

64738-5

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NO. 64738-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DANIEL HERR,

Appellant,

v.

ESMAEL FORGHANI AND JOY FORGHANI, HIS WIFE, AND
ADDITIONAL PARTIES, PACIFIC NORTHWEST TITLE
INSURANCE COMPANY AND DEPOSITORS INSURANCE
COMPANY,

Respondents.

**BRIEF OF RESPONDENT DEPOSITORS
INSURANCE COMPANY**

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I. INTRODUCTION

This lawsuit arises out of a neighbor dispute between plaintiff Daniel Herr (“Herr”) and Esmaeil and Joy Forghani (“Forghani”). Herr added his title insurer, Pacific Northwest Title Insurance Company (“Pacific NW”) and homeowners insurer Depositors Insurance Company (“Depositors”).

The precise grounds alleged for coverage benefits from either insurer has never been clear. Depositors moved for summary judgment and the trial court granted Depositors’ motion as to all claims.

Because neither the liability nor the property coverages in the Depositors policy arguably apply to Herr’s situation, this Court should affirm the trial court’s grant of summary judgment to Depositors.

II. STATEMENT OF ISSUES

1. The liability section of Depositors’ policy with Herr provides a duty to defend covered suits against the insured. Under Washington law, the duty to defend is triggered when a complaint alleging covered claims is filed against the insured. Did Depositors have a duty to defend Herr when no counterclaim or other complaint was filed against him?

2. Depositors’ property policy with Herr covers direct physical loss to Herr’s dwelling. Did Depositors have a duty to provide

any first party benefit to Herr under the property section of Herr's homeowner's policy on the ground that the Forghanis were using their property as an adult group home and were using an easement across Herr's land for the purpose of accessing the adult group home?

III. STATEMENT OF THE CASE

A. Factual and Procedural Background

Herr brought this lawsuit against his neighbors, the Forghanis, as a result of a dispute over the scope of an easement. *See* CP 1-5. The details of the dispute are laid out in detail in the briefs of Herr and the Forghanis. In his Complaint against adjacent landowner Forghani, Herr alleges that “on or about 2005, Defendants (Forghani) changed the nature of the existing residence use to a commercial business use housing six or seven persons in a nursing home setting.” CP 4. Plaintiff has not alleged a specific violation of the zoning for the property; rather, he claims that the zoning laws have changed to permit an adult group home next door, and that he has suffered as a result of such changed use. *Id.* Herr's suit against the Forghanis alleges Trespass, Damages, and Quiet Title. CP 1-5. Herr claims that in 2005 the Forghanis changed their residential duplex into a nursing home or and adult group home. CP 4. Herr alleged that the Forghanis were improperly using an easement across the Herr property to service the commercial enterprise and that this use of the easement

rendered the Herr property “unmerchantable.” CP 4-5. Herr sought damages from Forghani and a ruling and injunction establishing the scope of Forghani’s easement. CP 5.

In April 2008, Herr filed an Amended Complaint naming Depositors and his title insurer, Pacific Northwest Title. With respect to Depositors, Herr alleged:

4.

On or about July 31, 2007, Plaintiff was insured by Depositors Insurance Company under a homeowner’s Policy #HMD 0012113455-6, said policy covered Plaintiff’s residence at 110 SW 122nd St. Seattle (Burien) Washington. That policy insures Plaintiff’s dwelling in the sum of \$188,200, other structures for \$18,820, and personal property for \$131,740. It insures against direct physical loss to the residence property.

5.

Plaintiff alleges that should Defendant, Forghani, succeed in impressing an expanded implied easement to his property for ingress and egress for commercial use of his property over Plaintiff’s land and/or easement, this Court enter judgment against the additional Defendants for sums as represent a diminution or destruction of the merchantability of Plaintiff’s property, together with reasonable attorneys’ fees and costs and expenses herein.

CP 12-13.

Herr’s amended complaint appears to have been motivated by the belief that Respondents Forghani filed an answer and counterclaim.

However, as the Forghanis explain in their response brief, they served an

answer and counterclaim, but decided not to file it, apparently with the intent to abandon the counterclaims. See Brief of Respondents Forghani at 3. Depositors moved for, and was granted summary judgment as to all claims brought by Herr. CP 485; CP 197-98.

B. The Depositors Policies

Depositors issued annually-renewed homeowners policies to Herr in effect between July 31, 2005 through July 31, 2009. CP 208-437. The policies contained separate sections providing liability coverage for claims against Herr and for property coverage for damage to Herr's insured dwelling.

1. The Liability Coverage (Section II)

The liability coverage under which Herr argues that Depositors had a duty to defend provides as follows:

SECTION II – LIABILITY COVERAGES

A. COVERAGE E – Personal Liability

If a claim is made or a suit is brought against an “insured” for **damages** because of “**bodily injury**” or “**property damage**” caused by an “**occurrence**” to which this coverage applies, we will:

1. Pay up to our limit of liability for the damages for which an “insured” is legally liable. Damages include prejudgment interest awarded against an “insured”; and

2. Provide a defense at our expense by counsel of our choice, even if the suit is groundless false or fraudulent . . .

CP 230.

SECTION II - EXCLUSIONS

F. COVERAGE E – Personal Liability

Coverage E does not apply to:

* * *

2. **“Property damage” to property owned by an “insured.”** This includes costs or expenses incurred by an “insured” or others to repair, replace, enhance, restore or maintain such property to prevent injury to a person or damage to property of others, whether on or away from an “insured location”;
3. **“Property damage” to property rented to, occupied or used by or in the care of the “insured”.** This exclusion does not apply to “property damage” cause by fire, smoke or explosion;

CP 234

* * *

DEFINITIONS

2. **“Bodily injury”** means bodily harm, sickness or disease, including required care, loss of service, and death that results.

....*

8. Under Section II **“Occurrence”** means an accident, including continuous or repeated

exposure to substantially the same general harmful conditions, which result, during the policy period, in:

- a. “Bodily injury”; or
- b. “Property damage”.

....*

- 9. Under Section II, “Property damage” means physical injury to, destruction of, or loss of use of tangible property.

CP 213.

2. The Property Coverage (Section I)

SECTION I – PROPERTY COVERAGES

A. COVERAGE A – Dwelling

- 1. We cover:
 - a. The dwelling on the “residence premises” shown in the Declarations, including structures attached to the dwelling; and
 - b. Materials and supplies located on or next to the “residence premises” used to construct, alter or repair the dwelling or other structures on the “residence premises”.
- 2. This coverage does not apply to land, including land on which the dwelling is located.

CP 214-15.

* * *

**SECTION I – PERILS INSURED AGAINST
THIS SECTION ALSO CONTAINS EXCEPTIONS
TO OR EXCLUSIONS FROM COVERAGE**

**A. COVERAGE A – Dwelling And
COVERAGE B – Other Structures**

1. We insure against risk of direct physical loss to property described in Coverages A and B.
2. We do not insure, however, for loss:
 - a. Excluded under **SECTION I – EXCLUSIONS**;

CP 221.

The policy provides that it does not cover loss in value to the building or structure due to the requirements of any ordinance or law, including faulty planning, zoning, development, surveying and siting:

* * *

SECTION I – EXCLUSIONS

A. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

1. Ordinance Or Law

Ordinance or Law means any ordinance of law:

* * *

- b. The requirements of which result in a loss in value to property; or

CP 225.

....*

- B. We do not insure for loss to property described in Coverages **A** and **B** caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded in **SECTION I – EXCLUSIONS** in A. above is covered.

....*

- 2. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;
- 3. Faulty, inadequate or defective:
 - a. Planning, zoning, development, surveying, siting;

CP 226.

IV. SUMMARY OF ARGUMENT

There is no third party liability coverage because Forghani was not sued and the liability coverage grant only covers claims and suits against the insured. Because Herr was never sued, much less sued for covered bodily injury or property damage or any other form of covered liability, no liability claim is supportable. There is quite simply nothing to defend Herr against, and nothing to indemnify him for.

While Herr's issue and fact statements are limited to liability insurance issues (duty to defend), Herr does quote from and discuss the property coverage at some points in his briefing. There are, however, no property coverage benefits available for the existence of a dispute with the Forghanis over the scope of an easement. The dwelling coverage only covers against the risk of direct physical loss to the covered dwelling (not the land that makes up the easement), and Herr points only to dissatisfaction with his neighbors' decision to operate an adult group home and use of the easement over his property to serve the adult group home. Herr does not point to any arguably covered losses in connection with this situation.

V. ARGUMENT

A. Standard of Review

Orders granting summary judgment are reviewed *de novo*. *WilsonCourt Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). A court shall grant summary judgment to a party "as to all or any part" of a claim where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." CR 56.

B. There Is No Support in the Record for Herr's Only Assignments of Error Relating to Depositors' Alleged Duty to Defend the Nonexistent Forghani Counterclaim

Herr asserts two issues on appeal relating to Depositors:

C. Depositors Insurance Company

No. 1 Should the trial Court ordered [*sic*] Depositors to defend the Counterclaim of Forghani against Herr based upon its coverage?

D. Attorney's Fees & Costs

No. 1 Should attorney's fees and costs be awarded Herr against both Pacific Northwest and Depositors for refusing to defend?

Brief of Appellant at 13. Neither of these issues is reviewable on appeal because the Forghanis never filed a counterclaim against Herr and there was nothing for Depositors to defend Herr against. The Forghanis state in their Respondent's brief that they served the answer and counterclaim but did not file it, "essentially non-suiting their counterclaims." Brief of Respondents Forghanis at 3. No copy of the non-filed counterclaim appears in the record.

Washington courts have long held that "The triggering event [for the duty to defend] is the filing of a complaint alleging covered claims." *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 138, 29 P.3d 777 (2001). Because Forghani never filed a counterclaim, the triggering event for the duty to defend under the liability coverage (Section II) never occurred.

Second, even if the above were not dispositive, because no copy of even the unfiled counterclaim is in the record, Herr's claim of error is not reviewable. An insurer has a duty to defend "when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007) (quotations omitted). Substantive review necessarily requires a comparison of the allegations in the counterclaim to the policy coverage. Without a counterclaim in the record, this Court has no way of construing the complaint to determine whether it alleges covered claims under the Depositors policy.¹ The appellant bears the burden of providing an adequate record for our review. *State v. Tracy*, 128 Wn. App. 388, 394-395, 115 P.3d 381 (2005) (citations omitted). Because there is no record on this issue, Herr's claims of error should be dismissed.

C. To the Extent Herr is Making a Property Claim Under Section I of the Policy, that Claim is Wholly Without Merit

While Herr's issue statements and headings appear devoted to the duty to defend and liability coverage, Herr quotes from both the first party property coverage grant (Section I) in his argument in conjunction with a

¹ While the counterclaim pleading was never filed and is not in the record, Depositors believes it would have had no duty to defend the counterclaim even if it had been filed.

definition of “property damage” applicable to only to the liability coverage grant (Section II). Specifically, Herr states:

Depositor’s policy provides (CP 73; CP 56):

1. We insure against the risk of direct physical loss to property described in coverage A (Herr’s Residence).

Under definitions the policy provides:

Property Damage. Under Section 2 property damage means physical injury to, destruction of, or loss of use of tangible property.

Appellant’s brief at 29. Herr appears to be arguing that the requirement that there be “direct physical loss” for coverage under Section I of the policy is undermined by a definition of “property damage” (found at CP 213) applicable only to Section II (Liability Coverages). Of course, the “property damage” definition applicable only to the liability coverage plays no role in the scope of coverage under Section I (property).

Given that the property coverage in fact requires direct physical loss to trigger coverage, no covered property claim can exist. In Washington, “[d]etermining whether coverage exists is a 2-step process. The insured must [first] show the loss falls within the scope of the policy’s insured losses. To avoid coverage, the insurer must then show the loss is excluded by specific policy language.” *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 732, 837 P.2d 1000 (1992).

In this case, Herr cannot meet the first part of the *McDonald* test. He cannot show that his claimed property loss falls within the scope of the insured losses. The Depositors' policy covers direct physical loss to the insured property, defined as the dwelling, not land.

First, Herr's lawsuit has nothing to do with the dwelling as it concerns a dispute over an easement over Herr's property.

Second, Washington courts have held that requirements for a physical loss show a clear intent to provide no coverage for purely intangible harms. In *Prudential Prop. & Cas. Ins. Co. v. Lawrence*, the court addressed a similar issue of whether view obstruction constitutes property damage under an insurance policy. 45 Wn. App. 111, 724 P.2d 418 (1986). In *Prudential*, the court considered two policies, a homeowner's policy, and an "umbrella" policy. The court primarily focused on the umbrella policy which, as the court held, provided broader coverage than the homeowner's policy. *Id.* at 117. The umbrella policy defined property damage as "damage to or destruction of tangible property. 'Property damage' also includes the loss of the use of the damaged or destroyed property.'" *Id.* at 117, 724 P.2d 418, emphasis added. In contrast, the homeowner's policy defined property damage as "physical injury to or destruction of tangible property, including loss of use of this property." *Id.* at 115. The court emphasized the fact that

because the umbrella policy did not use the term “physical injury,” it, therefore, provided broader coverage to “encompass damage involving diminution in the value of the property, even when no physical damage has otherwise occurred.” *Id.* at 117. The court noted that the inclusion of the term “physical” in the coverage grant was particularly significant:

The inclusion of this word (“physical”) negates any possibility that the policy was intended to include “consequential or intangible damage,” such as depreciation in value, within the term “property damage.” The intention to exclude such coverage can be the only reason for the addition of the word. As a result, in the absence of a showing that any physical damage was caused to the rest of the [insured structure] by [the defendant’s acts] . . . plaintiff cannot recover.

Id. at 116. Here, the Depositors’ policy contains the limiting term addressed in *Prudential*, “physical,” and in fact goes a step further, to cover only “direct physical loss.” Under *Prudential*, in order for plaintiff to recover, he must show a direct physical loss to the tangible property (defined as the dwelling, not land). His complaints of increased traffic on the adjacent easement, do not constitute physical loss to the insured property, and therefore does not fall within the policy’s coverage grant.

Additionally, even if Herr claimed that the 20-foot strip of land that serves as the easement has been damaged in some way (such as increased wear and tear), the Depositors’ policy covers only damage to the dwelling or the residential home on the property, not to the land itself.

Herr cannot carry his burden of proof to show that his claimed damage falls within the policy's coverage grant as the damage is not to the dwelling nor is the peril complained of (increased use of an easement and diminution in value) a peril insured against by the Depositors policy.

While it is clear that Herr does not claim a peril covered by the policy, the policy goes on to exclude claims based upon inadequate zoning and or planning. To the extent Herr characterizes the problem as one of "spot zoning" or similar property law issues, the exclusions for diminished value based on ordinance or law and zoning clearly apply as well.

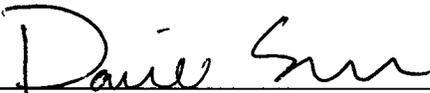
Finally, a lack of property coverage for Herr's situation comports with common sense and the reasonable expectations of the parties. If Herr were due compensation for being unhappy with his neighbors or for claiming that the way his neighbors use their property diminishes the value of his property, everyone with worse-than-average neighbors would be entitled to a check in some amount from their homeowner's insurer. The trial court therefore correctly granted summary judgment to Depositors.

VI. CONCLUSION

For the foregoing reasons, Depositors respectfully requests that the Court of Appeals affirm the trial court's order granting summary judgment to Depositors.

RESPECTFULLY SUBMITTED this 2nd day of July, 2010.

BETTS, PATTERSON & MINES, P.S.

By: 
Daniel L. Syhre, WSBA #34158
Attorney for Respondent Depositors
Insurance Company

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 2, 2010, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief Of Respondent Depositors Insurance Company; and**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 2nd day of July, 2010.



Valerie D. Marsh