

No. 35117-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CITY BANK, a Washington corporation,

Respondent,

v.

S & HY CORPORATION, a Washington corporation; and
SUNG CHA YI and JUNG JA YI, husband and wife;

Defendants,

and

COLONY INSURANCE COMPANY,

Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	3
A. The trial court erred in determining the scope of its obligation under RCW 6.27.220.	3
B. The trial court erred in entering judgment in favor of City Bank.	6
C. City Bank is not entitled to recover attorney fees and costs incurred on appeal.	10
III. CONCLUSION	10

TABLE OF AUTHORITIES

Page

Cases

Cases

Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.,
155 Wn.2d 603, 146 P.3d 914 (2006)..... 6, 7

Bartel v. Zuckriegel,
112 Wn. App. 55, 47 P.3d 581 (2002)..... 3

Mulcahy v. Farmers Ins. Co. of Wash.,
152 Wn.2d 92, 95 P.3d 313 (2004) 6

Seven Gables Corp. v. MGM/UA Entm't Co.,
106 Wn.2d 1, 721 P.2d 1 (1986)..... 4, 7

Statutes

CR 56(c)..... 4, 6

RCW 6.27.220 3

RCW 6.27.230 10

I. INTRODUCTION

The issue in this case is whether the trial court properly concluded that, as a matter of law, the insurance policy issued to defendant S & Hy Corporation by appellant/garnishee, Colony Insurance Company, provided coverage for a claim asserted by respondent/garnishor, City Bank. The issue is *not*, as City Bank seems to believe, whether Colony acted improperly or in bad faith in handling either a claim reported by S & Hy in 2001 or the claim reported by City Bank in 2005. Accordingly, City Bank's repeated insinuations regarding Colony's alleged misconduct are not only unsupported by the record¹ but completely irrelevant to the issue before the Court.

As explained in Colony's opening brief, the trial court erred in two respects. First, because a question of fact existed regarding Colony's liability, the court should

¹ For example, City Bank contends S & Hy was forced to go out of business because Colony denied the claim reported by S & Hy in 2001. Brief of Respondent at 4. In support of this assertion, City Bank cites the declaration of its Assistant Vice President. *Id.* The declaration states only that S & Hy defaulted on its loan from City Bank. (CP 12-13)

have noted the matter for further proceedings, in accordance with the procedures set forth in the garnishment statutes. Second, even if a summary disposition were proper, the trial court should not have ruled in favor of City Bank on the coverage issue before it. City Bank did not establish that it was entitled to coverage as a matter of law for cleanup costs it allegedly incurred at the S & Hy site. In fact, once it became apparent the trial court intended to decide the coverage issue without further proceedings, Colony came forward with evidence establishing that, as a matter of law, its policy did *not* provide coverage. Thus, Colony, not City Bank, was entitled to judgment in its favor. Because the trial court should not have summarily decided the coverage issue before it and because the court erroneously decided that issue, Colony respectfully requests that the judgment in favor of City Bank be reversed.

II. ARGUMENT

A. The trial court erred in determining the scope of its obligation under RCW 6.27.220.

As explained in Colony's opening brief, City Bank obtained a writ of garnishment, Colony filed an answer, and City Bank submitted an affidavit purporting to controvert Colony's answer. At that point, it was apparent a factual dispute existed requiring a trial, in accordance with RCW 6.27.220.² However, instead of noting the case for trial or other further proceedings, as it should have done, the trial court summarily ruled in favor of City Bank on the merits of its claim.

In effect, the trial court granted summary judgment in favor of City Bank with respect to whether the insurance policy issued by Colony provided coverage for the cleanup

² See *Bartel v. Zuckriegel*, 112 Wn. App. 55, 65, 47 P.3d 581 (2002). City Bank contends Colony's reliance on *Bartel* is misplaced, asserting that the appellate court in that case reviewed only whether the trial court's findings were supported by the evidence. Brief of Respondent at 11-12. In fact, the *Bartel* court specifically stated that the trial conducted by the lower court to determine whether the plaintiff was entitled to garnishment was "the process the garnishment statute, and specifically the controversion procedure, accommodates." *Bartel*, 112 Wn. App. at 65.

costs allegedly incurred by City Bank. City Bank did not, however, file a motion for summary judgment, and the court's summary disposition was therefore improper.³ If City Bank had filed a motion for summary judgment, Colony would have been on notice both (1) that City Bank was seeking a determination of coverage as a matter of law, and (2) that Colony was *required* to come forward with evidence showing the existence of a genuine issue of material fact.⁴ In this case, as discussed in Colony's opening brief, Colony was *not required* to rebut City Bank's controverting affidavit. Instead, Colony filed an answer explaining why its policy did not afford coverage.⁵

³ The trial court essentially treated City Bank's writ of garnishment as a motion for summary judgment, Colony's answer as a response to a motion for summary judgment, and City Bank's affidavit as a reply.

⁴ See CR 56(c); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986).

⁵ City Bank asserts the statement in Colony's answer that City Bank did not report its claim to Colony during the policy period is "demonstrably false." Brief of Respondent at 10. In fact, the undisputed evidence establishes that City Bank did not notify Colony of its claim until May 2, 2005, more than three years after the Colony policy expired. As explained below and in Colony's opening brief, the fact that S & Hy submitted a

City Bank's affidavit controverting that answer did not entitle City Bank to judgment in its favor as a matter of law; it merely established that further proceedings would be necessary to determine whether the Colony insurance policy was subject to garnishment.

In sum, the trial court failed to appreciate that a dispute existed as to whether the Colony policy provided coverage with respect to the judgment obtained by City Bank against Colony's insured. Because of this dispute, the trial court should have noted the case for trial or other further proceedings. Instead, the court treated City Bank's writ of garnishment as a motion for summary judgment and decided the coverage issue as a matter of law without giving Colony an adequate opportunity to respond. The trial court erred in entering judgment in favor of City Bank, and this decision must therefore be overturned.

separate, unrelated, claim to Colony during the policy period does not change this fact.

B. The trial court erred in entering judgment in favor of City Bank.

Even if the trial court had been entitled to summarily resolve the coverage issue before it, the court did not decide this issue correctly. As discussed above, the court essentially treated City Bank's writ of garnishment as a motion for summary judgment. That is, the court ruled that, as a matter of law, the Colony policy provided coverage for the claim asserted by City Bank against Colony's insured.

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁶ The moving party bears the burden of establishing that there is no genuine issue of material fact.⁷ The adverse

⁶ CR 56(c); *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.*, 155 Wn.2d 603, 608-09, 146 P.3d 914 (2006).

⁷ *Mulcahy v. Farmers Ins. Co. of Wash.*, 152 Wn.2d 92, 97, 95 P.3d 313 (2004).

party must then come forward with facts showing the existence of a genuine issue for trial.⁸ All facts and reasonable inferences therefrom must be construed in favor of the nonmoving party.⁹ Summary judgment is proper only if reasonable minds could reach but one conclusion from the evidence presented.¹⁰

In this case, as explained in Colony's opening brief, City Bank did not satisfy its burden of proving that the Colony policy provides coverage. City Bank incorrectly asserts that the undisputed evidence establishes coverage for City Bank's claim.¹¹ In fact, the undisputed evidence establishes that the Colony policy does *not* provide coverage.

City Bank produced evidence showing that:

- S & Hy made a claim under the policy in November 2001. That claim was based upon allegations by customers of that gas purchased from S & Hy contained water.

⁸ *Seven Gables*, 106 Wn.2d at 12-13.

⁹ *Ballard Square*, 155 Wn.2d at 609.

¹⁰ *Id.*

¹¹ Brief of Respondent at 13.

- City Bank wrote to Colony in May 2005 alleging it incurred cleanup expenses at the S & Hy site.

(CP 60-66, 68) From this evidence, City Bank makes a number of uncorroborated assumptions. As explained below, these assumptions are not supported by the evidence. The trial court erred in (1) construing the evidence *against* Colony and then (2) concluding that, as a matter of law, the Colony policy provided coverage for City Bank's claim.

First, although S & Hy made a claim under the policy in November 2001 (during the policy period), the evidence does not establish that a "release" of a "petroleum product" occurred at that time. City Bank *assumes* a "release" occurred.¹² However, evidence submitted by Colony establishes that this is not true. In particular, Colony retained an environmental consultant to investigate the November 2001 claim, and the consultant's report showed

¹² *Id.*

that no release took place.¹³ (CP 202) City Bank did not present any evidence to controvert this conclusion.

Second, City Bank *assumes* its claim, first asserted in May 2005, was the same claim asserted by S & Hy over three years earlier. City Bank produced no evidence to support this assumption. It provided only a letter asserting that it had incurred cleanup costs at the S & Hy site.¹⁴ Because the Colony policy provides coverage only for claims made during the policy period, and because City

¹³ City Bank asserts the trial court did not need to consider evidence, including the environmental consultant's report, submitted with Colony's motion for reconsideration. Brief of Respondent at 15-16. City Bank fails to appreciate that, although the trial court treated City Bank's writ of garnishment as if it were a summary judgment motion, it was not. As explained above and in Colony's opening brief, Colony did not have an obligation to respond to City Bank's affidavit purporting to establish the existence of coverage under the Colony policy. Once it became clear that the trial court did not recognize that further proceedings were necessary due to the existence of a factual dispute over coverage, Colony presented evidence establishing that the policy did not provide coverage. Thus, this is not the ordinary case where a party has an obligation to come forward with evidence in response to a summary judgment motion, fails to do so, and then presents that evidence in the context of a motion for reconsideration.

¹⁴ City Bank did not even submit the attachment to the letter supposedly documenting a "release" of "petroleum products" at the S & Hy site. Thus, the record before the trial court contains no evidence showing a "release" *ever* occurred.

Bank did not show that its May 2005 claim was made during the 2001-02 policy period, it was not entitled to judgment as a matter of law on this issue.

C. City Bank is not entitled to recover attorney fees and costs incurred on appeal.

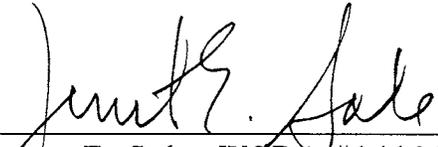
RCW 6.27.230 authorizes an award of attorney fees and costs to the prevailing party in a garnishment proceeding when, as in this case, the answer was controverted. As explained above and in Colony's opening brief, City Bank is not entitled to prevail. The evidence establishes that the Colony policy does not provide coverage for City Bank's claim. At a minimum, there is a question of fact regarding this issue, requiring remand to the trial court for determination. In any event, City Bank should not be deemed the "prevailing party" and thus is not entitled to an award of attorney fees on appeal.

III. CONCLUSION

For the reasons set forth above and in its opening brief, Colony respectfully requests that the trial court's judgment in favor of City Bank be REVERSED.

DATED this 12th day of March, 2007.

BULLIVANT HOUSER BAILEY PC

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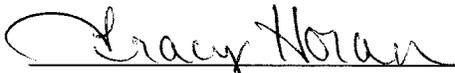
CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of March, 2007, I caused to be served this document to:

Clark J. Davis	<input type="checkbox"/>	via hand delivery.
Davis Roberts & Johns, PLLC	<input checked="" type="checkbox"/>	via first class mail.
7525 Pioneer Way, Ste. 202	<input type="checkbox"/>	via facsimile.
Gig Harbor, WA 98335		

I declare under penalty of perjury under the laws of the state of Washington this 12th day of March, 2007, at Seattle, Washington.

STATE OF WASHINGTON
COUNTY OF KING
MARCH 12 2007
BY: [Signature]
11:15 AM


Tracy Horan

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