SC90442

IN THE SUPREME COURT OF MISSOURI

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
Appellant

vs.

D.R. SHERRY CONSTRUCTION, LTD.,
Respondent

Appeal from the Circuit Court of Platte County, Missouri
6st Judicial Circuit, Case No. 05AE-CV03676, Division II
The Honorable Owens Lee Hull, Jr.

SUBSTITUTE REPLY BRIEF OF APPELLANT AMERICAN FAMILY MUTUAL INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Several points need to be addressed in response to plaintiff's "Statement of Facts":

A.

Plaintiff acknowledges that it was insured by American Family for a period of more than a dozen years. (See Plaintiff's Brief, p. 3). Nonetheless, plaintiff alleges that it never received a complete copy of the CGL insurance policy that is at issue. (See Plaintiff's Brief, p. 3). Elsewhere plaintiff argues that even to the present day it has not been provided with a complete copy of the insurance policy. (See Plaintiff's Brief, p. 23).

However, in its Petition in this case, plaintiff admitted that it had "a complete copy of the policy", as of June, 2005. (See Petition, ¶ 13, L.F.2) (emphasis added). In its Response to American Family's Motion For Summary Judgment in this case, plaintiff said, " . . . on May 25, 2005, Plaintiff was provided a full copy of its policy. . . ". (A-129) (emphasis added). Plaintiff offers no explanation for these plainly contradictory statements.

Furthermore, although plaintiff attempts to rewrite the testimony of its sole officer, director and shareholder, Darrin Sherry, (see Plaintiff's Brief, p. 3) the record of Mr. Sherry's trial testimony demonstrates that he admitted receiving a copy of American Family's policy. Mr. Sherry even admitted receiving the policy when he first purchased the coverage in 1991:

"Q. Do you agree that you first purchased this CGL or Commercial General Liability Policy from American Family back in 1991? Right?

A. I first started doing business with American Family in 1991. Yes, sir.

Q. More than a decade before this house was ever built.

A. Yes.

Q. Is it your position that you never ever, during the entire time you were insured by American Family, ever received a copy of the Commercial General Liability Policy from the company?

A. Oh, absolutely not.

Q. So you admit that you received the CGL Policy at some time from American Family?

A. Oh, you bet. Gary -- Gary always tried to get me the proper paperwork. Yes.

Q. Did you get the policy initially when you first bought the coverage in 1991?

A. Oh, I'm sure I did. Yeah." (Tr. 293).

Mr. Sherry also testified as follows:

"Q. And in subsequent years, after 1991 when you renewed the policy, do you believe that Mr. Weaver provided you with full complete copies of the CGL Policy?

A. To my knowledge, absolutely. I - - I think I - - may have been a mix-up or something in there. But was it a big deal? No, absolutely not.

Q. In 2003 when this house was built or in 2004 when there started to be problems to the extent that you couldn't put your hands on a Commercial General Liability Policy that American Family had issued

you, that wasn't because American Family had failed to provide you with a policy.

A. No.

Q. That was because you had either lost it or misplaced it or couldn't just put your hands on it.

A. Absolutely. Absolutely. That is correct." (Tr. 295).

Later, plaintiff makes a slightly different allegation with respect to the insurance policy. Plaintiff claims: "In this case, an entire written policy was never introduced before the trial court". (See Plaintiff's Brief, p. 21). Plaintiff also makes a related claim: "Both throughout the litigation and even now in its brief, American Family fails to identify which trial exhibit it believes is 'the policy'". (See Plaintiff's Brief, p. 5). In fact, plaintiff even goes an additional step and alleges: ". . . apparently no complete copy of the policy exists or ever existed". (See Plaintiff's Brief, p. 22).

These allegations all fly in the face of plaintiff's own evidence, as demonstrated by the following:

- American Family admitted the insurance policy into evidence as "Exhibit A" at the trial of this case, without objection from plaintiff. (Tr. 504). (Appendix A-001). Exhibit A was the only insurance policy that American Family offered into evidence at trial and was the only insurance policy that even appeared on American Family's Exhibit List. Plaintiff admits this. (See Plaintiff's Brief, p. 54).

- Plaintiff attached a copy of the insurance policy to its Response to American Family's Motion For Summary Judgment in this case. On page 2 of its Response plaintiff stated:

> "At the time construction began, Plaintiff had a Commercial General Liability Policy in place through Defendant AmFam, see Exhibit 1, attached." (A-128). (emphasis added).

Defendant's Exhibit A is the exact same, identical insurance policy that plaintiff attached to its response to American Family's summary judgment motion and which plaintiff acknowledged was the insurance policy that was "in place" at the time of construction of the house.

In other words, the insurance policy was before the trial court, contrary to plaintiff's allegation to the contrary. The policy that plaintiff attached to its summary judgment response was identical to the policy that American Family marked as an exhibit at the trial of this case. Not only was the insurance policy before the court, plaintiff presented it to the court. The parties to this lawsuit therefore agreed about which policy constituted "the policy". That fact is further demonstrated by plaintiff's Petition.

The insurance policy that plaintiff attached to its summary judgment response is the so-called "Number 17" policy. (See, Supplemental Appendix A-18). That Number 17 policy is the policy that was admitted into evidence as defendant's Exhibit A and is the same policy that plaintiff identified in paragraph 10 of its Petition as the contract that American Family

allegedly breached. (L.F. 2). In its Petition in this case, plaintiff alleged:

- DR Sherry Construction purchased a policy of insurance from American Family through its authorized agent Gary Weaver, policy number 24 X35041-17, having a policy period from December 5, 2002 through December 5, 2003. (See Petition, ¶ 10, L.F. 2).

As a result, plaintiff's allegations that the insurance policy was never presented to the trial court, or that American Family never identified the exhibit that it claimed was "the policy", are contradicted by plaintiff's own statements and evidence.

B.

Although plaintiff's present lawsuit asserts a cause of action for breach of contract (i.e. breach of the insurance policy), plaintiff, as noted above, alleges that there never was a single written insurance policy. Instead, plaintiff alleges that American Family provided plaintiff with several "supposed policies", which contained conflicting terms. (See Plaintiff's Brief, pp. 5 and 4). Plaintiff's Brief contains a chart which allegedly displays the "conflicting terms" of these various policy documents. (See Plaintiff's Brief, p. 4). The applicable page-limit restriction will not allow American Family to address each of plaintiff's exhibits; however, an examination of one such exhibit will help to set the record straight on this topic.

Plaintiff alleges that its Exhibit 37 ". . . is what American Family gave Mr. Sherry as his 'policy' while he was paying premiums . . . ". (See Plaintiff's Brief, p. 6). Plaintiff asserts that: "The threshold question of ambiguity must be resolved on the face of Exhibit

37". (See Plaintiff's Brief, p. 34).

The record in this case actually shows the following: Exhibit 37 contains 42 pages. (See Appendix to Plaintiff's Substitute Brief, A-16 through A-57 and Plaintiff's Brief, p. 9). The second page of Exhibit 37 indicates that American Family's insurance agent, Gary Weaver, faxed 22 of those pages to plaintiff on April 6, 2005. (See Appendix to Plaintiff's Substitute Brief, A-17 and Tr. 151-2). However, the first page of that exhibit is an Affidavit signed by Darrin Sherry which states that plaintiff received only 14 pages of documents from Gary Weaver. (See Appendix to Plaintiff's Substitute Brief, A-16 and Tr. 151). Plaintiff does not offer any explanation for the discrepancy in the number of pages. Plaintiff also does not offer any explanation for the discrepancy between Mr. Sherry's Affidavit, which indicates that he received 14 pages from agent Weaver, and the 42 pages that make up Exhibit 37. Even a cursory examination of the exhibit indicates that it contains numerous duplicate pages. (See, eg., Appendix to Plaintiff's Substitute Brief, A-32 and A-44). Plaintiff offers no explanation for the existence of these duplicate pages within its own exhibit.

In addition, the last page of Exhibit 37 is a real estate survey for a residential "Lot 73", which is not part of the property in question. (See Appendix to Plaintiff's Substitute Brief, A-57). Plaintiff does not explain where this page came from. Clearly the survey is not part of the insurance policy in question. Plaintiff simply does not explain why the survey is part of its Exhibit 37. Furthermore, and contrary to plaintiff's assertion (p. 6), American Family never represented that Exhibit 37 was a complete copy of the insurance policy, and plaintiff

knows this. In its July 29, 2005 settlement demand letter to American Family (Plaintiff's Exhibit 46), plaintiff's counsel stated that he had requested certain policy documents from agent Weaver, but "Mr. Weaver informed my office that he did not possess nor regularly keep these documents in his office . . ." (See Plaintiff's Exhibit 46, p. 2, Supplemental Appendix, A-0002). (As an aside, plaintiff also claims that in Exhibit 46 plaintiff "rejected" American Family's Reservation of Rights. (See Plaintiff's Brief, pp. 10 and 90). In reality, plaintiff never rejected the reservation; Exhibit 46 is silent on that topic and doesn't even mention the Reservation of Rights letter.)

In short, Exhibit 37 is not a complete copy of the insurance policy and does not purport to be one. Exhibit 37 is made up primarily of declaration pages, endorsements and audit information. The record is silent on the question of why Mr. Weaver faxed these particular pages to Mr. Sherry.

C.

Plaintiff alleges that American Family "admitted" at trial that it "failed to include parts of the insuring agreement" in certain documents that were provided to plaintiff. (See Plaintiff's Brief, p. 6). This alleged "admission" occurred during defense counsel's re-direct examination of American Family's representative, Dean Barnhart. Plaintiff had alleged during Mr. Barnhart's cross-examination that certain pages were missing from a copy of one of the expired insurance policies issued to plaintiff. On re-direct examination, American Family's undersigned counsel questioned Mr. Barnhart regarding these "allegedly missing pages":

Q. Did Mr. Davey, Mr. Sherry, or the lawyer or Mr. Costello ever write to you and say, "Hey, we think we're missing some pages from - - from one of these policies?

A. No.

Q. Do any of the allegedly missing pages have anything to do with the coverage that's applicable to the claim that's being made in this case?

[Plaintiff's objection overruled.]

A. To my knowledge, no."

(Tr. 575-576). There was no "admission" by American Family that any pages were missing from any insurance policy. There certainly were no pages missing from the CGL policy that was at issue in this case.

D.

Plaintiff asserts that at trial Darrin Sherry testified regarding the "hundreds" of conversations that he had with American Family's agent, Gary Weaver, about insurance coverage. (See Plaintiff's Brief, p. 7). According to plaintiff, Darrin Sherry received assurances from Mr. Weaver that "everything" was covered. (Id.). Plaintiff then complains that Mr. Weaver did not testify for American Family at the trial of this case despite defense counsel's promise to the jury that Mr. Weaver would testify. (Id.).

The answer to this allegation is simple: Mr. Weaver did not testify at trial because the trial court dismissed plaintiff's negligent misrepresentation claim against Mr. Weaver, with prejudice, at the close of plaintiff's evidence. (Tr. 445-6 and 454). Some additional

background information will put this ruling in context: In its Petition, plaintiff alleged that it had been assured by Gary Weaver that the policy would protect plaintiff "from liability for acts of god, casualty loss, and/or the negligent acts of third parties". (See Petition, ¶ 48, L.F. 6). In plaintiff's opening statement at trial plaintiff's counsel told the jury that Mr. Weaver "promised" Darrin Sherry "that these policies would cover him in the event that something went wrong". (Tr. 52). However, in dismissing plaintiff's negligent misrepresentation claim against Mr. Weaver, the trial court noted that the only evidence of any misrepresentation allegedly made by agent Weaver was Darrin Sherry's testimony that Weaver had assured him, "You're covered". (Tr. 445). The dismissal of plaintiff's negligent misrepresentation claim against defendant Weaver meant that Mr. Weaver's testimony was not necessary in this case.

E.

Plaintiff alleges that at trial American Family's representative, Dean Barnhart, "confessed" that he had "manipulated" the company's records by changing the "date of loss". (See Plaintiff's Brief, p. 12). Later plaintiff alleges that Mr. Barnhart "admitted that he committed a dishonest act so that the insurer could disclaim coverage". (See Plaintiff's Brief, p. 91). Elsewhere plaintiff accuses Barnhart of "forgery". (See Plaintiff's Brief, p. 66). To be clear, the words "manipulate" or "manipulation" do not appear in any testimony given by any representative of American Family. This is simply plaintiff's inflammatory interpretation of what was said. The trial testimony in this case tells a dramatically different story.

American Family first learned of plaintiff's claim when Darrin Sherry called American Family's 800 claim number. (Tr. 460-2). On the basis of that telephone call, American Family prepared a document known as the "First Notice of Loss". (Id.) The "date of loss" initially assigned to plaintiff's claim on that First Notice of Loss form was August 15, 2003 (Tr. 536), and was based on information provided by Mr. Sherry. (Tr. 572). (The date of loss that was assigned to plaintiff's claim -- August 15, 2003 -- happens to be the date that plaintiff sold the house in question to the initial homeowners. (Tr. 107).) Dean Barnhart testified that the date of loss was subsequently changed by American Family from August 15, 2003 to October 1, 2003 -- a difference of a month and a half. (Tr. 536-7). Contrary to plaintiff's allegation that the change in the date of loss was a "manipulation" made without any investigation, Mr. Barnhart testified that the change was made on the basis of phone calls and other information that he (Barnhart) had in his possession at the time the change was made. (Tr. 539). In addition, Barnhart testified that the date of loss that American Family assigns to a particular claim file does not determine whether there is or isn't coverage for the claim. (Tr. 572). The facts of the claim, combined with the language of the insurance policy, determine whether there is coverage or not.

ARGUMENT

Reply to Plaintiff's "Preface" (See Plaintiff's Brief, pp. 21-25)

It is worth noting that plaintiff does not argue anywhere in its Brief that the insuring agreement of American Family's insurance policy is ambiguous. Plaintiff admits: "This was not a case where the ambiguity was in a single word or phrase . . .". (See Plaintiff's Brief, p. 43). Instead, plaintiff makes the sweeping allegation that because no complete copy of the insurance policy was ever given to plaintiff or to the trial court the terms and intent of the parties' "insurance agreement" were therefore in dispute. (See Plaintiff's Brief, pp. 21-22). From this premise, plaintiff then offers the following conclusion:

> "Since both parties had their own understandings of what their agreement covered and what it did not, the contours of coverage could only be defined by resort to extrinsic evidence, which made coverage an issue of fact." (See Plaintiff's Brief, p. 23).

Plaintiff does not provide any citation to support its claim that the parties "had their own understandings of what their agreement covered and what it did not". Plaintiff does not explain what it means by the phrase "contours of coverage". Plaintiff does not explain why the parties' separate understandings of the agreement, or the resort to extrinsic evidence, make coverage "an issue of fact".

Plaintiff's Petition asserts a cause of action for breach of contract. In order to make a submissible case of breach of contract, the complaining party must establish every element of that cause of action, including the existence of a valid contract. Howe v. ALD Services,

Inc., 941 S.W.2d 645, 650 (Mo. App. 1997). An essential element of a valid contract is the parties' mutuality of assent or meeting of the minds on the essential terms of the contract. Building Erection Services Co. v. Plastic Sales & Mfg. Co., Inc., 163 S.W.3d 472, 477 (Mo. App. 2005). Here, plaintiff states that the terms of the insurance agreement, and even the intent of the parties, were in dispute. (See Plaintiff's Brief, pp. 22 and 33). As a result, according to plaintiff, there was no meeting of the minds. (See Plaintiff's Brief, p. 23). Consequently, plaintiff's allegation that there was no contract (no insurance policy) is fatal to plaintiff's cause of action for breach of contract.

Plaintiff's argument about the "contours of coverage" and "extrinsic evidence" is flawed for an even more fundamental reason. Throughout its Brief plaintiff alleges that the terms of the insurance agreement were in dispute because, according to plaintiff, no complete copy of the insurance policy ever existed or was provided to plaintiff. However, as demonstrated above, plaintiff acknowledged in its Petition, in its response to American Family's Motion For Summary Judgment, and in Darrin Sherry's trial testimony that plaintiff had been provided with "a complete copy of the policy". (See Petition, ¶ 13, L.F. 2), A-129, and Tr. 293-5). Therefore, plaintiff's most fundamental argument in this case is easily refuted by reference to the record, including plaintiff's own testimony and evidence.

Elsewhere, plaintiff complains that the insurance documents on which American Family relied in denying coverage "were created years after Sherry notified the insurer of its claim, making this contract one of adhesion". (See Plaintiff's Brief, p. 22). Later, plaintiff alleges that the creation of these documents after the loss "smack[s] of fraud". (See

Plaintiff's Brief, p. 36). This is utter nonsense.

Apparently plaintiff's allegation regarding post-occurrence creation of documents is a reference to defendant's Exhibit A - - the insurance policy that was in question in the present lawsuit. (See A-1). In conjunction with the present lawsuit, plaintiff served interrogatories and documents requests, including Document Request Number 5, which sought the production of "Any and all insurance policies ever issued or sold to Plaintiff by this Defendant". American Family produced copies of those policies to plaintiff in response to that document request. Plaintiff is correct in saying that by doing so American Family produced documents that were dated after the events in question. However, that production does not constitute fraud, as plaintiff suggests; rather, it demonstrates that American Family complied with plaintiff's discovery request during the litigation of this lawsuit.

To really understand the dispute in this lawsuit, the Court needs to look no further than plaintiff's Exhibit 37. In this lawsuit plaintiff accuses American Family of what might be described as gross incompetence - - for example, the failure to provide American Family's own insured with a complete copy of the insurance policy. Against this backdrop plaintiff repeatedly refers to its Exhibit 37 and says: "The threshold question of ambiguity must be resolved on the face of Exhibit 37". (See Plaintiff's Brief, p. 34).

However, as demonstrated above, plaintiff's Exhibit 37 is a nearly incomprehensible mess. The exhibit indicates that American Family's insurance agent, Gary Weaver, faxed 22 pages to plaintiff (See Appendix to Plaintiff's Substitute Brief, A-17); however, the first page of that exhibit is an Affidavit signed by Darrin Sherry which states that plaintiff

received only 14 pages from Mr. Weaver. (See Appendix to Plaintiff's Substitute Brief, A-16). Plaintiff does not explain the discrepancy between Mr. Sherry's Affidavit, which indicates that he received 14 pages from agent Gary Weaver, and the 42 pages that make up Exhibit 37. Furthermore, the exhibit contains a great many duplicate pages. Finally, the last page of Exhibit 37 is a real estate survey for a piece of property that has absolutely no relation to the present lawsuit. (See Appendix to Plaintiff's Substitute Brief, A-57).

Why, then, does plaintiff claim that "The threshold question of ambiguity must be resolved on the face of Exhibit 37"? (See Plaintiff's Brief, p. 34). Why doesn't plaintiff analyze the coverage question at issue in this case in terms of defendant's Exhibit A - - the only insurance policy that American Family admitted into evidence at the trial of this case and the document on which plaintiff based its breach of contract claim? Throughout its brief plaintiff refers to "missing endorsements" and "missing sections" of the insurance policy (see Plaintiff's Brief, pp. 6 and 21); however, it is worth noting that plaintiff never identifies any pages that it claims are missing from defendant's Exhibit A. When plaintiff complains of "missing sections" of the insurance policy, plaintiff refers only to its own exhibits. (See Plaintiff's Brief, p. 6).

POINT I

American Family argued in its first point that this case should have been decided by the trial court, not by a jury, because the lawsuit involved the resolution of an insurance coverage dispute -- a question of law -- and because the jury was not asked to resolve a single factual question. In its response to American Family's first point, plaintiff argues that the trial court's rulings in this case were not in error because, according to plaintiff's now discredited arguments, American Family never provided plaintiff with a complete copy of the insurance policy and because the documents that American Family did provide "varied so substantially as to coverage that they were incapable of constituting a complete and unambiguous written account of the parties' intent". (See Plaintiff's Brief, p. 26).

Part of the problem with this portion of plaintiff's brief is that plaintiff cannot make up its own mind about what it claims is ambiguous in this case. In some places plaintiff argues that the insurance policy is ambiguous. (See Plaintiff's Brief, pp. 31and 43). In other places plaintiff argues that it was the intent of the parties that was ambiguous. (See Plaintiff's Brief, pp. 33 and 43). Sometimes plaintiff argues that the trial court submitted the case to the jury because the insurance policy was ambiguous. (See Plaintiff's Brief, p. 32). Other times plaintiff argues that the case was submitted to the jury because of ambiguities in the parties' intent. (See Plaintiff's Brief, pp. 33, 44 and 48). Plaintiff can't seem to make up its own mind.

In addition, plaintiff's argument ignores the fact, demonstrated above, that plaintiff's cause of action for breach of contract was premised on the existence of a single insurance

policy - - defendant's Exhibit A - - the single policy that was identified by plaintiff in paragraph 10 of its Petition, the same policy that was marked as defendant's Exhibit A, and the same policy that plaintiff attached to its summary judgment response in this case.

American Family has demonstrated that the resolution of the present lawsuit should be dictated by the Western District's holding in Opies Milk Haulers, Inc. v. Twin City Fire Ins. Co., 755 S.W.2d 300 (Mo. App. 1988). (See Defendant's Brief, p. 22, *et. seq.*). Opies held that it was error for the trial court in that case to submit the issue of insurance coverage to the jury. Id. at 302. According to the present plaintiff, Opies Milk Haulers does not apply to this suit because the trial court in Opies did not find any ambiguities in the insurance policy, whereas the trial court in the present lawsuit did find that the insurance policy was ambiguous. (See Plaintiff's Brief, pp. 41-2).

Plaintiff acknowledges that the trial court in this case did not make any "express finding of ambiguity" with respect to American Family's policy. (See Plaintiff's Brief, p. 32). However, plaintiff argues that the trial court, by submitting the present case to the jury, "implicitly" found that the "coverage terms of the insurance agreement" were ambiguous. (Id.). Plaintiff does not identify the "coverage terms" that the court allegedly found ambiguous. The jury instructions didn't refer to any alleged ambiguities (L.F. 30-46) and the jury was not asked to resolve any such ambiguities. In addition, plaintiff offers no case law citation to support its claim that a finding of ambiguity legally and logically follows from the trial court's submission of the case to the jury. Plaintiff's problem in this case is that the jury was not asked to resolve a single factual dispute.

The only question that the verdict directing instruction asked the jury to resolve was whether the cause of the damage to the house is specifically covered in plaintiff's insurance contract with defendant and, therefore, whether defendant breached the insurance policy by failing to pay plaintiff's claim. (L.F. 39). That question is an insurance coverage question that should have been determined by the Court, not the jury, as a matter of law.

In arguing that American Family's policy was ambiguous, and therefore not binding on plaintiff, plaintiff claims that the burden was on American Family to prove "by substantial evidence" "the existence of contract terms it seeks to make binding on Sherry". (See Plaintiff's Brief, p. 36). Plaintiff cites Drury v. Missouri Youth Soccer Ass'n., Inc., 259 S.W.3d 558, 575 (Mo. App. 2008) in support of this proposition. Drury (which plaintiff identifies by the name "Entwistle") is a sexual harassment lawsuit which has nothing to do with an insurance policy or an insurance dispute and has no relevance whatsoever to the present lawsuit. More importantly, the burden was not on American Family to prove (by substantial evidence or otherwise) the existence of the contract terms, as plaintiff alleges (p. 36). Instead, in order to support its breach of contract claim in this lawsuit, plaintiff bore the burden of proving the elements of the contract it claims were breached. Teets v. American Family Mut. Ins. Co., 272 S.W. 3d 455, 461 (Mo. App. 2008).

Regarding plaintiff's claim of ambiguity, plaintiff correctly cites the controlling rule: "Where there is no ambiguity in the contract, the intention of the parties is to be gathered from it and it alone, and it becomes the duty of the court and not the jury to state its clear meaning". Peterson v. Continental Boiler Works, Inc., 783 S.W.2d 896, 901 (Mo. banc

1990). (See Plaintiff's Brief, p. 29). In other words, for the present plaintiff to even get to a discussion of the parties' intent in this matter, plaintiff must first show that there was ambiguity in the insurance contract. Plaintiff attempts to make such a showing in two different ways, neither of which is successful.

Initially, as noted above, plaintiff argues that the trial court "implicitly" found that the coverage terms of the insurance policy were ambiguous. Here plaintiff engages in an extended argument in which it claims that the "various insurance agreement documents" are "latently ambiguous as to coverage intent". (See Plaintiff's Brief, pp. 36-41). However, all of this argument is a post-trial, after-the-fact creation by plaintiff's counsel; it is not the result of any argument that was presented at trial.

Plaintiff alleges that the trial court found that the lack of a single insurance policy made the entire contract ambiguous and required extrinsic evidence to resolve the ambiguity. (See Plaintiff's Brief, p. 42). Plaintiff offers no citation in support of that allegation. Plaintiff argues that the terms of coverage were ambiguous and that the trial court "could not determine the parties' intent as a question of law". (See Plaintiff's Brief, p. 43). Plaintiff claims that what the trial court submitted to the jury was "the question of the parties' intent as to coverage". (See Plaintiff's Brief, p. 33). (emphasis added). However, the verdict directing instruction does not contain the word "intent" and does not otherwise ask the jury to make a determination about the parties' intentions. (L.F. 39). The intent of the parties was irrelevant to the coverage issue that the jury was asked to resolve.

Plaintiff alleges that the trial court ruled, "as a matter of law", that the language of the

contract between plaintiff and defendant "was ambiguous as to its terms of coverage". (See Plaintiff's Brief, p. 43). Plaintiff does not say where the trial court recorded this alleged conclusion. There simply is no support for plaintiff's unfounded proposition.

POINT II AND V

In Point II of its brief, American Family argued that plaintiff presented no evidence at trial to support three of the critical elements of plaintiff's case. In its response to that Point, plaintiff initially argues that the terms "legally obligated" and "occurrence" were not part of "the parties' insurance agreement". (See Plaintiff's Brief, p. 52). On the basis of that contention, plaintiff argues that the terms "legally obligated" and "occurrence" "were not elements of Plaintiff's burden of proof". (See Plaintiff's Brief, p. 53). Plaintiff provides no case law citation in support of this proposition. Moreover, the terms "legally obligated" and "occurrence" appear in the "Insuring Agreement" of American Family's policy (quoted in defendant's Brief, pp. 11-12, and see A-0014). The terms, and the Insuring Agreement, are contained in the policy on which plaintiff based its breach of contract claim. Accordingly, plaintiff bore the burden of proving that its claim was within the language of American Family's "Insuring Agreement". Plaintiff's argument that this was not part of plaintiff's burden of proof is simply contrary to the controlling case law.

In the next section of its brief, plaintiff argues that the damage to the house was an "occurrence" (an unforeseen accident) within the meaning of American Family's insurance policy. (See, Plaintiff's Brief, pp. 54, *et seq*.). American States Ins. Co. v. Mathis, 974 S.W.2d 647, 650 (Mo. App. 1998) establishes the legal standard for analysis on this issue. (An "occurrence" must be an "accident" -- "An event that takes place without one's foresight or expectation . . .") (See American Family's Brief, p. 35).

The house in question was built on fill dirt that was 15 to 20 feet deep. (Tr. 407).

Darrin Sherry knew that the house was built on fill dirt because his company put it there. (Tr. 411). Darrin Sherry knew that the foundation of the house was supported by concrete piers (Tr. 76). Mr. Sherry testified that such piers are used under a foundation of a house to keep it from sinking into soft soil. (Tr. 258-9). He testified that if he used concrete piers under a house, it was because the house was built on fill dirt. (Tr. 257).

Plaintiff now claims that there is no evidence that the piering of this house was insufficient or that the damage to the house was caused by improper piering. (See Plaintiff's Brief, pp. 55-6). Plaintiff concludes that the damage to the house was not foreseeable. (Id.). But if concrete piers are used under a house to keep it from sinking into soft soil, as Mr. Sherry testified (Tr. 258-9), and if it is undisputed that this house has settled at least eight inches, how can it be said that there is no evidence of insufficient or inadequate piering, as plaintiff alleges? Of course the piers were insufficient - - they failed to perform their only function; that's why the house sank into the ground. If the piers are designed to prevent settlement and if the house settled despite the presence of those piers, then the piers were insufficient.

As plaintiff notes, the real question is whether the settling of the house, and the subsequent damage, was foreseeable by plaintiff. Plaintiff argues about Mr. Sherry's testimony on this topic (p. 55); however, Sherry's testimony clearly demonstrates his understanding of the foreseeability in question:

> Q. Mr. Sherry, I didn't ask you if the piers were inspected. I asked you if the house was built on fill and if the piers that are installed underneath the

house are insufficient to support the weight of that house because the house is built on fill, then it is foreseeable that the house could sink.

A. I can't disagree with that. No, sir." (Tr. 292-3).

Because settlement of the house was foreseeable under these circumstances, that settlement was not an accident and therefore was not an occurrence. Plaintiff presented no evidence at trial that the property damages was the result of an occurrence.

Plaintiff says that American Family improperly assumes that "fill dirt" is the same as "bad soil", even though nothing in the record establishes such a correlation. (See Plaintiff's Brief, p. 56). Plaintiff's argument doesn't make sense. Plaintiff has admitted that the house in question was built on fill dirt. (Tr. 629). Mr. Sherry didn't dispute that the house was built atop fill dirt that was 15 to 20 feet deep. (Tr. 257). Plaintiff has admitted that the house settled into the dirt that it was built on. (See Plaintiff's Brief, p. 8). Plaintiff has alleged that the house settled because of "bad soil". (Id.). If the bad soil that the house sank into wasn't the fill dirt that Darrin Sherry's company trucked onto the property, what soil was it?

In its brief American Family argued that plaintiff presented no evidence at trial to establish, under the Insuring Agreement of the insurance policy, that plaintiff was ever "legally obligated" to anyone for damages pertaining to the house in question. (See American Family's Brief, pp. 42-4). It is undisputed that plaintiff voluntarily repurchased the house from the original homeowners. (Tr. 270). No suit was ever filed by the homeowners against plaintiff. (Tr. 269-70).

Plaintiff argues that its voluntary decision to repurchase the house created a legal

obligation for plaintiff to pay the homeowners. (See Plaintiff's Brief, p. 62). While it is true that a contract creates a legal obligation, plaintiff's argument misses the point. If Mr. Sherry voluntarily purchased a new car he would, under almost any imaginable circumstances, be "legally obligated" to pay for that car, pursuant to the purchase agreement. However, the obligation to pay for the car does not mean that Mr. Sherry was "legally obligated" to buy the car in the first place. The purchase was voluntary. The same is true of plaintiff's repurchase of the house in question in the present lawsuit.

American Family argued in its brief that plaintiff presented no evidence at trial to establish, under the Insuring Agreement of the policy, that the loss occurred during the policy period. (See American Family's Brief, pp.40-41). Plaintiff argues that it presented evidence at trial that the loss in question occurred during the "applicable coverage period", although curiously, plaintiff also argues that there was ambiguity regarding that coverage period. (See Plaintiff's Brief, p. 64). American Family has previously demonstrated that the insurance policy in question ended, due to cancellation by plaintiff's President, Darrin Sherry, effective September 18, 2003. (See American Family's Brief, p. 27, F.N.6). Plaintiff says that the policy didn't end until December 5, 2003. (See Plaintiff's Brief, p. 64). Although plaintiff never rebutted American Family's evidence establishing that the policy was cancelled effective September 18, 2003, it doesn't matter - - plaintiff presented no evidence to establish that the loss occurred prior to either date. Keep in mind that Darrin Sherry testified that there was no evidence of any problems with the house, other than cosmetic concerns, during his August 8, 2003 "walk-through" of the house. (Tr. 103-4). He also testified that he didn't

have any contact with the homeowners from August, 2003 to April, 2004 (Tr. 121).

Plaintiff points to Exhibit 1 - - the report of plaintiff's expert, Ken Sidorowicz - - who stated: "The subject new home was constructed during 2003, and shortly after closing, settlement issues with the foundation began to appear". (A-19). Regarding this hearsay statement, which was written three years after the completion of the house, Mr. Sidorowicz never clarified what is meant by the phrase "shortly after closing". The parties agree that the closing occurred on August 15, 2003; however, Exhibit 1 is silent on the question of whether the "settlement issues" began before the insurance policy ended. As a result, Mr. Sidorowicz' report is of no assistance to plaintiff.

Next, plaintiff seeks support from the testimony of engineer John Evans. (See Plaintiff's brief, p. 69). However, Mr. Evans testified at trial:

> "QUESTION: Is there any way to determine when the house first started settling or moving?
>
> ANSWER: Not from my observations. No. You would - - no. Not from my observations." (Tr. 387).

Finally, plaintiff argues that the "date of loss" that American Family assigned to the claim file when the claim was first reported - - August 15, 2003 - - demonstrates that the loss occurred during the policy period. (See Plaintiff's Brief, p. 65). American Family's witness, Dean Barnhart, testified that American Family first learned of plaintiff's claim when Darrin Sherry called American Family's 800 claim number. (Tr. 460-2). On the basis of that telephone call, American Family prepared a "First Notice of Loss", which contains a date of

loss. (Id.). Mr. Barnhart testified that a date of loss has to be assigned to a file before the claim can be entered into American Family's system. (Tr. 470). The date of loss initially assigned to plaintiff's claim was based solely on information provided by Darrin Sherry. (Tr. 536 and 572). The date of loss that was assigned to plaintiff's claim happens to be the date that plaintiff sold the house in question to the initial homeowners. (Tr. 170).

The Date of Loss that was initially assigned to this claim file does not demonstrate in any way that the loss occurred during the policy period. Instead, that assigned date was based solely on information provided to American Family by Darrin Sherry, before American Family had had any opportunity to investigate the facts of this claim.

Plaintiff argues that the "injury-in-fact" doctrine of Shaver v. Insurance Co. of North America, 817 S.W.2d 654 (Mo. App. 1991) does not apply to cases involving progressive injury to property, such as the present case. (See Plaintiff's Brief, p. 66). Plaintiff asserts that this Court should instead adopt the reasoning of Scottsdale Ins. Co. v. Ratliff, 927 S.W.2d 531 (Mo. App. 1996) and Stark Liquidation Co. v. Florists' Mut. Ins. Co., 243 S.W.3d 385 (Mo. App. 2007). (See Plaintiff's Brief, p. 67). However, the Court does not need to reach this issue. The record in this case is absolutely devoid of any evidence that the house started to move or sustained any property damage prior to the expiration of the insurance policy, whether that date was September 18, 2003, or December 5, 2003.

POINT IV

In its fourth point American Family argued that Exhibit No. 1 (the report authored by the plaintiff's expert witness, Ken Sidorowicz) should have been stricken because there was a complete absence of foundation for the expert opinions expressed in that report. Plaintiff argues that American Family conceded that Mr. Sidorowicz was an expert. (See Plaintiff's Brief, p. 85). Plaintiff's argument is incorrect and misinterprets defendant's objection at trial. In the portion of the bench trial that appears on page 85 of Plaintiff's Brief, plaintiff quotes from its counsel's lengthy statements to the court regarding plaintiff's witness, Mr. Sidorowicz. At the conclusion of those statements, defendant's undersigned counsel said: "And I don't have any quarrel with that". (See Plaintiff's Brief, p. 85 and Tr. 435). However, defense counsel's remark was directed toward the last sentence of plaintiff's statement ("That's his job is to make opinions regarding foundations and the performance of those foundations".). (Tr. 435). American Family did not concede that Mr. Sidorowicz was an expert witness of any kind. Plaintiff's Exhibit No. 1 should be stricken.[1]

[1]The page-limit restriction in Supreme Court Rule 84.06(e)(8) prevents American Family from replying to plaintiff's arguments regarding Points III and VI; however, American Family does not waive those point.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION

Undersigned counsel for Appellant hereby certifies that this Brief contains the information required by Rule 55.03. Additionally, this Brief complies with the limitations contained in Rule 84.06(b), in that it contains 6,554 words counted using Corel WordPerfect 10. Furthermore, this Brief complies with Rule 84.06(g) in that the computer disk provided to the Court containing this Brief has been scanned for viruses and that it is virus-free and has been formatted in Coral WordPerfect 10.

Respectfully submitted,

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