

FILED
Apr 24, 2017
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34920-9-III

SUZANNE G. KUNDA, Appellant,

v.

AMERICAN CONTRACTORS INDEMNITY COMPANY, Bond No. 100124722, Respondent.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITEDii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....4

A. Kunda is entitled to judgment against ACIC as a matter of law because ACIC admitted sufficient facts to establish liability, and did not present any evidence at trial to support any of its affirmative defenses4

B. The legal authorities do not support ACIC’s contention that Kunda abandoned her claim8

C. CR 54(e) does not bar Kunda from obtaining substantive relief12

VI. CONCLUSION.....15

CERTIFICATE OF SERVICE16

AUTHORITIES CITED

Washington State Cases

<i>Dept. of Labor & Industries v. City of Kennewick</i> , 99 Wn.2d 225, 661 P.2d 133 (1983).....	14
<i>Dewitt v. Mullen</i> , 193 Wn. App. 548, 375 P.3d 694 (2016).....	5, 8
<i>Doremus v. Root</i> , 23 Wash. 710, 63 P. 572 (1901).....	9, 10
<i>Harting v. Barton</i> , 101 Wn. App. 954, 6 P.3d 91 (2000).....	6
<i>Henderson v. Pennwalt Corp.</i> , 41 Wn. App. 547, 704 P.2d 1256 (1985).....	6, 7
<i>Landberg v. Dept. of Game & Fisheries</i> , 36 Wn. App. 675, 676 P.2d 1027 (1984).....	14
<i>Makah Indian Tribe v. Clallam County</i> , 73 Wn.2d 677, 440 P.2d 442 (1968).....	6
<i>Schmitz v. Mathews</i> , 133 Wash. 335, 233 P. 660 (1925).....	6
<i>Wagner v. McDonald</i> , 10 Wn. App. 213, 516 P.2d 1051 (1973).....	8
<i>Ward v. LaMonico</i> , 47 Wn. App. 373, 735 P.2d 92 (1987).....	11, 12
<i>Yellam v. Woerner</i> , 77 Wn.2d 604, 464 P.2d 947 (1970).....	14

Statutes

RCW 4.40.010.....	5
RCW 4.40.080.....	5, 8
RCW 4.40.090.....	5
RCW 18.27.040.....	4, 5, 11

Court Rules

CR 8(d).....	6
CR 12(b).....	6
CR 40(d).....	4, 5, 8, 12
CR 54(e).....	12, 13, 14, 15

I. INTRODUCTION

Suzanne Kunda sued Mickey Shaul and Michelle Shaul, owners of Mick Shaul Construction, and their contractors bond, issued by American Contractors Indemnity Company (“ACIC”), for breach of a construction contract. ACIC acknowledged issuing the bond pursuant to RCW 18.27.040 to guarantee the Shauls’ contractual performance. A jury returned a verdict against the Shauls for \$132,000, and the trial court entered a judgment in Kunda’s favor. Subsequently, after ACIC refused to honor the judgment, Kunda moved to enter judgment against ACIC’s bond on the grounds that ACIC presented no defenses and no evidence at trial that would preclude entry of judgment as a matter of law. The trial court denied Kunda’s motion and granted ACIC’s motion to dismiss Kunda’s claim against it, concluding that Kunda was precluded from enforcing the judgment against ACIC when the jury did not return a verdict on the bond. Kunda now appeals.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in granting ACIC’s motion to dismiss.

ASSIGNMENT OF ERROR 2: The trial court erred in refusing to enter judgment against ACIC as a matter of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is a jury verdict required to establish liability against a surety when no disputed facts exist to be decided and liability arises solely by operation of law?

ISSUE 2: Is a claim against a surety tried within the meaning of CR 40(d) when a jury hears evidence and decides the principal's liability, and the surety presents no evidence supporting any affirmative defenses?

ISSUE 3: Is the remedy for untimely presentment of a judgment against the surety dismissal of the plaintiff's successful claim with prejudice?

IV. STATEMENT OF THE CASE

Suzanne G. Kunda sued Mickey D. Shaul, Michelle R. Shaul, and Mick Shaul Construction for a number of claims arising from a construction contract for improvements to Kunda's home. CP 35-42. She also named ACIC and its bond as defendants, alleging that ACIC issued the bond pursuant to RCW 18.27.040 to cover the Shauls' performance of construction contracts. CP 36. In its answer, ACIC did not deny these allegations. CP 45. Instead, ACIC and the Shauls generally denied that the Shauls had breached the construction contract and asserted that Kunda was responsible for various project delays and cost overruns. CP 44-48.

ACIC and the Shauls also alleged a variety of affirmative defenses to liability, including failure of the complaint to allege facts sufficient to constitute a cause of action against ACIC. CP 48-52.

The case proceeded to jury trial and the jury found in favor of Kunda on claims of breach of contract, unjust enrichment, and conversion. CP 20-31. It awarded Kunda damages in the amount of \$132,346.00. CP 33. ACIC did not present any evidence at trial in support of its affirmative defenses. CP 55-56. The jury did not return a verdict against ACIC or the bond. CP 8. Subsequently, the trial court entered judgment against the Shaul defendants in the amount of \$153,251.80. CP 2.

When that judgment went fully unsatisfied by the Shauls and ACIC, Kunda moved to enter judgment against ACIC and the bond as a matter of law. CP 6. ACIC opposed the motion and moved to dismiss, arguing that Kunda abandoned her claim against ACIC under CR 40(d) when the jury did not return a verdict against ACIC. CP 10. The trial court denied Kunda's motion and granted ACIC's motion, dismissing Kunda's claim against ACIC with prejudice. CP 64-65. Kunda now appeals. CP 66.

V. ARGUMENT

Despite Kunda prevailing in her claim against the Shauls and establishing their liability for a claim ACIC admitted it covered under RCW 18.27.040, the contractor's bond statute, the trial court denied her recovery on procedural grounds. Because no facts precluded entry of judgment against ACIC as a matter of law when the Shauls' liability was established, the trial court erred in dismissing her claim against the bond. Accordingly, the order granting ACIC's motion to dismiss should be reversed, and the cause remanded to enter judgment in Kunda's favor.

A. Kunda is entitled to judgment against ACIC as a matter of law because ACIC admitted sufficient facts to establish liability, and did not present any evidence at trial to support any of its affirmative defenses.

In its order granting ACIC's motion to dismiss, the trial court did not make any specific findings justifying the remedy of dismissal with prejudice, nor did it identify the legal basis for dismissal. CP 64-65. However, ACIC asserted CR 40(d) as its grounds for relief. CP 16, 60. Where, as here, the only disputed facts concern the liability of the insured, and not the liability of the surety, CR 40(d) does not require dismissal of the claim against the surety due to the lack of a jury verdict when the

surety's liability follows as a matter of law from the jury's verdict against the insured.

This court reviews *de novo* the trial court's authority to dismiss a case under CR 40(d). *Dewitt v. Mullen*, 193 Wn. App. 548, 555, 375 P.3d 694 (2016). Under CR 40(d), "when a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance." Under ACIC's interpretation, Kunda did not try her claim against ACIC when she proceeded to obtain a jury verdict only against the Shaul defendants. But ACIC's interpretation overlooks the distinction between issues of fact and issues of law in determining which questions require a jury trial at all.

Issues in dispute identified in the pleadings may be issues of fact, or issues of law. RCW 4.40.010. Issues of law are decided by the court. RCW 4.40.080. Issues of fact are decided by the jury. RCW 4.40.090. In the present case, other than the liability of the Shauls for breaching their contract, the facts giving rise to ACIC's liability were not in dispute, and therefore did not need to be tried by a jury. ACIC did not deny issuing a contractors' bond to the Shaul defendants pursuant to the contractors' bond statute, RCW 18.27.040, and thereby admitted those facts. *See* CR

8(d); *Makah Indian Tribe v. Clallam County*, 73 Wn.2d 677, 680, 440 P.2d 442 (1968).

Thus, in determining whether a jury verdict was required to establish ACIC's liability, the court must evaluate whether any factual issues remain to be decided. Here, ACIC raised a number of affirmative defenses in its answer, but did not present any evidence at trial to support any of them. In general, the burden of proving the elements of an affirmative defense is on the party asserting it. *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547, 555, 704 P.2d 1256 (1985); *see also Schmitz v. Mathews*, 133 Wash. 335, 336-37, 233 P. 660 (1925) (when defense raises no affirmative issues but denotes a general denial as an affirmative defense, the defendant does not bear the burden of proof). Affirmative defenses are waived unless they are affirmatively pleaded, asserted in a motion under CR 12(b), or tried by the parties. *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000).

Viewing ACIC's affirmative defenses individually, none preclude entry of judgment against ACIC. Defense number 10 pleads insufficiency of the pleadings as a matter of law, which raises a question of law rather than fact, and therefore requires no jury verdict. CP 50. Defense numbers 11-15 raise entirely legal questions concerning the nature and scope of

coverage of a contractor's bond, which likewise are passed on by the court, not the jury. CP 50-51. Defense number 16 raises the possibility of additional, unpleaded defenses by the bond principal, which would require an evidentiary showing that ACIC did not make. CP 51. Defense number 17 alleges acts by Kunda constituting an alteration of her original relationship with the bond principal, which would require an evidentiary showing that ACIC did not make. CP 51-52. Defense number 18 raises the statute of limitations, which ACIC has the burden to prove. CP 52; *see Henderson*, 41 Wn. App. at 555. And defense number 19 asserts secondary liability to another surety, which would require ACIC to prove the existence of a second surety. CP 52. As such, all of ACIC's defenses either required ACIC to make an affirmative showing to avoid liability, which ACIC did not do, or are susceptible to legal determination by the court, not the subject of jury consideration.

Contrary to ACIC's claim that Kunda failed to try her claim against ACIC when she did not obtain a jury verdict, Kunda did in fact try her claim when she presented evidence of the bond principal's liability for breaching its construction contract. When ACIC did not present any evidence to support any of its affirmative defenses, it waived them. Consequently, no factual issues remained to be determined to establish ACIC's liability, so no issues were within the jury's purview to decide.

ACIC's liability for the acts of its principal was solely a legal question that flowed from its admission to issuing the bond to the Shauls under the bond statute. Because RCW 4.40.080 provides for legal questions to be decided by the court, not the jury, the absence of a jury verdict against ACIC does not establish a failure by Kunda to prosecute her claim under CR 40(d).

B. The legal authorities do not support ACIC's contention that Kunda abandoned her claim.

In support of its argument that Kunda abandoned her claim when she did not obtain a jury verdict against it, ACIC relies upon several appellate court decisions that are inapposite. In *Dewitt v. Mullen*, 193 Wn. App. at 550, dismissal under CR 40(b) was appropriate where the plaintiff did not appear and his attorney, who appeared, was not prepared to proceed to trial. *Dewitt* does not address the facts presented here, where Kunda appeared and tried her claims successfully against a surety principal.

Similarly distinguishable is *Wagner v. McDonald*, 10 Wn. App. 213, 516 P.2d 1051 (1973), which held that a dismissal under CR 40(b) when the plaintiff does not appear for trial operates as an adjudication on the merits for purposes of *res judicata*. Where the *Wagner* plaintiff

simply failed to show up on the date of trial, Kunda here appeared and tried the factual issues in dispute.

Other cases relied upon by ACIC support Kunda's position. Of particular interest is *Doremus v. Root*, 23 Wash. 710, 63 P. 572 (1901), which involved a joint lawsuit against a train conductor and his employer. In that case, the jury returned a verdict against the employer but not the employee; consequently, the trial court entered judgment in the employee's favor on that claim. *Id.* at 713. That judgment was not appealed, and subsequently, the employer challenged the judgment against it. *Id.* In evaluating the rule that a verdict against one defendant that is silent as to another operates as a verdict in favor of the other, the *Doremus* Court distinguished cases in which multiple tortfeasors are alleged to be liable for committing a single injury, and cases in which one defendant is responsible for the wrongful act and the other defendant's liability arises by operation of law. *Id.* at 714-15. In the second instance, because the co-defendant's liability depends upon the liability of the principal, an acquittal of the principal necessarily bars recovery against the co-defendant. *Id.* at 717. Consequently, the *Doremus* Court observed that it was error to enter judgment in favor of the employee because the rule inferring a favorable disposition from a silent verdict does not apply to cases concerning liability arising as a matter of law. *Id.* at 721. But

because the judgment in the employee's favor was not appealed, it was final, and not before the court for review. *Id.* at 721-22. As a result, the judgment in the employee's favor precluded entry of judgment against the employer as a matter of law. *Id.* at 722-23.

Here, as in *Doremus*, the jury returned a verdict as to one co-defendant and was silent as to another. But because ACIC is liable as a surety, not a joint tortfeasor, under *Doremus*, the rule that silence operates as a favorable verdict does not apply. Furthermore, unlike *Doremus*, in this case the jury found the bond principal liable. While the *Doremus* Court observed that an employer is not automatically bound by a judgment against the employee unless the employer had notice and an opportunity to defend the case, such is not the case here where ACIC was a party to the suit and had a full and fair opportunity both to contest the liability of its insured for the wrongful acts alleged, as well as to present evidence establishing its own affirmative defenses. *Id.* at 718. Accordingly, *Doremus* supports Kunda's argument that the verdict against the Shauls does not operate as a judgment in ACIC's favor and can be asserted against ACIC when ACIC had the opportunity to appear and contest the case at trial.

Similarly, another case cited by ACIC likewise supports Kunda's position. In *Ward v. LaMonico*, 47 Wn. App. 373, 375, 735 P.2d 92 (1987), homeowners sued their construction contractor in District Court and obtained a judgment, then subsequently filed suit against the contractor bond. Rejecting the surety's argument that the subsequent suit was barred, the *Ward* court noted that RCW 18.27.040 does not require the plaintiff to sue the contractor and the surety in a single action. Moreover, the *Ward* court considered the purpose of Chapter 18.27 RCW to protect the public "from unreliable, fraudulent, financially irresponsible, or incompetent contractors" and concluded the claimants were not required to "undergo the expense and delay of a superior court suit without regard to the amount in controversy or how solvent the contractor may be, in order to preserve a remedy the need for which may never arise." *Id.* at 378. Similarly here, ACIC contends that Kunda was required to obtain a judgment against ACIC at the same time that she obtained a judgment against the Shauls, even though the Shauls may have been able to satisfy the judgment without recourse against the bond. But *Ward* stands for the proposition that the remedial nature of Chapter 18.27 RCW affords the homeowner flexibility in pursuing remedies for contractor malfeasance. As such, *Ward* does not support ACIC's attempt to argue Kunda's options for pursuing recompense are limited.

Additionally, the *Ward* court held that because the judgment against the principal does not automatically bind the surety, the bond company was “entitled to present any evidence it may have of the nonoccurrence of conditions necessary to trigger liability on its bond.” 47 Wn. App. at 380. Here, ACIC has already had that opportunity and did not present any such evidence. As such, Kunda was entitled to judgment in her favor.

In sum, ACIC has failed to establish that Kunda failed to try her case under CR 40(d) when she proceeded to trial as scheduled, established the liability of the principal, and ACIC presented no evidence of “the nonoccurrence of conditions necessary to trigger liability on its bond.” Nor has ACIC shown that Kunda’s action in taking a judgment against the contractor, and later seeking a separate judgment against the surety, is in conflict with the requirements of the contractor’s bond statute.

C. CR 54(e) does not bar Kunda from obtaining substantive relief.

Under CR 54(e), the prevailing party “shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct.” Under ACIC’s interpretation, because Kunda did not request entry of judgment against ACIC within 15 days of the jury verdict, she is

substantively barred from relief. No case law supports this reading, the structure of CR 54(e) undermines it, and the principle favoring adjudication of disputes on the merits contradicts it. Accordingly, the trial court erred in concluding that Kunda was barred from seeking a judgment against ACIC when she did not do so within 15 days of the jury verdict.

Contrary to ACIC's contention that the harsh penalty of forfeiture applies when a plaintiff entitled to judgment does not present one within 15 days, the rule itself provides for a different remedy, stating:

If both the prevailing party and the prevailing party's attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

Contrary to ACIC's contention that the remedy for untimely presentation is dismissal with prejudice, the rule expressly provides for a remedy in that ACIC was allowed to present one itself, without notice to Kunda. ACIC did not do so, and thereby waived its recourse under the rule.

Moreover, ACIC's argument that untimely presentment of judgments is punishable by dismissal of the claim with prejudice is unsupported by any case law and contradicted by the widely accepted principle that administrative dismissals are disfavored, and every

reasonable opportunity should be afforded to address controversies on the merits. *See, e.g., Landberg v. Dept. of Game & Fisheries*, 36 Wn. App. 675, 676-67, 676 P.2d 1027 (1984); *Yellam v. Woerner*, 77 Wn.2d 604, 608, 464 P.2d 947 (1970). In *Dept. of Labor & Industries v. City of Kennewick*, 99 Wn.2d 225, 661 P.2d 133 (1983), the Washington Supreme Court held that a memorandum ruling was not a judgment within the meaning of CR 54. There, the Department assessed penalties against the City, which were upheld in a memorandum ruling by the Superior Court. *Id.* at 226. But no judgment was ever entered. *Id.* The Department subsequently filed a warrant for enforcement and the court vacated it, concluding that the memorandum ruling was not a final order. *Id.* at 226-27. The Supreme Court agreed the memorandum ruling was not a final order, but did not thereafter bar the Department from relief due to untimeliness in presenting a judgment under CR 54(e). *Id.* at 228. To the contrary, the Court stated, “A judgment must be entered in the original cause” *Id.* at 231. This relief is directly contrary to ACIC’s argument that untimeliness under CR 54(e) requires dismissal with prejudice.

Here, simply put, ACIC waived its affirmative defenses at trial and now seeks to avoid entry of judgment on purely procedural technicalities. It has shown no prejudice resulting from the judgment being presented more than 15 days after the jury verdict, and made no effort to exercise its

remedy under the rule to present its own judgment. Moreover, it points to no precedent in which a court has applied the time limits of CR 54(e) in such a punitive form as to deny substantive relief to a party entitled to it. Because such relief would be an unduly harsh penalty for minor technical noncompliance that is inconsistent with the court's preference to resolve disputes on the merits, this court should hold that CR 54(e)'s 15-day time limit does not bar Kunda from obtaining a judgment in her favor after that time period has elapsed.

VI. CONCLUSION

For the foregoing reasons, the trial court erred in granting ACIC's motion to dismiss Kunda's claim against it with prejudice and in denying her request to enter judgment against ACIC. Accordingly, the order should be reversed and the cause remanded for entry of judgment in Kunda's favor against ACIC.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following party in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Alexander Friedrich
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380

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

Signed this 24th day of April, 2017 in Walla Walla, Washington.


Breanna Eng

BURKHART & BURKHART, PLLC
April 24, 2017 - 11:06 AM
Transmittal Letter

Document Uploaded: 349209-Appellants Brief.pdf
Case Name: Suzanne G. Kunda v. American Contractors Indemnity Company, Bond No. 100124722, a California Corporation
Court of Appeals Case Number: 34920-9
Party Respresented: Suzanne G. Kunda, Appellant
Is This a Personal Restraint Petition? Yes No
Trial Court County: ____ - Superior Court #: ____

Type of Document being Filed:

- Designation of Clerk's Papers / Statement of Arrangements
- Motion for Discretionary Review
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill / Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition / Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

Appellant's Brief

Proof of service is attached

Sender Name: Andrea J Burkhart - Email: Andrea@BurkhartAndBurkhart.com