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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-569 / 89-1853

FRANCISCAN BROTHERS OF CHRIST THE KING, INC., an Iowa Non-profit Organization,

Appellee,

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vs.

THE CINCINNATI INSURANCE COMPANY,

Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Insurer appeals from a district court ruling which found its insurance policy covered the loss of the insured's retaining wall. **AFFIRMED.**

J. Richard Johnson of White & Johnson, P.C., Cedar Rapids, for appellant.

Michael J. McCarthy of McCarthy & Lammers, Davenport, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

PER CURIAM

The plaintiff, the Franciscan Brothers of Christ the King, Inc., occupies a monastery on property that it purchased in 1981. The plaintiff obtained insurance coverage with the defendant company. The policy in issue was the first one between the parties and took effect in June of 1985.

The previous owners of the real estate entered into an agreement with the City of Bettendorf in 1925. Pursuant to the agreement, the previous owners erected a retaining wall on the city-owned right-of-way. Under the agreement, the previous owners were to maintain the wall.

The purpose served by the wall was to provide lateral support for the plaintiff's premises--including the buildings and enclosure wall. On October 6, 1986, the retaining wall collapsed into the street. The cause of the collapse was excessive pressure placed against the wall by ground water which was a combination of rainfall and the draining of plaintiff's swimming pool. The plaintiff incurred various clean-up expenses and repair costs.

The plaintiff then filed a petition for declaratory judgment asking the court to determine whether it is entitled to coverage for such expenses under its insurance policy with the defendant. The specific issues before the trial court were whether the retaining wall was covered by the insurance policy and, if so, whether the water-

pressure-related collapse is a risk for which benefits are available.

Plaintiff asserts that the wall is covered property, both by definition and by reasonable expectation. The policy definition is silent as to retaining walls. The policy defines "covered property" and includes structures which are additions and extensions and fixtures which are a permanent part of and pertain to the service of the building. Yard fixtures are also covered property, but are not defined.

Following two evidentiary hearings, the district court held that the retaining wall was covered property under the policy provisions as an extension of the other structures on the premises and as a yard fixture. The district court then determined that the loss was covered under the "all risk" endorsement. The court further found that a ground water exclusion did not defeat coverage because the wall collapse was not caused by mere ground water, but rather by the negligence of the pool employees in discharging swimming pool water toward the retaining wall.

The insurer appeals. It contends that the retaining wall is not covered property because: 1) the wall was not owned by the plaintiff; 2) the plaintiff had no legal obligation to maintain the wall; 3) the wall was not scheduled under the policy; and 4) the plaintiff could not reasonably expect the wall to be covered. The insurer further argues that the loss is excluded because the loss

is an inherent or latent defect, and caused by surface water or ground water.

A number of the assertions raised by the defendant need not be considered by us for we affirm the trial court on the legal theory of reasonable expectation. In this respect, the trial court's "findings" must be examined in light of our applicable rules. Ordinarily in a law action tried to the court, its findings of fact having adequate evidentiary support shall not be set aside unless induced by an erroneous view of the law. C & J Fert. Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169, 172 (Iowa 1975). As the court in C & J Fert. stated, "It follows, the rule does not preclude inquiry into the question whether, conceding the truth of a finding of fact, the trial court applied erroneous rules of law which materially affected the decision." Id. at 172.

With those principles of law in mind, there is evidence in the record to support the trial court's finding that the retaining wall in question was built by the predecessor to the Franciscan Brothers pursuant to a written agreement with the City of Bettendorf. Under that writing, the previous owner agreed that the wall to be built was to be of good and substantial construction and that it was to always be maintained by them.

As the successor in title, the Franciscan Brothers recognized this responsibility. There is testimony in the record that shortly after the Brothers moved into their

monastery it was called to their attention that there was a crack in the wall. Brother Skube examined the crack and called an engineer to inspect it. The engineer gave an opinion as to its structural worthiness. The same engineer was called to make an inspection shortly before the wall fell.

It is clear that as between the City and the Franciscan Brothers, the Franciscan Brothers recognized and admitted their responsibility as to that wall. We conclude that the Brothers had an insurable interest in the retaining wall. In reaching this conclusion, we, however, limit that responsibility only to the terms and provisions of the written agreement. That agreement is referred to in the briefs of the parties as Exhibit B which, regrettably, does not appear in the appendix.

Having found that the retaining wall is an insurable interest, we next address the issue of reasonable expectations of the Franciscan Brothers. Our supreme court discussed the concept of reasonable expectations in C & J Fertilizer Inc., v. Allied Mutual Insurance Co., 227 N.W.2d 169, 174 (Iowa 1975). The following articulation of the concept had been made in earlier case law:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Rodman v. State Farm Mutual Ins. Co., 208 N.W.2d 903, 905-08 (Iowa 1973).

Defendant contends it was error for the trial court to have found the coverage ordered had been reasonably expected. In C & J Fertilizer, Inc. v. Allied Mutual Insurance Co., 227 N.W.2d 169 (Iowa 1975), the court stated:

> It is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it if he does. 7 Williston on Contracts § 906B, p. 300 ("But where the document thus delivered to him is a contract of insurance the majority rule is that the insured is not bound to know its contents")1; 3 Corbin on Contracts § 559, pp. 265-66 ("One who applies for an insurance policy . . . may not even read the policy, the number of its terms and the fineness of its print being such as to discourage him"); Note, Unconscionable Contracts: The Uniform Commercial Code, 45 Iowa L. Rev. 843, 844 (1960) ("It is probably a safe assertion that most involved standardized form contracts are never read by the party who 'adheres' to them. In such situations, the proponent of the form is free to dictate terms most advantageous to himself"); see Hully v. Aluminum Company of America, 143 F.Supp. 508, 513 (S.D. Iowa 1956), aff'd sub nom. Columbia Casualty Company v. Eichleay Corporation, 245 F.2d 1 (8th Cir. 1957); Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 859 (Iowa 1972); Quinn v. Mutual Benefit Health & Acc. Ass'n of Omaha, 244 Iowa 6, 14, 55 N.W.2d 546, 550 (1952); Lankhorst v. Union Fire Ins. Co., 236 Iowa 838, 844, 20 N.W.2d 14, 17 (1945).

Id. at 174.

The reasonable expectations doctrine is intended to protect "objectively reasonable expectations" of insureds and beneficiaries "even though painstaking study of the insurance policy provisions would have negated those expectations." Rodman State Farm Mutual Automobile Ins. Co., 208 N.W.2d 903, 906 (Iowa 1973). Its application

turns attention to "the basic agreement, to the concept of substance over form." C & J Fertilizer, 227 N.W.2d at 177.

The reasonable expectations doctrine may be applied even where the language, whose effect is disputed, is unambiguous. Rodman, 208 N.W.2d at 906; C & J Fertilizer, 227 N.W.2d at 177; Cairns, 398 N.W.2d at 825. The reasonable expectations doctrine may also be applied even where the language would not be misunderstood. C & J Fertilizer, 227 N.W.2d at 177; Cairns, 398 N.W.2d at 825.

The trial court found that Brother Skube is unsophisticated with regard to insurance policies. However, there is also testimony he wanted his property insured. Brother Skube testified that he was adamant with his insurance representative that he wanted everything covered. The wall is in plain view and is a rather large structure. It would be difficult to ignore.

Brother Skube was highly complimentary of insurance agent Dan Curran. He consistently informed Mr. Curran he wanted everything covered, no matter what it was. He advised he knew nothing about insurance, and it is clear that he did not read the policy but relied on Mr. Curran's advice. Factually it appears that Mr. Curran admitted that Brother Skube relied upon his advice as to insurance matters.[1]

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1. The Company strongly argues that the retaining wall is not listed or itemized on the policy. The record reveals that the Company has paid claims on a swimming pool even though it was not listed and that a crucifix on the property is covered under the definition of a yard

It is evident from this testimony that Brother Skube reasonably believed his property would be covered. We find no error on the part of the trial court and accordingly affirm.

Although the trial judge determined that coverage of the retaining wall would be proper, in the first evidentiary hearing he determined there to be no coverage because of the policy exclusion. However, in the second evidentiary hearing he determined that because the water pressure which caused the wall to collapse had an immediate and identifiable root in the actions of third parties and because it was not a "sole cause" situation, the damage in this case would not fall under the exclusion. The exclusions relied on by the defendant provided that the policy "would not cover any loss resulting from, contributed to, or aggravated by any of the following . . . surface water."

Plaintiff's expert testified that the collapse of the wall was caused by the water from the pool. He discussed the idea that since the wall had some cracks in it, during a normal rain or even a rainy season, the water would seep through the cracks thus avoiding a build-up behind the wall. However, he determined that since the hoses from the pool gave the water such tremendous volume, it was able to

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fixture. The insurance agent also testified that the retaining wall was a structure.

build up a head of water which was sufficient to roll the wall over. Upon investigation, he determined it would take just a few moments of the hose's discharge and then it would push the wall over.

The plaintiff's policy had an "all risk" endorsement to it, extending coverage to all risks of direct physical loss except as excluded in the endorsement. "All risks" insurance is a modern development wherein the events which must cause the loss or damage before the insurer becomes liable are not specified; "it is a promise to pay upon the fortuitous and extraneous happening of loss or damage from any cause whatsoever." Williston on Contracts, 3rd Edition, Vol. 7, p.40. Here, a proximate cause of the plaintiff's loss was the negligence of the swimming pool employees in discharging the water toward the retaining wall, thus the defendant's exclusions would not apply and the loss would be covered by the "all risk" endorsement.

The trial court relied on the "efficient proximate cause standard" and we agree it is properly applied in this case. The Supreme Court of California adopted this standard in Sabella v. Wisler, 377 P.2d 889 (1963). This standard provides:

> In determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause - the one that sets others in motion - is the cause to which the loss is to be attributed, though the other causes may follow it , and operate more immediately in producing the disaster.

Id. at 895.

The "all risk" policy covers negligence of others as a cause. The water from the swimming pool was a proximate cause of the collapse of the wall. Further, the water would not have been directed at the wall but for the negligence of the individuals working on the pool.

We recognize that coverage would not exist if the covered risk was a remote cause or if the excluded risk was the predominate cause. However, the excluded risk here is subsurface water, and we are unable to find that to be the predominant or efficient proximate cause.

Under the circumstances here, it is reasonable to determine the retaining wall loss was caused by a peril which was a covered peril. We accordingly affirm the trial court.

AFFIRMED.