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A. UMBRELLA ISSUE

The overarching issue in this lawsuit is whether mold that was an ensuing loss or resulting damage from the various water intrusion events is a covered loss under the insurance policy. Respondent answered this question affirmatively: “For purposes of its summary judgment motion, defendant accepted the opinion of plaintiffs’ experts that the mold for which plaintiff filed a claim in May 2002 was caused by the October 2001 water leak into the bathroom wall. Defendant also conceded that it was possible that these alleged water losses would have been covered under the insurance policy.” (Respondent’s Brief at page 6.)

This umbrella issue is extremely important because Safeco is trying to escape or avoid paying a bona fide claim on an issue for which they originally denied coverage, but now admit coverage exists, by asserting notice as an affirmative defense. Under this scenario, Washington law places the affirmative burden of proof on the insurance company. Since the affirmative burden of proof is placed on the insurer, it is not a burden that can be shifted to plaintiff. It is the insurer’s burden both at trial and at the summary judgment level. The insurer must meet this burden both to show that the Plaintiff’s conduct regarding notice was

untimely and that the insurer was actually and substantially prejudiced thereby.

B. MERE SPECULATION IS INADEQUATE PROOF OF ACTUAL AND SUBSTANTIAL PREJUDICE

The insurer is not relieved of its duty to pay an insured's claim unless the insurer is actually and substantially prejudiced thereby. The insurer must show concrete detriment –not mere speculation- of actual and substantial prejudice resulting from the delay together with some specific harm to the insurer caused thereby. *Canron v. Federal Insurance Co.*, 82 Wn. App. 480, 487, 918 P.2d 937 (1996).

Under Washington law, the question of prejudice is normally left to the jury. In order to be determined as a matter of law, the facts must be so clear that one conclusion only is reasonably possible. Under the circumstances of this case, the trial court erred when it found prejudice as a matter of law.

To support its claim of actual and substantial prejudice, Respondent relied upon the declarations of Kelly Keith and John Halladin. These declarations simply do not meet the strict burden of proof mandated by Washington law. Safeco identified possible detriments resulting from Appellants' delay in providing notice, but presented no evidence of specifics and no evidence of actual harm. Mr. Halladin asserts: "Ms.

Stone's failure to report the October 2001 and June 2002 water losses deprived Safeco of the opportunity to inform her of the required mitigation and assist her with information and recommendations to accomplish it." (CP 314.) Mr. Keith opines: "Mold spores **can** begin to grow within forty-eight hours of exposure to moisture." (CP 310.) Other than these bare allegations, there is no evidence that Safeco's ability to investigate was compromised. Conclusory or speculative expert opinions that lack an adequate foundation are not admissible and do not meet the strict burden of proof mandated by Washington law. *See, Safeco Insurance Co. v. McGrath*, 63 Wn. App. 170; 817 P.2d 861 (1991).

Once notified in May 2002, Safeco conducted only a minimal investigation. There is no evidence that any of Safeco's representatives actually advised Appellants that they should take efforts to mitigate water damage or mold. They did not do it after the 1996 water incident and they did not do it in May 2002. (CP 419.) Under Washington law, the contemporaneous acts and conduct of the parties reflect how they interpret the contract. *Berg v. Hudesman*. 115 Wn.2d 657, 801 P.2d 222 (1990).

The contemporaneous acts of Safeco reflect that they really have no policy of advising homeowners to mitigate the impacts of mold or water intrusion. Scott Hess viewed the Stone residence in May 2002. At that time, Ms. Stone advised Mr. Hess of the October 2001 water event

that occurred in the hall bathroom. Stone Deposition at page 160. (CP 216.) Nonetheless, Mr. Hess did not observe any obvious water intrusion issues and did not advise Ms. Stone of any steps to take to clean up or otherwise mitigate the mold which he did observe. (CP 419.)

Moreover, the October 2001 water incident occurred in the hall bathroom. Water dispersed to the master bathroom and caused extensive mold in that bathroom. It is mere speculation that any drying efforts initiated within the first forty eight hours in the hall bathroom would have prevented mold spores from developing in the master bedroom bath. Mere speculation is not enough. *Canron*, 82 Wn.App. at 487.

This case is more appropriately analyzed as an undiscovered, progressively worsening condition of mold infestation, which was hidden from view, out of sight behind the walls, and continued until the bathroom ceiling and walls were removed. *See Panorama Village v. Allstate Insurance Co.*, 99 Wn. App. 271, 992 P.2d 1047 (2000) and cases cited therein. Appellants took reasonable actions once they observed the mold on the bathroom ceiling. It ultimately took experts specializing in the field of water intrusion investigations and industrial hygienists to uncover the full extent of water intrusion and resulting mold problems. Appellants solved this puzzle at great personal expense and without the assistance of Safeco.

The earliest Safeco correspondence advising Ms. Stone to protect the property or mitigate any damages was August 26, 2002. (CP 472, 491.) By that time, the Stones mitigated damages by removing the drywall as soon as they realized that mold was present in the wall cavities.

C. THE JURY SHOULD DETERMINE THE
PLAUSABILITY OF STONE EVIDENCE

The Motion for Reconsideration was denied because, “This determination is based primarily on the fact that plaintiff admitted knowledge of the water intrusion ‘behind’ the wall. This was established by excerpts from her deposition. The ‘clarification’ attached to the motion for reconsideration is substantially similar to self-impeachment which is improper as a defense to Summary Judgment.” (CP 652.)

The trial judge reviewed the supplemental declarations submitted with the Motion for Reconsideration. The key point here is that the trial judge considered the declarations but ruled that it was tantamount to self-impeachment. Thus, the issue is whether Stone’s evidence, including the declarations submitted when moving for reconsideration, created a genuine issue of material fact.

The trial judge erred when he concluded that the clarification is substantially similar to self impeachment. Respondents rely upon the rule that “self serving affidavits contradicting prior depositions cannot be used

to create an issue of material fact.” (Respondent’s Brief at page 19.)

However, this is only a portion of the rule. The full expression of the law provides: “When a party has given clear answers to unambiguous (deposition) questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.” *McCormick v. Lake Washington School District*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). In *Safeco Ins. v. McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991), the court found the above rule inapplicable where the subsequent sworn testimony was not in “flat contradiction” to previous testimony. In *Safeco*, the subsequent testimony was used to offer explanation of the prior sworn statements. *Safeco*, 63 Wn. App. at 174-75. On review, the court must determine whether Stone’s declaration contradicted earlier testimony, whether she explained the inconsistency, and overall whether sufficient evidence raises a material issue of fact.

In the opposition papers to the summary judgment, Appellants submitted a Declaration of Ms. Stone which stated that her husband took reasonable steps to repair the broken valve, and that she was unaware that the broken pipe had caused a substantial water intrusion until the walls were opened by Energy Options Northwest in August 2002. (CP 419.)

Ms. Stone did not believe that this was a reportable incident at the time it occurred because they fixed the water valve. (CP 205.) Ms. Stone reported the mold incident in May 2002 because her health was being jeopardized. (CP 205.) Clearly if Ms. Stone knew that water penetrated behind the wall or tub enclosure, she would have known that it was a reportable incident. The fact that she did not report the incident to Safeco at the time supports Appellants' contention that they did not know that the water penetrated behind the wall.

Ms. Stone explained that at the time of her deposition she was testifying based upon the totality of facts which she knew at the time of the incident, combined with the facts that she subsequently learned when the walls in the bathroom were opened up by Energy Options Northwest. Ms. Stone could not observe any water gushing behind the wall. (CP 629.) All she could observe was water gushing into the bathtub and down the outside of the tile wall. (CP 629.) Moreover, Appellants presented Mr. Fanning's declaration. He was the individual most familiar with the water incident. Mr. Fanning's declaration establishes that both at the time the incident occurred and at the time that he made the repairs to the hot water valve, he had no reason to believe that any water had discharged behind the tile wall or inside the tile wall. It was not possible to look inside or behind the wall. (CP 633.)

In August, 2002, Energy Options Northwest took apart the bathroom walls. A lot of water had penetrated behind the tile wall enclosure. (CP 633.) In addition, the wall space between the hallway bathroom wall and the master bathroom wall was open so that any water that penetrated behind the wall migrated into the master bedroom bathroom as well. (CP 634.) Significant amounts of mold were visibly present once the walls were opened up. (CP 634.) This information which was contained in the supplemental declaration was also set forth in Ms. Stone's deposition at pages 135 to 137. (CP 210.)

Here, Stone's declaration differs from her earlier testimony, only with respect to the timing of her knowledge, i.e. whether she knew at the time of the water incident that water penetrated behind the wall or whether she discovered this information later. She provides a reasonable explanation for the contradiction, i.e. she was testifying based upon information that she obtained on the day of the incident combined with information she learned later from the investigation. Moreover, this comports with a lay person's reasonable knowledge of bathroom fixtures. You simply can't see behind the tile of a bathroom tub enclosure. The Energy Options Northwest investigation was the key to the puzzle. Ms. Stone did not know that water had migrated behind the wall until Energy Options Northwest opened up the walls.

When viewed in a light most favorable to Appellants, the declarations of Ms. Stone and Mr. Fanning create a material issue of fact. The jury should determine her statements' plausibility.

The court should also note that at the time of the deposition, Ms. Stone was quarantined to her home. (CP 181.) Ms. Stone was taking Benadryl and had concerns that it would inhibit her ability to give accurate and complete answers to questions. (CP 181.) Ms. Stone was also recuperating from an automobile accident in which she suffered a closed head trauma. (CP 179.) At the time of the deposition, she still had cognitive difficulties including lack of balance and short term memory loss. (CP 179.) The key area of questioning regarding the October 2001 water incident took place during the afternoon at a point in time when Ms. Stone was having a memory problem and starting to feel a little sick. (CP 203.) She needed something to eat and a short pause in the proceedings took place. This problem is recorded in Ms. Stone's deposition at page 109. (CP 203.) Ms. Stone should certainly be given the benefit of the doubt with respect to her timing of knowledge related to the October 2001 water incident. The jury should determine her statement's plausibility in light of her cognitive difficulties.

D. CONCLUSION

The summary judgment decision was limited to Safeco's affirmative defense regarding notice. Because the trial judge ruled, as a matter of law, that Safeco was prejudiced by Plaintiff's untimely notice regarding the October 2001 claim, it was unnecessary to address the merits of the claims asserted by Plaintiff. Ultimately, the question is whether the average person purchasing insurance would believe that she/he assumed the risk of mold growing behind the bathroom walls and underneath the kitchen floor, when he or she repaired a bathroom valve or cleaned up a flooded floor from a dishwasher hose that burst. Substantial justice requires that a jury determine these issues. Appellants respectfully request that the case be remanded for trial.

DATED this 27th day of July, 2006.

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NO. 34214-6-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPUTY

PAULA STONE and JOHN F. FANNING.,
wife and husband and the marital community composed thereof,

Plaintiffs-Appellants,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Respondent.

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DECLARATION OF SERVICE

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