Idaho 214, 46 P.3d 510 (2002). Interpreting contracts and applying the law to undisputed facts constitutes matters of law which this Court reviews *de novo*. *Polk v. Larrabee*, 135 Idaho 303, 308, 17 P.3d 247, 252 (2000).

B. Analysis.

1. Coverage is Not in Dispute Nor an Issue on Appeal.

Fisher sets forth the following issue 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 of Respondent?

(Appellant's Brief, p. 3.) The district court did not grant summary judgment in favor of Garrison that there was no coverage for the loss. The district court granted summary judgment in favor of Fisher on that issue:

> There is no genuine issue of any material fact; the direct loss to the residence is a loss covered by the policy. The Court will grant partial summary judgment to Fisher as to this issue.

(R., p. 229.) It is unusual for an Appellant to seek reversal of a grant of partial summary judgment in his or her favor. This issue is not (or should not be) an issue on appeal. The only issue on appeal is whether the property damage loss is excluded from coverage.

2. The District Court's Denial of the Cross Motions for Summary Judgment Regarding the Application of the Intentional Loss Exclusion is Not Appealable.

The district court denied the cross motions for summary judgment on whether the intentional loss exclusion applied to Fisher's loss. (R., p. 231.) Fisher appeals from that denial. (Appellant's Brief, pp. 4, 8, 11.)

Fisher cannot appeal from the denial of the cross motions for summary judgment. *Dominguez*, 142 Idaho at 13, 121 P.3d at 944. Asking this Court to review and overturn the district court's denial of the cross motions for summary judgment should be rejected.

3. The District Court Properly Granted Summary Judgment to Garrison that Fisher's Loss to the Dwelling was Excluded by the Faulty, Inadequate or Defective Work Exclusion.

The district court held that the faulty, inadequate or defective work exclusion applies to Fisher's loss as follows:

> In this case, the Court has considered the language of the faulty, inadequate or defective work exclusion, and finds that the language is clear and unambiguous. There is an exclusion for any loss attributable to faulty, inadequate or defective work. The Court finds that the loss here was caused directly by faulty[,] inadequate or defective work as set forth in the exclusion. The policy excludes coverage for any and all faulty, inadequate and/or defective work.
> . . .
> Fisher has demonstrated that the direct loss was covered under the policy. Garrison has shown that the faulty, inadequate or defective work exclusion applies to Reynoso's incomplete construction work. . . .

(R., p. 236, 237.) The district court further held "that there is no genuine issue of material fact as to whether the faulty, inadequate or defective work exclusion applies; it does." (R., p. 237.) Fisher agrees there are no genuine issues of material fact relating to application of the faulty, inadequate or defective work exclusion.

> 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.

(Appellant's Brief, p. 12.)

Nor does Fisher dispute the district court's finding that the language of the faulty, inadequate or defective work exclusion is clear and unambiguous. (R., p. 236.) Appellant appeals from the district court opinion "and seeks an order from this Court that, based upon the uncontested facts and the plain language of the policy, there is no coverage for the losses and the exclusions do not apply." (Appellant's Brief, p. 1.) (*See also* Appellant's Brief, p. 5, "In this case, the clear language of the policy provides coverage for Appellant's loss".)

Because there is agreement between and among the district court, Fisher and Garrison that the faulty, inadequate and defective work exclusion is clear and unambiguous and that the material facts are undisputed, this Court, using the rules of construction described below, can determine whether the loss is excluded from coverage as a matter of law.

An insurance policy will generally be construed so that the insurer bears the burden of proving that the asserted exclusion is applicable. *Harman v. Northwestern Mutual Life Ins. Co.*, 91 Idaho 719, 721, 429 P.2d 849, 851 (1967). "The language of standardized contracts must

necessarily be somewhat general, in anticipation of varying circumstances and facts." *Foster v. Johnstone,* 107 Idaho 61, 65, 685 P.2d 802, 806 (1984). "There is no obligation on courts to countenance a tortured construction of an insurance contract's language in order to create an ambiguity and thus provide an avenue for coverage where none exists." *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 236, 912 P.2d 119, 123 (1996). "A contract must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous." *Hill v. American Family Mut. Ins. Co.*, 150 Idaho 619, 622, 249 P.3d 812, 815 (2011).

Where policy language is found to be unambiguous, this Court is to construe the policy as written, "and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability." *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 69, 205 P.3d 1203, 1205 (2009) (quoting *Purvis v. Progressive Casualty Ins. Co.*, 142 Idaho 213, 216, 127 P.3d 116, 119 (2005)). Common, non-technical words are given the meaning applied by laymen in daily usage in order to effect the intent of the parties. *Armstrong*, 147 Idaho at 69, 205 P.3d at 205.

The *de novo* review by this Court is thereby limited to applying the clear and unambiguous language of the faulty, inadequate or defective work exclusion to the undisputed facts to determine whether Fisher's loss is excluded from coverage.

a. Fisher's Loss is Excluded by the Plain Meaning of the Faulty, Inadequate or Defective Work Exclusion.

Fisher's policy provides coverage for her dwelling. (R., p. 60.) The peril insured against is the risk of direct loss to her dwelling if that loss is a physical loss to the property. (*Id.* at p. 63.) (Appendix A.) A "loss" is generally defined as:

> 3. *Insurance.* The amount of financial detriment caused by . . . an insured property's damage, for which the insurer becomes liable.

BLACK'S LAW DICTIONARY, 8th Ed., p. 963. There is no dispute that Fisher suffered a direct, physical loss to her property – an incomplete, uninhabitable house.

The policy excludes from coverage any loss to property caused by any of the following:

> c. **Faulty, inadequate or defective;**
> . . .
> (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
> . . .
> of part or all of any property whether on or off the Described Location.

(R., p. 66.) (Appendix A.) The loss here resulted from faulty, inadequate or defective workmanship, repair, construction, renovation and/or remodeling of the dwelling, leaving it, to her financial detriment, in an incomplete state.

The relevant terms in the faulty, inadequate and defective work exclusion have the following common, non-technical definitions used by laymen in daily use:

1. Inadequate – not adequate; insufficient
2. Defective – having a defect; faulty
3. Faulty – containing a fault or faults; imperfect
   a. Workmanship – the quality of such art, skill or technique
   b. Repair – to restore to sound condition after damage or injury; fix; the work, act or process of repairing

c. Construction – the act or process of constructing; the state of being constructed; the way in which something is put together
d. Renovation – to make new; to restore to a previous condition, as by remodeling
e. Remodeling – to remake with a new structure

WEBSTER II NEW COLLEGE DICTIONARY, 558, 295, 409, 1272, 939, 242 and 937 (1999).

The undisputed facts show that the buyer/lessee Reynoso was to make certain improvements to the dwelling. By definition, improvements involve workmanship, construction, renovation and/or remodeling. Those improvements were not completed and were therefore inadequate, defective or faulty. Any loss based on "certain improvements" to the dwelling is excluded by the plain language of the exclusion.

In the process of improving the property for resale (the Lease-Purchase Agreement does not limit the improvements), Reynoso tore down, or as Fisher labels it "destroyed" the dwelling. By definition, this also involves construction (demolition is a process of construction), renovation (demolition is a process related to renovating existing structures), and remodeling (demolition is part and parcel of remodeling). After the demolition/destruction of substantial portions of the dwelling it was inadequate (not adequate for or unequal to the purpose of being a dwelling) and defective (wanting in something, incomplete, lacking a part, deficient) and faulty (not fit for the use intended). Any loss based on "destroying" the dwelling is excluded by the plain language of the exclusion.

Reynoso began rebuilding the dwelling in order to, as Fisher states, "repair" the damage to the dwelling. Moreover, the undisputed facts show that Reynoso intended to improve the dwelling for resale and profit. By definition and admission, rebuilding the dwelling involves

workmanship, repair and construction. Reynoso did not complete the construction of the dwelling or complete the repair of the damage, making that workmanship, repair and construction inadequate, defective and faulty. Any loss based on failing to rebuild or repair the dwelling is excluded by the plain language of the exclusion.

Regardless of the words used by Fisher to describe the causes of the loss, applying any of those causes to the plain meaning of the exclusion supports the application of that exclusion to Fisher's loss. The failure to complete the improvements, the demolition of the dwelling, the repair of the damage and construction of those repairs and the failure to complete the improvements or rebuild the dwelling were losses caused by faulty, inadequate or defective workmanship, repair, construction, renovation and/or remodeling of part or all of the dwelling.

The district court correctly ruled that the plain meaning of the exclusion applied to and excluded Fisher's loss. The district court should be affirmed.

b. The Words, Terms, and Conditions Fisher Seeks to Add to the Exclusion Cannot Preclude Application of the Exclusion.

Fisher argues that the faulty, inadequate, or defective work exclusion does not apply because she did not authorize Reynoso to destroy the dwelling, the destruction was not done at her direction or done by her, she had no knowledge that Reynoso had "leveled" the dwelling, and she did not hire or have a contractual undertaking with her tenant to do the work or to repair the damage. Each of these arguments is made to avoid the application of the exclusion and requires adding words, terms, or conditions to the exclusion and ignore the plain meaning of the words actually used in the exclusion.

When analyzing the clear and unambiguous language of the faulty, inadequate, or defective work exclusion, this Court is constrained to construe it as written. *See Armstrong*, 147 at 69, 205 P.3d at 1205. This Court cannot add words to the contract of insurance to either create or avoid liability. *Id.* The faulty, inadequate or defective work exclusion has no language that Fisher authorize, direct, have knowledge of, perform herself, or hire out to a third person. To engraft these words, terms, and conditions onto the clear and unambiguous language violates long-established rules of contract construction. It fails to construe the policy as written. Adding words, terms and conditions creates a liability not assumed by Garrison. Fisher's request to add these words, terms or conditions should be rejected.

Support for not adding Fisher's words, terms, or conditions to the faulty, inadequate, or defective work exclusion is found in the presence of similar words and conditions in a different exclusion (intentional loss) and the absence of those terms and conditions in the subject exclusion (faulty, inadequate or defective work exclusion). The intentional loss exclusion in Fisher's policy provides:

> 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.

(R., p. 66.) (Appendix A.) There is no "by or at the direction of" the insured language in the faulty, inadequate, or defective work exclusion. *Id.*

As the district court held:

> The conclusion that the faulty, inadequate or defective work exclusion provision is unambiguous is further supported by reviewing the language of the intentional loss provision. In that exclusion, whether an intentional loss was excluded depended expressly upon whether the loss arose out of an act committed "by or at the direction of the [insured]". The faulty, inadequate or defective work exclusion provision makes no mention of whether the work activity was done by or at the direction of the insured. The presence of this language in one exclusion and the absence of this language in another exclusion is telling. The absence of this language supports the conclusion that the policy did not intend to condition the faulty, inadequate or defective work exclusion on whether any work was undertaken by or on behalf of the insured.

(R., pp. 236-237.) The expression or inclusion of one thing implies the exclusion of another. *See Ace Realty Inc. v. Anderson*, 106 Idaho 742, 749, 682 P.2d 1289, 1296 (Ct. App. 1984). If Garrison had intended the faulty, inadequate or defective work exclusion to require that it apply only when the loss/work was done "by or at the direction of" the insured, it could have borrowed that language from the intentional loss exclusion. Garrison's failure to do so leads to a reasonable inference that it did not intend to limit the faulty, inadequate or defective work exclusion be limited to a loss arising out of work "by or at the direction" the insured. The absence of that language in the faulty, inadequate or defective work exclusion is indeed telling.

The clear and unambiguous language of the subject exclusion precludes adding Fisher's words, terms, or conditions in order to avoid its application. The district court correctly refused to add any words, terms or conditions to the exclusion. The district court should be affirmed.

c. Even if the Exclusion is Deemed Ambiguous and Interpreted to Include Additional Words, Terms, or Conditions, the Exclusion Still Applies.

Even if the Court adds Fisher's words, terms or conditions to the faulty, inadequate, or defective work exclusion, the undisputed facts show that even with the added language, the exclusion applies.

(1) Fisher Authorized Work to be Done to the Dwelling.

The Lease-Purchase Agreement expressly and in writing authorized improvements and repairs to the dwelling. (R., pp. 95-96, 105.) Fisher signed the Lease-Purchase Agreement. Fisher admitted that she verbally authorized the tenant to fix the damage and rebuild the dwelling. (R., pp. 164-165.) Even if "authorized" is added to the exclusion, that condition to the application of the exclusion was met.

Fisher argues that she did not, however, authorize the destruction of the entire dwelling. This merely expresses her dissatisfaction with the outcome of the authorized work. The fact that the improvements led to damage she did not authorize simply defines the scope of the loss (damages) rather than its cause.[2] Fisher authorized work to be done on the dwelling. That authorized work involved workmanship, construction, repair, renovation, or remodeling. That authorized work was faulty, inadequate, or defective. The exclusion applies even if authorization is required.

[2] For instance, under Fisher's interpretation of this added term, if Reynoso had, in the process of doing the certain improvements she authorized damaged a load bearing wall causing the dwelling to collapse, the exclusion would not apply because she did not authorize him to damage the wall or cause the house to collapse. This is not a reasonable interpretation of the scope of the exclusion, even if authorization is required.

Regardless, it is undisputed that she authorized the tenant to "fix the damage" and "rebuild" the dwelling. (R., pp. 164-165.) The failure to do so caused Fisher's ultimate loss – a partially constructed dwelling. An unfinished, incomplete dwelling is faulty, inadequate or defective construction or repair. To the extent authorization is required, the exclusion applies to her loss.

(2) The Work Was Done by or at the Direction of Fisher.

Fisher argues the exclusion only applies to work done by or at her direction. Similar to authorizing Reynoso to do work, the work was done by or at Fisher's direction.

Fisher directed Reynoso's use of subcontractors used in making the authorized improvements to the dwelling by requiring all disbursements be made by TitleOne and that the subcontractors sign lien-waivers. (R., p. 95.) Fisher directed Reynoso's work by requiring him to give a monthly update for "plans/upgrades." (R., p. 96.) Fisher had the right to inspect the premises. (R., p. 107.) Indeed, she monitored the reconstruction of the dwelling and questioned the possible lien for concrete, a stop work order sign on the dwelling ("just checking to make sure all is good"), and monitoring progress of the reconstruction. (R., pp. 168, 169, 170, 173.) To the extent "by or at the direction" of Fisher is added to the exclusion, that condition was met.

(3) Fisher had Knowledge that Work Would Be Done.

Fisher claims that she did not have knowledge that Reynoso would destroy the dwelling. She has admitted, however, that she knew improvements would be done to the dwelling. (R., p. 164.) The fact that she did not know the final outcome of the work is of no consequence to the application of the exclusion. At most, if knowledge is required, it would be knowledge of some

repair, construction, renovation or remodeling to the dwelling, not knowledge that this work would be done in a faulty, inadequate, or defective manner.

Regardless, she had full knowledge of the repair and construction of the dwelling (and, in fact, monitored its progress). She also had full knowledge that the repair or construction was not completed. To the extent knowledge of the work done is required, she had it.

(4) Fisher Had an Agreement With the Tenant to Do Work on the Dwelling.

Fisher argues that she did not, however, hire Reynoso to demolish the dwelling or to rebuild it. Fisher had a written agreement with the tenant to do improvements and major repairs to the dwelling. (R., pp. 96, 105.) Fisher had an oral agreement with the tenant to repair the damage and construct the dwelling. (R., p. 164.) Although the written agreement and oral contract may not be traditional construction contracts, the work to be done under those agreements (improvements, repairs, and rebuilding the house) provided consideration to both parties. If Reynoso failed to close on the property before the Lease-Purchase Agreement expired, all improvements forfeited to Fisher. (R., p. 96.) Improvements or repairs would maintain or increase the value of Fisher's security (the dwelling). On the other hand, Reynoso's work was done with the intent to sell the property for a profit. (R., p. 96.) If an agreement to do the work is required, that condition was met.

Even if the faulty, inadequate, or defective work exclusion is interpreted to require that Fisher authorize or direct the work, have knowledge that the work was being done, or have an agreement or contractual undertaking to do the work, these conditions were met. She authorized,

directed, had knowledge of, and had agreements to improve the property, make repairs to it, and rebuild it. That she claims she did not authorize, direct, have knowledge of, or contractually agree to destroy or leave the property unbuilt is irrelevant. The loss to the property, whether labeled as its destruction or its lack of completion, merely defines the scope of the damage caused by faulty, inadequate, or defective workmanship, repair, construction, renovation or remodeling. Fisher's loss is excluded even under the expanded version of the exclusion.

d. Case Law Relied on by Fisher Fails to Support the Non-Application of the Faulty, Inadequate or Defective Work Exclusion; Other Case Law Supports Application of the Exclusion.

Fisher relies on case law from foreign jurisdictions to support non-application to her loss of the faulty, inadequate or defective work exclusion. Given the plain and unambiguous language of the exclusion and the undisputed facts, there is no reason to resort to any case law to determine whether this exclusion applies to Fisher's loss. Applying the undisputed facts to the plain meaning of the exclusion should end the analysis.

Nevertheless, the foreign jurisdiction case law does not support her arguments because: (1) they are distinguishable on their facts; (2) they add words, terms or conditions to the exclusion in contravention of contract construction rules; or (3) they support application of the exclusion.

Fisher argues that the foreign jurisdiction case law upon which she relies stands for the proposition that the plain meaning of the exclusion narrows its application to losses where the insured authorizes the work, does the work, or hires someone to do the work. (Appellant's Brief, p. 17.)

The centerpiece of Fisher's foreign jurisdiction case law analysis is *Husband v. LaFayette Ins. Co.*, 635 So. 2d 309 (La. 1994). In *Husband*, the Louisiana Court interpreted the exclusion to apply to a situation where the insured, or someone authorized by the insured, contracted to do the alterations to the property. *Husband*, 635 So. 2d at 311. Because in that case the alterations were undertaken without authorization and in direct conflict with the terms of the lease, the exclusion was found not to apply. Based on *Husband*, Fisher argues, the exclusion here does not apply because the "destruction" of the dwelling by Reynoso was not done at her direction or with her authorization or pursuant to a contract.

The holding in *Husband* does not support non-application of the exclusion to Fisher's loss. First, Fisher had a written and oral agreement with Reynoso to make alterations to the property. (R., pp. 96, 164-165.) These improvements to, and repair and rebuilding of, the dwelling were authorized by Fisher. This authorization and contracted for work was done in a faulty, inadequate or defective manner. Even under *Husband*, the exclusion applies.

Second, the Louisiana Court interpreted the exclusion to add words, terms and conditions not found in its plain and unambiguous language. As discussed above, the exclusion does not contain language that the work be undertaken by the insured or someone authorized by the insured to do that work. Under Idaho rules of contract construction, there is no need to construe the plain and unambiguous language of the exclusion and it violates rules of construction to add terms and conditions to the exclusion, especially when similar terms and exclusions exist in a different exclusion but not in the subject exclusion.

Third, *Husband* is factually distinguishable. In *Husband*, the insured had no knowledge that any work was being done and made a claim only when the loss was discovered. Here, Fisher knew some work (improvements) was happening. She had the right to inspect that work and get periodic reports of its status. Moreover, Fisher knew about the repair and rebuild of the dwelling before it happened. She monitored that work as it happened. She did not make a claim upon "discovery" of the destruction of the dwelling. Indeed, she did not make a claim until after the actual loss occurred – the incomplete repair and rebuild (for which she had complete knowledge).

Fisher also relies on *Home Savings of America, F.S.B. v. Continental Ins. Co.*, 87 Cal. App. 4th 835 (Ct. App. 2001). In *Home Savings*, the Court determined that the faulty, inadequate or defective work exclusion did not exclude the loss caused by a third party's intentional destruction of a residence. *Home Savings*, 87 Cal. App. 4th at 852. Fisher argues that similarly, in this case, the loss caused by Reynoso's intentional destruction of the dwelling was not excluded. (Appellant's Brief, p. 14.)

Home Savings, however, is distinguishable. In *Home Savings* there was a total destruction of the residence. The residence was destroyed for the sole purpose of redevelopment without any intent to rebuild it. Here, there was no total destruction of the residence. (R., p. 118.) Here, the work was done to sell the property for a profit. (R., p. 96.) Here, there was a clear intent to rebuild the dwelling, which process was in fact started. (R., p. 118.) In *Home Savings*, the damages arose from the total destruction of the dwelling. Here, the damages arose from an incomplete dwelling.

Fisher also relies on *Fidelity Co-Op Bank v. Nova Casualty Co.*, 726 F.3d 31 (1st Cir. 2013), because it relies on the language from *Husband* that a faulty workmanship exclusion was "intended to prevent the expansion of coverage under the policy to ensuring the quality of the contractual undertaking by the insured or someone authorized by him." *Fidelity Co-Op Bank*, 726 F.3d at 38. *Fidelity Co-Op* is distinguishable on its facts. In that case, the undisputed evidence showed that the faulty workmanship (a roof repair) occurred prior to the insured's ownership. Here, the work was done during Fisher's ownership. Moreover, Fisher claims that *Fidelity Co-Op* stands for the proposition that "[b]ecause the work on the roof was not a contractual undertaking by the insured or someone authorized by the insured, the exclusion did not apply." (Appellant's Brief, p. 15.) However, the *Fidelity Co-Op* Court's reference to the *Husband* language does not stand for the proposition that there must be a contractual undertaking or authorization for the work that was faulty. *Fidelity Co-Op* was merely agreeing that the exclusion was not intended to expand coverage to ensure the quality of construction.[3]

Fisher argues that based on *Husband*, *Home Savings*, *Fidelity Co-Op* and *11 Essex*, the plain meaning of the exclusion applies only to situations where the insured, or someone authorized by the insured, contracts for alterations to the property and is dissatisfied with the quality or performance under the contract. (Appellant's Brief, p. 17.) That is the situation here. Fisher authorized Reynoso in the written Lease-Purchase Agreement and the oral agreement to

[3] Fisher also relies upon *11 Essex St. Corp. v. Tower Ins. Co. of New York*, 2005 N.Y. Misc. LEXIS 3556, 234 N.Y.L.J. 115 (S.C. New York 2005) because it quotes Husband. (Appellant's Brief, p. 16.) This appears to be a trial court decision with no precedential or persuasive value. Nor does this case add anything new to the discourse.

make alterations to the property and was clearly dissatisfied with the quality of his performance. These cases support application of the exclusion or are otherwise distinguishable.

Other cases have held that the exclusion applies regardless of the insured's authorization of the work, involvement in the work done or knowledge that the work had occurred. These cases also held that the language of the faulty, inadequate or defective work exclusion is clear and unambiguous, thereby precluding an interpretation of the exclusion that adds words, terms or conditions.

In *Wilson v. Farmers Ins. Exchange*, 102 Cal.App.4th 1171 (Ct. App. 2002), the insured submitted a claim for the loss in the value of their house resulting from an unfinished renovation project. *Id.* at 1172. The *Wilson* Court upheld summary judgment that the loss was expressly excluded from coverage as a loss caused by inadequate repair, construction, renovation, or remodeling. *Id.* The Court held "[a]n unfinished renovation or remodeling project that leaves the house in disrepair is plainly 'inadequate.'" *Id.* at 1174.

The *Wilson* Court distinguished *Home Savings* for two reasons. First, the *Wilson* Court determined that the exclusion was not limited to loss caused by "faulty construction" but "applies more broadly to any loss caused by faulty, inadequate, or defective workmanship, repair, construction, renovation, or remodeling." *Id.* at 1175.

Second, the *Wilson* Court distinguished *Home Savings* based on factual distinctions – specifically the insured home in *Home Savings* was not simply renovated or remodeled, it was completely destroyed and was destroyed by a third party entirely without the mortgagee bank's knowledge. *Id.* at 1175.

> Here [in *Wilson*], on the other hand, plaintiffs reasonably should have known a renovation project undertaken by or on behalf of the named insured with their knowledge, which involved some demolition but not the complete destruction of the house, gave rise to a risk that *was* excluded from coverage under the "inadequate renovation" exclusion. The risk was that the renovation or remodeling would be performed defectively or inadequately, leaving the house in a state of disrepair that reduced its value. This is exactly the sort of risk of loss expressly encompassed by the "inadequate renovation" exclusion, and exactly the sort of loss plaintiffs suffered when Wampler abandoned his renovation of the house before it was completed.

Id. at 1176.

Like *Wilson*, Fisher should have reasonably known that the improvement project undertaken with her knowledge, which necessarily involved some demolition,[4] might give rise to a risk excluded by the faulty, inadequate or defective work exclusion. The risk was that Reynoso's improvements would be performed defectively or inadequately leaving the dwelling in a state of disrepair (even total disrepair) that reduced its value.

Like *Wilson*, Fisher should also have reasonably known that repairing the damage and rebuilding the dwelling might give rise to a risk excluded by the faulty, inadequate or defective work exclusion. The risk here was that Reynoso's repair and rebuild would be performed inadequately or defectively leaving the dwelling in a state of disrepair that reduced the value of the dwelling. This is exactly the sort of risk of loss encompassed by the faulty, inadequate or defective work exclusion and exactly the loss suffered when Reynoso abandoned the repair and rebuild before the dwelling was completed.

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[4] Even "cosmetic" improvements involving flooring and countertops require demolition of the old flooring and countertops.

The *Wilson* Court ultimately determined that the loss fell within the scope of the faulty, inadequate or defective work exclusion, as a matter of law, because:

> Where, as here, the named insured or someone authorized by the named insured engages in renovation or remodeling with the knowledge and approval of the mortgagee, the "inadequate renovation" exclusion precludes the mortgagee who is later dissatisfied with the quality of the insured's performance of the renovation from claiming coverage because the renovation has left the property worth less than it was before.

Id. at 1177.

Like *Wilson*, Fisher authorized Reynoso to engage in renovation or remodeling (improvements) with her knowledge and approval. She was later dissatisfied with the quality of Reynoso's performance of the improvements (renovation and remodeling). As in *Wilson*, the exclusion applies because the improvements left the property worth less than it was before.

Like *Wilson*, Fisher authorized Reynoso to engage in repair and construction of the dwelling with her knowledge and approval. That repair and construction was begun but was not completed. Fisher was dissatisfied with the quality of Reynoso's performance of the repair and construction. As in *Wilson*, the exclusion applies to the incomplete repair and construction because the property was worth less than it was before.

In *Stephens v. Liberty Mutual*, 2008 WL 480287 (N.D.Cal. 2008), the federal district court, in an unreported case, determined that the faulty, inadequate or defective work exclusion is not ambiguous. *Id.* at *14. The *Stephens* Court also held, the application of the exclusion does not depend on whether the insured or any third party authorized the construction or hired the contractor. *Id.* at *15.

In *Stephens*, the Court further noted that the insured "never agreed or contracted to have its building struck with heavy machinery, used for storage of construction material, or damaged as a result of the negligent activity of the Olympic Club or Plant Construction." *Id.* The *Stephens* Court rejected that argument and applied the exclusion. Similarly, Fisher argues the exclusion does not apply here because she never agreed or contracted to have Reynoso "destroy" the dwelling. This argument should also be rejected.

In analyzing a similar faulty, inadequate or defective work exclusion the Court in *Capelouto v. Valley Forge Ins. Co.*, 990 P.2d 414 (Wash.App. 1999), noted "[a]n insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." *Capelouto*, 990 P.2d at 418. Rather, courts must turn to general principles governing the interpretation of the insurance contracts, including examining the ordinary meaning of the terms used. *Id.* Here, Fisher attempts to avoid the exclusion by labeling or characterizing the act or event causing the loss as destroying the property. The *Capelouto* Court suggests that these gratuitous labels or characterizations be ignored in favor of more accurate words to describe the act or event causing the loss – here, remodeling, renovating, repair and construction. Ultimately, the *Capelouto* Court determined that the "plain meaning of the exclusion indicates that the claimed loss, damage caused by a contractor's use of an inadequate pump on a sewer replacement project off the insured's premises, is not covered." *Id.* at 418.

Case law from foreign jurisdictions analyzing or interpreting similar exclusions need not be consulted. The language of the faulty, inadequate or defective work exclusion is clear and

unambiguous and the undisputed facts must be applied to the plain meaning of that language. That language does not include words, terms or conditions requiring Fisher to authorize or direct the alterations to the property, contract with a third party to do the alterations or have knowledge of exactly what work is going to be done before it is performed. Even if foreign case law is consulted, those cases that are more factually analogous to the present case and do not construe or interpret the exclusion to include words, terms or conditions not expressly stated therein support application of the faulty, inadequate and defective work exclusion to Fisher's loss.

IV. CONCLUSION.

Garrison respectfully requests that this Court affirm the district court's grant of summary judgment and dismissal of Fisher's Complaint on the grounds that her loss is excluded from coverage by the faulty, inadequate or defective work exclusion.

DATED this 20 day of September, 2016.

ELAM & BURKE, P.A.

By: _____

Jeffrey A. Thomson, Of the firm
Attorneys for Defendant/Respondent
Garrison Property & Casualty Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20 day of September, 2016, I caused a true and correct copy of the foregoing document to be served as follows:

James G. Reid
Jennifer Reid Mahoney
Kaufman Reid, PLLC
1211 W. Myrtle Street, Suite 350
Boise, ID 83702

___ U.S. Mail
_✓_ Hand Delivery
___ Federal Express
___ Via Facsimile – 342-4657

Jeffrey A. Thomson

4822-7463-1733, v. 1

APPENDIX A

d. weight of contents, equipment, animals or people;

e. weight of rain which collects on a roof;

f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b, c, d, e and f unless the loss is a direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged covered property.

11. Glass or Safety Glazing Material. We cover:

a. the breakage of glass or safety glazing material which is part of a covered building, storm door or storm window; and

b. damage to covered property by glass or safety glazing material which is part of a building, storm door or storm window.

This coverage does not include loss on the Described Location if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

Loss for damage to glass will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

This coverage does not increase the limit of liability that applies to the damaged property.

PERILS INSURED AGAINST

COVERAGE A - DWELLING and
COVERAGE B - OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

1. involving collapse, other than as provided in Other Coverages 10;
2. caused by:
   a. freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:
      (1) maintain heat in the building; or
      (2) shut off the water supply and drain the system and appliances of water;
   b. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:
      (1) fence, pavement, patio or swimming pool;
      (2) foundation, retaining wall or bulkhead; or
      (3) pier, wharf or dock;
   c. theft of property not part of a covered building or structure;
   d. theft in or to a dwelling or structure under construction;
   e. wind, hail, ice, snow or sleet to:
      (1) outdoor radio and television antennas and aerials including their lead-in wiring, masts or towers; or
      (2) trees, shrubs, plants or lawns;
   f. vandalism and malicious mischief, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;
   g. constant or repeated seepage or leakage of water or steam over a period of weeks, months or years from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;
   h. (1) wear and tear, marring, deterioration,

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(2) inherent vice, latent defect, mechanical breakdown;

(3) smog, rust or other corrosion, mold, wet or dry rot;

(4) smoke from agricultural smudging or industrial operations;

(5) discharge, dispersal, seepage, migration release or escape of pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;

(6) settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings; or

(7) birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

3. excluded under General Exclusions.

Under items 1 and 2, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

COVERAGE C - PERSONAL PROPERTY

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in the General Exclusions.

1. Fire or lightning.
2. Windstorm or hail.

   This peril does not include loss to

   a. property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening;

   b. canoes and rowboats; or

   c. trees, shrubs or plants.
3. Explosion.
4. Riot or civil commotion.
5. Aircraft, including self-propelled missiles and spacecraft.
6. Vehicles.
7. Smoke, meaning sudden and accidental damage from smoke.

   This peril does not include loss caused by smoke from agricultural smudging or industrial operations.
8. Vandalism or malicious mischief.

   This peril does not include loss by pilferage, theft, burglary or larceny.
9. Damage by Burglars, meaning damage to covered property caused by Burglars.

   This peril does not include:

   a theft of property; or

   b. damage caused by burglars to property on the Described Location if the dwelling has been vacant for more than 30 consecutive days immediately before the damage occurs. A dwelling being constructed is not considered vacant.
10. Falling Objects.

    This peril does not include loss to property contained in the building unless the roof or an outside wall of the building is first damaged by a falling object.

    Damage to the falling object itself is not covered.
11. Weight of ice, snow or sleet which causes damage to property contained in the building.
12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

    This peril does not include loss:

    a. to the system or appliance from which the water or steam escaped;

    b caused by or resulting from freezing except as provided in the peril of freezing below; or

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c. on the Described Location caused by accidental discharge or overflow which occurs off the Described Location.

In this peril, a plumbing system does not include a sump, sump pump or related equipment.

13. **Sudden and accidental tearing apart, cracking, burning or bulging** of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

This peril does not include loss caused by or resulting from freezing except as provided in the peril of freezing below.

14. **Freezing** of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

This peril does not include loss on the Described Location while the dwelling is unoccupied or being constructed, unless you have used reasonable care to:

a. maintain heat in the building; or

b. shut off the water supply and drain the system and appliances of water.

15. **Sudden and accidental damage from artificially generated electrical current.**

This peril does not include loss to a tube, transistor or similar electronic component.

16. **Volcanic Eruption** other than loss caused by earthquake, land shock waves or tremors.

GENERAL EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

a. **Ordinance or Law,** meaning enforcement of any ordinance or law regulating the use, construction, repair, or demolition of a building or other structure, unless specifically provided under this policy.

b. **Earth Movement,** meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

(1) fire;

(2) explosion; or

(3) breakage of glass or safety glazing material which is part of a building, storm door or storm window;

ensues and then we will pay only for the ensuing loss.

c. **Water Damage,** meaning:

(1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(2) water which backs up through sewers or drains or which overflows from a sump; or

(3) water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire or explosion resulting from water damage is covered.

d. **Power Failure,** meaning the failure of power or other utility service if the failure takes place off the Described Location. But, if a Peril Insured Against ensues on the Described Location, we will pay only for that ensuing loss.

e. **Neglect,** meaning your neglect to use all reasonable means to save and preserve property at and after the time of a loss.

f. **War,** including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

g. **Nuclear Hazard,** to the extent set forth in the Nuclear Hazard Clause of the Conditions.

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.

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

a. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

c. Faulty, inadequate or defective;

(1) planning, zoning, development, surveying, siting;

(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.

CONDITIONS

1. Policy Period. This policy applies only to loss which occurs during the policy period.

2. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

a. for an amount greater than the interest of a person insured under this policy; or

b. for more than the applicable limit of liability

3. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, you have:

a. intentionally concealed or misrepresented any material fact or circumstance;

b. engaged in fraudulent conduct; or

c. made false statements;

relating to this insurance.

4. Your Duties After Loss. In case of a loss to covered property, you must see that the following are done

a. give prompt notice to us or our agent;

b. (1) protect the property from further damage;

(2) make reasonable and necessary repairs to protect the property; and

(3) keep an accurate record of repair expenses;

c. prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;

d. as often as we reasonably require:

(1) show the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examination under oath, while not in the presence of any other named Insured, and sign the same;

e. send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) the time and cause of loss;

(2) your interest and that of all others in the property involved and all liens on the property;

(3) other insurance which may cover the loss;

(4) changes in title or occupancy of the property during the term of the policy;

(5) specifications of damaged buildings and detailed repair estimates;