

FILED
MAY 11 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 293807-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DENNIS R. BALDWIN, et. ux., d/b/a B & D CONSTRUCTION;

Plaintiffs;

v.

THOMAS J. SILVER and ROBIN G. SILVER, husband and wife;

Appellants;

v.

FARMERS INSURANCE OF WASHINGTON;

Respondent.

APPELLANTS' REPLY BRIEF

George R. Guinn, WSBA #19573
Attorney for Appellants

George R. Guinn, PS
605 East Holland Avenue
Suite 113
Spokane, WA 99218
509-464-2410 phone
509-464-2412 fax

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APPELLANTS' REPLY BRIEF

I. INTRODUCTION

COME NOW, Appellants Thomas J. and Robin G. Silver, husband and wife, by and through their attorney of record, George R. Guinn, with their Reply Brief on Appeal, pursuant to RAP Rule 10.3(c).

Pursuant to the Assignment of Errors, legal argument and supporting evidence outlined in their Opening brief, along with review of

Farmer's Response brief, the Silvers firmly believe each of the claims listed in their Assignment of Errors has merit and further believe the trial court has erred in granting summary judgment to Farmers as follows:

1) The court failed to allow counsel for the Silvers' to fully argue at Summary Judgment;

2) The court refused and failed to review all pertinent pleadings and exhibits within the record before making its decision;

3) The court refused to allow argument and supporting evidence that was within the record regarding false and misleading representations to the court by Farmers regarding payment of claims;

4) The court acknowledged at least one genuine issue of material fact remained in dispute and still granted summary judgment dismissal to Farmers; and

5) The court had a personal prejudice against counsel for the Silvers because of a prior reversal by the Court of Appeals, Division III, in a unanimous, Published Opinion on claims within the same case.

Liability is clear in this matter, as are damages resulting from the following failures by Farmers:

1. Failure to pay all contractors;
2. Failure to defend the Silvers after being put on notice;
3. Failure to close the claim;

4. Cancelling the Silvers' policy;
5. Failure to complete repairs;
6. Failure to notify Silvers of settlement deals made, leading them to believe that they were liable for damages (ServiceMaster);
7. Failure to reimburse the Silvers for loss;
8. Failure to reimburse the Silvers for their attorney fees.

II. ARGUMENT

On summary judgment, the Silvers were not allowed to present specific facts and evidence supporting their claims as the trial judge was focused solely on a dollar amount (which is contained in the record - CP at 43) and not on any of the evidence, supporting testimony and documents establishing genuine issues for trial, and made it clear it did not want to hear Mr. Guinn's argument even making statements such as "You know, Mr. Guinn, I think I got to limit you to what was filed in response to the motions here." (RP at 8, lines 11-12), and "Let me have you cut to the chase ..." (RP at 13), when the very issues counsel was trying to argue were contained within the pertinent summary judgment pleadings and attachments. The court further went on to say with reference to her prior statements at the summary judgment hearing, "I don't think it [the court] was disrespectful of Mr. Guinn. It [the court] did ask Mr. Guinn at one point to focus on the issue *that was foremost in*

the court's mind which is often what I do..." (RP at 31, lines 2-3) and "...we have an allegation that the court cut Mr. – Mr. Guinn off 'More than one occasion, counsel was stopped short of his argument, told to cut to the chase.' well, yeah, I – I did ask him several questions throughout and one time I did ask him to cut to the chase *of the issue on my mind as I have indicated.*" (RP at 31, lines 21-22). (Emphasis added)

An order of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990), citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *Marincovich* supra at 274 (citing *Wilson*, at 437). A court must deny summary judgment when a party raises a material factual dispute. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

Respondent Farmer's states in their Response brief (*Respondent's brief at 18*) that Mr. Guinn told the court he had nothing further after the court queried him. What Respondent doesn't report is the court's refusal to review or allow Mr. Guinn to have adequate opportunity to point

directly to evidence during his turn to argue or the court's impatience towards Mr. Guinn. The court made it quite clear that it was done listening to Mr. Guinn's argument. The Verbatim Report of Proceedings speaks for itself as does the flavor of the court's attitude toward Mr. Guinn.

CR 56 (c) states in relevant part: "...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.**" (Emphasis added)

As argued before, there is at least one material issue for trial, the issue of damages. The court should have entered an interlocutory judgment order on the issues of the damages and misrepresentation to the court. The court however chose to summarily dismiss all claims.

CR 56 (e) Form of Affidavits; Further Testimony; Defense Required, states in part: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is

competent to testify to the matters stated therein.”... “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, **but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.** (Emphasis added)

Mr. Guinn, counsel for the Silvers, made multiple attempts to provide argument to the court via the sworn affidavit of Robin Silver (CP at 87-90), on several issues of material fact including but not limited to deck damage, tendering defense, timing of and/or not receiving checks and documents. The court refused to acknowledge it, and at one point stated that one of Mrs. Silvers’ statements was “*a bald statement by Ms. Silver that the deck cost them ten thousand dollars - ...*” (RP at 14). Further Judge Baker didn’t even acknowledge the Declaration until it was brought up at Reconsideration by Mr. Guinn. Thereafter, Judge Baker instructs Mr. Neal, counsel for Farmers, to prepare an Amended Order (CP at 503-504) granting summary judgment to include the fact that she reviewed the Declaration of Robin Silver (RP at 33-34, lines 8-18). (Emphasis added)

As argued, the Washington State court rules Code of Judicial Conduct are very clear. In the case at bar, the Silvers were unduly prejudiced by Judge Baker’s bias and prejudice against Mr. Guinn. Mr.

Guinn was not given opportunity to fairly represent his clients in summary judgment or reconsideration.

Farmers' continued argument and recitation to cases that do not apply to this litigation (denial of coverage, amount of claim), supports the very argument that the Silvers use to support their claim for attorney fees in the *Olympic Steamship* exception.

The Washington Court of Appeals in *Sharon Anderson v. State Farm Mutual Ins. Co.*, 101 Wash.App. 323, states:

“But Olympic Steamship is not applicable where the controversy is over the amount of, or denial of, a claim.” (citing *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

The case at bar is neither about the “amount of, or denial of, a claim.” It is much simpler than that.

1. This is about Farmers claiming to have paid a claim (for the deck) and the Silvers claiming that Farmers did not pay the claim, and
2. Farmers breaching their own contract, which states: Farmers will provide the following:

Additional Coverages

- 1 – debris removal
- 2 – necessary repairs

5 – emergency removal of property

3. Farmers claim that they paid the Silvers two checks, but have been unable to show proof that these checks were either issued or cashed by anyone, including the Silvers.

Farmer's refuses to correct the record, and even in their Response brief tells this court that it overpaid the claim and/or paid the claim twice, and even three times (*Respondent's brief at 5 and 6*). There is specific evidence that in fact the Silvers were not double or triple paid, and not unjustly enriched in any form. Farmers misled the trial court regarding the more than four thousand dollars in attorney fees paid to the attorney for B&D Construction in settlement after Farmers originally failed to pay that contractor, thus, generating the underlying lawsuit (CP at 331, lines 16-21).

Mr. Guinn addressed the issue of Farmers' misrepresentation at Summary Judgment when he asked the court "are you including Mr. Delay's (attorney for B&D Construction) fees in calculating the double payment to Farmers?" (RP at 20, lines 20-21) In response, the court states "No. No. No. I'm not..." *"I'm going on what was in Mr. Neal's declaration."* *"Mr. Neal's declaration. So it's, uh – it is a – it did not include attorney fees. It's what they paid out on the - to B&D."* (RP at 20-21). Mr. Neal for Farmers then states "Uh, the claim was settled

before I had anything to do with the case.” “I was looking at the numbers, estimates and checks.” (RP at 21) And Judge Baker, instead of looking at the pleadings in front of her or asking Mr. Neal to clarify for the record, states “*I don’t think that it did, but be that as it may,...*” (RP at 21, line 12). (Emphasis added)

Once again at Reconsideration Mr. Guinn attempted to address Farmer’s misrepresentation (RP at 25, lines 3-11) and the Court’s acceptance of it. “One final – one of the things that Farmers has claimed in the last summary judgment motion is that they paid three times the value of the claim. I mentioned it to the court at that time and I’ll mention it again, they didn’t pay three times the value of the claim to the Claimant. They paid over four thousand dollars in attorneys’ fees to the underlying Plaintiff as part of a settlement as attorney’s fees,” (RP at 25, lines 3-8). The court refuses Mr. Guinn’s argument on this matter, stating “... I don’t see any basis for a reconsideration of my previous ruling. ... Mr. Guinn threw up a question of ‘Where do you get the figures and so on...’ *and I really – I really think that the record speaks for itself.*” (RP at 27, lines 11-14). (Emphasis added)

Farmer’s then provides the court with a breakdown of checks and documentation purportedly received by the Silvers. There is absolutely no argument from the parties that the Silver’s never received the letter,

evaluation of claim or checks of \$654.43 and \$70.00 on July 27, 2006, (*Respondent's brief at 5* and CP at 262-264). Farmer's cannot provide these checks, nor can they provide proof the Silvers ever received or cashed these checks, yet Farmer's reported to the Superior court and this court that the Silvers cashed these checks.

Finally, the specific language in the Silvers contract with Farmer's provided they "**shall adjust all losses with you. We shall pay you unless another payee is named in the policy...**" (Declaration of Eric J. Neal, Exhibit A, Farmers Policy, CP at 146). That was not the case as Farmer's issued checks directly to the vendors (CP at 334-336). Of equal importance is the fact that the vendor(s) were retained by the Farmer's agent, not the Silvers, adding to the confusion.

These are material issues of fact still in dispute and summary judgment should have been denied based on these issues alone.

VI. CONCLUSION

The Silvers were not given a fair hearing and believe the trial court has erred in granting summary judgment to Farmers as follows:

- 1) The court failed to allow counsel for the Silvers' to fully argue at Summary Judgment;
- 2) The court refused and failed to review all pertinent pleadings and exhibits within the record before making its decision;

3) The court refused to allow argument and supporting evidence that was within the record regarding false and misleading representations to the court by Farmers regarding payment of claims;

4) The court acknowledged at least one genuine issue of material fact remained and still granted summary judgment dismissal to Farmers; and

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Liability is clear in this matter, as are damages resulting from the following failures by Farmers:

1. Failure to pay all contractors;
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3. Failure to close the claim;
4. Cancelling the Silvers' policy;
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6. Failure to notify Silvers of settlement deals made, leaving them to believe they were liable for damages (ServiceMaster);
7. Failure to reimburse the Silvers for loss;
8. Failure to reimburse the Silvers for their attorney fees.

The Silvers are respectfully requesting this Court set aside the trial court's Amended Order (CP at 503-504) granting summary judgment dismissal to Farmers on all of the Silvers remaining claims based on the argument and evidence outlined herein.

Additionally, pursuant to rule 18.1 of the Rules of Appellate Procedure, the Silvers respectfully request to recover their attorney fees and costs for the necessity of this appeal and will outline their fees and costs pursuant rule 14 *et seq.*

DATED this 10 day of May, 2011.



GEORGE R. GUINN, WSBA #19573
Attorney for Third-party Plaintiffs
Thomas J. and Robin G. Silver
George R. Guinn, P.S.
605 East Holland Avenue, Suite 113
Spokane, WA 99218
509-464-2410
509-464-2412 fax
rguinn@georgerguinn.com
angela@georgerguinn.com