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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 IDS PROPERTY AND CASUALTY
INSURANCE COMPANY,

9 Plaintiff,

10 v.

11 CHARLES H. FELLOWS,

12 Defendant.

C15-2031 TSZ

MINUTE ORDER

13
14 The following Minute Order is made by direction of the Court, the Honorable
Thomas S. Zilly, United States District Judge:

15 (1) Defendant Charles H. Fellows's renewed motion for partial summary
judgment, docket no. 118, is treated as a motion for reconsideration, and is DENIED.

16 (a) The Court previously ruled that, because the parties failed to address
17 how the issues should be analyzed if the three children engaged in the graffiti and
vandalism for which Fellows seeks insurance coverage, whether the "intentional
18 act of an insured" exclusion and/or its "domestic violence" exception apply to the
circumstances of this case cannot be determined in dispositive motion practice.
19 Order at 4 (docket no. 98). The record has not changed since the Court's earlier
decision. The parties provide no information concerning the ages of the children
20 involved or whether they had, at the time of the events at issue, the requisite
mental capacity to formulate an "intent" within the meaning of the "intentional act
21 of an insured" exclusion. *See* RCW 9A.04.050 (children under 12 are presumed
incapable of understanding the wrongfulness of their actions). Moreover, the
22 parties continue to dispute whether Fellows's ex-wife or the couple's children
caused the damage in question.

1 (b) With regard to the “theft committed by an insured” exclusion,
2 Fellows raises a new argument that his ex-wife did not commit theft because the
3 business attire and formal wear for which he seeks insurance coverage was
4 community property that his ex-wife legally possessed and had authority to
5 discard. Fellows does not explain why he could not have presented this argument
6 in his previous motion. *See* Local Civil Rule 7(h)(1). Moreover, although
7 Fellows’s contention might establish that the “theft committed by an insured”
8 exclusion does not apply, it also supports the conclusion that no loss occurred.
9 Thus, Fellows is not entitled to summary judgment in his favor as to coverage.

6 (2) Plaintiff IDS Property and Casualty Insurance Company’s motion for
summary judgment, docket no. 116, is DENIED.

7 (a) With regard to the applicability of the “intentional act of an insured”
8 and “theft committed by an insured” exclusions, plaintiff’s current motion simply
9 repeats the arguments made in its previous motion, and the Court is satisfied that
genuine disputes of material fact preclude summary judgment.¹ *See* Fed. R. Civ.
P. 56(a).

10 (b) As to Fellows’s claim for additional living expenses, plaintiff’s
11 current motion appears to seek reconsideration of the Court’s prior ruling, *see*
Order at 7-8 (docket no. 98), and it is denied.

12 (c) Given the unanswered questions concerning coverage, plaintiff’s
13 motion for summary judgment as to Fellows’s counterclaims for breach of
14 contract, violation of Washington’s Consumer Protection Act, violation of the
Insurance Fair Conduct Act, bad faith, constructive fraud, and negligence, and as
to Fellows’s prayer for emotional distress damages, must likewise be denied.

15 (3) The parties’ stipulated motion for referral to a settlement judge, docket
16 no. 124, is DENIED without prejudice. The Court’s practice is to require the parties to
17 engage in mediation before inquiring whether a district or magistrate judge is willing to
18 preside over a settlement conference. *See* Local Civil Rule 39.1(e). The parties have not
indicated whether they have attempted to resolve this matter through private mediation.
In addition, the Court’s protocol does not permit the parties to designate a specific

19 ¹ Plaintiff has raised a new argument that Fellows’s claim relating to lost business attire and formal wear
20 is barred by the one-year period of limitation set forth in the policy because an appraiser did not notice
21 whether the suits were in any of the closets when he examined the premises in April 2015, roughly eight
22 months before Fellows commenced this litigation. Plaintiff presented this theory only in response to
23 Fellows’s motion for partial summary judgment, and it did not affirmatively seek summary judgment on
this subject or offer its contention in a manner that would provide Fellows an opportunity to be heard.
Moreover, plaintiff’s assertion of untimeliness relies on inferences from the appraiser’s testimony drawn
against the opposing party, which is inappropriate on summary judgment. *See, e.g., James River Ins. Co.*
v. Hebert Schenk, P.C., 523 F.3d 915, 920 (9th Cir. 2008).

1 settlement judge. If the parties have already participated in mediation and wish to pursue
2 the option of a judicial settlement conference, they shall jointly contact the Court's law
3 clerk at (206) 370-8830.

3 (4) The Clerk is directed to send a copy of this Minute Order to all counsel of
4 record.

4 Dated this 13th day of February, 2017.

5
6 William M. McCool
7 Clerk

8 s/Karen Dews
9 Deputy Clerk