

154 Wash.App. 787
Court of Appeals of Washington,
Division 3.

NORTHWEST BEDDING CO., a Washington
Corporation, Appellant,
v.
NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD, a Foreign Corporation; CNA
Foundation Corp., a Foreign Corporation,
Respondents.

No. 28044–6–III. | Feb. 11, 2010.

Synopsis

Background: Insured business brought action against insurer for damages and for judicial declaration that its loss was covered under the all-risk commercial property coverage and commercial general liability (CGL) insurance policy, which loss involved water damage that followed an unusually fast snowmelt that overwhelmed third parties’ man-made drainage ditches and flooded the insured’s property. The Superior Court, Spokane County, [Tari S. Eitzen, J.](#), granted summary judgment to insurer. Insured appealed.

Holdings: The Court of Appeals, [Sweeney, J.](#), held that: [\[1\]](#) the water damage involved “surface water,” for purposes of the insurance policy’s exclusions; [\[2\]](#) the water damage involved “flood waters,” for purposes of the insurance policy’s exclusions; and [\[3\]](#) for purposes of efficient proximate cause rule, overflow of drainage system constructed or manipulated by one or more third parties was not an independent peril from the snowmelt and surface water and flood that inundated insured’s premises.

Affirmed.

West Headnotes (16)

[\[1\]](#) **Appeal and Error**
[Cases Triable in Appellate Court](#)

The interpretation of insurance contracts presents a question of law that is reviewed de

novo.

[\[2\]](#) **Insurance**
[Exclusions, exceptions or limitations](#)

The court strictly construes an ambiguous exclusionary clause in an insurance policy against the insurer.

[1 Cases that cite this headnote](#)

[\[3\]](#) **Insurance**
[Ambiguity in general](#)

A provision of an insurance policy is “ambiguous” if it is fairly susceptible to two different interpretations, both of which are reasonable.

[\[4\]](#) **Insurance**
[Risks or Losses Covered and Exclusions](#)

An “all-risk” insurance policy covers any peril that is not specifically excluded in the policy, but even all-risk policies may exclude certain perils.

[2 Cases that cite this headnote](#)

[\[5\]](#) **Insurance**
[Burden of proof](#)

An insured contesting the denial of coverage must first show that the loss falls within the scope of the insurance policy’s covered losses, and the insurer then must show that the claim of loss is excluded.

- [6] **Insurance**
🔑 Plain, ordinary or popular sense of language

Undefined terms in insurance policies should be given their plain, ordinary, and popular meaning.

- [7] **Insurance**
🔑 Understanding of Ordinary or Average Persons

The language in standard form insurance policies is interpreted in accord with the understanding of the average purchaser even if the insured is a more sophisticated business actor.

- [8] **Insurance**
🔑 Surface water; flood exclusions

Water damage to property of insured business, which followed unusually fast snowmelt that overwhelmed third parties' man-made drainage ditches and flooded insured's property, involved "surface water," for purposes of exclusion from coverage, in all-risk commercial property insurance policy, for surface water as a peril; drainage ditches carried water across relatively flat terrain, and abnormally heavy snowfall followed by rapid snowmelt overwhelmed the drainage ditches and forced water onto land that could not readily absorb the water because of frozen soil and bedrock close to surface, so that the water that caused the damage to insured's property was surface water once it overflowed the drainage ditch ending at border of insured's property.

- [9] **Insurance**
🔑 Surface water; flood exclusions

Water damage to property of insured business, which followed unusually fast snowmelt that overwhelmed third parties' man-made drainage ditches and flooded insured's property, involved "flood waters," for purposes of exclusion from coverage, in all-risk commercial property insurance policy, for flood waters as a peril; the water that inundated insured's premises was delivered to the normally dry property by an overflowing ditch ending at border of insured's property.

- [10] **Insurance**
🔑 Exclusions and limitations in general

Strict construction of exclusions from coverage in insurance policies should not overcome plain, clear language, as would result in a strained or forced construction.

1 Cases that cite this headnote

- [11] **Insurance**
🔑 Questions of law or fact

The determination of efficient proximate cause of a loss, for purposes of determining whether a risk or loss is covered or excluded by an insurance policy, is generally a question of fact for the fact finder, but it is a question of law if the facts are undisputed and the inferences from those facts are plain and incapable of reasonable doubt or difference of opinion.

- [12] **Insurance**

🔑 Combined or concurrent causes

“Efficient proximate cause” is the predominant cause which sets into motion the chain of events producing the loss, for purposes of determining whether a risk or loss is covered or excluded by an insurance policy.

[13] Insurance

🔑 Combined or concurrent causes

If the efficient proximate cause of the loss is covered by the insurance policy, the loss is covered even though other events within the chain of causation are excluded from coverage.

[14] Insurance

🔑 Combined or concurrent causes

The efficient proximate cause rule applies, for purposes of determining whether a risk or loss is covered or excluded by an insurance policy, when two or more independent forces operate to cause a loss, but the court applies the efficient proximate cause rule only after determining: (1) which single act or event was the efficient proximate cause of loss, and (2) that the efficient proximate cause of the loss is a covered peril.

[15] Insurance

🔑 Combined or concurrent causes

An exclusion in an insurance policy precludes coverage if it excludes the efficient proximate cause of the loss, but if the efficient proximate cause is a covered peril, then the exclusions have no effect.

1 Cases that cite this headnote

[16] Insurance

🔑 Surface water; flood exclusions

Insurance

🔑 Combined or concurrent causes

For purposes of efficient proximate cause rule, overflow of drainage system constructed or manipulated by one or more third parties was not an independent peril from the snowmelt and surface water and flood that inundated the premises of insured business, and thus, the exclusions, in all-risk commercial property insurance policy, for surface water and flood water were applicable, with respect to loss involving water damage that followed an unusually fast snowmelt that overwhelmed third parties’ man-made drainage ditches and flooded the insured’s property.

Attorneys and Law Firms

**486 Kevin W. Roberts, John Charles Black, Dunn & Black PS, Spokane, WA, for Appellant.

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Opinion

SWEENEY, J.

*789 ¶ 1 This is an insurance coverage dispute between a commercial business and an insurance company. The insurance company refused to cover water damage that followed an unusually fast snowmelt that overwhelmed man-made ditches and flooded the business’s property. The trial judge agreed with the insurance company that the loss resulted from surface water and that surface water was an excluded peril under the terms of the insurance policy. We agree and affirm the summary dismissal.

FACTS

¶ 2 National Fire Insurance Company of Hartford is wholly owned by CNA Foundation Corporation (we will refer to the company as *790 “National Fire”). It insured Northwest Bedding Co. under an all-risk commercial property coverage and commercial general liability insurance policy. The policy insured Northwest Bedding’s buildings and property in Spokane, Washington, and covered “direct physical loss of or damage to Covered Property ... caused by or resulting from any Covered Cause of Loss.” Clerk’s Papers (CP) at 60, 61. Covered Property includes Business Personal Property, which includes furniture, fixtures, equipment, “Stock” and other personal property, labor, and services furnished or arranged by the business on the premises. CP at 61.

¶ 3 The Spokane area experienced heavy snowfall during the winter of 2007–08. Toward the end of February, the Washington State Department of Transportation and others diverted snowmelt through trenches in the vicinity of Northwest Bedding. Several drainage ditches ran through the area around Northwest Bedding. The water overflowed the trenches onto Northwest Bedding’s property and building, inundated Northwest Bedding’s building and damaged both the building and property.

¶ 4 National Fire concluded that the loss was the result of surface water and, therefore, excluded from coverage. And it denied coverage.

¶ 5 Northwest Bedding sued National Fire for damages and a judicial declaration that the loss was covered. The parties agreed that there were no issues of material fact (and that is also apparent from our reading of the record) and filed cross-motions for summary judgment. The trial court agreed with National Fire and granted its motion for summary judgment and denied Northwest Bedding’s.

**487 DISCUSSION

[1] ¶ 6 We review a trial court’s summary judgment order de novo; we engage in the same review as the trial court and view the evidence in the light most favorable to the nonmoving party. *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990). The interpretation of *791 insurance contracts also presents a question of law that we review de novo. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165, 171, 110 P.3d 733 (2005).

[2] [3] ¶ 7 We apply a number of canons of construction when passing on the meaning of an insurance policy. We strictly construe an ambiguous exclusionary clause against the insurer. *Rodriguez v. Williams*, 107 Wash.2d

381, 384, 729 P.2d 627 (1986); *Kish v. Ins. Co. of N. Am.*, 125 Wash.2d 164, 883 P.2d 308 (1994). A provision of the policy is ambiguous if “it is fairly susceptible to two different interpretations, both of which are reasonable.” *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wash.2d 678, 690, 871 P.2d 146 (1994) (quoting *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash.2d 724, 733, 837 P.2d 1000 (1992)).

[4] [5] ¶ 8 An “all-risk” policy covers any peril that is not specifically excluded in the policy. *Findlay v. United Pac. Ins. Co.*, 129 Wash.2d 368, 378, 917 P.2d 116 (1996). But even all-risk policies may exclude certain perils; we will interpret this policy in a way that gives effect to each provision. *McDonald*, 119 Wash.2d at 734, 837 P.2d 1000. An insured contesting the denial of coverage must first show that the loss falls within the scope of the policy’s covered losses. *Diamaco, Inc. v. Aetna Cas. & Sur. Co.*, 97 Wash.App. 335, 337, 983 P.2d 707 (1999). The insurer then must show that the claim of loss is excluded. *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wash.2d 50, 71, 882 P.2d 703 (1994).

¶ 9 Northwest Bedding contends that the trial judge erred when she concluded that the loss here resulted from an excluded peril—surface water—because the loss resulted instead from third parties channeling water onto Northwest Bedding’s property. National Fire responds that the loss was clearly the result—directly or indirectly—of surface water caused by an unusually fast snowmelt. And the fact that water may have been channeled onto Northwest Bedding’s property by ditches and pipes does not change the fact that the loss was the result of surface water. Moreover, National Fire argues that any claim that the loss *792 was due to diversion, rather than surface water, became untenable when the water here overflowed the ditches and returned to its state as “surface water.”

[6] [7] ¶ 10 The policy does not define the two excluded water perils at issue here, damage caused by flooding or surface water. Undefined terms in insurance policies should be given their plain, ordinary, and popular meaning. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash.2d 869, 877, 784 P.2d 507 (1990). The language in standard form policies is interpreted in accord with the understanding of the average purchaser even if the insured is a more sophisticated business actor. *Id.* at 882–83, 784 P.2d 507.

¶ 11 Washington courts have characterized “surface water” as follows:

The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is

thus distinguished from water flowing in its natural course or collected into and forming a definite and identifiable body, such as a lake or pond.

[Halverson v. Skagit County](#), 139 Wash.2d 1, 15, 983 P.2d 643 (1999).

¶ 12 The parties disagree about the location of the ditch and whether its location bears on the character of the water inundating Northwest Bedding's building. Northwest Bedding describes the ditch as "butt[ing]" onto the Northwest Bedding premises "in an almost perpendicular orientation." CP at 157. National Fire describes the ditch as "bordering Northwest Bedding's property." Br. of Resp't at 11. Northwest Bedding relies on a Colorado case, [Heller v. Fire Ins. Exch.](#), 800 P.2d 1006 (Colo.1990), to argue that this distinction matters. In [Heller](#), the court found that water damage on a homeowner's property was not surface water because it was caused by snowmelt being diverted over a natural ridge by man-made **488 trenches that carried the water in channels to the insured property. [Heller](#), 800 P.2d at 1009.

¶ 13 But for us the characterization of the drainage ditch does not present a material question of fact because [Heller](#) *793 itself does not make clear that the trenches actually entered the property. *Id.* They merely carried the water directly up to the property, just as occurred in either description of the ditch by Northwest Bedding or National Fire. *Id.* The video in evidence also describes the ditch as "ending" at the Northwest Bedding property. Plaintiff's Ex. 1.

[8] ¶ 14 Here, drainage ditches carried water across relatively flat terrain. Abnormally heavy snowfall followed by rapid snowmelt overwhelmed the drainage ditches and forced water onto land that could not readily absorb the water because of frozen soil and bedrock close to the surface. So, regardless of what form it took between its origin and across the land of Northwest Bedding's neighbors, the water that caused the damage to Northwest Bedding's property was certainly surface water once it overflowed the ditch ending at the border of Northwest Bedding's property. [Sund v. Keating](#), 43 Wash.2d 36, 42, 259 P.2d 1113 (1953).

[9] ¶ 15 The water here might also be characterized as flood waters, another exclusion of this policy. In analyzing whether rain and flood are distinct perils for purposes of an exclusionary provision, the Washington Supreme Court surveyed various dictionary definitions of flood:

Webster's, for example, defines "flood" as "a rising and overflowing of a body of water that covers land not usu[ally] under water: DELUGE, FRESHET". *Webster's Third New International Dictionary* 873 (1986). *Webster's* further defines "deluge" as "an overflowing of the land by water: INUNDATION, FLOOD ... a drenching rain: DOWNPOUR". *Webster's Third New International Dictionary* 598 (1986)... [S]ee also *American Heritage Dictionary of the English Language* 697 (3d ed.1992); *Random House Dictionary of the English Language* 736 (2d ed.1987) (also stating that the term "flood" "refer[s] to the overflowing of normally dry areas, often after heavy rains").

[Kish](#), 125 Wash.2d at 171, 883 P.2d 308 (some alterations in original).

[10] ¶ 16 The water that Northwest Bedding itself describes as inundating its premises was delivered to the normally dry property by an overflowing ditch. And, while we strictly *794 construe exclusions, "strict construction should not overcome 'plain, clear language resulting in a strained or forced construction.'" [Diamaco](#), 97 Wash.App. at 342, 983 P.2d 707 (quoting [City of Bremerton v. Harbor Ins. Co.](#), 92 Wash.App. 17, 21, 963 P.2d 194 (1998)). We, therefore, reject Northwest Bedding's argument that water flowing through drainage culverts or ditches is not a body of water or that a reasonable person considers only a water formation such as a lake or an ocean a body of water. The water that damaged Northwest Bedding's property is reasonably characterized by National Fire as both surface water and a flood.

[11] ¶ 17 Northwest Bedding also argues that the trial court failed to identify and give legal effect to the efficient proximate cause of this loss. The determination of efficient proximate cause of a loss is generally a question of fact for the fact finder. [Graham v. Pub. Employees Mut. Ins. Co.](#), 98 Wash.2d 533, 539, 656 P.2d 1077 (1983). But it is a question of law if the facts are undisputed and the inferences from those facts are plain and incapable of reasonable doubt or difference of opinion. *Id.* Here, the parties agree on the essential chain of events that caused Northwest Bedding's damage. The dispute centers on whether the original diversion of water by a third party is a distinct peril that was the efficient cause of Northwest Bedding's loss.

[12] [13] [14] [15] ¶ 18 Efficient proximate cause is the "predominant cause which sets into motion the chain of events producing the loss." *Id.* at 538, 656 P.2d 1077. If the efficient proximate cause of the loss is covered by the insurance policy, the loss is covered even though other

events within the chain of causation are excluded from coverage. *Id.* The efficient proximate cause rule applies when two or more independent forces operate to **489 cause a loss. *Kish*, 125 Wash.2d at 170, 883 P.2d 308. But we apply the efficient proximate cause rule only after determining (1) which single act or event was the efficient proximate cause of loss and (2) that the efficient proximate cause of the loss is a covered peril. *McDonald*, 119 Wash.2d at 732, 837 P.2d 1000. An exclusion in an insurance policy precludes coverage if it excludes the efficient proximate cause of the loss. *795 *Findlay*, 129 Wash.2d at 377, 917 P.2d 116. But if the efficient proximate cause is a covered peril, then the exclusions have no effect. *Id.* at 380, 917 P.2d 116; *McDonald*, 119 Wash.2d at 731, 837 P.2d 1000.

[16] ¶ 19 So, the key question here is whether the overflow of a drainage system constructed or manipulated by one or more third parties is an independent peril from the snowmelt and surface water and flood that inundated Northwest Bedding’s premises. It is not. Diversion of water flowing in a large area, whether from snowmelt or not, is what the average purchaser of insurance would

expect the words “flood” and “surface water” to encompass. See *Kish*, 125 Wash.2d at 171, 883 P.2d 308.

¶ 20 We affirm the summary dismissal of Northwest Bedding’s suit.

¶ 21 We also deny Northwest Bedding’s request for attorney fees and costs. Northwest Bedding did not prevail at trial or on appeal and is not, therefore, entitled to a fee or cost award under any theory. RAP 18.1(a); *Malted Mousse, Inc. v. Steinmetz*, 150 Wash.2d 518, 535, 79 P.3d 1154 (2003).

WE CONCUR: BROWN, A.C.J., and KORSMO, J.

Parallel Citations

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