

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 13, 2023

Christopher M. Wolpert
Clerk of Court

FRONTLINE FELLOWSHIP INC.,

Plaintiff - Appellant,

v.

BROTHERHOOD MUTUAL
INSURANCE COMPANY,

Defendant - Appellee.

No. 22-6202
(D.C. No. 5:21-CV-00357-PRW)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Frontline Fellowship, Inc., sued Brotherhood Mutual Insurance Company alleging breach of an insurance policy. The district court granted summary judgment for Brotherhood, and Frontline appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

Brotherhood issued a commercial property insurance policy (Policy) to Frontline. Following a hailstorm, Frontline filed a claim under the Policy, alleging physical damage to its property in Edmond, Oklahoma (Property). After an initial investigation, Brotherhood denied coverage claiming any damage caused by the storm was less than the applicable Policy deductible. In response, Frontline hired an engineer to inspect the Property and submitted a report to Brotherhood. After Brotherhood hired its own engineer to inspect the Property, it once again denied coverage on the same basis.

Frontline filed the underlying lawsuit alleging Brotherhood breached the Policy by improperly denying benefits.¹ Frontline claimed a proper assessment of the damage to the Property from the hailstorm would result in a finding of damage exceeding the Policy deductible.²

Brotherhood moved for summary judgment. It argued the Policy permits two types of cash recoveries. The first is Replacement Cost Value, which Brotherhood contended requires repair or replacement of the damaged property before any payment of benefits. According to Brotherhood, if the insured fails to satisfy that

¹ Frontline originally filed an action against Brotherhood in state court in Oklahoma. Brotherhood removed the case to federal district court under 28 U.S.C. § 1441(b) on the basis of diversity of citizenship under 28 U.S.C. § 1332(a).

² Frontline also alleged that Brotherhood breached the duty of good faith and fair dealing but the parties stipulated to the dismissal of that claim without prejudice. We therefore disregard Frontline's contentions on appeal related to that claim.

prerequisite, the insured is limited to the second type of cash recovery, Actual Cash Value. Brotherhood argued Frontline could not recover Replacement Cost Value because it failed to repair or replace the Property. And it contended Frontline's claim for Actual Cash Value failed as a matter of law because Frontline presented no evidence of Actual Cash Value exceeding the Policy deductible.

The district court set forth the elements of Frontline's breach-of-contract claim under Oklahoma law as: (1) a contract was formed, (2) there was a breach of that contract, and (3) damages resulted from the breach. *See Morgan v. State Farm Mut. Auto. Ins. Co.*, 488 P.3d 743, 748 (Okla. 2021). It reviewed the Policy terms, held they were plain and unambiguous, and agreed with Brotherhood's proffered construction. The district court concluded Frontline had to show either (1) it actually repaired the damaged Property and the cost of doing so exceeded the Policy's deductible; or (2) the Actual Cash Value of the damaged Property at the time of the loss exceeded the Policy deductible.

Holding it was undisputed Frontline had not repaired or replaced the damaged Property, the district court held Brotherhood could not have breached the Policy by failing to pay Frontline the Replacement Cost Value. It noted,

Frontline does not attempt to dispute that this is a correct interpretation of the [Policy]. In fact, it admits in a subsequent pretrial brief that Brotherhood may be completely correct regarding the language of the [Policy] that the insured can only recover replacement cost value . . . after the property has been repaired or replaced.

Aplt. App., Vol. 3 at 688 n.28 (brackets and internal quotation marks omitted).

Addressing Brotherhood's contention that all of Frontline's evidence related to

Replacement Cost Value and there was no evidence of Actual Cash Value, the court concluded,

Frontline’s response makes no attempt to dispute this claim and fails to set forth specific facts demonstrating that there is a genuine issue of fact that the Actual Cash Value of the damaged property exceeded the policy’s deductible, which was its burden once Brotherhood pointed out the absence of evidence of Actual Cash Value.

Id. at 688-89 (brackets and internal quotation marks omitted). In particular, Frontline did not dispute its expert provided no opinion on Actual Cash Value. *See id.* at 688 n.29. And absent such evidence, the district court held no reasonable juror could conclude the Actual Cash Value of Frontline’s loss exceeded the Policy’s deductible. It therefore granted summary judgment in favor of Brotherhood.

II. Discussion

Frontline lists fifteen issues in its opening brief, but our resolution of this appeal depends on whether the district court erred in (1) construing the Policy or (2) holding Frontline demonstrated no dispute of material fact regarding its claim Brotherhood breached the Policy.

We review de novo a grant of summary judgment, applying the same legal standards as used by the district court. *Ace Am. Ins. Co. v. Dish Network, LLC*, 883 F.3d 881, 887 (10th Cir. 2018). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). To avoid summary judgment, “the nonmoving party may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive

matters for which it carries the burden of proof.” *Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Where a party fails to introduce evidence as to an essential element of its claim, summary judgment is appropriate. *See Hansen v. PT Bank Negara Indon. (Persero)*, 706 F.3d 1244, 1247 (10th Cir. 2013).

We also review de novo the district court’s construction of an insurance policy. *See Ace Am. Ins. Co.*, 883 F.3d at 887. Under Oklahoma law, “[i]nsurance policies are contracts interpreted as a matter of law.” *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 148 P.3d 832, 835 (Okla. 2005) (footnote omitted). “When policy provisions are unambiguous and clear, the employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties’ intentions.” *Id.* The policy must also be “read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof.” *Id.*

A. Relevant Policy Language

Under the Policy, Brotherhood must “pay only that part of [Frontline’s] loss over the deductible amount.” *Aplt. App.*, Vol. 2 at 306. The amount of loss is determined by the Valuation of Property provision, *see id.*, which provides, in relevant part:

1. Actual Cash Value: When Replacement Cost (RC) is not shown on the declarations for covered property, the value is based on the actual cash value at the time of the loss, except as provided below.

.....

8. Replacement Cost: When Replacement Cost (RC) is shown on the declarations for covered property, the value is based on replacement cost without any deduction for depreciation.

.....

The replacement cost is limited to the cost of repair or replacement with similar materials on the same site and used for the same purpose. The payment shall not exceed the amount you spend to repair or replace the damaged or destroyed property.

Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced. You may make a claim for actual cash value before repair or replacement takes place, and later for the replacement cost if you notify us of your intent within 180 days after the loss.

Id. at 307-08 (emphasis added).

B. Breach of the Policy Based on Failure to Pay Actual Cash Value

The district court held Frontline failed to point to evidence of Actual Cash Value exceeding the Policy’s deductible, and in particular, Frontline’s expert provided no opinion on Actual Cash Value. Frontline challenges this ruling, arguing Actual Cash Value is determined in Oklahoma by the so-called “broad evidence rule,” which it says considers all relevant factors and circumstances, such as purchase price, replacement cost, appreciation or depreciation, age and condition of the building, and market value. As to evidence, Frontline refers generally to two construction estimates and asserts Brotherhood had access to all of the (unspecified) documents reviewed by its expert.

Frontline did not invoke the broad evidence rule or point to any evidence of Actual Cash Value in response to Brotherhood’s summary judgment motion. Rather, as the district court concluded, Frontline failed to set forth specific facts

demonstrating a genuine dispute that the Actual Cash Value of the damaged Property exceeded the Policy's deductible. Frontline's response to this issue in the district court never mentioned Actual Cash Value, much less evidence supporting it. *See* Aplt. App., Vol. 3 at 587-89.

Where a plaintiff pursues a new legal theory for the first time on appeal, we deem it either waived or forfeited. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011). If a theory was simply not raised and therefore forfeited, we will reverse based on that theory only if the plaintiff demonstrates plain error. *See id.* at 1128. Frontline does not "argue for plain error and its application on appeal." *Id.* at 1131. And that failure "surely marks the end of the road for an argument for reversal not first presented to the district court." *Id.* Consequently, Frontline fails to show the district court erred in holding no reasonable juror could conclude the Actual Cash Value of Frontline's loss exceeded the Policy's deductible, and Frontline's breach-of-contract claim on that basis therefore failed as a matter of law.

C. Breach of the Policy Based on Failure to Pay Replacement Cost Value

Frontline challenges the district court's holding it could not recover Replacement Cost Value under the Policy because it did not repair the Property. The court erred, according to Frontline, because ordinarily "[a]n insured suffers a loss. A claim is made. An undisputed amount is paid that permits the insured to begin repairs. Repairs are completed and then the recoverable depreciation is paid after

proof of repairs is demonstrated.” Aplt. Opening Br. at 14. Frontline also contends there is no dispute it presented evidence of Replacement Cost Value, the Policy allowed it to make a claim on that basis within 180 days after the loss,³ and Brotherhood breached the Policy when it failed to make any payment of benefits.

Frontline ignores the Policy language stating, “Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced,” Aplt. App., Vol. 2 at 308, which the district court construed as requiring Frontline to repair the Property before Brotherhood was obliged to pay benefits. Moreover, the district court concluded Frontline made no attempt to dispute this interpretation of the Policy in responding to Brotherhood’s summary judgment motion. In its opening appeal brief, Frontline never mentions the Policy language relied on by the district court and therefore once again fails to show any error in its construction. *See Dodds v. Richardson*, 614 F.3d 1185, 1205 (10th Cir. 2010) (“A court of appeals is not required to manufacture an appellant’s argument on appeal when it has failed in its burden to draw our attention to the error below. In the event of such a failure, the court will ordinarily consider the appellant’s point waived.” (internal quotation marks omitted)).

Frontline nonetheless argues Brotherhood breached the Policy by failing to pay any benefits, which it says made repairing the Property impossible. Brotherhood

³ The parties disagree whether Frontline made a timely claim for Replacement Cost Value under the Policy. We need not address that issue to resolve this appeal.

contends Frontline did not raise this issue in the district court. But Frontline did,⁴ and the district court ruled on it, stating:

Frontline appears to suggest that the repair or replace requirement should be excused as a condition precedent because Brotherhood inhibited Frontline's ability to repair the property by refusing to pay out policy benefits. But courts have consistently rejected this argument and found nearly identical policy language enforceable under Oklahoma law.

Aplt. App., Vol. 3 at 688 n.28. The district court cited *Bratcher v. State Farm Fire & Casualty Co.*, 961 P.2d 828 (Okla. 1998), where the Oklahoma Supreme Court upheld similar policy language requiring the insured to repair or replace property before benefits based on a repair-or-replacement-cost provision were payable, *see id.* at 830, 831. *Bratcher* overruled a decision by the Oklahoma Court of Civil Appeals that held such a provision was unconscionable. *See id.* at 830-31.

Frontline argues *Bratcher* is distinguishable because, unlike here, the insurer in *Bratcher* made a payment to the insured while Brotherhood made no payment to Frontline. We disagree. In *Bratcher*, the insurer made a payment because the insured's loss based on actual cash value exceeded the deductible. *See id.* at 829. Here, as we have held, the district court did not err in holding Frontline produced no evidence of Actual Cash Value in excess of the Policy deductible. Therefore, Frontline did not demonstrate a genuine dispute that Brotherhood breached the Policy by failing to make a payment on that basis. And Frontline also fails to show the

⁴ Frontline points to its contention in the district court that performance of the Policy's condition precedent to repair should be excused based on Brotherhood's failure to pay any benefits. *See* Aplt. Reply Br. at 2-4 (quoting Aplt. App., Vol. 3 at 588-89).

district court erred in rejecting its contention that performance of the Policy's condition precedent to repair can be excused based on Brotherhood's nonpayment.

D. Other Issues

Frontline argues it is entitled to consequential damages resulting from its increased costs due to Brotherhood's delay in paying benefits under the Policy. Frontline did not raise this issue in the district court, but in any event, it failed to demonstrate a genuine dispute that Brotherhood owes any damages for breach of the Policy, consequential or otherwise.

To the extent Frontline lists additional issues in its opening brief that we have not addressed, we conclude it failed to sufficiently develop such issues to allow for appellate review. *See* Fed. R. App. P. 28(a)(8)(A) (requiring an opening brief to identify "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"); *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012) ("[I]ssues designated for review are lost if they are not actually argued in the party's brief." (internal quotation marks omitted)); *Utah Env't Cong. v. Bosworth*, 439 F.3d 1184, 1194 n.2 (10th Cir. 2006) ("An issue mentioned in a brief on appeal, but not addressed, is waived.").⁵

⁵ To the extent Frontline attempts to develop arguments on any of these points for the first time in its reply brief, we decline to consider those contentions. *See Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000).

III. Conclusion

We affirm the district court's judgment.

Entered for the Court

Veronica S. Rossman
Circuit Judge