IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent, v. ONEBEACON INSURANCE COMPANY, Appellant.	)	No. 64063-1-I DIVISION ONE UNPUBLISHED FILED: October 11, 2010

Cox, J. — The dispositive issue on appeal is whether the trial court abused its discretion in denying the motion for reconsideration of OneBeacon Insurance Company. OneBeacon argued for the first time in its CR 59 motion below a new theory of this case and cited new supporting authority. This new theory was argued to the trial court for the first time following entry of the summary judgment that was partially adverse to OneBeacon. OneBeacon's arguments on appeal rely primarily on the cases and arguments raised for the first time in its CR 59 motion. Because CR 59 cannot be properly used in this way, we affirm.

North Pacific Insurance Company, the predecessor in interest of OneBeacon, issued a commercial general liability (CGL) policy to Saltaire

Craftsman, PLLC, a general contractor. The policy was effective from September 16, 1999, to September 16, 2000. Mutual of Enumclaw insured Saltaire under two consecutive one year CGL policies from September 16, 2000, to September 16, 2002.

Saltaire contracted with QAS Residential, LLC, a developer, to convert a 75 unit Queen Anne apartment building into a condominium complex on January 1, 2000. The record indicates that work may have begun as early as November 1999, but the contract was not executed until January 2000. Saltaire completed work on the project in September 2001.

The Courtyard at Queen Anne Square Condominium Association ("the Association") sued QAS in March 2002 asserting, among other things, that construction defects existed at the project and that water damage resulted. In February 2004, QAS settled with the Association for three million dollars.

In October 2004, QAS sued Saltaire. Saltaire tendered defense of the suit to its insurers, OneBeacon and Mutual of Enumclaw. The insurers split the costs of the defense evenly, and the parties settled for $800,000. Mutual of Enumclaw paid the entire settlement amount to QAS because it was not able to reach an agreement with OneBeacon regarding the appropriate allocation of the settlement as between them. Mutual of Enumclaw then recouped $263,500 from Saltaire's subcontractors. Following this recovery by subrogation, Mutual of Enumclaw commenced this declaratory judgment action seeking equitable contribution from OneBeacon toward the remaining $536,500 deficit.

On cross-motions for partial summary judgment, Mutual of Enumclaw argued that the trial court should allocate the remaining cost of the settlement equally between the two insurers. It argued that the "other insurance" clauses contained in the policies required this result. OneBeacon, on the other hand, argued that the trial court should allocate the settlement pro rata based on each insurance company's "time-on-the-risk." We discuss more fully later in this opinion the precise arguments that OneBeacon made prior to entry of the trial court's summary judgment order. OneBeacon also argued that its liability should be limited by certain exclusions in its policy language.

The trial court denied Mutual of Enumclaw's motion to the extent that it argued that the "other insurance" clauses in the policies supported an equal allocation of the $536,500 deficit. The court also denied OneBeacon's motion to the extent that it argued that its liability should be limited by policy exclusions. However, the trial court granted, in part, Mutual of Enumclaw's motion for contribution and OneBeacon's motion for allocation. It set OneBeacon's contribution at 9/21 of the $536,500 deficit. The numerator of this fraction is the number of months that OneBeacon's policy was in effect during the construction contract between Saltaire and QAS (January 1, 2000, to September 16, 2000). The denominator appears to be the total number of months that OneBeacon's policy and Mutual's first policy were in effect during the construction contract (January 1, 2000, to September 16, 2001).

OneBeacon moved for reconsideration of the order, pursuant to CR 59.

The trial court denied the motion and later entered judgment in favor of Mutual of Enumclaw in the amount of $229,928.50 plus prejudgment interest, and statutory costs.

OneBeacon appeals.

EQUITABLE CONTRIBUTION

OneBeacon argues that the trial court abused its discretion in apportioning the costs of settlement between OneBeacon and Mutual of Enumclaw for several reasons. We disagree based on its arguments at the time of the cross-motions for summary judgment.

"Equitable contribution refers to the right of one party to recover from another party for a common liability. In the context of insurance law, contribution allows an insurer to recover from another insurer where both are independently obligated to indemnify or defend the same loss."[1] Equity does not provide a right for an insurer to seek contribution from another insurer who has no obligation to the insured.[2] Equitable remedies fashioned by the trial court are reviewed for abuse of discretion.[3] A trial court necessarily abuses its discretion "if it base[s] its ruling on an erroneous view of the law."[4]

The interpretation of an insurance contract is a question of law that this

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[1] Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 419, 191 P.3d 866 (2008) (citation and footnote omitted).

[2] Id.

[3] Polygon Northwest Co. v. American Nat'l Fire Ins. Co., 143 Wn. App. 753, 767, 189 P.3d 777 (2008) (citing Sorenson v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006)).

[4] Id. (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

court reviews de novo.[5] The terms of a policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.[6] Courts interpreting insurance policies are bound by the definitions provided therein.[7]

"CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision."[8]

Here, OneBeacon and Mutual both moved for summary judgment. OneBeacon did not contest that equitable apportionment should apply. Rather, it argued that the court should minimize its contribution to the settlement based on several theories.

OneBeacon argued that its coverage was limited by the J5 "operation exclusion" and the J6 "your work exclusion" in its policy. Specifically, OneBeacon argued that its policy excluded coverage for any work performed by Saltaire until such work was put to its "intended use." Because only one third of the condominium units had been sold prior to September 16, 2000, OneBeacon argued that it was only liable for one third of whatever portion of the settlement costs fell within the period of its policy coverage.

In addition, OneBeacon argued that the trial court should equitably

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[5] Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 337-38, 983 P.2d 707 (1999).

[6] Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 424, 38 P.3d 322 (2002).

[7] Id. at 427.

[8] Wilcox v. Lexington Eye Institute, 130 Wn. App. 234, 241, 122 P.3d 729, 732 (2005) (citing JDFJ Corp. v. Int'l Raceway, Inc., 97 Wn. App. 1, 7, 970 P.2d 343 (1999)).

allocate the settlement based on the parties' relative "time on the risk." OneBeacon urged the trial court to conclude that it was "on-the-risk" for only those months after the first condominium unit sold, based again on the exclusionary language of the policy.

The court entered its summary judgment order on May 29, 2009, setting the amount of OneBeacon's equitable contribution at 9/21 of the total settlement. This calculation apportioned the settlement based on how many months each insurer was on the risk out of the total number of months the construction contract was performed. The result of this allocation was that Mutual of Enumclaw was not apportioned any of the settlement cost for the period that its second CGL policy was effective – September 16, 2001 through September 16, 2002.

OneBeacon disagreed with this allocation. For the first time in a CR 59 motion, it argued that under Gruol Construction Company v. Insurance Company of North America,[9] the trial court erred in concluding that Mutual of Enumclaw's "time-on-the-risk" ended when the construction was completed in September 2001. OneBeacon expressly admitted in its motion that these arguments "were not adequately raised, briefed or argued in the underlying briefing." The trial court denied reconsideration.

OneBeacon appeals, primarily relying on Gruol and arguments raised for the first time in its unsuccessful reconsideration motion. CR 59 does not allow this.

[9] 11 Wn. App. 632, 524 P.2d 427 (1974).

In order to understand why this approach is not proper, we first consider the terms of OneBeacon's policy. It provided coverage as follows:

1. Insuring Agreement

> a. We 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. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.
> . . . .
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> b. This insurance applies to "bodily injury" and "property damage" only if:
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> (1). The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory."[10]

"Property damage" is defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.[11]

The policy defines an "occurrence" as "an accident***, including continuous or repeated exposure to substantially the same general harmful conditions***."[12]

In Gruol, this court first addressed the question of which insurer is responsible for damages arising out of an "occurrence" based on continuous

[10] Clerk's Papers at 65.
[11] Id. at 77.
[12] Id. at 76 (emphasis added).

property damage: the insurer at the time the defective work was performed, the insurer during the time the damage was progressively worsening, or the insurer at the time of discovery?[13] The court held that each insurer was jointly and severally liable because the continuous property damage constituted a single "occurrence" under the language of the applicable policies.[14] Our supreme court agreed with this holding in American National Fire Insurance Company v. B & L Trucking and Construction Company.[15] There, in determining whether an insurer was responsible for all of the cleanup costs at issue, or only that portion of the injury that accrued during its policy period, the court concluded that "Gruol stands for the proposition that all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages."[16] This rule has also been applied by Washington courts in other contexts.[17]

Here, while neither the parties nor the trial court expressly addressed what constituted the underlying "occurrence," it appears that it was based on property damage from water intrusion occurring over a period of time.[18]

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[13] Gruol Construction Co., 11 Wn. App. at 635-36.

[14] Id. at 637.

[15] 134 Wn.2d 413, 951 P.2d 250 (1998).

[16] Id. at 424.

[17] Polygon Northwest Co., 143 Wn. App. at 774 (holding excess insurers jointly and severally liable for damages in excess of the limits of the underlying primary insurance policies to the extent that such liability was consistent with the policy terms).

[18] See Clerk's Papers at 4 (the Association sued QAS for breach of contract alleging defective construction and damage resulting from water intrusion and QAS sued Saltaire for its defective construction of the project), and Clerk's Papers at 30 ("The initial suit by the Condo Owners Association against QAS was based on the Condominium Act and included allegations of property

Accordingly, each of the three policies would have been triggered.[19]

However, this theory was never argued to the trial court until OneBeacon's motion for reconsideration, which followed entry of the summary judgment order. Accordingly, we conclude that the trial court did not abuse its discretion in making the equitable apportionment based on the arguments made to it before entry of that order.

It follows that the trial court did not abuse its discretion in denying OneBeacon's CR 59 motion, which was primarily based on a new argument made after entry of the summary judgment order. Case authority is clear that such an approach is improper under CR 59.[20] Accordingly, we will not overturn the trial court's decision to deny reconsideration on the basis of that new argument.

We now turn to OneBeacon's assignments of error. First, OneBeacon argues that the trial court erred in its application of the "time-on-the-risk" method of equitable apportionment. We disagree.

We note that OneBeacon's contention that the appropriate method of allocating the settlement under these circumstances is "time-on-the-risk" does not appear to be supported by case law in Washington.[21] Rather, as discussed

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damage occurring over several years. After QAS settled with the Association for $3 million, QAS sued Saltaire to recover its settlement costs and all of its litigation costs.").

[19] Certain Underwriters at Lloyd's London v. Valiant Ins. Co., 155 Wn. App. 469, 474-76, 229 P.3d 930 (2010) (holding that continuous and repeated exposure to harmful moisture that gradually intrudes into a building fits the definition of a continuing damage "occurrence").

[20] Wilcox, 130 Wn. App. at 241 (citing JDFJ Corp., 97 Wn. App. at 7).

[21] See Brief of Appellant at 21-27 (citing cases from California, Hawaii,

above, the law in Washington governing continuous damage claims is that every policy in force throughout the injury-causing process is triggered.[22] Therefore, each insurer whose policy is triggered is jointly and severally liable for the entire amount of damages unless the parties demonstrate what portion of the damages occurred within the time limits of each policy.[23]

As to the appropriate method of apportioning damages between multiple insurers who are jointly and severally liable, this is an equitable determination that lies within the sound discretion of the trial court.[24] But loss allocation is only appropriate if the policy language supports allocation and there is a rational basis for differentiating between those losses covered under each separate policy.[25] Where an injury is sustained over a long period of time, some of which is within the policy period and some of which is outside the policy period, Washington courts have consistently refused to apply arbitrary formulas or pro rata allocations if those allocations are based merely on the period of time during the injury period that the policy was in effect.[26] Once a policy is triggered, allocability is appropriate only if a rational allocation scheme can be devised by the court or the policy explicitly provides for pro rata allocation.[27]

Maryland, and Illinois).

[22] Gruol Construction Co., 11 Wn. App. at 633-38; B & L Trucking, 134 Wn.2d at 424; Harris, Washington Insurance Law § 23.2 (2nd ed. 2006).

[23] Id.

[24] Polygon Northwest Co., 143 Wn. App. at 767.

[25] B & L Trucking, 134 Wn.2d at 423-28.

[26] See id. at 429; Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 565, 998 P.2d 856 (2000) (we note that this decision is only persuasive authority because it was decided by a Washington court construing Pennsylvania law).

[27] B & L Trucking, 134 Wn.2d at 429.

Here, the policies do not explicitly provide for pro rata allocation. But we do not disturb the trial court's conclusion that there was a rational basis for allocating the damages between the two insurers. This is because the determination is consistent with the parties' briefing below prior to entry of the summary judgment order.

OneBeacon next argues that the trial court abused its discretion in failing to limit its equitable contribution based on certain exclusions in the policy language. We again disagree.

> Determining whether coverage exists under a general liability policy is a two-step process. The burden first falls on the insured to show its loss is within the scope of the policy's insured losses. If such a showing has been made, ***the insurer can nevertheless avoid liability by showing the loss is excluded by specific policy language***.[28]

We strictly and narrowly construe insurance policy exclusions.[29]

OneBeacon's policy included the following exclusions to coverage under section J, "property damage:"

> (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations.
>
> (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed.[30]

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[28] Nat'l Clothing Co., Inc. v. Hartford Cas. Ins. Co., 135 Wn. App. 578, 582, 145 P.3d 394 (2006) (emphasis added) (citing Overton, 145 Wn.2d at 431-32).

[29] Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 64, 1 P.3d 1167 (2000).

[30] Clerk's Papers at 67.

However, paragraph J6 does not apply to "property damage" included in the "products-completed operations hazard."[31]

The "products-completed operations hazard" is defined as:

> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
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> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed.
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) ***When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project***.[32]

OneBeacon contends that, under the "property damage" exclusion J5, coverage was excluded because Saltaire's work on the project constituted an "operation" within the meaning of the exclusion. But because the policy does not define "operation" and the dictionary definition of "operation" is extremely broad,[33] it is not clear from the plain language of the policy whether this exclusion applies. The trial court did not err in concluding that OneBeacon did

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[31] Id. at 68.

[32] Id. at 76 (emphasis added).

[33] See Webster's Third New International Dictionary 1581 (unabridged 1993).

not meet its burden to demonstrate that the exclusion applies because the applicability of the exclusion would depend on a factual determination of whether Saltaire's role in the renovation constituted an "operation."[34]

OneBeacon also contends that, under the "property damage" exclusion J6 and the "projects-completed operations hazard" definition, coverage would not have been triggered under its policy until Saltaire's work on the project was deemed complete. It argues that this did not occur until the work was put to its intended use, i.e., until the condominium units sold. Under this interpretation of the policy, coverage was not triggered until the first condominium unit sold in June 2000, just three months before the policy expired. OneBeacon argues that it should therefore only be liable for three months of coverage out of the total number of months of coverage because that was its total "time-on-the-risk."

But as discussed above, in Washington, when an "occurrence" is based on continuing damage the law imposes joint and several liability on all insurers that provided coverage during the course of the injury. Thus, when OneBeacon's policy was triggered, which it concedes was by June 2000, it was jointly and severally liable for all damages arising out of that "occurrence." OneBeacon's argument that its liability would be limited to the number of months remaining in its policy after the policy was triggered is not consistent with Washington case law.

OneBeacon further argues that the trial court should have limited its

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[34] Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 763, 58 P.3d 276 (2002).

liability to one third of any portion of the settlement for which it was found liable based on the same policy language. Specifically, OneBeacon argues that because only one third of the condominiums had been sold when its policy expired in September 2000, only one third of the work was complete within the definition of the “products-completed operations hazard” exclusion. It contends that work on the remaining unsold condominium units would not have been covered.

We conclude that the trial court did not err in refusing to limit OneBeacon’s liability based on this policy language. The burden of proof to support a policy exclusion rests with the insurer.[35] Here, OneBeacon appears to argue that Saltaire’s “work” on the project was not put to its intended use until every condominium unit in the building sold. But as the trial court pointed out, there is no evidence in the record regarding the critical path of construction and specifically, when and in what sequence Saltaire made improvements to common areas and systems. In addition, the record lacks any evidence regarding the construction project as a whole: whether the work on the condominium units was sequential with one unit at a time undergoing work or whether the project included work on all of the units at the same time. Finally, OneBeacon also fails to prove whether the sale dates of the condominiums were consistent with work being completed. In many instances, condominiums and other residential housing units are sold prior to the completion of construction. Given the lack of evidence to resolve any of these issues, the trial court did not

[35] Diamaco, Inc., 97 Wn. App. at 337.

abuse its discretion in determining that OneBeacon failed in its burden to prove that the "products-completed operations hazard" exclusion precluded liability for any portion of the settlement.

ATTORNEY FEES

Mutual of Enumclaw appears to seek fees under Olympic Steamship Company v. Centennial Insurance Company.[36] We disagree.

All of the claims in this action are equitable contribution claims between two insurance companies. Olympic Steamship provides for the award of fees incurred by an ***insured*** in an effort necessary to establish coverage.[37] That is not the case here.

We affirm the judgment.

Cox, J.

WE CONCUR:

[36] 117 Wn.2d 37, 811 P.2d 673 (1991).
[37] Id. at 52-53 (emphasis added).

Appelwick, J.   Becker, J.