10-11-2016

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

IN THE SUPREME COURT OF THE

STATE OF IDAHO

Supreme Court No. 44117.

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

REPLY 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. INTRODUCTION AND SUMMARY

Appellant owns real property located at 2510 N. 34th Street, Boise, Idaho. The structure and attached fixtures were completely destroyed by a tenant, and Appellant sought to be reimbursed for the losses under a Policy of insurance issued by Respondent to Appellant. Respondent denied Appellant's claim, citing exclusions under the Policy. The District Court granted summary judgment in favor of Respondent, holding that an exclusion applied and that there was therefore no coverage for the losses.

The District Court erred in its interpretation of the language of the Policy. In fact, based upon the plain meaning of the exclusions, and the case law from other jurisdictions interpreting such language, it is clear that the exclusions cited by Respondent in its denial of coverage do not apply to the facts of this case, and that Appellant should be reimbursed for her covered losses under the Policy.

II. ARGUMENT

A. Whether There Is A Covered Loss Is Not An Issue On Appeal

Respondent first notes that the issue of whether the insurance policy provided coverage is not in dispute, and argues that Appellant's first issue on appeal should not address that issue. The parties are in agreement on this issue. Appellant's initial brief on appeal also noted that the District Court found "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." Appellant's Brief, at 3. Thus, Appellant's Brief correctly noted that the issue of whether the loss was covered was not an issue on appeal.

However, the issue of whether there was insurance coverage for the loss is an issue on appeal due to the question of whether the exclusions apply. While there is no question the loss is a "covered loss," the Policy does not provide coverage if one of the exclusions applies. That is why the first issue on appeal was whether the District Court erred in holding that there was not coverage, because of the application of the exclusions, not because the loss was not a covered loss. The Policy does not provide coverage if one of the exclusions applies, that is why the first issue on appeal was stated the way it was.

However, the question of how the issue on appeal was worded is not material, as both parties agree that there is no dispute that the loss in this case was a covered loss, and that the District Court held that an exclusion applied and thus dismissed Appellant's claim for coverage. Thus, the main issue on appeal is whether the District Court incorrectly held that an exclusion applied and incorrectly dismissed Appellant's claim for coverage under the policy.

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

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 regarding the unauthorized demolition of the property 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.

In its response, Respondent argues that the exclusion applies based upon its plain language, and alternatively, that even if the exclusion were read to require consent of the Appellant for the construction, the Appellant did consent to the demolition in this case. These conclusions are not supported by the case law or the undisputed facts of record.

1. The Plain Meaning of the Exclusion Requires the Work Be Performed With the Authorization of the Insured

The District Court incorrectly held that the exclusion for faulty, inadequate or defective work applied. The exclusion provides in part:

> 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.

Policy, at 8 (R. at 27). It cannot be reasonably said that Ron Reynoso's acts in tearing down Appellant's dwelling, destroying it and the fixtures in it, without authorization or direction to do so, were faulty, inadequate or defective workmanship, repair, construction, renovation or remodeling.

First, Respondent argues that it is undisputed that Reynoso was to make "certain improvements" to the dwelling and that those improvements were not completed and therefore were inadequate, defective or faulty. This argument ignores the undisputed evidence regarding what "improvements" were in fact authorized. The evidence shows that Reynoso was authorized 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. 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, at 1, ¶ 9 (R. at 96).

The Purchase and Sale Agreement does not define the term "certain improvements" and the only evidence in the record of what "improvements" to the property were contemplated by the parties is the Affidavit of Shammie Fisher, which states that the "improvements" included such things as new flooring or upgrades to the kitchen and bathroom floors and counters, new light and painting. 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, at 4, ¶ 19 (R. at 91).

Moreover, the claim for damages in this case is not based upon the "improvements" that Reynoso was allowed to do as part of the lease agreement. This is not a case where Reynoso tore out counter tops and failed to replace them, or did a bad job installing tile on the floor in the bathroom or got paint on the carpet when he was painting. Those might be situations where the exclusion may apply because the damage would have been caused by the acts of Reynoso in making improvements that he was authorized to do.

However, the damage in this case was not caused by Reynoso performing the cosmetic improvements he was authorized to do in an inadequate or faulty manner. Rather, the damages

stem from the complete destruction of the residence, which cannot be seen as related in any way to the "cosmetic" improvements he was permitted to make. Thus, the loss did not stem from "work" performed by Reynoso as allowed under the contract, it stemmed from unauthorized and unknown actions of Reynoso. Such destruction is not included in the exclusion.

Rather, the exclusion contemplates the situation where a person contracts with another to do construction or remodel work, and then does a poor job or fails to finish. For example, if Appellant had agreed to allow Reynoso to remodel the entire structure, and he had abandoned the project before completion, that might be the type of loss included in the exclusion. However, there is no evidence that there was any agreement for Reynoso to perform any remodeling or work that would require the destruction of the premesis; rather, the work was to be cosmetic improvements only. This is exactly what the Court in *Husband v. LaFayette Ins., Co.*, was addressing when it 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** and the insured must be dissatisfied with the quality of the performance under that contract. 635 So.2d 309, 311 (La.App. 1994) (emphasis added). As that Court held, alterations "undertaken without authorization and in direct conflict with the terms of the lease . . . fall outside the exclusion of the policy." *Id.* In this case, there is no dispute that the alterations to the property, including its total destruction, conflicted with the terms of the Agreement permitting only "certain improvements," which Appellant has testified were cosmetic in nature, and were

made without the authorization of Appellant. Therefore, the exclusion does not apply.

Respondent also takes dictionary definitions of each of the words in the exclusion, and then argues that the demolition of the residence falls within those definitions. Respondent's analysis in this regard fails to take into account the meaning of the words when taken altogether, and what the meaning of the exclusion is when read as a whole. Stating that there is no coverage for faulty or inadequate "design, specifications, workmanship, repair, construction, renovation, [or] remodeling" implies that there is some affirmative act on the part of the insured to commence a project. Either the insured itself commences a project or the insured hires someone else to do a project. There is no "design" or "workmanship" or "repair" if an unauthorized third party comes onto property and performs demolition.

Another argument relied upon by the District Court and advanced by Respondent is that because another exclusion contains language to the effect that an intentional loss is covered only if it is done by or at the direction of the insured, the fact that such language is not included in the faulty work exclusion means the work need not be done by the insured or with its authorization. However, the fact that another exclusion contains the language "by or at the direction of the insured" does not change the analysis set forth above because, with respect to the faulty workmanship exclusion, there is no circumstance where a remodel or construction project can be done on the property of the insured without their consent or direction. If it is done without the consent of the insured, it is not, by its definition, remodel or repair. Thus, there is no reason to

state in the language of the exclusion that the design or workmanship must be "at the direction of the insured" because remodel and repair work is always done by or at the direction of the insured.

However, with respect to the exclusion for intentional loss, an insured could have loss from an intentional act that was at its direction, or it could have loss from an intentional act done without its knowledge or consent. That is why the exclusion for intentional loss must contain language that the loss must be "by or at the direction of the insured" for that exclusion to apply; because there are two types of loss from intentional acts, and the Policy is only covering one of them.

Conversely, there is only one type of design, workmanship, repair or remodel of a property, and that is where an insured or someone authorized by the insured undertakes such work. There is no such thing as a design, remodel or repair to the property of an insured that the insured is not either involved in or authorizing. Such destruction or work would not be repair or remodel, it would be wrongful and unauthorized and would not be covered by the exclusion. For example, if someone painted graffiti on a wall, that would not be considered remodel or repair of a property, whereas a contractor hired by an insured painting the exterior of a building would be. The difference is that one is authorized by the insured and the other is a wrongful act of destruction not authorized by the insured.

In sum, the language of the exclusion, when read as a whole, contemplates action taken by an insured to improve its property through either remodel or repair work performed by it or by

someone at its direction. It does not address the situation where an unauthorized person commits damage to the insured's property without the knowledge or authorization of the insured.

2. The Undisputed Facts Demonstrate that the Damage to the Property Was Not Authorized

Respondent points to the lease/purchase agreement, and argues that Agreement is authorization for Reynoso to destroy the residence and its contents. It is not. As noted above, the only evidence in the record of what "improvements" to the property were contemplated by the parties is the Affidavit of Shammie Fisher, which states that the "improvements" included such things as new flooring or upgrades to the kitchen and bathroom floors and counters, new light and painting. 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.* Authorizing a person to paint a wall is not the same as authorizing them to tear it down anymore than consent to have a filling is authorization for a dentist to pull all of a patient's teeth. There is no dispute in this case that the destruction of the property was not authorized by Appellant prior to its occurring.

Respondent next argues that Appellant consented to having the structure rebuilt, and that such acquiescence in the reconstruction means that the exclusion applies; essentially, Respondent argues that once the residence was destroyed, Appellant agreed to have Reynoso rebuild it, and the covered loss is his inadequate rebuilding of the property. First, this misstates the covered loss. The covered loss was the destruction of the residence, not the failure to rebuild it.

Second, the fact that Appellant allowed her tenant to remain on the property and attempt to mitigate the losses (for Appellant and for her insurance company) is not authorization to have repair work done. This is like the situation where a person comes up to a car at a city stop light and sprays something on the windshield of a car and then charges the person to have it cleaned off. It cannot be said that the driver "consented" to having their window cleaned. The only reason the window was dirty was due to the unauthorized act of the person spraying the window. Similarly, in this case, it cannot be seen as consent for Appellant to allow Reynoso to attempt to fix the residence after he destroyed it. Consent means "voluntary agreement." Black's Law Disctionary, 6th Ed. In this case, Appellant did not enter into a "voluntary agreement" to allow Reynoso to perform remodel and construction work on the residence because she was in a forced position brought about by Reynoso's unlawful and wrongful act. Her acquiescence in the attempt to rebuild, as set forth in the texts quoted by Respondent in its brief, was not voluntary and cannot be seen as a voluntary agreement or consent for Reynoso to remodel her residence.

Respondent also argues that the work done by Reynoso was done by or at her direction because Reynoso was required to give monthly updates for plans and upgrade, and because the contract between the parties required any subcontractors to sign lien waivers. (R. at 95-96). These facts are not material because they come from language in the Purchase and Sale Agreement addressing the "improvements" to be made under that Agreement. As noted above, the Property Sale Agreement does not define "improvements" and the only evidence of the

improvments contemplated under the Agreement comes from the Affidavit of Shammie Fisher, which unequivocally states that the improvements were to be cosmetic in nature, and included such things as new flooring or upgrades to the kitchen and bathroom floors and counters, new light and painting. Fisher Aff., at ¶ 9 (R. at 85). Again, the undisputed evidence is that there was no discussion or agreement for the Buyer to demolish or rebuild any portion of the premises or remodel the structure. *Id.* Thus, the language in the Property Sale Agreement requiring subcontractors to sign lien waivers relates to any painters or other tradesmen who may have performed the cosmetic upgrades contemplated by the parties and the updates would include things like pictures of new light fixtures to be installed or information on whether other cosmetic improvements were being made. That language has nothing to do with the destruction of the premises or any attempts to fix damage caused by Reynoso and does not demonstrate that Appellant was directing the work to be done to fix damage Reynoso caused. It relates only to the cosmetic improvements authorized under the Property Sale Agreement. There is no dispute that Appellant did not voluntarily participate in the work to be done to fix the destruction caused by Reynoso.

Appellant likewise did not have knowledge of the destruction of the residence until after it had happened. The undisputed evidence of record is that Appellant did not have knowledge that Reynoso would destroy the residence. Respondent wants to argue that the fact that she knew that "improvements" were to be made is enough, and it doesn't matter that she didn't know that

Reynoso would destroy the building because she knew he was going to do "some work" on it. The extent of the work is not material, the fact that work was to be done is enough. This might make some sense if Appellant had agreed beforehand to allow Reynoso to do major remodel work. In that case, it might be foreseeable that he would have to demolish the residence in order to do that work. However, the fact that the work contemplated by Appellant and Reynoso was cosmetic in nature and was not structural, and the fact that Reynoso represented that he would be using the house as his primary residence, demonstrate that it was not foreseeable that Reynoso would level the home, and that Appellant's knowledge of the fact that cosmetic improvements would be made while he lived in the home cannot be seen as knowledge that he would tear the home down.

3. The Case Law Cited By Appellant Supports the Conclusion That the Exclusion Does Not Apply

Because the Idaho appellate courts have not had the occasion to interpret a policy provision like the one at issue in this case, Appellant directed the Court to other decisions wherein courts have interpreted exclusions in policies with the same language, and have found the exclusion for faulty or inadequate work to apply only to situations where the work was performed by the insured or someone authorized by the insured. As noted above, the conclusion of these courts makes sense because it is 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. It is not

adding language to the policy to hold that the plain meaning of an insured having remodeling or renovation work performed on their property means that the work is either performed by the insured or with the insured's consent. It is implied in the meaning of renovation and repair work.

Respondent attempts to distinguish the cases cited by Appellant, beginning with *Husband v. LaFayette Ins., Co.*, 635 So.2d 309, 311 (La.App. 1994). First, Respondent argues that *Husband* is factually distinguishable because in *Husband* the alterations were taken without the authorization of the insured and in direct conflict with the terms of the lease, whereas in this case, Respondent argues that Appellant authorized the destruction of her property. As discussed at length above, Appellant did not authorize either the destruction of her property nor did she voluntarily agree to the plans to rebuild it. Morever, just like the situation in *Husband*, Reynoso's actions in destroying the residence were in fact in direct violation of the terms of the Property Sale Agreement between the parties, which contemplated that Reynoso would live in the residence while making cosmetic repairs. Thus, *Husband* is similar factually, and its rational is persuasive and compelling:

> **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).

Contrary to the assertions of Respondent, the court in *Husband* is not reading additional language into the policy. Rather, the court is recognizing that when repairs or alterations are done on a property, they are done by or at the direction of the insured. That does not require additional language. Instead, it interprets the words when read as a whole to mean that repair and remodel work implies an agreement or authorization to do the work.

Likewise, Respondent's attempts to distinguish *Home Savings of Am. v. Cont'l Ins. Co.*, 104 Cal.Rptr. 2d 790 (Ct.App. 2001) are unpersuasive. Respondent argues that in *Home Savings,* the residence was leveled and for redevelopment and there was not intent to rebuild, whereas in this case, the residence was not destroyed, it was merely demolished and then partially rebuilt. However, the fact that the residence in *Home Savings* was demolished for redevelopment was not central to the holding that the exclusion did not apply. *See* 104 Cal.Rptr. 2d at 852-53. Thus, that factual distinction is immaterial. Additionally, the insurance company in *Home Savings* argued that the property was destroyed as part of an overall process of renovation, and that the destruction of the property was just one step in the process of remodeling. *Id.* at 852. This is the same argument advanced by Respondent in this case: that the destruction of the residence was just one step in its renovation. Thus, the differences raised by Respondent do not make the outcome of the case distinguishable, and *Home Savings* is still persuasive authority

supporting the non-applicability of the exclusion. Similarly, Respondent's attempts to distinguish other cases cited by Appellant do not altar the valid and fundamental principals set forth in those cases, which support a finding that the exclusion does not apply in this case. *See eg., Fidelity Coop. Bank v. Nova Cas. Co.,* 726 F.3d 31, 38 (1st Cir. 2013).

Respondent also argues that a few cases have held that the exclusion applies regardless of the insured's authorization of the work, and directs the Court to *Wilson v. Farmers Ins. Exchage* in support of its claim that the exclusion applies. 102 Cal.App.4th 1171, 126 Cal.Rptr.2d 305 (2002). First, *Wilson* does not stand for the proposition that the exclusion applies regardless of the insured's authorization of the work. In fact, the court in *Wilson* cited the language in *Husband v. Lafayette Ins. Co.,* that the exclusion for faulty construction or remodeling applied "to situations where the insured of someone authorized by the insured contracts for alteration to the property and is dissatisfied with the quality of the performance under that contract." 635 So.2d 309, 311 (La.Ct.App. 1994). Thus, the *Wilson* court agreed with the general statement of law in *Husband.*

However, it then held that, under the facts in *Wilson*, the exclusion applied because the insured had knowledge of and authorized the renovation. In fact, the insured in *Wilson* watched as the property was partially torn down and did not stop the destruction because he had agreed to the remodel. The facts in *Wilson* are distinguishable in that one crucial aspect: the insured in *Wilson* knew of the destruction of the property. In fact, he watched the destruction of the

property and was in agreement with it:

> In February 1997, Wilson saw that Bruce Wampler's son, Chris, was remodeling the house, including replacing some exterior walls and part of the foundation and putting in new plumbing. Around March 1997, Wilson saw most of the exterior walls of the house had been stripped down to the studs.

Id. at 1173, 126 Cal.Rptr.2d 306. In *Wilson*, the insured watched over a period of a month as the property was partially torn down, and he did not stop it because he had agreed to the remodel.

This is not the situation in this case. In this case, Appellant did not sit idly by and watch as her property was torn down to the foundation. She did not drive by, as the insured in *Wilson* did, over the course of a month and watch as her property was torn down. In fact, the undisputed facts demonstrate that Appellant was not aware that Reynoso was going to attempt to tear down and remodel the house and that she was not aware of his intent to destroy the structure until after she was notified of its complete destruction. Fisher Aff., at ¶ 5 (R. at 84). Appellant did not have an opportunity to stop the destruction of her property and prior to its destruction she did not have any agreement with Reynoso to have the structure itself remodeled and he was not authorized to destroy it. *Id.* at ¶ 6. Appellant was not a willing participant in the destruction of her residence in this case, as the insured in *Wilson* was, she was a victim. Thus, the holding in *Wilson* is distinguishable and the general statements of law in *Wilson* actually support the Appellant's claims in this case.

In reaching its decision that the faulty workmanship, construction or renovation exclusion

did apply, the District Court ignored the reasoning in the cases cited by Appellant, 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. Respondent cites both of those cases and argues that they support the application of the exclusion.

However, in *Capelouto v. Valley Forge Ins. Co.*, 900 P.2d 414 (Wash. App. 1999), the issue of whether the work performed was authorized by or contracted for by the plaintiff was not even addressed. 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. 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. Similarly, *Stephens v. Liberty Mut*, 2008 U.S. Dist. LEXIS 12243, 2008 WL 480287 (N.Dist. Cal. 2008), also is not persuasive because that case does not contain any analysis of the issue of whether the faulty, inadequate or defective construction applies to situations where an unauthorized third party destroys real property and involves facts distinguishable from this case.

Based upon the undisputed facts of record, and based upon the case law cited by Appellant, the decision of the District Court that the exclusion for faulty or inadequate work applies should be reversed and summary judgment should be granted in favor of Appellant on that issue.

C. The Court Should Hear the Issue of Whether The District Court Erred In Denying Appellant Summary Judgment On the Intentional Loss Exclusion And Decide It In Favor of Appellant

The other 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). 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).

Respondent argues that this issue is not properly considered on appeal because an order denying a motion for summary judgment is an interlocutory order from which no direct appeal may be taken, and that this rule is not altered by the entry of an appealable final judgment. *Dominguez, ex. rel. Hamp v. Evergreen RES, Inc.,* 142 Idaho 7, 13, 121 P.3d 938, 944 (2005).

While Appellant agrees that normally an order denying summary judgment is an interlocutory order, in this case, the order denying summary judgment was contained within a final order disposing of the entire case. Thus, Appellant is permitted to pursue a direct appeal because the order appealed did in fact dispose of the entire case. The direct appeal may be taken from the final order granting Respondent's motion for summary judgment, and because a direct appeal is permitted on that basis, Appellant should be permitted to raise other issues on appeal.

The cases holding that a denial of summary judgment may not be reviewed on appeal even after a final judgment address the issue of whether, after a trial on the merits, the Court should revisit the issue of whether summary judgment was improperly denied. *See Watson v. Idaho Falls Consol. Hosps.*, 111 Idaho 44, 45, 720 P.2d 632 (1986) (appeal after jury trial); *Evans v. Jensen*, 103 Idaho 937, 942 (Ct. App. 1982)(explaining the reason for the rule: "The final judgment in a case can be tested upon the record made at trial, not the record made at the time summary judgment was denied."). Clearly, after a trial on the merits, it does not make sense for the Court to review the decision denying a motion for summary judgment.

However, in this case, that policy reason does not apply. There was no trial on the merits and thus an appeal of the order denying summary judgment is not seeking to second guess any decision by the trier of fact. In fact, in asking this Court to reverse the District Court and grant Appellant's motion for summary judgment on the issue of the intentional loss exclusion, Appellant is seeking to conserve judicial resources and prevent the need for a trial upon remand.

There is simply no reason that this Court should not address the issue of whether the intentional loss exclusion applies to the facts in this case, and based upon the arguments made in Appellant's Brief on Appeal, the District Court decision denying summary judgment in favor of Appellant should be reversed.

III. CONCLUSION

The District Court's holding and the Respondent's arguments that the loss in this case was caused directly by faulty inadequate or defective work as set forth in the exclusion is simply not reasonable or supported by the case law interpreting insurance contracts. Respondent simply cannot meet its burden in this case to clearly demonstrate the application of the exclusions. The exclusion for faulty or inadequate work does not apply, and summary judgment should have been granted to Appellant by the District Court on that issue. Likewise, the exclusion for intentional loss does not apply and summary judgment should have been granted in Appellant's favor on that issue.

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, holding that no exclusions set forth in the Policy apply.

DATED this 11th day of October, 2016.

KAUFMAN REID, PLLC

By _____
James G. Reid

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 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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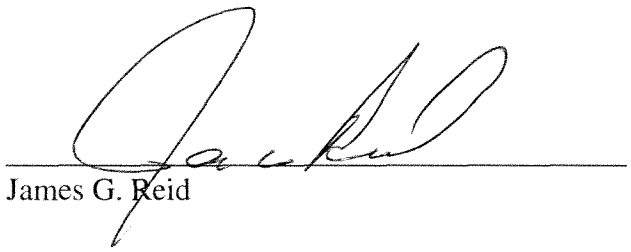

James G. Reid