

**Summary of SC90442, D. R. Sherry Construction, Ltd. V. American Family Mutual Insurance Company**

Appeal from the Platte County circuit court, Judge Owens Lee Hull Jr.

Argued and submitted Feb. 24, 2010; opinion issued June 15, 2010

**Attorneys:** American Family was represented by Keigh A. Cary and John E. Franke of Franke, Schultz & Mullen P.C. in Kansas City, (816) 421-7100; and Sherry was represented by Jonathan Sternberg of Jonathan Sternberg, Attorney, P.C. in Kansas City, (816) 474-3000, and Jason Davey of Costello Davey & Fera LLC in Kansas City, (816) 298-8395.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** An insurance company appeals a jury verdict in favor of a construction company for coverage of structural damage to a house the construction company built. In a 7-0 decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri affirms the trial court's judgment entered in accord with the jury's verdict. The insurance policy covers the construction company's claim for progressive damage as a matter of law, there was substantial evidence to support this claim, the construction company made a submissible case for breach of contract, and the evidence supports the construction company's claims for breach of contract and vexatious refusal to pay.

Presiding Judge William L. Syler of the 32nd Judicial Circuit (Bollinger, Cape Girardeau and Perry counties) sat with the Court by special designation in place of Judge Zel M. Fischer.

**Facts:** D.R. Sherry Construction finished building a particular Platte County home in July 2003. The next month, its president completed a walk-through of the home with the future homeowners and found no evidence of any structural damage. The homeowners expressed satisfaction with the home and closed on its purchase August 15, 2003. During this time, Sherry was insured under a commercial general liability policy issued by American Family Mutual Insurance Company. In April 2004, the homeowners notified Sherry's president that the foundation and drywall were cracking. Three months later, they sent a letter notifying Sherry that there were numerous reappearing and new cracks in the home's foundation, that they had hired a professional engineer to inspect the house, and that the engineer had determined that the structural problems with the house were happening because the house was out of level by as much as 8 inches. Sherry's president investigated further and determined that repeated exposure of the foundation to poor soil conditions caused structural damage to the home and resulted in the leveling problem. The homeowners threatened to file suit and demanded that Sherry repurchase the house. In March 2005, Sherry entered into an agreement with the homeowners to repurchase the house. Sherry then made a claim on its insurance policy. American Family declined coverage. In November 2005, Sherry sued American Family, asserting claims of breach of contract and vexatious refusal to pay and arguing that, although the full extent of damage was not apparent until after the policy expired, there was an insurable "occurrence" during the policy period because the foundation problems began during the policy period and caused progressive damage that was not apparent until after the coverage period expired. The trial court did not determine, as a matter of law, the scope of coverage provided by the American Family policy. Instead, it submitted the case to the jury to determine whether the policy covered the damages

Sherry claimed and, if so, whether Sherry proved those damages. The trial court entered judgment on the jury's verdict in favor of Sherry. American Family appeals.

**AFFIRMED.**

**Court en banc holds:** (1) Although the trial court erred in submitting the question of coverage to the jury, such error does not require reversal. Interpretation of an insurance contract generally is a question of law, particularly in reference to the question of coverage. The issue of coverage becomes a jury question only when the trial court determines that the contract is ambiguous and that there is a genuine factual dispute regarding the parties' intent. The record does not show the contract here is ambiguous. Reversal is not required because no prejudice resulted.

(2) American Family was not prejudiced because the policy covers Sherry's claim for progressive damage as a matter of law and there was substantial evidence to support Sherry's claim. The central issue is whether Sherry's damages arose during the policy period, which turns on whether the "occurrence" triggering coverage under the American Family policy was the poor soil condition and ensuing progressive damage or the eventual detection and confirmation of the property damage caused by the poor soil conditions. *Scottsdale Insurance Co. v. Ratliff*, 27 S.W.2d 531, 534 (Mo. App. 1996), and *Stark Liquidation v. Florists Mutual Insurance Co.*, 243 S.W.3d 385, 394 (Mo. App. 2007), establish that an occurrence-type policy such as the American Family policy at issue here covers cases of progressive injury where the cause of the damage is present during the policy period but the damage is not apparent until after the policy period. As a matter of law, the policy covers the type of claim Sherry made in this case. Sherry introduced evidence showing that the house inadvertently was constructed on soil that was incapable of providing adequate support and that, as a result of this unforeseeable circumstance, the house was damaged progressively to the point of being uninhabitable. Sherry admitted the home was built on fill dirt but presented testimony that the home was equipped with foundation piers designed to provide further stabilization and that the house passed all county inspections. Viewed in the light most favorable to the verdict, there is evidence to support Sherry's claim that the cause of the damage commenced during the policy period and, therefore, constituted an insurable "occurrence." Because of the settlement agreement with the homeowners, Sherry legally was obligated to pay damages to them. As such, Sherry made a submissible case for breach of contract, and the trial court did not err in overruling American Family's motions for directed verdict and judgment notwithstanding the verdict on this claim.

(3) Because its counsel announced it had no objection to the admission into evidence of an engineer's report, American Family failed to preserve any argument for appeal regarding the exhibit's admission.

(4) The trial court did not err in overruling American Family's motion for judgment notwithstanding the verdict on Sherry's claim for vexatious refusal to pay. There is no dispute as to the first two elements of this claim: that Sherry was insured by American Family and that American Family did not pay Sherry's claim. Viewed in the light most favorable to the jury's verdict, the evidence supports the third element of the claim: that American Family's refusal to pay was without reasonable cause or excuse. Sherry notified American Family of the property damage as early as July 2004, but American Family took no steps to investigate Sherry's claim until it assigned an adjuster to the claim in July 2005. There also was evidence that American Family told Sherry it would not investigate further until the homeowners filed a lawsuit.