IN THE SUPREME COURT OF GUAM

YASUDA FIRE & MARINE INSURANCE CO., LTD.,
Plaintiff-Appellee,

v.

HEIGHTS ENTERPRISES,
Defendant-Appellant.

Supreme Court Case No. CVA97-014
Superior Court Case No CV0223-94

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on December 11, 1997
Hågatña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J.:

[1] The Defendant-Appellant, Heights Enterprises, appeals a judgment granting summary judgment in favor of the Plaintiff-Appellee, Yasuda Fire & Marine Insurance Co., Ltd. The Superior Court found that Heights was excluded from coverage under a general liability insurance policy due to two exclusion clauses--a work product exclusion and a professional services exclusion. This court, having heard oral arguments, and having reviewed the record and the applicable law, affirms the trial court's decision based on the reasoning set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

[2] Yasuda brought a declaratory judgment action to determine whether Yasuda was obligated to indemnify or defend Heights, based on a general liability policy. This cause of action was prompted by an action brought by Fargo Pacific, Inc. against Heights, based on a contractual agreement, for alleged defective workmanship for termite spraying done for the Perlas Courte condominium project[1]. Fargo, as the general contractor, had previously been found liable to the project's owner, Guam Land and Realty, Inc. (GLR), for damage to the project.[2] Heights was insured by Yasuda at the time the underlying claims to this case arose. Heights obtained a Manufacturers' and Contractors' Liability Insurance policy, a general liability policy. Universe Insurance Underwriters (UIU), agent for Yasuda, issued the policy to Heights at the request of the company's President, Norman Imamura. Imamura is a businessperson and the founder and president of Heights Enterprises. Imamura earned a two-year degree in Accounting/Business Administration from the Honolulu Business College in Hawaii. Imamura requested the liability insurance policy; however, he made no specific requests as to the inclusion of specific types of liability coverage, nor did the insurance agent make any further inquiry as to any special needs. After receiving the policy, Imamura "scanned" the policy, but did not fully understand it. However, Imamura at no time notified or inquired of the insurance agent as to any questions or concerns regarding the provisions or coverage of the policy that he did not agree with or understand.

[3] The general liability policy contained exclusions, two of which are at issue in this case. The first is what is referred to as a "work product" exclusion which states that "this insurance does not apply to: property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." The second exclusion refers to "professional services" and provides that "this insurance policy shall not apply to bodily injury or property damage due to . . . (D) the rendering or failure to render professional services."

[4] Yasuda's first motion for summary judgment was denied on May 23, 1994 which Justice Weeks, then a Superior Court Judge, on the basis that the case was not ripe for summary judgment because genuine issues of material fact existed. A subsequent motion for summary judgment was then brought by Yasuda on October 24, 1994. The court below heard oral arguments and entered, on December 27, 1996,

[1] The underlying action was initiated in the Superior Court as Civil Case Number CV0615 -94.

[2] An action was conducted in Guam, although initiated in Hawaii before a panel, certified by the American Arbitration Association, by GLR against Fargo. Fargo was found liable to GLR for work on the Perlas Courte condominium project for the sum of $710,000.00 on February 16, 1994.

a written decision and order granting summary judgment in favor of Yasuda. The judgment was entered on March 26, 1997 and a timely notice of appeal was filed on April 23, 1997.

ANALYSIS

I.

[5] This case is on appeal from the granting of a summary judgment motion in favor of the Plaintiff-Appellee, Yasuda Fire & Marine Insurance Co., Ltd. The Defendant-Appellant, Heights Enterprises, claims a misapplication of the law as well as the existence of factual disputes that would bar the grant of summary judgment. First, an issue is presented as to whether the court erred in finding that no factual disputes existed which would have supported Heights' argument for use of the doctrine of estoppel. Secondly, there is the issue of whether the trial court erred in holding that the liability policy held by Heights excluded coverage for the claims of Fargo Pacific, Inc. based on the "work product" exclusion. Lastly, Heights raises the issue of whether the court erred in finding that the "professional services" exclusion also excluded coverage for the Fargo claims.

[6] This court has jurisdiction over this case pursuant to 48 U.S.C. § 1424-3(d) and 7 GCA §§ 3107(a) and 3108(a). The trial court's granting of summary judgment will be reviewed *de novo*. *Iizuka Corp. v. Kawasho Int'l (GUAM) Inc.*, 1997 Guam 10, ¶7. A grant of summary judgment is proper "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 judgment as a matter of law." Guam R. Civ. P. 56(c).

Doctrine of Estoppel

[7] Heights argues that the doctrine of estoppel may be applied in situations to prevent companies from denying coverage to an insured based on policy exclusions when the insured has been led to believe that coverage existed. *Ivey v. United National Indemnity Co.*, 259 F.2d 205, 208 (9th Cir. 1958). Heights argues that it could be construed that the UIU agent mislead Imamura as to the nature and scope of the company's coverage, and, as a result, Imamura detrimentally relied on the agent's representations in obtaining insurance from Yasuda. Heights attempts to portray Imamura as an unsophisticated businessperson with limited education who is naive in negotiating insurance coverage.

[8] However, the doctrine of estoppel also cannot be applied so as to broaden or extend the scope of coverage when no such coverage previously existed. *Baton v. Transamerica Insurance Co*., 584 F.2d 907, 911 (9th Cir. 1978). Furthermore, although once the law in California, the courts of California seem to have since abandoned the *Ivey* view by refusing to recognize the use of estoppel or waiver for the purpose of bringing risks within a policy, which were not covered by the policy's terms. *Manneck v. Lawyers Title Ins. Corp.*, 28 Cal. App. 4th 1294, 1303, 33 Cal. Rptr.2d 771, 777 (Cal. Ct. App. 1994). The reasoning reflected in the more recent California cases is the majority rule. *Estate v. Hapo Federal Credit Union*, 869 P.2d 116, 117-8 (1994).

[9] Even under the minority rule, which applies estoppel where an insurer expressly misrepresents a policy's coverage, the facts in this case do not seem to warrant the application of estoppel. In this case, Imamura sought a policy for liability insurance, a general liability policy, which is what he obtained. He did not specifically request an errors-and-omissions policy or performance bond or specify certain risks against which he wished the company to be insured. Furthermore, he failed to carefully read and review the policy and did not question its coverage. Yasuda cites an older California case that was decided when California still followed the minority rule— *Taff v. Atlas Assurance Co.*, 58 Cal. App. 2d 696, 137 P.2d

483 (Cal. Ct. App. 1943). In *Taff*, the court refused to extend coverage where the insured failed even to read the policy to discover if what the insured presumed to be covered was actually included. *Id*. at 486.

[10] Imamura is a man with a higher degree of formal education, having received an Associate Degree from a business college in Hawaii. Sophistication really is not the issue here, since this concern is one of practicality. Imamura may have desired to obtain an errors-or-omissions policy or a performance bond, but without making this desire known to the UIU agent, Heights cannot now claim that it was defrauded and that Yasuda should be required to provide such extended coverage under the general liability policy. A reasonable consumer would have expressed the risks against which he wished to obtain coverage. A reasonable consumer would have subsequently read over his policy to make sure it included coverage for those risks. A reasonable consumer would have gone back to the insurance agent when the policy he received did not contain coverage for the risks which he believed he had obtained coverage. These actions have nothing to do with sophistication. Yasuda cannot be expected to have read Imamura's mind and in turn should not be held responsible for insuring Heights for risks which were not included in the policy.

[11] The trial court clearly appears to have properly assessed the facts presented before it, and there is no basis for estoppel under the majority view, and perhaps even under the minority rule. Additionally, it is not clear what factual dispute Heights raises as an issue in this appeal. This court chooses to adopt the majority rule and thereby refuses to extend coverage where such was neither contemplated nor provided for in the policy itself.

II.

[12] A well settled general principle of insurance law is that, should ambiguities exist in the language of the policy provisions, they are to be liberally construed in favor of the insured. *Stroehmann v. Mutual Life Ins., Co. of New York,* 300 U.S. 435, 439 (1937) ("the rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured."). However, in the absence of any ambiguities in an insurance agreement, the objective rules of contract law apply, and the clear and explicit language governs. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 833 P.2d 545, 551-2 (Cal. 1992) (holding that "[w]hile insurance contracts contain special features, they are still contracts to which ordinary rules of contractual interpretation apply.").

[13] Therefore, the threshold issue is whether the provisional language of the policy is itself ambiguous. If unambiguous, interpretation must express the mutual intentions of the parties. *Id*. at 545. However, if found to be ambiguous, the terms of a promise are to be interpreted in the manner in which the promisor believed the promisee understood it at the time of its making. *Id*. "This rule, as applied to the promise of coverage in an insurance policy, protects not the subjective beliefs of the insured but, rather, 'the objectively reasonable expectations of the insured.'" *Id*. It is only at the point when this rule fails to resolve the ambiguity that the general principle applies which construes the ambiguity against the insurer. *Id*.

[14] Heights contends that the language of the work product exclusion and the professional services exclusion are both ambiguous. Furthermore, it is Heights' contention that because the provisions are ambiguous, those provisions should be interpreted in favor of coverage for the insured. However, what Heights fails to do is establish how the language is ambiguous to begin with. For ambiguities in an insurance policy to exist, it must be shown that a provision is capable of two or more reasonable interpretations. *Adler v. Western Home Ins. Co.*, 878 F.Supp. 1329, 1333 (C.D. Cal. 1995). "Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." *Hollingsworth v. Commercial Union Ins., Co.*, 208 Cal. App. 3d 800, 805, 256 Cal. Rptr. 357 (Cal. Ct.

App. 1989). Separate analysis of each provision must be made in order to determine whether ambiguities exist and in whose favor the provisions should fall. However, even an ambiguous policy is not to be so liberally construed as to provide an unreasonable or forced interpretation or to provide extended coverage to the insured. *United States v. A.C. Strip*, 868 F.2d 181, 186 (6th Cir. 1989). "Language in a contract must be construed in the context of that instrument as a whole and the circumstances of that case, and it cannot be found ambiguous in the abstract." *Bank of the West*, 2 Cal. 4th at 1265.

Work Product Exclusion

[15] There is a split of authority as to the interpretation of when the work product exclusion will exclude coverage under a general liability policy. The trial court chose to follow the line of cases holding that liability from defective termite treatment is excluded under the work product exclusion. There is varying authority which directs, respectively, the inclusion and exclusion of coverage under a general liability policy construing a work product exclusion provision.

[16] There are two cases of import that support exclusion from coverage in the present situation—*Hawk Termite & Pest Control, Inc. v. Old Republic Ins. Co.*, 596 So. 2d 96 (Fla. Dist. Ct. App. 1992) and *Uhock v. Sleitweiler*, 778 P.2d 359 (Kan. Ct. App. 1988). In *Uhock*, homeowners brought suit against the exterminator alleging liability for termite damage to their home. The exterminator subsequently sought indemnification from a second pest controller. *Id*. Judgment was issued against the exterminator, garnishment was then issued against the exterminator, which the court dismissed, and the homeowners appealed. *Id*. The court in Kansas had previously ruled, and accordingly in *Uhock* held, that the work product exclusion language was unambiguous. *Id*. at 364. The court, relying on the reasoning found in *Owings v. Gifford*, 697 P.2d 865 (Kan.1985), stated:

> When an exterminator treats a home, warranties arise both under his contract with the owner and by operation of tort law. Since an exterminator can control the quality of his work, he is liable to the owner when the work is faulty. The risk that the exterminator may incur liability under warranty is a normal part of doing business.
>
> The exterminator may obtain a performance bond or purchase a guarantee of contractual performance for repair or replacement of faulty workmanship.

Uhock, 778 P.2d at 364. A general liability policy "is not a performance bond or a guarantee of contract performance." *Owings*, 697 P.2d at 865.

[17] In *Hawk*, the homeowner brought suit against the exterminator alleging negligence. 596 So. 2d at 96. The exterminator brought a declaratory judgment action seeking to determine its rights under its insurance policy. *Id*. The work exclusion policy excluded coverage for "failure of the insured's . . . to meet the level of performance, quality, fitness or durability . . . represented by the named insured" or due to "lack of performance." *Id*. at 97. The court found no ambiguity in the language and determined it was a simple case of poor workmanship that was not covered under the terms of the insurance policy. *Id*.

[18] In contrast, there are the cases of *Hurtig v. Terminix Wood Treating & Contracting Co.*, 692 P.2d 1153 (Haw. 1984), *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 459 S.E.2d 318 (S.C. Ct. App. 1994), and *Scottsdale Ins. Co. v. Ratliff*, 927 S.W.2d 531 (Mo. Ct. App. 1996). In *Hurtig*, homeowners brought suit against Terminix for failure to correctly perform work under a contract to inspect and treat for termites, which led to termite damage to the house. 692 P.2d at 1153. Terminix moved for summary judgment on the issue of the it's coverage under the policy. *Id.* The court granted in favor of coverage and the Appellate and Supreme Courts affirmed. *Id.* The Hawaii Supreme Court issued a brief one-page

opinion which reflected a 3-2 majority. The exclusion provided that coverage did not apply "to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith . . . ." *Id.* at 1154. The court relied on the general rule in favor of coverage and held that the exclusion only applied to damages to the inspection and application of chemicals. *Id*.

[19] At the time of oral arguments before the trial court in this matter, the *Isle of Palms* and *Ratliff* cases had not yet been decided. Heights seeks additional support from the above two cases and claims they demonstrate an emerging majority rule on the issue. In *Isle of Palms*, an exterminator sought a declaratory judgment against the insurer, seeking a determination of coverage for an alleged negligent preparation of a termite inspection report. 459 S.E. 2d at 318. The trial court held that the inspection was covered under the terms of the policy and the appellate court affirmed this determination, citing the *Hurtig* decision. *Id.* The court determined that the work product exclusion did not apply in that case because "the only product or work of the insured is the inspection performed by the Isle of Palms, these exclusions are clearly inapplicable, and do not remove the Purchaser's claim from the scope of the policy or relieve Monticello of its duty to defend." *Id*. at 322 n.2.

[20] Lastly, in *Ratliff*, the court addressed the issue of exclusion from coverage for a negligent

inspection report for another pest control business. 927 S.W.2d at 531. The court determined that under the general liability policy, the terms "occurrence" and "property" carried ambiguous definitions contained within the policy. *Id*. As a result of the ambiguity, the court found in favor of coverage for the insured and expressed the view that, if insurance companies do not intend to cover the types of claims presented in that case, they should use language more specific to the risks particular to the business being insured. *Id*. at 534.

[21] As the trial court concluded below, "[t]his Court finds the reasoning of Uhock and the Hurtig dissent more sound than the somewhat wooden analysis presented by the Hurtig majority." *Yasuda v. Heights*, Civ. No. CV0233-94 (Guam Super. Ct. December 27, 1996). We agree with the trial court's legal conclusions and finds no cause to overturn the decision below. Although we are concerned with ensuring that an insured is properly protected and receives the benefit of his bargain, we must also balance the interests of the insurer in limiting its responsibilities.

[22] Additionally, there are clear distinctions between the *Hurtig* line of cases and the case at bar. In *Ratliff*, there is no mention of whether the case actually involved the interpretation of a work product exclusion provision in the insurance policy. Furthermore, in *Ratliff*, as in *Isle of Palms*, the factual scenario involved termite inspection rather than termite treatment. In *Isle of Palms* itself, although it employed a confused analysis, the court drew a definite distinction between inspection and faulty workmanship. *Hurtig* did involve a mix of both inspection and treatment for termite infestation; however, the *Hurtig* opinion is not persuasive to this court based on a lack of reasoning to support the majority's position. In *Hurtig*, a two-justice minority issued a dissent in which they opined that Terminix failed to properly perform its duties under the contract—to inspect and treat the house for termites. *Hurtig*, 692 P.2d at 1155. The minority emphasized that the majority's decision and reasoning would act to transmute a general liability policy into a performance bond, covering the "business risks"[3] of an insured. *Id*. The dissent disagreed completely with what it regarded as the majority's schizophrenic rational, noting the comparison between the case under decision and those previous.

[3] Business risks were described by the court as risks of injury to persons or property caused by faulty products or workmanship. *Hurtig*, 692 P.2d at 1155.

[23] We fail to see any ambiguity in the language of the work product exclusion here. It is also important to note that alternate forms of insurance are available to an insured to protect himself against the "business risks" which have been at issue in all of these cases--performance bonds, a guarantee of contractual performance for repair or replacement of faulty workmanship, or omissions-and-errors policies. To allow coverage in the face of these exclusions creates a slippery slope that undermines the distinctions such provisions are intended to create.

Professional-Services Exclusion

[24] The professional-services exclusion present in the *Isle of Palms* case reads as follows: "[a]ll coverage is excluded hereunder for claims arising out of the rendering or failure to render any professional service by any Insured or any Additional Named Insured." 459 S.E.2d at 320. The court in *Isle of Palms* had previously defined a professional act or service as:

> one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, a skill, and the labor or skill involved is predominantly mental or intellectual rather than physical or manual . . . . In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

Id. at 321. Although training and licensing are required to practice pest control, the above definition would likely place extermination outside the ambit of the professional-services exception.

[25] However, Yasuda argues that the professional-services exclusion is not ambiguous and that the term professional services is not limited to those traditionally recognized professions such as law or medicine. In *Hollingsworth*, the court addressed the issue of what constituted "professional services." 208 Cal. App. 3d at 803. *Hollingsworth* involved a claim of negligent ear-piercing, allegedly performed by the insured as a service offered in a retail cosmetic store. *Id*. The court granted summary judgment in favor of the insurer, finding that coverage was excluded under the professional services exclusion of the policy. *Id*. The insured argued that because ear-piercing was not state regulated, nor did it require licensing, it did not qualify as a "professional service" that would fall under the exclusion. *Id*. at 806.

[26] The court held that the conclusion was based on three separate factors. First, the court considered a plain reading and understanding of the language of the provision itself. *Id*. Secondly, the court noted case law indicating that in an insurance contract the language must be "construed in the context of the instrument as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract." *Id*. at 807. Lastly, the court attempted to balance the interests of the parties, giving weight to the insured's reasonable expectations of coverage and the insurer's right to limit the extent of the policy's coverage when plain language has been used to do so. *Id*. The court further expressed the desire not to rewrite an insurance contract to force inclusion of coverage not contemplated. *Id*.

[27] In the case at bar, this court must decide whether the term "professional services", in the contract of this insurance contract, is properly applied to pest extermination services. In the instant case, the exclusion reads as follows:

> This insurance shall not apply to bodily or property damage to
>
> A. the rendering of or failure to render (1) medical, surgical, dental, x-ray or nursing service or treatment, or the furnishing of food or beverages in connection therewith; (2) any service or treatment conducive to health or of a professional

nature; (3) any cosmetic or tonsorial service or treatment;

B. the furnishing or dispensing of drugs or medical, or surgical supplies or appliances.

C. the rendering of or failure to render any cosmetic, ear piercing, tonsorial massage, physiotherapy, chiropody, hearing aid, optical or optometrical services or treatments.

D. the rendering of or failure to render any professional services

[28] This court chooses to adopt a definition of professional services which stays truer to a literal interpretation of the language--the rendering of services professionally. The distinction drawn is that of the professional versus the amateur, an example which Justice Weeks alluded to in oral arguments. For example, in the world of sports there are professional athletes, who are paid for their services, and there are amateur athletes, who are unpaid. This is not to say that had Heights, as a professional service provider, not charged the homeowners for services rendered that Heights would not be considered to have engaged in professional services. Getting paid is not the issue, but rather the status of the service provider as one generally paid for rendering such services. If, for example, one has a business license allowing one to be paid for such services, one would be considered a professional service provider. Unlike the *Isle of Palms* court, this court views the status of the service provider as having weight equal to that of the service or act provided.

[29] Accordingly, the court determines that the trial court made a proper legal determination as to what constitutes professional services which we now adopt, subject to the clarification noted above.

CONCLUSION

[30] In summary, we conclude the trial court properly found this case to be appropriate for summary judgment. A general liability insurance policy is meant to be just that, a policy for general liability, and not a policy which protects against all possible risks. The precise reason that performance bonds and errors and omissions policies exist is to cover specified risks which a general liability policy will not. Both the professional-services and work product exclusions were unambiguous and wholly effective. We have construed the professional services exclusion to include the services which Heights performed. Therefore, we must affirm the trial court's decision granting summary judgment in favor of Yasuda. **AFFIRMED**.