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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 5/28/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

MT. HAWLEY INSURANCE COMPANY, ) No. 1 CA-CV 12-0677  
a foreign corporation, )  
) DEPARTMENT C  
Plaintiff/Counterdefendant/ )  
Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
WORLD TRAVEL INNS LIMITED )  
PARTNERSHIP VII, an Arizona )  
limited partnership, )  
)  
Defendant/Counterclaimant/ )  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-022830

The Honorable Lisa D. Flores, Judge

**AFFIRMED**

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Kunz Plitt Hyland & Demlong Phoenix  
By Steven Plitt  
Joshua D. Rogers  
Attorneys for Plaintiff/Counterdefendant/Appellee

Tiffany & Bosco, P.A. Phoenix  
By Robert A. Royal  
Aaron T. Lloyd  
Attorneys for Defendant/Counterclaimant/Appellant

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J O H N S E N, Judge

¶1 World Travel Inns Limited Partnership VII appeals the superior court's entry of summary judgment in favor of Mt. Hawley Insurance Company on World Travel's claim for coverage under a commercial general liability insurance policy and the court's subsequent denial of World Travel's motion for new trial. We affirm.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 World Travel hired Mt. Hawley's insured, The Sahuaro Group, as the general contractor for a hotel construction project. A month before the work was to be finished, Terry Haver, Sahuaro's principal and sole member, announced that Sahuaro would not complete the project unless World Travel advanced an additional \$100,000 not provided for in the contract. After World Travel refused Sahuaro's ultimatum, Sahuaro left the project without performing any additional work.

¶3 World Travel sued Sahuaro and other related parties for damages it sustained due to Sahuaro's abandonment of the project. The complaint alleged breach of contract, fraudulent misrepresentation, consumer fraud, fraudulent transfer, conversion, racketeering and negligence, and sought \$1,755,574.42 in damages and attorney's fees and costs. World Travel obtained a \$1,700,000 default judgment against all the defendants.

¶14 World Travel then turned to Mt. Hawley, seeking recovery under a commercial general liability policy Mt. Hawley had issued to Sahuaro. Mt. Hawley filed a complaint seeking a declaratory judgment that the policy did not cover the judgment. World Travel answered and counterclaimed for a declaration of coverage. On cross-motions for summary judgment, the superior court ruled there was no coverage because Sahuaro's abandonment of the project did not constitute an "occurrence" within the meaning of the policy.

¶15 World Travel timely appeals. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes sections 12-120.21(A)(1) (West 2013) and -2101(A) (West 2013).<sup>1</sup>

## DISCUSSION

### A. Legal Principles.

¶16 In reviewing a superior court's grant of summary judgment, we view the evidence and reasonable inferences in a light favorable to the party against which summary judgment was entered. *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 214, ¶ 87, 236 P.3d 421, 441 (App. 2010). Summary judgment is appropriate if the evidence "shows that there is no genuine dispute as to any material fact and the

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<sup>1</sup> Absent material revision after the relevant date, we cite a statute's current version.

moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

**B. The Policy Does Not Cover the Judgment.**

¶7 Mt. Hawley's policy provides that it "will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies," with the further proviso that the "bodily injury" or "property damage" must be caused by an "occurrence." The policy defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶8 Interpretation of an insurance policy is a question of law we review *de novo*. *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 46, ¶ 11, 13 P.3d 785, 788 (App. 2000). "We interpret an insurance policy according to its plain and ordinary meaning, examining it from the viewpoint of an individual untrained in law or business." *Desert Mountain Props.*, 225 Ariz. at 200, ¶ 14, 236 P.3d at 427. While ambiguity in an insurance policy will be construed against the insurer, this rule applies only to provisions that are "actually

ambiguous." *Thomas v. Liberty Mut. Ins. Co.*, 173 Ariz. 322, 325, 842 P.2d 1335, 1338 (App. 1992).

¶9 As the superior court observed, under the policy at issue here, damages are not caused by an "occurrence" if they are not caused by an accident.<sup>2</sup> As to that issue, World Travel argues questions of fact remain concerning whether Sahuaro intended to cause the financial loss that World Travel incurred when Sahuaro walked off the job.

¶10 Arizona courts have defined "accident" in an insurance policy to mean "an undesigned, sudden, and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force." *Century Mut. Ins. Co. v. S. Ariz. Aviation, Inc.*, 8 Ariz. App. 384, 386, 446 P.2d 490, 492 (1968) (quotation omitted). This is consistent with Black's Law Dictionary's definition of the term as "an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental." Black's Law Dictionary 15 (8th ed. 2004).

¶11 Applying these definitions, Sahuaro's abandonment of the project can in no way be deemed an "accident." It is undisputed that Sahuaro's principal, Haver, expressly told World

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<sup>2</sup> World Travel does not argue that the facts here implicate the remaining language in the policy's definition of "occurrence," which encompasses damages caused by "continuous or repeated exposure to substantially the same general harmful conditions."

Travel that Sahuaro would not complete the hotel project unless World Travel advanced an additional \$100,000. It also is undisputed that after World Travel refused to advance the extra money, Sahuaro ceased all work on the project. These uncontested facts show that Sahuaro consciously and deliberately abandoned the project, causing the damages World Travel seeks to recover.

¶12 World Travel argues that when Sahuaro walked off the job, it did not know how World Travel would complete the project or how much in damages World Travel would incur as a result of Sahuaro's breach. World Travel cites *Trinity Universal Insurance Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997), which rejected the broad argument that in all cases, "if an actor intended to engage in the conduct that gave rise to the injury, there can be no 'accident.'" But by citing that sentence in the Texas court's opinion out of context, World Travel fundamentally misconstrues the holding of the case.

¶13 The *Trinity* court considered whether a young man's intentional copying and sharing of revealing photographs of a young woman could constitute an "occurrence," defined as an "accident" in the insurance policy. 945 S.W.2d at 826. The court stated "that whether an event is accidental is determined by its effect." *Id.* at 827. "[A]n effect that cannot be reasonably anticipated from the use of [the means that produced

it], an effect which the actor did not intend to produce and which he cannot be charged with the design of producing, is produced by accidental means." *Id.* (quotation omitted). Thus, the court held that it did not matter that the man did not intend that the woman would find out that he had copied and distributed her photographs; his actions were not "accidental" because the injury she sustained as a result of his intentional actions was "of a type that 'ordinarily follow[s]'" from what he did and her "injuries could be 'reasonably anticipated'" from the conduct. *Id.* at 828 (alterations in original; citation omitted).

¶14 *Trinity* is of no help to World Travel because, like the injuries that resulted from the intentional tort in that case, the consequences of Sahuaro's decision to abandon the construction were precisely those that are "reasonably anticipated" under the circumstances: World Travel was compelled to find another contractor to finish the work, and suffered delay damages and lost profits as a result. While Sahuaro may not have known exactly what World Travel would do after it walked off the job, or how much World Travel would incur in damages as a result of the breach, Sahuaro clearly understood World Travel would have to undertake additional actions and expenses to rectify the situation. World Travel

therefore cannot argue that the damages Sahuaro's abandonment produced were "accidental."

¶15 For these reasons, we agree with the superior court that Sahuaro's abandonment of the project was not an "occurrence" within the meaning of the policy.<sup>3</sup>

**C. The Superior Court Did Not Abuse Its Discretion in Denying World Travel's Motion For New Trial.**

¶16 World Travel argues that the superior court erred in denying its motion for new trial because an affidavit by Haver that it offered with that motion contained evidence that created a genuine issue of material fact precluding summary judgment on coverage. Specifically, World Travel argues Haver's testimony controverts the superior court's finding that Sahuaro "intentionally and knowingly chose to abandon the Project."

¶17 "We will not overturn a superior court's decision to deny a motion for new trial absent a clear abuse of discretion." *In re Estate of Long*, 229 Ariz. 458, 464, ¶ 22, 276 P.3d 527, 533 (App. 2012). "An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶ 14, 13 P.3d 763, 769 (App. 2000) (quotation omitted).

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<sup>3</sup> Because of our conclusion that the damages were not caused by an "occurrence," we need not address Mt. Hawley's several other arguments in support of the summary judgment.



¶18 Arizona Rule of Civil Procedure 59(a)(4) provides:

A verdict, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting that party's rights:

\* \* \*

4. Material evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial.

A motion for new trial based upon newly discovered evidence should be granted only "if it appears that (1) the newly discovered evidence could not have been discovered before the granting of judgment despite the exercise of due diligence, (2) the evidence would probably change the result of the litigation, and (3) the newly discovered evidence was in existence at the time of the judgment." *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990).

¶19 We need not consider the first or third requirement, as the second is dispositive. World Travel argues Haver's affidavit raises an issue of fact as to whether Sahuaro's decision to cease work on the project was an "occurrence" because it shows that Sahuaro neither intended to abandon the project nor cause damages to World Travel. But in his affidavit, Haver does not dispute that Sahuaro deliberately and consciously abandoned the project; he only explains what led to

Sahuaro's decision to do so. Contrary to World Travel's argument, it does not matter to our analysis that Sahuaro did not mean to cause damage when it walked off the job because the damage it caused was the utterly predictable, necessary consequence of its having done so. The affidavit therefore does not present any new evidence creating a genuine issue of material fact precluding summary judgment.

**CONCLUSION**

¶20 For the foregoing reasons, we affirm both the superior court's rulings in favor of Mt. Hawley.

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge