IN THE COURT OF APPEALS OF IOWA

No. 7-509 / 07-0187
Filed October 24, 2007

WILLIAM SMUTZ,
Plaintiff-Appellee,

vs.

CENTRAL IOWA MUTUAL INSURANCE ASSOCIATION,
Defendant-Appellant.

CENTRAL IOWA MUTUAL INSURANCE ASSOCIATION,
Third-Party Plaintiff,

vs.

CATHY RUSH,
Third-Party Defendant.

Appeal from the Iowa District Court for Wright County, Stephen P. Carroll, Judge.

Defendant appeals the district court's finding that a homeowners insurance policy covered plaintiff's loss and appeals the district court's dismissal of its claim for contribution from plaintiff's tenant. **AFFIRMED.**

Duane M. Huffer and Robert L. Huffer, Huffer Law Office, Story City, for appellant.

George A. Cady, III, Hampton, for appellee.

Joseph R. Sevcik, Cedar Falls, for third-party defendant.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Plaintiff-appellee, Bill Smutz, sought a declaratory judgment ruling that his homeowners insurance policy provided coverage for water damage to a property he owns. Smutz also sought damages in the amount estimated to repair the home. After a bench trial, the court ruled the policy did provide coverage for the water damage and policy exclusions did not apply. The court ordered the defendant insurance company, Central Iowa Mutual Insurance Association (CIMIA), to pay Smutz the total estimated cost to repair the water damage. CIMIA appeals claiming the district court erred by (1) applying a higher standard of proof to CIMIA's affirmative defenses; (2) treating circumstantial evidence as less probative than direct evidence; (3) finding the insurance policy provided coverage for the water damage; (4) finding the policy exclusions did not apply to the loss; and (5) finding CIMIA was not entitled to contribution by a third-party defendant. The third-party defendant, Cathy Rush, also requests attorney fees. We affirm the district court and deny Rush's request for attorney fees.

I. BACKGROUND.

Bill Smutz and his wife, Ronda, lived at 508 Sixth Avenue Northeast, Belmond, Iowa, from July 2000 to January 2004. In January of 2004, they decided to move to another home in Belmond. After eight months of attempting to sell the Sixth Avenue home without success, they decided to rent the property for a year. Bill and Ronda entered a one-year lease with Cathy Rush in August of 2004. On December 1, 2004, Rush sent notice that she intended to terminate the lease effective "midnight on the 31st of December 2004." Rush moved nearly all of her belongings out of the home on December 21 or 22. She planned to

return on December 31 to take the few remaining items and clean the house. She did not inform Bill or Ronda Smutz that she was moving her belongings before the 31.

Meanwhile, Bill learned of a couple interested in renting the home. He arranged to show them the home on December 28. He called Rush several times to inform her of the showing but was unable to reach her. When Bill and Ronda met the prospective tenants at the home on the evening of December 28, they immediately noticed water pouring out from the sides of the house where the foundation and siding meet. Inside, several inches of water covered the main floor, water was streaming from the clothes washer hookup pipe, and it was flowing down the basement stairway. In the basement, ceiling tiles were saturated and falling down and it appeared to be "raining." Sheetrock and insulation were soaked and water was leaking from light fixtures. Bill shut off the water to the house. Bill learned there was no heat to the house when he checked the thermostat and saw that it had been turned off.

That night Bill called his insurance agent to report the problem. The agent told Bill not to do anything until an adjuster could investigate the property. An insurance adjuster investigated the damage the next day. He noted that there was no standing water since it was able to drain out after the water was shut off, but the house remained wet throughout. He saw that the thermostat had been turned off. Over the next several days, the agent advised Ronda to begin the clean-up process. Bill and Ronda turned on some fans and dehumidifiers to dry out the house. When Rush arrived at the house on December 31 to retrieve the remainder of her things, she saw the damage. She denied turning off the

thermostat and believed someone else entered the house and shut it off. Bill also denied turning the heat off.

On January 10, 2005 the adjuster informed Bill and Ronda that CIMIA was denying coverage for the damage because a policy exclusion applied to the situation. Smutz filed a petition seeking a court's declaration that the insurance policy did cover his loss and the insurance company was required to pay to repair the damage under the policy. CIMIA filed a claim against Rush seeking contribution. After a bench trial, the district court ruled that the insurance policy covered the loss, the policy exclusions did not apply, and that CIMIA owed Smutz $26,291 plus interest to repair the water damage. The court dismissed CIMIA's claim for contribution from Rush. CIMIA appeals.

II. STANDARD OF REVIEW.

The standard of review for declaratory judgment actions depends on whether the district court treated the claim as a legal or equitable action. *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006). If the district court ruled on evidentiary objections, there is a strong indication that the action is at law. *Id*. The transcript shows that the district court judge ruled on evidentiary objections. "Because the parties tried the case at law, our review is for correction of errors at law." *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). Involuntary dismissals are also reviewed as a matter at law. *Blair v. Werner Enter.*, 675 N.W.2d 533, 535 (Iowa 2004).

Under this standard, the court's legal conclusions are not binding on the appellate court but the court's findings of fact are binding if "supported by substantial evidence." *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste*

Agency, 641 N.W.2d 776, 781 (Iowa 2002). Substantial evidence exists if a "reasonable mind would accept it as adequate to reach a conclusion." *Id.* Furthermore, we view the evidence "in a light most favorable to the trial court's judgment." *Id*.

III. STANDARD OF PROOF.

CIMIA first argues that the court applied a higher standard of proof requirement to CIMIA's affirmative defenses. "The rule is clear that special limitations or exclusions on the right to recover under a policy inserted in the policy after the general insurance clause, are affirmative defenses which must be pleaded and established by the insurer." *Stortenbecker v. Pottawattamie Mut. Ins. Ass'n*, 191 N.W.2d 709, 711 (Iowa 1971). CIMIA was "required to prove, by a preponderance of the evidence, that pursuant to its terms, there was no policy in effect and hence no coverage." *Holliday v. Rain and Hail, L.L.C.*, 690 N.W.2d 59, 64-65 (Iowa 2004).

CIMIA defended the suit by claiming several exclusions in the policy applied. To succeed in this defense, CIMIA had the burden of proving by a preponderance that the exclusions applied under the facts and circumstances of the loss. CIMIA contended coverage was excluded because either Smutz or Rush were negligent in causing the heat to be turned off or negligent in failing to preserve the property after the loss.

In discussing the exclusion of coverage when an insured fails to preserve property during and after a loss, the court stated, "[s]imply put, the insurer has failed in its burden of proof on this issue." The court clearly articulates the burden applied later in the opinion by stating that the insurance carrier failed to

sustain "its *burden of proof in showing by a preponderance of the evidence* that Ms. Rush failed to do something to keep the heat on or negligently turned the heat off." (Emphasis added.) After a careful review of the opinion, we see no indication the court applied an incorrect standard of proof to CIMIA's affirmative defenses.

IV. CIRCUMSTANTIAL EVIDENCE.

CIMIA next asserts the court erroneously treated circumstantial evidence less favorably than direct evidence. Specifically, CIMIA contends the circumstances surrounding the incident prove someone intentionally or negligently caused the damage but the court refused to so find. The trial court noted neither party's evidence "shed any light on the mystery of how the heat went off." The judge stated that Rush denied turning off the heat when she left and Rush "speculated that someone else did it or that the pilot light had been turned off." However, the court ruled that neither party proved by a preponderance who turned the thermostat off.

We have initial concern that error may not be preserved on this issue. CIMIA seems to argue that the court failed to make a factual finding. Its brief states:

> The circumstantial evidence points to a conclusion that someone damaged the home. Unfortunately, the District Court's Opinion did not decide what occurred. The Court only looked at the evidence and decided the insurance company should pay regardless of who set in motion the incident causing the damage.

CIMIA failed to file a motion to enlarge findings pursuant to Iowa Rule of Civil Procedure 1.904(2). "[W]e have repeatedly said that a [motion to enlarge findings] is necessary to preserve error 'when the district court *fails to resolve* an

issue, claim, or other legal theory properly submitted for adjudication.'" *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002) (quoting *Explore Info. Servs. v. Iowa Ct. Info. Sys.*, 636 N.W.2d 50, 57 (Iowa 2001)). However, a motion to enlarge is only required to preserve error when the district court fails to address an issue. *Explore Info. Servs.*, 636 N.W.2d at 57. "There is a distinction between the use of a motion under rule [1.904(2)] *to challenge* a ruling made by the district court and *to address the failure* of the district court to make a ruling." *Meier*, 641 N.W.2d at 539 (emphasis added). At the very least, for error to be preserved, the record must show the court was aware of the issue and litigated it. *Id.* at 540. The district court's order expressly refused to settle the factual dispute of how the heat was turned off. Since the record reveals this issue was litigated, we will pass on the question of error preservation and address the merits of CIMIA's claim. *See Ichelson v. Wolfe Clinic, P.C.*, 576 N.W.2d 308, 310 (Iowa 1998); *State v. Khouri*, 503 N.W.2d 393, 394 (Iowa 1993) (electing to rule on the merits of the claim despite error preservation concerns).

The judge found neither party provided adequate proof to make the determination of how the heat was turned off. CIMIA contends this conclusion was reached because the court did not give proper consideration to circumstantial evidence. CIMIA argues that Rush's testimony outlined circumstances that prove someone intentionally damaged the home. For example, Rush testified a shower head was not broken when she originally left the premises but it was broken when she returned to the property on December 31. CIMIA argues that frozen pipes would not cause a shower head to break. Rush also testified that a light switch was missing when she moved her

belongings but the light switch had been replaced when she arrived on December 31. Rush stated she remembered shutting the hallway door to the basement when she originally left. However, Smutz stated that he believed the door was open when he arrived and saw the damage on December 28. CIMIA contends these circumstances, taken as a whole, prove someone besides Rush was in the home after Rush left on December 21 or 22 and before the damage occurred. It argues Bill or Ronda Smutz most likely replaced the light switch, opened the basement door, broke the shower head, and caused the thermostat to be shut off.

"An issue in a civil case may be proven by circumstantial evidence provided the evidence is such as to make the claimed theory reasonably probable, not merely possible, and more probable than any other theory based on such evidence." *Christianson v. Kramer*, 257 Iowa 974, 984, 135 N.W.2d 644, 650 (1965). To prove the issue, the circumstantial evidence need not eliminate all other theories. *Id.* at 984, 135 N.W.2d at 650. The trier of fact is generally charged with determining whether the circumstantial evidence meets this test. *Wiley v. United Fire & Cas. Co.*, 220 N.W.2d 635, 635 (Iowa 1974). Under our standard of review, the trial court's fact findings are "equivalent to a jury verdict" and are binding upon us if supported by substantial evidence. *Carson v. Mulnix*, 263 N.W.2d 701, 705 (Iowa 1978). A reviewing court is to view the evidence in a light favorable to the trial court's judgment and "will not weigh the evidence or pass on the credibility of witnesses." *Id.*

> However the rule does not preclude inquiry into the question whether, conceding the truth of a finding of fact, a conclusion of law drawn therefrom is correct, nor does it apply if in arriving at a finding the trial court erred in its ruling on evidence or in other

> respects upon questions of law which materially affect that decision.

Id. at 706 (citing *Whewell v. Dobson*, 227 N.W.2d 115, 117 (Iowa 1975)).

In light of these principles, we must determine whether the trial court erred in reaching the legal conclusion that there was not proof by a preponderance of the evidence of how the heat was turned off because it failed to take proper account of the circumstantial evidence CIMIA provided at trial. We conclude that it did not. The court's order acknowledged that Rush "speculated that someone else did it" but found this was not proved by a preponderance. Circumstantial evidence is insufficient to prove causation when it provides mere speculation rather than a reasonable basis for a legal conclusion. *Hasselman v. Hasselman*, 596 N.W.2d 541, 546 (Iowa 1999); *see also Gerst v. Marshall*, 549 N.W.2d 810, 818 (Iowa 1996) (holding testimony that identifies a possible source of contamination was insufficient to establish causation when the testimony did not identify when the contamination occurred); *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner, and Engberg*, 428 N.W.2d 288, 291 (Iowa 1988) ("A jury cannot be left to speculate, but rather, must be provided with facts affording a reasonable basis for ascertaining the loss."). CIMIA's circumstantial evidence may suggest that Bill or Ronda Smutz were in the house between the time Rush moved most of her belongings on December 21 or 22 and December 31 when Rush returned. However, this fact is undisputed. Bill and Ronda admitted to being at the house on December 28 when they discovered the damage and again on December 30 to try to dry out the house. CIMIA's evidence does not identify whether Bill and Ronda were in the house during the critical time period after Rush moved most of her belongings but prior

to the heat being shut off. CIMIA's evidence does not identify when the heat was turned off or when the pipes burst. Although there was conflicting testimony about whether an interior door to the basement was open or closed during this time period, this testimony is not probative on the issue of who turned off the heat. Therefore, we conclude the court gave adequate consideration to the circumstantial evidence presented and correctly concluded that the evidence did not prove by a preponderance how the heat was turned off.

V. INSURANCE POLICY COVERAGE AND EXCLUSIONS.

CIMIA next contends the court erred in finding the insurance policy covered the loss and no policy exclusions applied. CIMIA argues the court should not have found the policy to cover this loss when Smutz did not prove the elements of breach of contract. CIMIA argues the court incorrectly interpreted the policy exclusions. This argument must fail because it misunderstands the nature of this action and CIMIA's affirmative defenses.

Smutz filed a petition seeking a declaratory judgment that the policy covered the loss. Smutz did not make a breach of contract claim. "[T]he purpose of a declaratory judgment is to resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed." *Dubuque Policemen's Protective Ass'n v. City of Dubuque*, 553 N.W.2d 603, 607 (Iowa 1996). Any party interested in a contract "whose rights, status or other legal relations are affected by any . . . contract may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status or legal relations thereunder." Iowa R. Civ. P.

1.1102. A party can seek a declaratory judgment construing a contract either before or after a breach. Iowa R. Civ. P. 1.1103.

Smutz's action asked the court to interpret the insurance policy. He asked the court to analyze whether the loss was covered by the terms of the policy or excluded. "Construction of an insurance policy and the interpretation of its language are matters of law for the court to decide, when as here, neither party offers extrinsic evidence about the meaning of the policy's language." *Am. Family Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 111 (Iowa 2005). Thus, Smutz was not required to prove he knew the contract terms, followed the duties outlined in the policy, or mitigated damages as CIMIA contends. He merely sought the court's interpretation of the policy's terms. Smutz was not required to prove the elements of breach of contract prior to seeking declaratory relief.

By contrast, CIMIA did have the burden to come forward with evidence to prove that policy exclusions precluded coverage. CIMIA's argument that Smutz, the insured, must prove compliance with all conditions and limitations in the policy prior to recovery has been rejected by the Iowa Supreme Court. *See Stortenbecker*, 191 N.W.2d at 711 ("Defendant argues proof of occupancy is a condition precedent which must be pleaded and proved by the insured. We do not agree."). In *Stortenbecker*, the court stated, "The rule is clear that special limitations or exclusions on the right to recover under a policy . . . inserted in the policy after the general insurance clause, are affirmative defenses which must be pleaded and established by the insurer." *Id.* Thus, the court will apply rules of construction to construe the meaning of the exclusions, but the insurer will have to come forward with evidence to prove the exclusion applies. Also, a court is to

construe exclusionary clauses narrowly against the insurer. *Hickman v. IASD Health Servs. Corp.*, 572 N.W.2d 165, 167 (Iowa Ct. App. 1997). CIMIA alleges the following exclusions prevent coverage in this situation:

> **Neglect and/or Intentional Acts.** We do not pay for loss which results from an act committed by or at the direction of an insured and with the intent to cause a loss.
> **Neglect.** We do not pay for loss which results from the neglect of an insured to use all reasonable means to save and preserve covered property at and after the time of the loss.
> **Freezing, Discharge, Leakage or Overflow – Unoccupied Residence.** If the residence is vacant, unoccupied or under construction and unoccupied, the insured must take reasonable care to:
>
> a. maintain heat in the building; or
> b. shut off the water supply and completely empty liquids from any plumbing, heating or air-conditioning system, water heater, bed or domestic appliance.
>
> If any insured fails to do this, we do not pay for loss caused by freezing or the resulting discharge, leakage, or overflow from such system, water heater or domestic appliance.

The district court concluded that there was not sufficient proof that the damage was caused negligently or intentionally by the Smutzs or Rush. The judge stated CIMIA "failed in its burden of proof" to show that Smutz failed to use reasonable means to mitigate the damage after the loss. As discussed above, there was no error in these conclusions and the court correctly found the exclusion did not apply. CIMIA argues that Rush's negligence should be imputed to Smutz since she is a tenant that had a duty to maintain the property. However, as discussed above, there is not adequate proof that Rush was the proximate cause of the damage. Therefore, as a matter of law, there is no negligence to impute to Smutz.

Under the "Freezing, Discharge, Leakage or Overflow, Unoccupied Residence" exclusion, CIMIA contends the district court incorrectly interpreted the

words "vacant" and "unoccupied." The district court sought the legal meaning of these terms from *Couch on Insurance*. The judge explained, according to *Couch*, temporary vacancy or nonuse by a tenant that is reasonable in light of the use of the property, and indicates an intent to return and not to completely vacate does not constitute vacancy or unoccupancy for purposes of insurance policy exclusions. Lee R. Russ & Thomas F. Segalla, *Couch On Insurance* § 94:118, at 94-131 (3d ed. 2005). This is so even if the tenant's nonuse has commenced, "which, when completed, will constitute such a vacancy or nonoccupancy." *Id.*

Iowa cases applying unoccupancy and vacancy policy exclusions in tenant and landlord situations are divided and fact sensitive. The length of the absence and intent to return are important factors but not conclusive. *See Walrod v. Des Moines Fire Ins. Co.*, 159 Iowa 121, 124, 140 N.W. 218, 219 (1913) (finding "temporary absence" of tenant does not render a premises "vacant"); *Worley v. State Ins. Co. of Des Moines*, 91 Iowa 150, 154, 59 N.W. 16, 17 (1894) (holding no vacancy under the policy when the property was unoccupied for three days due to a change of tenants even when prior tenant had returned keys); *Snyder v. Fireman's Fund Ins. Co.*, 78 Iowa 146, 148-49, 42 N.W. 630, 630-32 (1889) (finding vacancy when family had moved out the same day as the damage occurred when tenants had returned the keys to the property and left permanently with no intent to return).

In this case, Rush still had the keys to the property and intended to return. Rush still had some boxes and belongings in the house. Though she was in the process of vacating the property, her notice to the Smutzs expressly stated she would maintain responsibility under the rental agreement until December 31. She

testified she was paying for the utilities on the property until December 31. Under these facts, the case law, and rule to interpret exclusions narrowly, we cannot find error in the district court's conclusion that the property was not "vacant" or "unoccupied" under the policy.

CIMIA also argues that there is no coverage because Smutz had a home owner occupant insurance policy when he should have had a tenant residential policy. This argument has no merit. The policy's terms contemplate coverage even if the home is rented. "Residence" is defined as "a one to four family house, or a one to two family mobile home." The policy states that it does not cover property used for business but that the business exclusion does not apply to structures "[r]ented to a tenant of the residence on the insured's premises and not used for business." It is undisputed that Rush was a tenant who did not use the property for business purposes.

VI. RIGHT OF CONTRIBUTION.

CIMIA also filed an action against Rush seeking contribution for any loss CIMIA would be required to pay the Smutzs under the policy. CIMIA argued its right of contribution stems from Rush's negligence. The district court dismissed the action. The district court held that inadequate proof that Rush was the proximate cause of the damage precluded a finding of negligence, and consequently the contribution claim must fail. "A right of contribution exists between or among two or more persons who are liable upon the same indivisible claim for the same . . . harm, whether or not judgment has been recovered against all or any of them." Iowa Code § 668.5(1) (2005). However, "[a]ctionable negligence and liability to the third party on the part of the party from whom

contribution is sought must be established." *Nat'l Farmers Union Prop. & Cas. Co. v. Nelson*, 260 Iowa 163, 169, 147 N.W.2d 839, 843 (1967).

The trial court, as fact finder, determined there was inadequate proof that Rush turned off the heat. We agree with this finding. Rush and the Smutzs denied turning off the heat and there was no witness testimony or evidence provided to corroborate either party. Since Rush's negligence cannot be established, the district court properly dismissed CIMIA's claim for contribution.

VII. ATTORNEY FEES.

Rush requests appellate attorney fees. Generally a party is only awarded attorney fees if it is mandated by statute or contract. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993). There is an exception when a losing party acts in bad faith. CIMIA's appeal was not in bad faith and attorney fees are not demanded by a statute or contract in this case. We therefore decline Rush's request.

VIII. CONCLUSION.

The district court applied the proper standard of proof to CIMIA's affirmative defenses and gave proper consideration to circumstantial evidence. There was no error in the district court's declaratory judgment ordering the insurance policy provided coverage for the water damage to the Smutz property and was not precluded by the exclusions. The court's dismissal of CIMIA's claim for contribution from Rush was proper and Rush is not entitled to attorney fees.

AFFIRMED.