COURT OF APPEALS OF THE EIGHTH DISTRICT OF TEXAS AT EL PASO

Great American Insurance Company d/b/a Great American Insurance Companies v. Glen Hamel and Marsha Hamel

444 S.W.3d 780 (Tex. App.—El Paso 2014) · No. 08-11-00302-CV · Decided September 19, 2014

SUMMARY

The Texas Eighth Court of Appeals considered an insurance coverage and indemnity dispute arising from construction defects and water damage to the Hamels' home. Great American challenged a trial court judgment in favor of the Hamels, including coverage-related claims based on policies issued to the contractor and an EIFS exclusion. The court sustained one appellate issue, modified the judgment, and affirmed it as modified.

CASE DETAILS

COURT	Court of Appeals of the Eighth District of Texas at El Paso
WRITING FOR THE COURT	Yvonne T. Rodriguez; McClure, C.J.; Rivera, J.; Rodriguez, J.
JURISDICTION	Texas
DECIDED	September 19, 2014
DOCKET	08-11-00302-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Great American appealed from a bench-trial judgment in favor of Glen and Marsha Hamel in an insurance coverage and indemnity action arising from an underlying residential construction judgment. The court of appeals sustained Great American's fifth issue, modified the judgment by deleting $50,000 in mental-anguish damages, and affirmed the judgment as modified.
STANDARD OF REVIEW	In a bench trial, findings of fact are reviewed for legal and factual sufficiency under the standards applicable to jury findings, while conclusions of law are reviewed for correctness. The admissibility and qualification of expert testimony are reviewed for abuse of discretion. Unchallenged findings are binding unless contrary findings are established as a matter of law or no evidence supports them.
PRECEDENTIAL VALUE	Published precedential opinion of the Court of Appeals of the Eighth District of Texas.

PARTIES	Great American Insurance Company d/b/a Great American Insurance Companies v. Glen Hamel, Marsha Hamel

TOPICS

insurance coverage · duty to defend · indemnity · construction defects · appellate procedure

PRACTICE AREAS

insurance coverage · insurance litigation · construction law · appellate procedure

QUESTIONS PRESENTED

1. Whether the underlying construction judgment resulted from an actual and fully adversarial trial such that Great American could not invoke the policy's actual-trial condition.
2. Whether TMB's post-judgment assignment of its claims against Great American was invalid under State Farm Fire & Casualty Co. v. Gandy.
3. Whether the trial court abused its discretion by admitting expert testimony concerning the timing and progression of wood rot.
4. Whether the Hamels proved covered damage during a Great American policy period and whether the damage had to be allocated among policy periods or segregated from excluded damage.
5. Whether the EIFS exclusion applied to the damages awarded.
6. Whether the policies covered the $50,000 mental-anguish award arising from negligently caused property damage.

HOLDINGS

1. An insurer that wrongfully refuses to defend its insured cannot insist on compliance with an insurance policy's actual-trial requirement. The underlying bench trial was an actual and fully adversarial trial, and Great American was bound by the resulting judgment and relevant findings.
2. TMB's post-judgment assignment of its claims against Great American was not invalid under State Farm Fire & Casualty Co. v. Gandy.
3. The trial court did not abuse its discretion by admitting the testimony of Donald Yeandle and Robert Nicholas concerning the timing and progression of wood rot.
4. The Hamels established that covered injury-in-fact occurred during the first Great American policy period, and the EIFS exclusion in the later policies did not apply. The damages did not have to be allocated among the policies under the circumstances presented.
5. The policies did not cover the Hamels' $50,000 mental-anguish award because the underlying property damage was caused by negligence, not intentional, malicious, or grossly negligent conduct, and mental anguish based solely on negligently caused property damage is not compensable as a matter of law.

KEY QUOTATIONS

> *“Texas courts and federal courts applying Texas statutory and case law long and consistently have held that an insurance company cannot insist on compliance with an “actual trial” requirement within its insurance contract where the insurer has breached its duty to defend.”* (28)

> *“Gandy requires “a fully adversarial trial” when considering the validity of an assignment of claims against an insurer, but fails to define that term.”* (36)

> *“The trial court’s ultimate task is to determine whether the analysis the expert used to reach his or her conclusions is reliable, and therefore admissible, but it is not the court’s task to determine whether the expert’s conclusions are correct.”* (42)

> *“mental anguish based solely on negligent property damage is not compensable as a matter of law.”* (50)

FACTUAL BACKGROUND

Great American issued five commercial general-liability policies to Terry Mitchell Builder, Inc. covering successive periods from May 3, 1996, through May 3, 2001; the EIFS exclusion appeared only in the fourth and fifth policies. TMB completed a Flower Mound home after taking over from an original contractor, but construction defects permitted water intrusion and later caused wood rot and structural damage. The Hamels obtained an underlying judgment against TMB, including mental-anguish damages, and TMB assigned its claims against Great American after Great American refused to defend. Expert testimony supported the trial court's finding that covered wood-rot damage requiring repair occurred during the first policy period, before the EIFS exclusion applied.

PROCEDURAL HISTORY

The Hamels sued Terry Mitchell Builder, Inc. in an underlying construction case and obtained a bench-trial judgment that included $50,000 in mental-anguish damages. TMB assigned its claims against Great American to the Hamels after Great American refused to defend TMB. The Hamels then sued Great American for breach of contract, declaratory relief, and Insurance Code violations. Following a bench trial, the coverage-case court ruled for the Hamels and awarded covered damages, and Great American appealed.

DISPOSITION

affirmed

CASES CITED

- Southwestern Bell Media, Inc. v. Lyles, 825 S.W.2d 488, 493 (Tex. App.—Houston [1st Dist.] 1992, writ denied)
- Anderson v. City of Seven Points, 806 S.W.2d 791, 794 (Tex. 1991)
- Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994)
- Ramsey v. Davis, 261 S.W.3d 811, 815 (Tex. App.—Dallas 2008, pet. denied)
- Milton M. Cooke Co. v. First Bank & Trust, 290 S.W.3d 297, 303 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

- McGalliard v. Kuhlmann, 722 S.W.2d 694, 696 (Tex. 1986)
- Rogers v. City of Fort Worth, 89 S.W.3d 265, 277 (Tex. App.—Fort Worth 2002, no pet.)
- Raman Chandler Props., L.C. v. Caldwell's Creek Homeowners Ass'n, Inc., 178 S.W.3d 384, 397 (Tex. App.—Fort Worth 2005, pet. denied)
- Oliphant Fin. L.L.C. v. Hill, 310 S.W.3d 76, 77 (Tex. App.—El Paso 2010, pet. denied)
- State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714-15 (Tex. 1996)
- Scottsdale Ins. Co. v. Sessions, 331 F. Supp. 2d 479, 488 (N.D. Tex. 2003)
- Gulf Ins. Co. v. Parker Prods., Inc., 498 S.W.2d 676, 679 (Tex. 1973)
- Pioneer Cas. Co. v. Jefferson, 456 S.W.2d 410, 413 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.)
- King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002)
- Vines-Herrin Custom Homes, LLC v. Great American Lloyds Ins. Co., 357 S.W.3d 166, 172 (Tex. App.—Dallas 2011, pet. denied)
- Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 13 (Tex. 2007)
- Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997)
- Heyden Newport Chem. Corp. v. So. Gen. Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965)
- Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co., 279 S.W.3d 650, 655 (Tex. 2009)
- Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 28-29 (Tex. 2008)
- Insurance Network of Texas v. Kloesel, 266 S.W.3d 456, 466 (Tex. App.—Corpus Christi 2008, pet. denied)
- Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc., 256 S.W.3d 660, 673 (Tex. 2008)
- State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 40-41 (Tex. 1998)
- Yorkshire Ins. Co. v. Seger, 279 S.W.3d 755, 768-73 (Tex. App.—Amarillo 2007, pet. denied)
- American Eagle Ins. Co. v. Nettleton, 932 S.W.2d 169, 171-72 (Tex. App.—El Paso 1996, writ denied)
- State v. Petropoulos, 346 S.W.3d 525, 529 (Tex. 2011)
- Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 628-29 (Tex. 2002)
- Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 499 (Tex. 2001)
- State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 870 (Tex. 2009)
- Broders v. Heise, 924 S.W.2d 148, 151-53 (Tex. 1996)
- Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 579 (Tex. 2006)
- Schneider v. Lynaugh, 835 F.2d 570, 576 (5th Cir. 1988)
- In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 440 (Tex. 2007)
- Control Solutions, Inc. v. Gharda USA, Inc., 394 S.W.3d 127, 160 (Tex. App.—Houston [1st Dist.] 2012, pet. filed)
- United Blood Svcs. v. Longoria, 938 S.W.2d 29, 30-31 (Tex. 1997)
- In re Commitment of Bohannan, 388 S.W.3d 296, 304-05 (Tex. 2012), cert. denied, 133 S. Ct. 2746 (2013)
- TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 235, 239 (Tex. 2010)
- Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 904-05 (Tex. 2004)

- American Physicians Insurance Exchange v. Garcia, 876 S.W.2d 842, 855 (Tex. 1994)
- Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 820, 822-23 (Tex. 1997)
- Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 812-15 (Tex. 2006)
- National Union Fire Ins. Co. v. Puget Plastics Corp., 532 F.3d 398, 403 (5th Cir. 2008)
- Hartford Cas. Co. v. Cruse, 938 F.2d 601, 605 (5th Cir. 1991)
- City of Tyler v. Likes, 962 S.W.2d 489, 492, 497 (Tex. 1997)
