

FILED

APR 11 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By-----

No. 338622-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

SUN VALLEY PLAZA, LLC,
a Washington limited liability company,

Appellant,

v.

ADMIRAL INSURANCE COMPANY, a corporation and TERRIL,
LEWIS & WILKE INSURANCE, INC., a Washington corporation.

Respondents.

BRIEF OF APPELLANT

Submitted by:

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Assignment of Error

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I. ASSIGNMENT OF ERROR

Assignments of Error

The trial court erred in granting the Defendant's Motion for Summary Judgment.

Issue Pertaining to Assignments of Error

Did the Plaintiff present sufficient factual evidence, direct and circumstantial, from which a reasonable person could conclude that the damage to Plaintiff's real property on or after September 15, 2012?

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II. STATEMENT OF THE CASE

This was an action against the Defendant, Terril, Lewis & Wilke Insurance, Inc., (TLW) for its failure to advise the Plaintiff, Sun Valley Plaza, LLC (Sun Valley), that the insurance obtained by TLW on the property owned by Sun Valley was to have operable Central System Burglar Alarms. (CSBAs) Sun Valley suffered a loss at its property and the insurer, Admiral Insurance Company (Admiral) denied the claim because Sun Valley did not have CSBAs at the property. *CP 6-10*

TLW denied that it failed to advise Sun Valley that it was required to have CSBAs at the property. However, TLW moved for summary judgment claiming that there is no evidence to support Sun Valley's claim that the damage to its property occurred during the effective period of the insurance policy that required CSBAs. TLW alleges that the damage to the property of Sun Valley could have occurred during a period prior to the insurance policy of which required CSBAs. TLW argues, as a result, it is not liable for any claimed failure. *CP 93*

The Court granted the motion for summary judgment of TLW. The Court found that Plaintiff failed to present anything more than speculative evidence of an essential element of its case, namely, the

subject loss occurred during the second policy period. *CP 253-254*

Sun Valley Plaza is the owner of commercial real property and improvements located in Yakima, Yakima County, Washington. Larry Hull is a member and the manager of Sun Valley.

Larry Hull is also a member and the manager of Megalodon, LLC, (Megalodon). Megalodon is a property management company which managed the commercial property of Sun Valley which is the subject of this suit during all times material to this action. *CP 178*

Commencing November 1, 2010, the property was leased to Del Matthews. The Lease was for two years and one month, from November 1, 2010 until November 30, 2012. Rent was \$1,500.00 per month. *CP 178-179*

The property was insured by Admiral Insurance Company (Admiral), during a portion of this time under two insurance policies. The first policy ran from September 15, 2011 until September 14, 2012. The second policy ran from September 15, 2012 until September 14, 2013. *CP 179*

In the summer of 2012, and in anticipation of the expiration of the first policy with Admiral on September 14, 2012, Sun Valley sought insurance for the property. Sun Valley sought the services of TLW in obtaining the insurance. *CP 179*

In 2012, Caroline Nava, an employee of Megalodon was responsible for obtaining insurance for the property. She worked with Aaron McCoy of TLW. *CP 179*

It was the absolute policy of Sun Valley to inform our insurance agents and insurance companies of any damage to any of the properties being managed by Megalodon for which it seeks insurance. Larry Hull discussed this prior to the summer of 2012 with Ms. Nava. It was an ongoing policy. *CP 179*

At no time prior to renewal of the first Admiral insurance policy on September 15, 2012 with the second Admiral policy was Larry Hull aware or told of any unusual activity or damage to the property of Sun Valley. There was no report by the tenant of any damage to the property. There was no report from law enforcement of any damage to the property. There was no report from fire officials of any damage to the property. There was no report from City of Yakima code enforcement officials of any damage to the property. Finally, there was no report from Pacific Power of any termination of electrical service or any damage or problems with electrical service to the property. *CP 179*

Larry Hull drove by the property on a frequent basis. The property is readily seen from the roads surrounding it. Prior to September 15, 2012,

Larry Hull did not notice any unusual activity at the property. Prior to September 15, 2012, Larry Hull did not notice any damage to the property.

CP 179

Del Matthews occupied the property until he vacated on or about November 1, 2012. Del Matthews operated his businesses at and from the property until vacated. *CP 179*

In anticipation of the termination of the Lease on November 30, 2012 Del Matthews acting personally and through his agent, James Bell, requested a renewal or extension of the Lease. These discussions took place in September and early October of 2012. In October 2012, Larry Hull decided not to lease the premises to Mr. Matthews after the expiration of his current lease on November 30, 2012. *CP 179-180*

In September 2012, Mr. Matthews fell behind in rent in the sum of \$100.00. In October 2012, Mr. Matthews fell behind in rent an additional \$1,500.00. On October 16, 2012, Mr. Matthews was given a Ten (10) Day Notice to Pay Rent & Vacate. *CP 179-180*

Larry Hull was told that Mr. Matthews requested additional time to move and pay rent. Larry Hull advised his staff at Sun Valley to tell Mr. Matthews that he must comply with the Ten (10) Day Notice. *CP 180*

Shortly thereafter, Larry Hull was told of a conversation between Mr.

Matthews and a staff member at Megalodon which caused him a great deal of concern for the safety of the staff at Sun Valley. Larry Hull advised his staff to report the incident to the Yakima Police Department. After that incident Larry Hull agreed to allow Mr. Matthews until the end of October 2012 to move out. *CP 180*

On October 31, 2012, Larry Hull requested Sun Valley's attorney to commence an unlawful detainer action as it appeared Mr. Matthews had not vacated the property. On October 31, 2012 an unlawful detainer action was commenced. On or about November 5, 2012, Larry Hull inspected the property. Mr. Matthews vacated the property on or about October 31, 2012. A staff member of Sun Valley had inspected the property shortly after Mr. Matthews vacated the property and reported significant damage to the property. Upon his inspection, Larry Hull confirmed the damage. *CP 180*

Between September 15, 2012 and the discovery of the damage in the first part of November 2012, Larry Hull received no reports of unusual activity or damage at the property. There were no reports from the tenant, law enforcement, fire officials, code enforcement officials or utility providers, including Pacific Power. Mr. Matthews had continued to occupy and conduct his business at the property up until the very end of October 2012. *CP 180*

Larry Hull owns several properties and was familiar with construction and demolition. He was formally a licensed and bonded general contractor and licensed an bonded well contractor and was familiar with welding and steel cuttings with a cutting torch. *CP 180*

The damage Larry Hull discovered and observed on November 5, 2012 could, in his opinion, have been accomplished in a few days and certainly less than on week. *CP 181*

During discovery, Mr. Hull's deposition was taken. During that deposition, the following questions and answers were asked and given:

Q. Do you have any idea when [the vandalism and theft] was done?

A. No.

Q. Okay. It could have been done a month before, for all you know: is that correct?

A. It could have been done during the first policy rather than the second one, yes.

Q. Okay.

A. Because the policies changed from September 15th, each September 15th, so if the, if the damage, if we, if we call the claim in around the 1st of November, it would only be a

month and a half then you would be back to the first policy.

Q. Okay.

A. So if, if it did take him a long time, then they would actually be operating under the first policy rather than the second one, which . . . *CP 39*

ARGUMENT

Standard of Review

The standards on a motion for summary judgment are as follows:

A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Barrie v. Hosts of America, Inc.*, 94 Wash.2d 640, 642, 618 P.2d 96 (1980). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Yakima Fruit & Cold Storage. v. Central Heating & Plumbing Co.*, 81 Wash.2d 528, 530, 503 P.2d 108 (1972); *Barber v. Bankers Life & Cas. Co.* 81 Wash.2d 140, 142, 500 P.2d 88(1972). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion, *Morris v. McNicol*, 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974).

Wilson v. Steinbach 98, Wn.2d 434, 437, 656 P.2d 1030 (1982) See also *Olympic Fish Products v. Lloyd* 93 Wn.2d 596, 611 P.2d 737 (1980) wherein it

was stated.

The purpose of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact. *Ohler v. Tacoma Gen. Hosp.*, 92 Wash.2d 507, 598 P.2d 1358 (1979). The burden of proving by uncontroverted facts that no genuine issue exists is upon the moving party. *Ohler v. Tacoma Gen. Hosp.*, *supra*; *LaPlante v. State*, 85 Wash.2d 154, 531, P.2d 299 (1975); *Graves v. P.J. Taggares Co.*, 25 Wash.App 118, 605, P.2d 348 (1980). The motion will be granted only if, after viewing the pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable person could reach only one conclusion, and (3) the moving party is entitled to judgment, *Island Air, Inc. v. LaBar*, 18 Wash.App 129, 136, 566 P.2d 972 (1977).

93 Wn.2d at Page 602

On Appeal, the appellate court reviews the motion for summary judgment de novo.

When reviewing a summary judgment order we evaluate the matter de novo, performing the same inquiry as the trial court. *Ski Acres, Inc., v. Kittitas County*, 118 Wash.2d 852, 827 P.2d 1000 (1992) (citing *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987)). Summary

judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982) (citing *Yakima Fruit & Cold Storage Co. v. Cent. Heating & Plumbing Co.*, 81 Wash.2d 528, 530, 503 P.2d 108 (1972)). The motion should be granted only if, from the evidence, reasonable persons could reach but one conclusion. *Morris v. McNicol*, 83 Wash.2d 491, 494-95 519 P.2d 7 (1974).

Heg v. Alldredge, 157 Wn.2d 154, 160-161, 137 P.3d 9 (2006)

The evidence the Court can consider can be both direct and circumstantial.

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

Washington Civil Jury Instructions, WPI 1.03 Direct and Circumstantial Evidence.

Argument

The issue, more refined, is whether there is evidence before the Court, either direct or circumstantial, from which reasonable persons could conclude that the damage to the property of Sun Valley occurred on or after September 15, 2012. Reviewing all of the evidence is a light most favorable to Sun Valley, one can reasonably conclude that the damage to the property of Sun Valley occurred after September 15, 2012.

The insurance policy under which this action is brought commenced on September 15, 2012. The following facts are significant as of that date:

1. The tenant, Del Matthews, was occupying and operating his business pursuant to a Lease from November 1, 2012 through November 30, 2012.
2. Shortly after September 15, 2012, the tenant, Del Matthews began negotiations to extend or renew the Lease beyond its termination date of November 30, 2012.
3. The tenant, Del Matthews, was behind in rent only \$100.00 as of the end of the September 2012.
4. Prior and up to September 15, 2012, there had been no reports of damage or unusual activity at the property and Mr. Mathews continued to operate his property.
5. The Manager of both Sun Valley and Megalodon drove by the property on a frequent basis and did not observe any damage or unusual activity at the

property prior to September 15, 2012. It was observed that Mr. Mathews was ???

6. The employees at Megalodon and significantly, Caroline Nava, were to report any damage or problems at the property it was managing, including the property of Sun Valley.
7. Ms. Nava had been engaged in ongoing discussions and negotiations for insurance for the Sun Valley Plaza with TLW since, at least, July 30, 1982.

Subsequent to September 15, 2012 and prior to November 1, 2012 several things occurred, including the following:

1. The tenant, Del Matthews, wanted to continue leasing the property beyond the termination date of his Lease of November 30, 2012 in order to operate his business.
2. Del Matthews was told the Lease would not be extended.
3. Del Matthews did not pay rent for October 2012 in the sum of \$1,500.00.
4. On October 16, 2012, Del Matthews was given a Ten (10) day Notice to Pay Rent or Vacate.
5. Subsequent to October 16, 2012, Del Matthews requested additional time to vacate the property.
6. Del Matthews' request for additional time was denied and an incident occurred prompting Larry Hull to advise his staff at Megalodon to report

the incident to the police.

7. Larry Hull granted Del Matthews until the end of October to pay past due rent or vacate Sun Valley's property.
8. As of October 31, 2012, past due rent had not been paid and Sun Valley commenced an unlawful detainer action against Del Matthews.
9. As of approximately November 1, 2012, Del Matthews had vacated the property and Caroline Nava inspected the premises and observed sufficient damage to the property.

On November 1, 2012 the following facts existed.

1. No report of any damage or problems at the property of Sun Valley had been received at any time from the following: (a) the tenant, Del Matthews; (b) police or law enforcement, (c) fire department or fire officials, (d) code enforcement officials, (e) Pacific Power; (f) or any other utilities.
2. The damage, in the opinion of Larry Hull, a person experienced in construction, demolition and cutting metal with a torch, could have been done in just a few days.

The only reasonable conclusion to be drawn from the facts presented to the Court is that the damage to the property of Sun Valley took place after September 15, 2012. It is eminently reasonable to conclude that the damage occurred subsequent to October 16, 2012 and prior to November 1, 2012.

While Defendant takes great pains to suggest that it is merely speculative to claim that the damage occurred after September 15, 2012, to the contrary and light of all the facts and evidence it is eminently reasonable to conclude that the damage took place on or subsequent to September 15, 2012.

In support of its motion TLW ignored each and every fact cited above. The trial court did also. The reasonable inference from those facts is that the damage occurred on or after September 15, 2015.

TLW suggested that Mr. Hull could not see into the property as he drove by the property daily. This is contrary to Mr. Hull's testimony. The suggested is supported by no evidence.

TLW asked the court to ignore that the damage was so extensive that no business could be operated. Yet, Mr. Mathews was apparently operating his business and was requesting to extend or renew his least to do so.

TLW asked that the Court ignore that copper wire for power was removed. Yet, no report of power outage was received from the utilities.

TLW asked that the Court ignore that there was no damage to the premises and cars and no garbage everywhere and that Mr. Hull drove by the premises almost daily prior to November 1, 2012 and did not see evidence of these conditionst. TLW asked the Court to ignore that the damage that occurred was possible to do in a very short time.

TLW asked the Court to ignore that it was not until after September 15, 2012 that

Mr. Mathews was told his lease would not be extended or renewed. Thereafter, his actions caused Sun Valley employees to call police. Therefore, he also quit paying rent.

These facts and the inferences from which would lead a reasonable person to conclude that the damage to Sun Valley's property occurred on or after September 15, 2012. These facts were, incorrectly brushed aside and ignored.

CONCLUSION

The trial court erred in granting TLW's motion for summary judgment. The Appellant respectfully submits that this Court reverse the trial court's decision and remand the matter for trial.

RESPECTFULLY SUBMITTED this 21st day of April, 2016.

WAGNER, LUFOFF & ADAMS, P.L.L.C.

By: James K. Adams
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NO. 338622

CERTIFICATE OF SERVICE

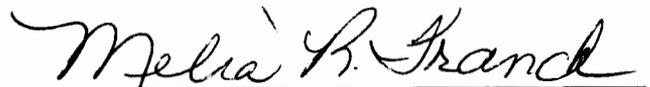
CERTIFICATE OF SERVICE

17 I certify that on the 8th day of April, 2016, I caused a true and correct copy of Applleant's
18 Opening Brief to be served on the following in the manner indicated below:

19 Court of Appeals, Division III
20 Attn: Clerk of the Court
21 500 N. Cedar Street
22 Spokane, WA 99210-2159

23 James S. Berg
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27 Dated this 8th day of April, 2016.



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