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ABK, LLC v. Mid-Century Insurance Company Appellant's Brief Dckt. 46430

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IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 46430-2018

ABK, LLC, a limited liability company,

Plaintiff/Appellant,

v.

MID-CENTURY INSURANCE COMPANY, a foreign insurer,

Defendant/Respondent.

BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District for Kootenai County
Case No. CV-2017-5916
The Honorable Cynthia K.C. Meyer, District Judge

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I. STATEMENT OF THE CASE

This is an insurance coverage dispute relating to Mid-Century's denial of coverage for gasoline contamination damages and business income losses incurred by ABK, LLC ("ABK"). Despite conflicting evidence regarding the cause of the loss, the district court weighed the evidence and determined that the cause of loss was "surface water," an excluded peril under the Mid-Century policy. Based on the district court's determination that the cause of loss was excluded, the Court granted Mid-Century summary judgment and dismissed ABK's suit.

The district court also determined that it was unnecessary to determine the efficient proximate cause of the loss because it was "undisputed" that surface water and weather (both excluded under the policy) contributed in some way to cause the loss. Under Idaho's efficient proximate cause rule, when multiple causes of loss are involved, some of which are covered and others excluded, a trier of fact must determine the predominant cause regardless of the language of the policy. The court erred by failing to acknowledge the rule and properly applying it.

Finally, the district court dismissed ABK's claim for bad faith based on the erroneous determination that Mid-Century's coverage denial was correct.

II. ISSUES PRESENTED ON APPEAL

1. Whether the district court improperly determined that there were no disputed facts regarding the cause of the loss.

2. Whether the district court erred in determining that the efficient proximate cause rule is inapplicable.

3. Whether the district court erred in dismissing ABK's bad faith claim.

III. FACTS OF THE LOSS

ABK, LLC ("ABK") operates a gas station in Post Falls, Idaho under the business name Jones Chevron & Deli located at 4000 Seltice Way. Clerk's Record ("R."), p. 68. On January 18, 2017, the underground gas tanks (also known as underground storage tanks or "UST") at the station were infiltrated by water. R., p. 68-69. ABK filed a claim with its insurer Mid-Century Insurance Company ("Mid-Century") under ABK's Business Owners Special Property Coverage policy number 0605127535 (the "Policy"). R., p.64. ABK sought coverage and payment for the costs to remediate the contaminated gas in the tanks and lost business income for the time the gas pumps were unavailable. R., p. 98.

ABK utilized Coeur d'Alene Service Station Equipment, Inc. ("CDASSE") to determine the cause of the infiltration and to make necessary repairs. R., p. 230-231. On January 20, 2017, CDASSE inspected the gas tanks. R., p.122. CDASSE observed that the vapor recovery lids were full of ice and that the seal cap on the vapor recover riser was cracked and the vapor adapter was not sealing. Id.

On January 24 and 25, 2017, CDASSE purged the gas tank dispenser lines and repaired the broken parts and seals. R., p.124. Another ABK contractor, Orrco, pumped the water tainted gas out of the tanks. Id. The gas was then "polished" to remove the water and then the treated gas was returned to the tanks. R., p. 118.

On January 25, 2017, after the repairs to the broken parts and seals at the surface of the tanks were completed the tanks were re-filled with clean gas. R., p. 118. It was thereafter discovered that water was still infiltrating the tanks and contaminating the gas. R., p. 118.

On January 31, 2017, after additional repairs were made, Northwest Environmental Solutions, Inc., performed leak testing on the tanks and determined they were "tight" meaning there was no leaks in the system. R., p. 128-131.

On February 20, 2017, Timothy Hurley, a consultant hired by Mid-Century, gave permission to again have the tanks cleaned and new fuel put back in to the tanks. R., p.109. The premium fuel tank no longer had problems but the unleaded tank again had water infiltration. Id.

Mr. Hurley did a "desk review" of documents provided by service providers and, based on Mr. Hurley's opinions, Mid-Century denied coverage for the damages on February 22, 2017. R., p. 64-67. Mr. Hurley did not inspect the actual UST and never was on site at the Post Falls location. R., p. 68. Timothy Hurley concluded water infiltrated the tanks due to "multiple maintenance related issues with the unleaded and premium riser cap seals and vapor adapters that could permit water intrusion into the USTs ." R., p. 70.

Based on Mr. Hurley's report, Mid-Century denied the claim, stating "there is no coverage for any costs related to this loss due to policy language which excludes loss or damage caused by or resulting from wear and tear or faulty or inadequate maintenance." R., p. 64.

Timothy Hurley also expressed the opinion that "UST's are required to perform annual inspections of release detection and spill containment equipment to verify equipment is in proper

condition." R., p. 149. ABK retained its own expert who opined that no such inspections are required. R., p. 254. ABK produced records to show that its UST system was regularly maintained by CDASSE. R., p. 164-223. There was no recommended maintenance to the UST systems that was not performed. Id. ABK's UST tanks were inspected by the Idaho Department of Environmental Quality ("DEQ") on June 28, 2016, seven months prior to the loss. R., p. 152-162. No maintenance or deficiencies were noted. *Id.*

It is undisputed that after the repairs were made and the sump caps and vapor riser were replaced the tanks were refilled, yet the water continued to infiltrate the USTs. R., p. 227. For this reason, Mr. Hurley could not opine as to what caused the infiltration. Mr. Hurley stated in his report:

> [I]t is noted that the precise reason that phase separation was detected after CDASSE performed the product line cleaning on January 24th is not known at this time. The integrity of the regular unleaded and premium unleaded UST systems have been confirmed to be tight with no reported leaks that would enable water intrusion and resulting phase separation since the repairs were performed by CDASSE. R., p. 227.

Don Boyd, an employee of CDASSE who inspected and repaired the UST's concluded:

> It is our understanding the Unlead (sic) tank settled down and stayed water free coming to the conclusion that water was entering the tank from below grade of the spill bucket, 3" vapor line quit burping static water and ground water from run off had about run its course. R., p. 231.

IV. PERTINENT POLICY PROVISIONS

The Mid-Century policy provides, in relevant Part:

3. Covered Causes Of Loss
Risks Of Direct Physical Loss unless the loss is:
a. Excluded in Section **B.**, Exclusions; or

b. Limited in Paragraph **A.4**, Limitations

R., p. 73

The exclusions, provide, in relevant part:

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

...

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by rain or not;

...

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not;

or;

(c) Doors, windows or other openings.

...

3. We will not pay for loss or damage caused by or resulting from any of the following **B.3.a.** through **B.3.c.** But if an excluded cause of loss that is listed in **B.3.a** through **B.3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

a. Weather conditions

Weather conditions. But 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 or damage.

b. Acts Or Decisions

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

c. Negligent Work

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 on or off the described premises.

R., p. 80-83.

V. ARGUMENT

A. The District Court Improperly Weighed the Evidence to Conclude that the Source of Water Infiltration was Surface Water.

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c).

Upon a motion for summary judgment, all disputed facts are liberally construed in favor of the non-moving party. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991). The burden of proving the absence of a material fact rests at all times upon the moving party. *Id*. This burden is onerous because even "[c]ircumstantial evidence can create a genuine issue of material fact." *Id*., quoting *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 868–69, 452 P.2d 362, 365–66 (1969).

Moreover, all reasonable inferences which can be made from the record shall be made in favor of the party resisting the motion. *McCoy*, 120 Idaho at 769. If the record contains conflicting inferences upon which reasonable minds might reach different conclusions, a summary judgment must be denied because all doubts are to be resolved against the moving party. *Id*. The requirement

that all reasonable inferences be construed in the light most favorable to the non-moving party is a strict one and a motion for summary judgment should be granted with caution. *Id.*

It is a well-established summary judgment principle that it is not the trial court's function to weigh the evidence, but to determine whether there is a genuine issue for trial. *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); accord *Montgomery v. Montgomery*, 147 Idaho 1, 7, 205 P.3d 650, 656 (2009); *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994).

The district court denied the portion of Mid-Century's motion for summary judgment based on the "faulty maintenance" exclusion[1]. The court found that the records that ABK produced regarding its maintenance of the USTs, as well as the inspection report from the Department of Environmental Quality, created issues of fact regarding the maintenance of the USTs. R., p. 287-89. For similar reasons, the court denied summary judgment on the "wear and tear" exclusion. R., p 289-91.

However, the district court concluded, after weighing the evidence, the source of the water was surface water, stating, "It appears to the Court that the damage from the water infiltration falls under the exclusion for 'surface water'." R., p.295. The court also stated, "The record contains unrebutted evidence that one source of the water infiltration was melting snow, ice and water that

[1]Mid-Century referred to "faulty maintenance" in its denial letter. The actual exclusion in the policy is "Negligent Work," which is defined, in part, as faulty, inadequate or defective maintenance.

entered the underground storage tanks through cracks in the vapor riser caps and a crack in the spill or fill bucket." Id.

The Court was correct that Mid-Century did present hearsay statements regarding the source of the water being melting snow. However, Mid-Century's expert, Tim Hurley, opined that surface water *could* enter through cracks in the riser caps and spill buckets *if* they were in disrepair and *if* surface water was puddling above the caps. There was no evidence provided that surface water was, in fact, puddling above the caps. More importantly, ABK did present evidence that the source of the water was ground water. Don Boyd's report stated his opinion that ground water was causing the water infiltration because water continued to enter the USTs after repairs were made that should have prevented surface water from entering. Moreover, the district court failed to consider circumstantial evidence that suggests the source of the water was not surface water. Namely, that after any surface water was present, and after repairs to the covers had been made, water continued to infiltrate the tanks. A jury could conclude, based on this circumstantial evidence alone, that surface water was not the source of the infiltration.

On reconsideration the district court again ignored any reference to ground water causing the contamination. R., p. 339-340. The district court found the surface water language to be clear and unambiguous but also removed the reference to ground water when it cited the policy. Compare R., p. 339 with R., p. 281.

Based on a similar analysis, the district court also found that the "weather" exclusion applied to defeat coverage. R., p. 295-96.

It is apparent that the court reasoned that if either surface water or weather contributed in any way, then the loss is excluded. The court cited language from the policy that the exclusions apply *regardless of any other cause or event.* R., p. 295. For this reason, the court found it unnecessary to conduct an efficient proximate cause analysis. R., p. 339.[2]

B. The District Court Erred in Determining that Mid-Century had Proven that the Loss was Caused by Surface Water.

In addition to being denied the protections and inferences it was entitled to on summary Judgment, Plaintiff was also denied the protections and inferences provided to an insured through Idaho's case law when the district court concluded, despite conflicting evidence, that surface water was the cause of the gasoline contamination.

Idaho courts construe insurance contracts in a light most favorable to the insured and in a manner which provides full coverage for the indicated risks rather than narrowing its protection. *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co* ., 115 P.3d 751, 754 (Idaho 2005). The burden is on the insurer to use clear and precise language if it wishes to restrict the scope of coverage and exclusions not stated with specificity will not be presumed or inferred. *Clark v. Prudential Property and Cas. Ins. Co.*, 66 P.3d 242, 245 (Idaho 2003); *Hamilton v. Associated Indem. Corp.*, No. CV-07-141-N-BLW, 2008 WL 711375, at *2 (D. Idaho Mar. 14, 2008).

"It is a long established precedent of [Idaho] Court[s] to view insurance contracts in favor of their general objectives rather than on a basis of strict technical interpretation of the language

[2]See, assignment of error "c," *infra.*

found therein. Where language may be given two meanings, one of which permits recovery and the other does not, it is to be given the construction most favorable to the insured. Stated somewhat differently, an insurance contract is to be construed most favorably to the insured and in such a manner as to provide full coverage for the indicated risks rather than to narrow protection. The Courts do not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance." *Erikson v. Nationwide Mutual Insurance Company*, 97 Idaho 288, 292, 543 P.2d 841, 845 (1975). An insurance policy will generally be construed so that the insurer bears the burden of proving that the asserted exclusion is applicable. *Perry v. Farm Bureau Mut. Ins. Co. of Idaho*, 130 Idaho 100, 103, 936 P.2d 1342, 1345 (Ct. App. 1997). The exclusion cannot be extended by interpretation or implication, and must be accorded a strict and narrow construction. *Unigard Mut. Ins. Co. v. McCarty's, Inc.*, 756 F. Supp. 1366, 1368 (D. Idaho 1988).

The insurance policy differentiates between ground water and surface water. R., p. 81. Mid-Century asserts that it is immaterial whether the water that entered the tanks was surface water or ground water because all water is excluded. R., p. 27. Mid-Century is mistaken.

The ground water exclusion does not exclude coverage in every instance. Ground water is an excluded peril only when pressing on, or flowing or seeping through, foundations, walls, floors, paved surfaces, basements, doors, windows or other openings. Mid-Century interprets the exclusion to exclude "water under the ground surface ... seeping though ... openings." R., p. 27. It then argued

(apparently) that the water entered the tanks from some unidentified "opening." Id. This is a strained interpretation of the exclusion.

"Openings" is not defined in the policy. R., p. 72-93. When words or phases have doubtful or obscure meanings, they are not to be taken alone but rather interpreted in light of the other terms located in the same passage and in light of the purpose of the clause where the term is found. See, *Farm Bureau Mut. Ins. Co. v. Carr,* 215 Kan., 591, 596 (1974) (applying *noscitur a sociis*[3] rule of contract construction).

In *M & M Holdings, Inc. v. State Auto Property and Cas., Ins. Co.* 2007 WL 1531843 (U.S. Dist. Court, D. Kansas), the court rejected a similar interpretation as Mid-Century proposes here. In *M & M Holdings,* the insured's underground storage tank was pushed out of the ground by hydrostatic pressure. The policy excluded "water under the ground surface pressing on, or flowing or seeping though. . . foundations, walls, floors or paved surfaces. . ." The insurer argued that the sub-surface water pressed on the "walls" of the underground tank and, as such, the loss was excluded. The court held that the undefined word "walls" must be construed in the context of the surrounding words and phases in order to determine the intent of the exclusion. The court held that:

> . . . the applicable definition of "walls" for purposes of this contract is one that refers to parts of a building since the other terms listed in the passage, i.e., "foundations," "floors," "basements," "doors," and "windows," are commonly used to describe parts of a building but are not usually used to describe the outside of an underground storage tank.

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[3]Latin for "it is known from its associates."

Similarly, "other openings," when read in conjunction with Mid-Century's policy would not lead a reasonable person to interpret "openings" as a sump or riser valve for an underground storage tank. "Openings" must be read in the context of the surrounding policy language which, as in *M&M Holdings*, refers to parts of a building. This is consistent with Idaho's policy of construing the contract in favor of coverage and strictly construing exclusion against the insurer if the terms are ambiguous.

In this case, the district court ignored the ground water arguments and focused solely on surface water. The district court listed inferences that imply surface water may have been the water that contaminated the tanks. R., p. 292-293. The weight of the evidence is not the issue at the summary judgment stage. *Harrison v. Binnion*, 147 Idaho 645, 659, 214 P.3d 631, 645 (2009). The question is whether there is conflicting evidence of a material issue of fact.

Conflicting evidence is present in the record. The district court relied on statements made by Timothy Hurley while simultaneously ignoring that Mr. Hurley also stated "the precise reason that phase separation was detected after CDASSE performed the product line cleaning on January 24th **is not known at this time."** R., p. 293 (emphasis added). The district court also ignored Don Boyd's statement that "It is our understanding the Unlead (sic) tank settled down and stayed water free coming to the conclusion that **water was entering the tank from below grade of the spill bucket**. R., p. 231 (emphasis added).

On reconsideration, the district court again ignored any reference to ground water causing the contamination. R., p. 339-340. The district court found the surface water language to be clear and unambiguous but also removed the reference to ground water when it cited the policy. Compare R., p. 339 with R., p. 281. The district court then used its finding that surface water exclusion applies as the basis to not conduct an efficient cause analysis. R., p. 339.

With facts in the record that directly contradict Defendant's theories and the district court's conclusions it was improper for the district court to grant summary judgment and dismiss Plaintiff's claims. It was also improper for the district court to fail to do an efficient proximate cause analysis.

C. The District Court Erred by Finding the "Weather" Exclusion Excludes Coverage for ABK's Loss.

The weather exclusion is nothing more than a redundancy in the policy as it applies only if there is already another excluded loss . R., p. 83. The policy states:

> 3. We will not pay for loss or damage caused by or resulting from any of the following B.3.a. through B.3.c. But if an excluded cause of loss that is listed in B.3.a. through B.3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> a. Weather Conditions
>
> Weather conditions. But 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 or damage.

R., p. 83.

The coverage granting language of the Mid-Century policy provides:

> **3. Covered Causes Of Loss**
> Risks Of Direct Physical Loss unless the loss is:

a. Excluded in Section**B.**, Exclusions; or
b. Limited in Paragraph **A.4.,** Limitations; that follow. R., p. 73.

As an "all-risk" policy, the Mid-Century policy provides coverage for all perils, unless the specific peril is excluded. *Leep v. Trinity Universal Ins. Co.*, 261 F. Supp. 3d 1071 (D. Mont. 2017).

The policy provides for coverage of contaminated gasoline because it is a "Direct Physical Loss." Even if, for argument sake, weather contributed to the loss, by the policy's own language if weather conditions "results in a Covered Cause of Loss (*contaminated gasoline*), we will pay for the loss or damage caused by that Covered Cause of Loss (*contaminated gasoline*)". R., p. 83 (emphasis added).

The weather exclusion can never act as a stand alone exclusion for coverage because it always has to combine with another exclusion from the policy to apply. With material questions of fact of whether it was surface water or ground water that infiltrated the tanks it was inappropriate to grant summary judgment and dismiss Plaintiff's claims. Moreover, if weather resulted in a Covered Cause of Loss (*contaminated gasoline)* that was not caused by another excluded peril, the ensuing or resulting loss is covered.

D. The District Court Erred in Determining that the Efficient Proximate Cause Rule is Inapplicable.

The district court failed to consider that an efficient proximate cause analysis, which is the province of a jury, was necessary. Idaho courts have adopted the efficient proximate cause analysis relating to insurance coverage and therefore it was error to not address the doctrine. *Burgess Farms*

v. New Hampshire Ins. Grp., 108 Idaho 831,, 702 P.2d 869 (Ct. App. 1985). The court in *Burgess* reversed the trial court's grant of summary judgment and found there existed a genuine issue of material fact. *Id.* In discussing the efficient proximate cause the court stated:

> As noted, in addition to the conjunction between an intentional act and malice, the act must be the proximate cause of the damage or destruction. Cf. *Graham v. Public Employees Mutual Ins. Co.*, 98 Wash. 533, 656 P.2d 1077 (1983) (not involving vandalism or malicious mischief, but overruling a case that did and which also required a "direct, violent and efficient cause"). Proximate cause was defined in the *Graham* case, as:
>
> > [T]hat cause "which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the event, and without which that event would not have occurred." *Stoneman v. Wick Constr. Co.*, 55 Wash.2d 639, 643, 349 P.2d 215 (1960). **Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the 'proximate cause' of the entire loss.** [Citations omitted.]
>
> It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events.
> 656 P.2d at 1081. **The question of proximate cause is normally one for the jury**. *Clark v. Chrishop*, 72 Idaho 340, 241 P.2d 171 (1952). "[I]t is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Graham v. Public Employees Mutual Ins. Co.*, 656 P.2d at 1081."*Burgess,* 108 Idaho at 834–35 (emphasis added).

Another example of efficient proximate cause analysis by the appellate court is found in *Jones v. Mountain States Tel. & Tel. Co.*, 105 Idaho 520, 670 P.2d 1305 (Ct. App. 1983).

> Seldom does a loss involve a *sole* [emphasis original] cause independent of all other causes as asserted by the appellant. **Furthermore, we recognize that there is a plethora of authority in other jurisdictions holding that language in insurance**

> **contracts restricting coverage as does the policy here, nevertheless has no greater meaning than the requirement that an accident must be the dominant cause of the injury incurred or the active efficient cause that precipitated the resulting loss.**

[Emphasis added.]

105 Idaho at 529(quoting *Erickson v. Nationwide Mut. Ins. Co.*, 97 Idaho 288, 292, 543 P.2d 841 (1975). Other jurisdictions have addressed this issue more directly. *Xia v. ProBuilders Specialty Ins. Co.*, 188 Wash. 2d 171, 184, 400 P.3d 1234, 1241 (2017), as modified (Aug. 16, 2017), reconsideration denied (Aug. 17, 2017) ("The rule cannot be circumvented by an exclusionary clause; an exclusionary clause drafted to circumvent the rule will not defeat recovery." See also, *Key Tronic Corp. v. Aetna Fire Underwriters Ins. Co.*, 124 Wash.2d at 618, 881 P.2d 201 (1994); *Safeco Ins. Co. of America v. Hirschmann*, 112 Wash.2d at 621, 773 P.2d 413 (1989) (each invalidating policy language designed to circumvent the efficient proximate cause rule).

Because so many risks are contemplated by insurance contracts, causation doctrines, such as the efficient proximate cause doctrine, are of particular importance in property insurance. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW, A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES: PRACTITIONERS EDITION §5.5(e), at 559 (1988).

Initially, Mid-Century asserted that ABK's loss was excluded because defects in the UST system were the result of faulty maintenance. R., p.64. The district court refused to grant summary judgment on that theory, because there was evidence that ABK's UST system had been regularly maintained prior to the loss and the USTs had passed inspection by the Idaho Department of

Environmental Quality seven months prior to the loss. R., 287-291. However, the district court also found that there was "unrebutted evidence that ***one source*** of the water infiltration was melting snow, ice, and water that entered the underground storage tanks through cracks in the vapor riser caps and a crack in the spill or fill bucket."[4] R., p. 295 (Emphasis added). The Court's acknowledgment that there may have been more than one source or cause of the water infiltration should have triggered an efficient proximate cause analysis.

Specifically, the cracks in the riser caps and spill buckets were identified as the means of the water infiltration. However, unless the cracks in the vapor risers or spill bucket resulted from negligent maintenance or wear and tear, which the court found to be in dispute, a loss arising from the cracks would be covered if they were determined to be the efficient proximate cause. In other words, but for the cracks, surface water would not have entered the system. Therefore, a jury should decide whether the cracks were the efficient proximate cause and whether the cracks resulted from faulty maintenance or wear and tear. Similarly, because there was conflicting evidence as to the source of the water, it should be left to a jury to weigh the evidence and determine causation.

The district court refused to apply efficient proximate cause analysis because it found that the loss was caused, "at least in part, by surface water." R., p. 339. This conclusion acknowledges that two or more perils may have combined to cause the loss. UST systems are designed so that water does not infiltrate the system any time it rains or snows. Mid-Century's own expert testified

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[4]As argued, *Supra.,* ABK disputes that there was not evidence that the source of the water was ground water.

that water can infiltrate a UST system only if components of the system are damaged, which would allow the infiltration. R., p. 70. Thus, it is a question of fact for the jury to determine (1) were the cracks in the vapor riser caps and spill bucket a proximate cause of the loss; (2) did the cracks in the riser caps or spill buckets result from ABK's negligent maintenance or wear and tear; and (3) were the cracks or the surface water (or other source of water) the efficient proximate cause of the loss.

It is clear that the district court found that, if surface water or weather conditions contributed to the loss in any way, even minimally, the entire claim is excluded. R., p. 296 That is an incorrect application of the efficient proximate cause rule. The district court also ignored efficient proximate cause because it found that the terms of the policy were clear and unambiguous. Namely, the policies concurrent loss provision that excludes the named perils "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." R., p. 295. This language in the policy is clearly intended to circumvent the efficient proximate cause rule, which is prohibited under Idaho law.

In order for a concurrent loss clause to apply, the excluded loss must be the efficient proximate cause. This rule does not prohibit Mid-Century's freedom to contract to insure limited causes of loss. Mid-Century can exclude coverage resulting from surface water or weather, so long as those excluded perils are the predominate cause of loss.

E. The District Court Erred in Dismissing ABK's Claim for Bad Faith.

The district court dismissed ABK's bad faith on the premise that, absent coverage, no bad faith claim may be asserted. Because the district court erred in determining that coverage was excluded, its dismissal of the bad faith claim based on the finding of no coverage was improper.

VI. CONCLUSION

For the reasons set forth above, Plaintiff ABK asks the Court to reverse the district court and set the case for trial.

Respectfully Submitted this January 30, 2019.

PHILLABAUM, LEDLIN, MATTHEWS & SHELDON, PLLC

/S/ DOUGLAS DICK
Douglas Dick
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 2019, I electronically filed the foregoing with the Clerk of the Court using the Odyssey File and Serve System, which will send notification of such filing to all attorneys of record, including the following:

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Matthew Parks mcp@elamburke.com

/s/ KAMI RICCO
Kami Ricco
Legal Assistant to Douglas Dick