

COURT OF APPEALS, STATE OF
COLORADO

Two East 14th Ave.
Denver, Colorado 80203

Appeal from the Chaffee County District Court,
Honorable Charles M. Barton
Tr. Ct. No. 2003CV145
Division II Judgment Reversed
Opinion by Judge Steven L. Bernard
Judges Daniel M. Taubman and David M.
Furman, concurring

THE COLORADO INTERGOVERNMENTAL
RISK SHARING AGENCY

Plaintiff-Appellee,

v.

NORTHFIELD INSURANCE COMPANY

Defendant-Appellant.

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Case No.: 07 CA 58

PETITION FOR REHEARING

Plaintiff-Appellee, the Colorado Intergovernmental Risk Sharing Agency (“CIRSA”), through its undersigned counsel, respectfully submits this petition for rehearing pursuant to C.A.R. 40.

Introduction

On July 24, 2008, the Court of Appeals issued its Opinion reversing the order of the trial court on Northfield’s Motion for Pretrial Determination of a Question of Law and the trial court’s entry of judgment in favor of CIRSA and against Northfield on CIRSA’s breach of contract claim.

Issues on Rehearing

CIRSA respectfully requests a rehearing in this case on the grounds that this Court misapprehended or misapplied the law with the facts which exist in this case, as follows:

1. *The issue of whether the anti-concurrent cause exclusion (“ACC”) applies in this case requires an analysis of the trial evidence and whether the alleged causes of the damage to the Salida Hot Springs Pool building acted concurrently to cause the collapse or whether those two conditions independently caused two different types of damage. In other words, was there evidence that the weight of snow and pre-existing condition of the roof combined to concurrently*

cause the collapse, or was the evidence that two forces independently caused different damage?

In its Opinion, the Court found that “Northfield contended that decay of some of the wooden trusses ... caused the collapse” and “CIRSA claimed the weight of the snow caused the roof to collapse.” Opinion, p. 2. The Court then asserts that the decay and weight of snow are concurrent causes of the collapse. *Id.* However, no evidence from the trial in this case shows that these two causes combined to concurrently or in any sequence cause the collapse of the roof.

The Evidence at Trial and the Jury’s Verdict Were That Two Independent Causes Resulted in Different Property Damage

The Court stated that “Northfield consistently argued to the trial court that, if the collapse was caused by covered and excluded events, then the ACC relieved Northfield of any payment obligation because these causes were either concurrent or sequential.” Opinion, p. 13. This statement is apparently based on arguments from motions made prior to trial. However, the only evidence presented by Northfield at trial was that the roof did not fail (Record, Vol. 12, p. 191: 17-20), but even if it did the only cause of the damage was the decayed condition of the roof – there was no snow damage (Record, Vol. 12, p. 105:1-12, p. 232:8-11, p. 233:7-9, p. 235:19-24; Vol. 17, Exh. 38). Thus, Northfield presented no evidence that the snow

and roof condition combined to cause the collapse, and Northfield failed to meet its burden of showing that the subject exclusion applies in this case.

Further, the jury did not find that the weight of snow and the condition of the roof concurrently led to the collapse of the roof. The verdict form stated only that “the cause or causes of the claimed property damage” were apportioned 90% to the weight of snow and 10% to other listed roof conditions. *See* Record, Vol. 4, p. 1445.

Contrary to the Court’s finding, this jury verdict cannot be interpreted to mean that the jury was apportioning the cause of the collapse itself for the following reasons. First, the verdict form is consistent with the trial court’s ruling that Northfield was obligated to pay for damage that was solely attributable to the weight of snow but was not obligated to pay for damage the was caused by decay and other roof conditions. *See also* Rossmiller *Katrina*, p. 89 (a building “is not one property, but many properties, each of which can suffer ‘loss’ within the policy.”) Second, the jury was never instructed that it should apportion the contribution of each cause to the collapse. Third, the verdict is consistent with an apportionment of damage as required by *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419 (5th Cir. 2007), that property damage from multiple causes must be

apportioned among damage caused by covered causes of loss, damage caused by excluded causes, and damage concurrently caused by covered and excluded causes.

A verdict should be reasonably construed in light of the issues submitted to the jury and the instructions of the court. *People v. Roberts*, 705 P.2d 1030 (Colo. App. 1985). In light of the reasons stated in the previous paragraph, the jury's verdict does not support a finding that the weight of snow and the roof's condition acted concurrently to cause the collapse. *See Wulff v. Christmas*, 660 P.2d 18 (Colo. App. 1982) (a court may not generally amend the substance of a verdict); *Roberts, supra* (when construing a jury verdict, the overriding objective is to ascertain its intent). Instead, the verdict apportions the damages between two independent, not concurrent, causes, and to the extent the jury's verdict cannot be ascertained, the case should be remanded for a new trial.

The ACC Does Not Apply to the Facts of This Case

Notably, David P. Rossmiller, the authority relied on by the Court in its Opinion, interprets and applies the ACC differently from the Court. "In the strictest sense, concurrent means that two causes that are independent of each other combine and lead to one result, and the result would not have occurred in the absence of each cause. If this cannot be said, the cause is not concurrent." David P. Rossmiller, *Katrina in the Fifth Dimension: Hurricane Katrina Cases in the Fifth*

Circuit Court of Appeals, in New Appleman on Insurance: Current Critical Issues in Insurance Law 71, 77 (April 2008) (“Rossmiller Katrina”) (emphasis added). Instead, concurrent cause occurs when two causes, each of which is insufficient by itself to cause the loss, act together to create the result. *Id.* at 90. “The fact that two or more forces cause damage to property covered under one policy held by one person does not mean the loss is due to multiple causes.” *Id.* at 76. Concurrent causes occur only when multiple forces combine to cause the same damage. David P. Rossmiller, *Interpretation and Enforcement of Anti-Concurrent Policy Language in Hurricane Katrina Cases and Beyond*, *New Appleman on Insurance: Current Critical Issues in Insurance Law 43, 65 (Oct. 2007) (“Rossmiller Interpretation”)*. Merely because two causes act on the same property does not mean the loss is the same. *See Rossmiller Katrina; Rossmiller Interpretation; and Leonard, supra.*

As noted above and in the Court’s Opinion, the evidence at the trial in this case was that either the collapse was caused entirely by roof’s prior condition (Northfield’s argument) or it was caused entirely by the weight of snow (CIRSA’s argument). A cause of a loss that affects property that may have previously sustained damage from an independent excluded source does not lead to the result that the second loss was concurrently caused by the first loss. Given the evidence

in this case, the weight of snow was merely a second independent cause of damage to the roof, not one that acted concurrently with the roof's condition to cause the collapse. *See Rossmiller Katrina* at 89-94 (discussing independent but not concurrent causes of loss). Accordingly, the ACC does not apply to bar coverage for damage caused by the collapse under the weight of snow in this case, and the trial court result should be affirmed.

2. *Even if the ACC might apply, the analysis of the applicability of the ACC in this case should follow the Fifth Circuit's decision in Leonard, which requires apportioning the damage among different causation categories.*

In *Leonard, supra*, the Fifth Circuit analyzed the applicability of the ACC by apportioning the property damage into the following categories: (1) damage caused solely by covered causes of loss (in this case the weight of snow); (2) damage caused solely by excluded causes (in this case, pre-existing condition of the roof); and (3) damage caused concurrently by covered and excluded causes. *Leonard* held that the ACC bars coverage only for damages that fall under the second and third categories above, and that the insurer is obligated to pay for damages falling under the first category of damages. *Leonard* and subsequent decisions from the Fifth Circuit provide the only case law regarding the application of the subject exclusion.

In this case, even though the Court agreed that the arguments were that the roof collapse was caused by two independent causes, the Court did not undertake the analysis set forth in *Leonard*. Instead, contrary to the holding of *Leonard*, the Court determined that apportionment of the damage was not appropriate. On rehearing, if the Court determines that the ACC might be relevant in this case, the Court should apply the analysis of *Leonard* to the facts of this case.

3. *The Court should consider the argument that the ACC is illusory as applied by Northfield.*

The trial court found, and CIRSA argued on appeal, that the ACC is illusory as it has been applied by Northfield in this case. However, in its Opinion, the Court did not analyze this argument and instead, the Opinion focuses on a legal discussion of whether the exclusion is illusory on its face. It is not disputed that the ACC is not illusory on its face when it is properly applied consistent with the holding of *Leonard* and as discussed by Mr. Rossmiller. However, as noted above, even though the Court relies on Mr. Rossmiller's and the Fifth Circuit's analyses in its Opinion, it does not follow either of their analyses of the ACC by apportioning damages and determining whether the ACC even applies to this loss.

Instead, the Court's and Northfield's application of the ACC results in the denial of coverage for every building, because, as noted by the trial court, "every

building will ... experience decay, deterioration, and wear and tear from the date of its completion.” (Record, Vol. 4, p. 1646.) Thus, although the ACC may not be illusory on its face, it is illusory as it has been applied in this case, and this issue should be considered on rehearing.

4. *The case should be remanded for further proceedings to give CIRSA an opportunity present evidence regarding illusory coverage.*

In deciding that the exclusion was not illusory on its face, the Court relied on the fact that “the record does not contain evidence to establish that it is probable that the causes excluded in the insurance contract would apply in any case, let alone every case.” However, in this case, because the trial court found that the ACC was illusory as it was applied by Northfield, CIRSA was not required to present any evidence at trial showing that the exclusion was illusory. Accordingly, before any determination can be made as to whether the evidence supports a finding that the exclusion is illusory, the case should be remanded for a new trial in order to give CIRSA an opportunity to present such evidence.

Conclusion

As a result of this Court’s ruling on these issues, CIRSA respectfully submits that the Court should grant its petition for rehearing, given the implications of the Court’s ruling regarding the application of the ACC. The Court’s decision

has ramifications beyond the facts of this case, and has potential to affect property damage and insurance coverage analyses for property owners and policy holders throughout this state. The ACC should be interpreted and applied consistently with the holdings of the Fifth Circuit and other jurisdictions.

For the reasons set forth herein, CIRSA respectfully requests that the Court grant this Petition for Rehearing.

Respectfully submitted,

LIGHT, HARRINGTON & DAWES, P.C.

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Intergovernmental Risk Sharing Agency*

CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 7th day of August, 2008, a true and complete copy of the foregoing **PETITION FOR REHEARING** was served on the following via U.S. Mail, first-class postage pre-paid:

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