FILED
United States Court of Appeals
Tenth Circuit

June 2, 2010

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GREYSTONE CONSTRUCTION, INC., PETER J. HAMILTON, THE BRANAN COMPANY, CARL K. BRANAN, MICHAEL C. BRANAN, and AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Plaintiffs-Appellants,

v.

NATIONAL FIRE & MARINE INSURANCE COMPANY,

Defendant-Appellee.

No. 09-1412

(D. of Colo.)
(D.C. No. 07-CV-66-MSK-CBS)

CERTIFICATION OF QUESTION OF STATE LAW

Greystone Construction, Inc., The Branan Company, and American Family Mutual Insurance Company (American) appeal the federal district court's grant of summary judgment in favor of National Fire and Marine Insurance Company (National). At issue is whether National owed Greystone and Branan defenses under their commercial general liability insurance policies.

The district court ruled National was not obligated to defend Greystone and Branan, finding the complaints brought against them did not allege covered "occurrences" under the policies' standard terms. The district court, applying a recent case by the Colorado Court of Appeals, *General Security Indemnity*

Company of Arizona v. Mountain States Mutual Casualty Company, 205 P.3d 529 (2009), held that claims for damages arising solely from faulty workmanship do not allege accidents that constitute covered "occurrences."

Because the disposition of this appeal turns on an important and unsettled question of Colorado law, we respectfully request the Colorado Supreme Court exercise its discretion to accept the following certified question in accordance with Tenth Circuit Rule 27.1 and Colorado Appellate Rule 21.1:

Question Presented

> Is damage to non-defective portions of a structure caused by conditions resulting from a subcontractor's defective work product a covered "occurrence" under Colorado law?

I. Background

The relevant material facts are undisputed. Richard and Lisa Hull purchased a house built by Greystone in June 2001. Greystone employed subcontractors to perform all the work on the house. In November 2005, the Hulls sued Greystone, asserting defective construction by the subcontractors. The Hulls claimed several elements of the house were damaged, including the upper-level living areas, porch, patio, garage, and driveway, as a result of a subcontractor's negligent design of the house's soil-drainage and structural elements. Greystone tendered the suit to American; Greystone is insured under commercial general liability (CGL) policies with American for the period April 18, 2001 to April 18, 2003. American hired defense counsel for Greystone and

defended the builder subject to a reservation of rights. Greystone tendered the suit to National in February 2006; Greystone is insured under CGL policies with National for the period April 18, 2003 to April 23, 2006. National denied it owed Greystone a defense.

Douglas and Sandra Giorgetta bought a house built by Branan in August 1999. Branan hired subcontractors to perform all of the work on the house. In January 2006, the Giorgettas sued Branan, asserting claims mirroring those the Hulls brought against Greystone. Branan is insured under CGL policies with American for the period August 12, 1998 to June 20, 2003, and under CGL policies with National for the period June 20, 2003 to June 20, 2005. American provided Branan defense counsel and defended the construction contractor subject to a reservation of rights. National denied it was obligated to defend Branan.

The terms of Greystone's and Branan's CGL policies with National are the same in all material respects. The coverage grant contained in the policies states:

> 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 damages for "bodily injury" or "property damage" to which this insurance does not apply . . . .
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" . . . .

R. at 146.

An "occurrence" is defined in the policies as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." R. at 147. The policies do not define the term "accident."

The policies do not provide coverage for damage to work performed by the insured. The policies exclude from coverage:

> j. "Property damage" to:
>
> * * * *
>
> 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; or
>
> 6. That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.
>
> Paragraph 6 of this exclusion does not apply to "property damage" included in the "products-completed operations hazard."
>
> l. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> *This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.*

Id. (emphasis added).

In the district court, Greystone, Branan, and American sought to recover a portion of their defense costs from National. The parties moved for summary

judgment on the duty to defend and coverage issues. Relying on *General Security*, the district court awarded National summary judgment, holding the Hull and Giorgetta complaints did not allege "occurrences" under National's policies.

II. Analysis

On appeal, Greystone, Branan, and American challenge the district court's summary judgment ruling. They contend the underlying complaints alleged "occurrences" under National's policies. National defends the district court's decision, arguing the district court's "occurrences" rationale was correct. This appeal implicates an important question of Colorado insurance law.

In *General Security*, the Colorado Court of Appeals held a subcontractor's insurer could not recover costs associated with defending the subcontractor against a third-party indemnification suit brought by the general contractor from sub-subcontractors' insurance companies. *See* 205 P.3d at 531–32. The sub-subcontractors held post-1986 CGL policies containing terms essentially identical to those present in the policies at issue in this case. *See id.* at 533. The Court of Appeals found the duty to defend contained in the sub-subcontractors' policies was not triggered because the underlying complaints did not allege a covered "occurrence." *See id.*

The Court of Appeals noted the term "accident," as used in CGL policies, had been defined in Colorado as "an unanticipated or unusual result flowing from

a commonplace cause," *id.* at 534 (citing *Hoang v. Monterra Homes LLC*, 129 P.3d 1028, 1034 (Colo. Ct. App. 2005); *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1201 (Colo. Ct. App. 2003)), and as a "fortuitous event," *id.* (citing *McGowan v. State Farm Fire & Cas. Co.*, 100 P.3d 521, 525 (Colo. Ct. App. 2004)). The Court of Appeals acknowledged the Supreme Court of Colorado, in *Hecla Mining Company v. New Hampshire Insurance Company*, 811 P.2d 1083 (1991), interpreted the terms "accident" and "occurrence" to exclude from coverage only "those damages that the insured knew would flow directly and immediately from its intentional act," *id.* at 1088, but discounted the applicability of that understanding because it was based on a reading of a pre-1986 CGL policy, *see General Security*, 205 P.3d at 537.

Based on its conclusion that an "accident" necessarily includes an element of fortuity, the Court of Appeals stated, "a claim for damages arising from poor workmanship, standing alone, does not allege an accident that constitutes a covered occurrence . . . ." *Id.* at 534. In making that statement, the Court of Appeals explained it was joining a majority of jurisdictions that has held damage caused by poor workmanship—even if unintended—is not an accident,[1] rather

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[1] In identifying the majority position, the Court of Appeals cited the following circuit and state supreme court decisions: *J.Z.G. Res., Inc. v. King*, 987 F.2d 98 (2d Cir. 1993); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006); *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 621 S.E.2d 33 (S.C. 2005); *Auto-Owners Ins. Co. v.*

(continued...)

than a minority of jurisdictions that has held "damage resulting from faulty workmanship is an accident, and thus, a covered occurrence, so long as the insured did not intend the resulting damage."[2] *Id.* at 535. The Court of Appeals also identified a corollary to the majority rule: "an accident and occurrence are present when consequential property damage has been inflicted upon a third party as a result of the insured's activity." *Id.*

Because the claims against the subcontractor and the sub-subcontractors in *General Security* were limited to allegations that their poor workmanship caused damage to their own work product, the Court of Appeals ruled no "accident" or "occurrence" took place and therefore the insurer had no duty to defend. *See id.* at 537–38. In the course of discussing the rationale for its ruling, the Court of Appeals suggested a general contractor's CGL policy would not provide coverage for a subcontractor's faulty work product by stating: "the minority rule has been criticized as improperly shifting the burdens of a subcontractor's poor

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[1](...continued)
Home Pride Cos., Inc., 684 N.W.2d 571 (Neb. 2004); *Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67 (Iowa 1999).

[2] The following cases are representative of what the Court of Appeals identified as the minority position: *Architex Assoc., Inc. v. Scottsdale Ins. Co.*, --- So.3d ---, 2010 WL 457236 (Miss. Feb. 11, 2010); *Revelation Indus. v. St. Paul Fire*, 206 P.3d 919 (Mont. 2009); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007); *Travelers Indem. Co. v. Moore & Assocs., Inc.*, 216 S.W.3d 302 (Tenn. 2007); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486 (Kan. 2006); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004).

workmanship from the contractor to the [insurer] . . . . [T]he minority rule would dissuade contractors from avoiding unqualified subcontractors because the [insurers], not the contractors, would pay for the consequences of a subcontractor's defective workmanship." *Id.* at 536.

Applying *General Security*, the district court held the Hull and Giorgetta complaints did not allege "occurrences" under National's policies, because they did not allege damages to anything beyond Greystone's and Branan's work product. The district court ruled consequential damages were not adequately alleged because the complaints only identified damages to elements of the houses, and not other forms of property. On that basis, the district court concluded National did not owe Greystone and Branan defenses under the standard terms of the CGL policies, and the district court awarded National summary judgment.

Despite the Colorado Court of Appeals' recent holding in *General Security*, we are uncertain of the status of Colorado caselaw on the coverage issue before us. As *General Security* indicates, the Colorado Supreme Court has not defined the terms "accident" and "occurrence," as those terms are used in post-1986 CGL policies, and other state supreme courts are split on the meaning and effect of those terms.[3]

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[3] *See supra* at n. 1–2; *see also Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541 (S.C. 2009); *French v. Assurance Co. of Am.*, 448 F.3d 693 (4th Cir. 2006).

Also, the basis for the Colorado Court of Appeals' understanding of the terms "accident" and "occurrence" is an important matter of Colorado law. The cases to which the Court of Appeals cited in *General Security* regarding the majority position provide two rationales for denying coverage for poor workmanship alone: (1) "the rule has been justified on public policy grounds"—i.e., "the cost to repair and replace damages caused by faulty workmanship is a business risk"; and (2) the rule has been justified as a matter of contract interpretation—i.e., "the fortuity implied by reference to accident or exposure is not what is commonly meant by a failure of workmanship." *Auto-Owners Ins. Co. v. Home Pride Cos., Inc.*, 684 N.W.2d at 577 (cited by *General Security*, 205 P.3d at 534).

Moreover, neither the Colorado Supreme Court nor the Colorado Court of Appeals has considered how the coverage grant and subcontractor exception to the "your work" exclusion found in post-1986 CGL policies operate in conjunction with one another.[4] We are mindful that a contract should be interpreted in its entirety with the aim of harmonizing and giving effect to all its provisions so that none will be rendered meaningless. *See Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009). We also note the Supreme Court of South Carolina and the Fourth Circuit have addressed the coverage

[4] *See* the coverage grant and exclusion l, quoted above at pages 3–4.

grant, the subcontractor exception to the "your work" exclusion, and the corollary identified in *General Security* in concluding post-1986 CGL policies provided coverage for general contractors where their subcontractors' poor workmanship caused conditions that resulted in damage to otherwise non-defective work product. *See Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541, 543–46 (S.C. 2009); *French*, 448 F.3d at 698, 700–06.

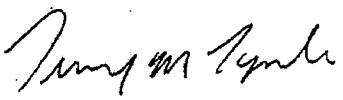
III. Certification of the Question to the Colorado Supreme Court

In light of the lack of precedential decisions on point and the split of authority, and in furtherance of comity and federalism, we conclude the Colorado Supreme Court should have the opportunity to answer this important question in the first instance. We recognize the discretion of the Colorado Supreme Court to reformulate the question posed herein.

The Clerk of this court shall transmit a copy of this certification order to counsel for all parties. The Clerk shall also forward, under the Tenth Circuit's official seal, a copy of this certification order and the briefs filed in this court to the Colorado Supreme Court.

This appeal is ordered ABATED pending resolution of the certified question.

Dated this 2nd day of June, 2010



Timothy M. Tymkovich, Circuit Judge
United States Court of Appeals
for the Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
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Denver, Colorado 80257
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Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

June 2, 2010

Ms. Susan Festag, Clerk
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Certified Question of State Law
Greystone Construction, Inc., et al. v. National Fire & Marine Insurance Company, No. 09-1412

Dear Ms. Festag:

At the direction of the United States Court of Appeals for the Tenth Circuit, I am forwarding to you eight copies of this court's Certification Order. This order was filed in the captioned appeals on June 2, 2010, and it explains the need for a ruling by the Colorado Supreme Court. Additionally, we have enclosed eight copies of the parties briefs filed in this court and this court's docket sheet pertaining to these cases.

Service of the June 2, 2010 certification order has been made on the parties by service upon their attorneys-of-record by email.

If you need anything further in connection with this matter, please let us know.

Very truly yours,
Elisabeth A. Shumaker, Clerk of Court

Deputy Clerk

/as

Enclosures

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Byron White United States Courthouse
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

June 2, 2010

Honorable Wiley Y. Daniel, Chief Judge
Honorable Richard P. Matsch, Senior Judge
Honorable John L. Kane, Senior Judge
Honorable Zita L. Weinshienk, Senior Judge
Honorable Lewis T. Babcock, Senior Judge
Honorable Walker D. Miller, Senior Judge
Honorable Marcia S. Krieger, District Judge
Honorable Robert E. Blackburn, District Judge
Honorable Philip A. Brimmer, District Judge
Honorable Christine M. Arguello, District Judge

Re: Certification of Question of State Law
Greystone Construction, Inc., et al. v. National Fire & Marine Insurance Company, No. 09-1412 (07-CV-66-MSK-CBS)

Dear Judges:

The court has certified a question of state law to the Colorado Supreme Court in *Greystone Construction, Inc., et al. v. National Fire & Marine Insurance Company*, No. 09-1412 (07-CV-66-MSK-CBS).

Attached for your information is a copy of the court's certification order.

Very truly yours,
Elisabeth A. Shumaker, Clerk of Court

Deputy Clerk

/as
Enclosures

cc: All Judges of the Tenth Circuit

UNITED STATES COURT OF APPEALS
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June 02, 2010

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RE: 09-1412, Greystone Construction, et al v. National Fire & Marine
Dist/Ag docket: 1:07-CV-00066-MSK-CBS

Dear Counsel:

Enclosed please find an order issued today by the court.

Please contact this office if you have questions.

Sincerely,

Elisabeth A. Shumaker

Elisabeth A. Shumaker
Clerk of the Court

cc: Robert M. Baldwin

George Berg Jr.
Peter J. Morgan
Heidi C. Potter
Kathryn Rackleff
Tory D. Riter

EAS/as