IN THE COURT OF APPEALS OF IOWA

No. 1999-57 (9-212) / 98-1525
Filed on October 27, 1999

STROTMAN BUILDING CENTER, INC.,

Plaintiff-Appellant,

vs.

WEST BEND MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

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Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles, Judge.

Plaintiff appeals the district court's summary judgment in favor of the defendant. **AFFIRMED.**

John J. Hines of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

David L. Riley of Yagla, McCoy & Riley, P.L.C., Waterloo, for appellee.

Considered by Streit, P.J., and Vogel, and Vaitheswaran, JJ.

VAITHESWARAN, J.

A home builder sought coverage under its commercial general liability policy. The district court denied coverage and the home builder appealed. We affirm.

I. Background Facts and Proceedings

The facts are essentially undisputed. Strotman Building Center, Inc. (Strotman) agreed to build a house for Barbara Benson. In April 1997, Benson sued Strotman and company president Jim Strotman, alleging that they were responsible for defects in the home. Strotman sought and was denied coverage under its commercial general liability (CGL) policy issued by West Bend Mutual Insurance Company (West Bend). Strotman then filed a petition for declaratory judgment against West Bend, seeking to have West Bend defend Strotman in the Benson litigation. On cross-motions for summary judgment, the district court ruled in favor of West Bend and dismissed the petition. This appeal followed.

II. Scope of Review

Although this declaratory judgment action was filed in equity, we review a summary judgment on error. *See Whicker v. Goodman*, 576 N.W.2d 108, 110 (Iowa 1998); *City of Clinton v. Sheridan*, 530 N.W.2d 690, 692 (Iowa 1995). Generally, we affirm a summary judgment when, after viewing the evidence in the light most favorable to the nonmoving party, there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Dico, Inc. v. Employers Ins. of Wausau*, 581 N.W.2d 607, 611 (Iowa 1998). Here, the parties have

agreed to the essential facts. Therefore, the sole issue before us is whether the district court erred as a matter of law in concluding that West Bend had no duty to defend Strotman in the Benson lawsuit.[1]

III. Duty to Defend

In determining whether there is a duty to defend, we look to the petition in the underlying action and decide whether the facts alleged "bring the claim within the liability covered by the policy." *Stine Seed Farm, Inc. v. Farm Bureau Mut. Ins. Co.*, 591 N.W.2d 17, 18 (Iowa 1999).

Benson alleged in her petition that she orally contracted with Strotman to have Strotman design, engineer and build a home. Benson claimed she relied on Strotman to properly construct the home, but construction, engineering and/or design defects began to appear. Her petition raised counts for breach of contract, negligence, breach of implied warranty, and negligent misrepresentation. Benson asserted that she incurred or would incur the following damages:

> (a) expenses to determine the defects in her home and to determine the feasibility and cost of repairing those defects;
> (b) expenses to tear up parts of her home to conduct this investigation and to complete certain repairs;
> © expenses incidental to these repairs such as cleaning expenses, being deprived of the use of her home and spending her own time on this project;
> (d) further repair and incidental expenses;
> (e) diminution in value of the home;
> (f) loss of investment;

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[1] West Bend notes in its brief that Benson's lawsuit against Strotman has settled. Because Strotman has expended defense costs, the settlement does not render this case moot.

> (g) loss of value, deterioration and destruction of the work done by subcontractors and others as a result of Defendants' defective work; and
> (h) personal injury due to emotional damages recklessly inflicted on Plaintiff by Defendants through their unreasonable delays in construction, unresponsiveness to investigate and repair defects in their work and the defective nature of the work itself.

A. Property Damage

Strotman first contends that Benson's request for damages based on loss of use of the home is a covered claim for "property damage" under West Bend's CGL policy. The policy defines "property damage" as follows:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it.

Relying on *Yegge v. Integrity Mutual Insurance Co.*, 534 N.W.2d 100 (Iowa 1995), the district court concluded that Benson's damage claim constituted an intangible economic loss and not "property damage" within the meaning of West Bend's CGL policy. We agree. The underlying dispute in *Yegge* arose from construction of a home. *Id.* at 100. The Yegges sued the builder, claiming breach of contract, breach of express warranty of fitness for a particular purpose, breach of implied warranty, negligence, and fraud. *Id.* at 102. They sought damages for the "cost of labor, material, and supplies necessary to complete the residence to their satisfaction; disruption of their lives; impairment of their business; increased expenses; diminished investment value; and emotional distress." *Id.*

The definitions of "property damage" in *Yegge* and in this case are identical. In *Yegge*, the court denied coverage, reasoning that the Yegges' lawsuit "was, from beginning to end, a claim of poor performance in constructing a residence," a risk that the insurer did not undertake to cover. *Id.* at 103. Benson's petition asserts she incurred expenses incidental to repair of her home *including* damages for loss of use of the home. These damages are of a kind associated with poor home construction and are similar, if not identical to the types of damages construed in *Yegge* as intangible economic losses.

Benson's petition also seeks compensation for diminution in value and damage to work performed by subcontractors. Strotman concedes these damages generally are considered intangible losses. However, citing *Kartridg Pak Co. v. Travelers Indemnity Co.*, 425 N.W.2d 687 (Iowa App. 1988), Strotman asserts these damages may constitute "property damage" under West Bend's policy, because they occurred as a result of physical injury to the home. We disagree. The act giving rise to the claim here was not injury to the home, but Strotman's asserted failure to properly build the home. *Id.* at 690 (act giving rise to the claim was not the meat grinding process, but failure of the deboner to properly separate the meat from the bone, resulting in diminished value to the meat). Accordingly, these damages are not covered under the "property damage" definition of West Bend's CGL policy.

Strotman also relies on *First Newton National Bank v. General Casualty Co. of Wisconsin*, 426 N.W.2d 618, 626 (Iowa 1988), which held that physical injury to

tangible property was not required before the loss of use claim was covered. However, the court there examined a different subsection of the "property damage" definition, as well as language in an umbrella policy which did not require physical injury. Therefore, that case is inapposite.

We agree with the district court's conclusion that Benson's petition did not assert claims for "property damage" under West Bend's CGL policy, and accordingly we affirm.

B. Occurrence

West Bend's CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Accident" is not defined in the policy but courts have stated the following:

> The word "accident" as used in insurance policies has frequently been defined as an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force...[G]iving to the word the meaning which a man of average understanding would, we think ["accident"] clearly implies a misfortune with concomitant damage to a victim, and not the negligence which eventually results in that misfortune.

Pursell Constr. v. Hawkeye-Sec. Ins., 596 N.W.2d 67, 70 (Iowa 1999) (*quoting Cent. Bearings Co. v. Wolverine Ins. Co.*, 179 N.W.2d 443, 448 (Iowa 1970)).

Strotman contends that Benson's claims for negligence and negligent misrepresentation are covered "occurrences" under West Bend's policy because they are premised on unintentional conduct. The district court rejected this contention,

concluding that the case was "on nearly all fours with *Yegge*," which held that a builder's actions did not constitute an occurrence. *Yegge*, 534 N.W.2d at 103. We agree with the district court that *Yegge* is dispositive, as is the Iowa Supreme Court's more recent opinion in *Purcell*. The claims Benson raised and the damages she sought all arose from Strotman's alleged failure to properly build the home. The court explained in *Yegge* that coverage of such poor performance claims would "convert a routine business liability policy into a performance bond." *Id.* at 103; *see also J.Z.G. Resources, Inc. v. King*, 987 F.2d 98, 102-3 (2d Cir. 1993) *cited in Purcell*, 596 N.W.2d at 71 (noting coverage was for "tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."); *United States Fidelity & Guar. Corp. v. Advance Roofing & Supply Co.*, 788 P.2d 1227, 1233 (Ariz. App. 1989) *cited in Purcell*, 596 N.W.2d at 71 (noting "[i]f the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond").

We see no reason to deviate from the rationale set forth in *Yegge*. Strotman is correct that the court in *Yegge* did not expressly address the Yegges' negligence count in concluding there was no "occurrence." However, the court did so in *Purcell*, finding that the underlying negligence and breach of contract claims were essentially claims for defective workmanship. *Purcell*, 596 N.W.2d at 70. The court held in

Purcell that a claim of defective workmanship resulting in damages only to the work product itself is not an "occurrence" under a CGL policy. *Id.* at 71.

Other opinions cited by Strotman are inapposite. *See West Bend Mut. Ins. Co. v. Iowa Iron Works*, 503 N.W.2d 596 (Iowa 1993); *First Newton Nat'l Bank*, 426 N.W.2d at 624-25. Those opinions turned on policy language that differed from the definition of "occurrence" at issue in this case and in *Yegge* and *Purcell*. Specifically, the policies in those cases contained language within the definition of "occurrence" that required the absence of any intent to cause injury. *See West Bend Mut. Ins. Co.*, 503 N.W.2d at 600 (noting that policy defined "occurrence" as an accident resulting in property damage "neither expected nor intended from the standpoint of the insured"); *First Newton Nat'l Bank*, 426 N.W.2d at 624-25 (containing same "occurrence" definition as in *West Bend Mutual Insurance Co.*). The definition of "occurrence" in West Bend's CGL policy contains no such language.

For these reasons, we conclude that the claims asserted by Benson were not covered "occurrences" within the meaning of West Bend's CGL policy.

C. Personal Injury

Strotman contends that Benson's claim for personal injury damages is covered under West Bend's CGL policy. The policy defines "personal injury" as:

> injury, other than "bodily injury", arising out of one or more of the following offenses:
> a. False arrest, detention or imprisonment;
> b. Malicious prosecution;

> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
> d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
> e. Oral or written publication of material that violates a person's right of privacy.

Strotman specifically suggests that his claim for emotional damages based on "unreasonable delays in construction, unresponsiveness to investigate and repair defects in their work and the defective nature of the work itself" falls within part c of the "personal injury" definition. We reject this contention. The district court stated:

> Obviously, Benson did not claim entitlement to recover for any of the "offenses" contained in the policy definition of personal injury. Moreover, the operative facts claimed by Benson would not support a claim for any of those offenses, even if they were otherwise unnamed. Therefore, the court concludes that the underlying petition does not include an allegation of personal injury within the meaning of the policy issued by West Bend.

We agree with this conclusion.

We affirm the district court's conclusion that West Bend had no duty to defend Strotman in the Benson litigation.

AFFIRMED.