FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD WOHLENHAUS,	)	
Plaintiff-Appellant,	)	Filed December 23, 1986
vs.	)	368
POTTAWATTAMIE MUTUAL INSURANCE ASSOCIATION,	)	6-387 85-1884
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Cass County (No. 19462) - E. F. Hanson, Judge.

Plaintiff insured has appealed from declaratory judgment in favor of insurer, contending the district court erred by concluding that the relevant portion of the insurance policy was not ambiguous, that the plaintiff was not entitled to recover under theories of implied warranty or "reasonable expectations," and that the plaintiff was not entitled to reformation of the insurance policy. He also contends the district court erred by refusing to submit the case to a jury for a determination of the meaning of the relevant portion of the insurance policy. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR JURY TRIAL.**

Ronald W. Feilmeyer of Cambridge, Feilmeyer, Landsness & Chase, Atlantic, for plaintiff-appellant.

John D. Sens of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, for defendant-appellee.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ.

SNELL, J.

The appellant in this action, Richard Wohlenhaus, has purchased insurance coverage for his farm from an agent of the defendant, Pottawattamie Mutual Insurance Association since approximately 1947. On August 30, 1983, Wohlenhaus purchased wind and fire coverage from the defendant for a recently-constructed Morton building. The building was also under a warranty furnished by the manufacturer. On June 7, 1984, the building was destroyed by a tornado. Pursuant to the warranty, the manufacturer replaced the building at no cost to Wohlenhaus. Wohlenhaus then sought a $13,000 recovery from Pottawattamie Mutual, which promptly denied payment based upon the following provision of Wohlenhaus's policy:

> SPECIAL PROVISION: It shall be a provision that any insurance recovery of a loss of property covered by this policy and also covered by warranty at the time of loss shall be excess of any recovery possible from the warranty, whether collectible or not.

Pottawattamie contends that this provision limits Wohlenhaus's recovery under the policy to that part of the loss not covered by an applicable warranty. As Wohlenhaus was made whole by the manufacturer's warranty here, Pottawattamie Mutual contends he was not entitled to recovery under the policy.

Wohlenhaus commenced the present action on January 10, 1985, requesting, inter alia, the district court to declare the special provision unenforceable and to reform the policy so as to delete the special provision. The district court bifurcated the action in order to hear Wohlenhaus's declaratory judgment claim and to determine whether issues remained for the jury. The declaratory judgment portion was submitted on November 26, 1985, and, on December 2, 1985, the district court issued a declaratory judgment in favor of Pottawattamie Mutual and dismissed Wohlenhaus's petition. In its declaratory judgment, the district court found the special provision to be unambiguous and found Wohlenhaus's

claim to reformation of the policy to be without merit. In addition, the district court found meritless Wohlenhaus's theories of recovery based upon implied warranty and reasonable expectation. Wohlenhaus appeals each of these determinations.

Wohlenhaus first contends that the district court erred in finding the special provision to be unambiguous as a matter of law. Contrary to the district court's findings, Wohlenhaus alleges the provision is ambiguous and that, given the rule of construction contra preferentem, see, i.e., Connie's Construction Company, Incorporated v. Fireman's Fund Insurance Company, 227 N.W.2d 207, 210 (Iowa 1975), it must be construed so as to provide recovery in this situation.

The mere fact that the parties to an insurance policy disagree on the meaning of language in the policy does not establish ambiguity for purposes of the rule, urged upon us by Wohlenhaus, that construes ambiguous language in favor of the insured. Farm Bureau Mutual Insurance Company v. Sandbulte, 302 N.W.2d 104, 108 (Iowa 1982). Nor is an insurance policy ambiguous merely because it could have been worded more clearly or precisely than it in fact was. Fraternal Order of the Eagles, Waterloo Aerie No. 764 v. Illinois Casualty Company, 364 N.W.2d 218, 221 (Iowa 1985). Rather, in order for us to label the provision "ambiguous," we must find that its language is "fairly susceptible to two meanings," Sandbulte, 302 N.W.2d at 108, or "of doubtful nature or meaning," "uncertain," or "equivocal." See M-Z Enterprises v. Hawkeye-Security Insurance Company, 318 N.W.2d 408, 413 (1982).

Wohlenhaus contends the provision is reasonably susceptible to the interpretation that recovery under the policy is "excess," i.e., "in addition to" recovery under the warranty. Pottawattamie Mutual finds the provision clearly to mean that recovery under the policy is limited to the difference, i.e.,"excess," between

the possible recovery under the warranty and the amount of the loss. Obviously, the resolution of this issue turns upon the meaning ascribed to the term "excess."

We disagree with the district court's determination that as a matter of law the provision at issue here is unambiguous and that consequently a jury question was not raised. We think the provision here falls safely within any of the definitions of "ambiguity" given by the cases. This is particularly true given the insurer's duty to define in clear and explicit terms any limitation to coverage expressed by broad promises. Skyline Harvester Systems Incorporated v. Centennial Insurance Company, 331 N.W.2d 106, 107 (Iowa 1983).

Although Wohlenhaus urges us to apply established rules of construction to this ambiguous provision, the primary dispute here is over what the words of the provision mean. Accordingly, the issue is one of contract interpretation. Sandbulte, 302 N.W.2d at 107. When the question of interpretation depends upon extrinsic evidence or a choice among reasonable alternatives to be drawn from that evidence, the question is one of fact for a jury. General Casualty Company of Wisconsin v. Hines, 261 Iowa 738, 745, 156 N.W.2d 118, 122-23 (1968). As Pottawattamie Mutual concedes, the parties submitted extrinsic evidence bearing on the interpretation of the provision's terms. We think this evidence is reasonably susceptible to either of the alternative interpretations suggested by the parties. Accordingly, a jury question was raised. We note that Wohlenhaus filed a timely demand for a jury trial.

Pottawattamie Mutual contends, however, that as Wohlenhaus failed to argue at trial his right to a jury, the issue has been waived. We do not agree.

Iowa Rule of Civil Procedure 180 provides that "[e]xceptions to rulings or orders of Court are unnecessary whenever a matter has been called to the attention of the Court, by objection, motion or otherwise and the Court has ruled thereon." In Missildine v. Brightman, 234 Iowa 1339, 14 N.W.2d 700 (1944),

our supreme court was faced with a fact situation wherein a party filed a demand for a jury trial to which they were entitled. The trial court denied the demand and proceeded to try the case in equity. On appeal, our supreme court said that:

> The record does not show that any exception was taken by the appellants to the action of the court in depriving them of the right to a jury trial. We call attention to our present rule 180, which is as follows: "Exceptions to rulings or orders of the court are unnecessary whenever a matter has been called to the attention of the court by objections, motion, or otherwise, and the court has ruled thereon." Certainly appellants called to the attention of the court their demand for a jury trial and the court ruled thereon by denying the same. This was error on the part of the court and its action therein cannot be sustained.

Id., 234 Iowa at 1347, 14 N.W.2d at 705.

Similarly, in the present case Wohlenhaus made a timely demand for a jury trial, thus bringing the matter to the attention of the district court. The district court denied the motion by determining in its declaratory judgment order that the special provision was unambiguous and that, accordingly, "[a] jury question is not generated." We hold both these determinations to be error and, pursuant to rule of civil procedure 180, find that Wohlenhaus has not waived his right to a jury on the issue of interpretation. We think the district court's denial of this right is reversible error. See South Central Iowa Production Credit Association v. Scanlan, 380 N.W.2d 699, 704 (Iowa 1986).

In his request for declaratory judgment, Wohlenhaus also requested the district court to reform the policy so as to delete the special provision because it was not agreed to by the parties. The district court found the reformation claim to be without merit. Wohlenhaus contends this was error. Our review of this equitable claim is de novo. Iowa R. App. P. 4.

One who seeks reformation by contending, as does Wohlenhaus, that the instrument does not reflect the real agreement of the parties has the burden of establishing his contentions by clear, convincing, and satisfactory proof. Kufer v. Carson, 230 N.W.2d 500, 503 (Iowa 1975). The evidence proffered by the party seeking reformation must be sufficiently compelling to constitute an effective appeal to the conscience of the court and prompt it to interfere by reformation to mitigate the rigorous rules of law. Id. The remedy of reformation is not absolute but rather lies within the sound discretion of the equity court. Kendall v. Lowther, 356 N.W.2d 181, 188 (Iowa 1984).

We think Wohlenhaus failed to present the declaratory judgment court with sufficient proof that the provision failed to reflect the intent of the parties. The gist of Wohlenhaus's contention here is that the true intent of the parties was to provide for insurance coverage notwithstanding full warranty coverage. Not only do we think Wohlenhaus failed to present the declaratory judgment court with sufficient proof of this claim, we believe such a claim is contradicted by his concession that he never discussed the warranty coverage with anyone from Pottawattamie Mutual. We note that declaratory judgment was the only relief sought by Wohlenhaus on his reformation claim. Although we think this case must be remanded for a jury trial, we think the district court properly disposed of this equitable issue.

Wohlenhaus also contends that the district court was in error when it held as a matter of law that he was not entitled to recovery under the theories of implied warranty and reasonable expectation. Wohlenhaus did not request declaratory relief with respect to these issues and had requested a jury trial in this case. In light of our decision to remand this case for a jury trial, we think Wohlenhaus is entitled to develop these theories further at that time.

Accordingly, we reverse the district court's determination that Wohlenhaus was not entitled to a jury trial on the issues of interpretation of the special provision, implied warranty, or reasonable expectations, and affirm its dismissal of the reformation claim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR JURY TRIAL.