SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Swenson v. Auto-Owners Insurance Co.

2013 S.D. 38 (2013) · No. #26424 · Decided May 15, 2013

SUMMARY

The South Dakota Supreme Court reviewed summary judgment in favor of Auto-Owners Insurance Company in a dispute concerning its duty to defend and indemnify a contractor under a commercial general liability policy. The court held that several policy exclusions applied to the claimed construction-related property damage, eliminating coverage and the insurer's duty to defend or indemnify. Because the insurer had a reasonable basis for denying coverage, the court also rejected the insureds' bad-faith claim and affirmed.

CASE DETAILS

COURT	Supreme Court of the State of South Dakota
WRITING FOR THE COURT	Gilbertson, Chief Justice; Konenkamp, Justice; Zinter, Justice; Severson, Justice; Wilbur, Justice
JURISDICTION	South Dakota
DECIDED	May 15, 2013
DOCKET	#26424
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from summary judgment for Auto-Owners Insurance Company in an action asserting breach of insurance contract, bad faith, and declaratory claims concerning duties to defend and indemnify.
STANDARD OF REVIEW	Summary judgment is reviewed to determine whether genuine issues of material fact exist and whether the law was correctly applied. When material facts are undisputed, review is limited to whether the trial court correctly applied the law. Insurance-policy interpretation is reviewed de novo.
PRECEDENTIAL VALUE	published
PARTIES	Jamie Swenson, Randy Stewart, individually and as assignees of Dale Jelen and DJ Construction, LLC v. Auto-Owners Insurance Company

TOPICS

insurance coverage | duty to defend | duty to indemnify | insurance bad faith | construction defects

PRACTICE AREAS

insurance law | construction law | contract law | appellate procedure

QUESTIONS PRESENTED

1. Whether policy exclusion j(5) excluded coverage for damage to building materials that were in DJ Construction's care, custody, or control.
2. Whether policy exclusion j(6) excluded coverage for damage to the home arising out of construction operations.
3. Whether policy exclusion j(7) excluded coverage for property damage resulting from incorrectly performed work when the work was not completed and therefore was not within the products-completed operations hazard.
4. Whether Auto-Owners had a duty to defend or indemnify DJ Construction under the policy.
5. Whether Auto-Owners acted in bad faith by denying defense and indemnity.
6. Whether the circuit court properly granted summary judgment to Auto-Owners.

HOLDINGS

1. Exclusion j(5) applied because the framing lumber and other building materials were personal property in DJ Construction's care, custody, and control when they were damaged. South Dakota law does not require exclusive care, custody, or control for the exclusion to apply.
2. Exclusion j(6) applied to claims concerning damage to the home that arose from DJ Construction's and its subcontractors' construction operations.
3. Exclusion j(7) was unambiguous and excluded coverage for property damage to property that had to be restored, repaired, or replaced because DJ Construction's work was incorrectly performed on it.
4. Auto-Owners had no duty to defend or indemnify DJ Construction because exclusions j(5), j(6), and j(7) excluded coverage for the claims.
5. Auto-Owners did not act in bad faith because it had a reasonable basis for denying coverage: multiple policy exclusions applied.

KEY QUOTATIONS

> *"If, after considering the complaint, and when appropriate, other record evidence, doubt exists whether the claim against the insured arguably falls within the policy coverage, such doubts must be resolved in favor of the insured."* (¶ 13)

> *"In this case, Owners had a reasonable basis for denying coverage because multiple Policy exclusions applied."* (¶ 31)

FACTUAL BACKGROUND

Swenson and Stewart hired DJ Construction in 2007 to build a home. During construction, building materials were left exposed to rain and snow, the basement was not adequately protected, and damaged materials were used in the home. The home sustained mold, water damage, and other construction defects and remained incomplete. DJ Construction's commercial general liability insurer, Auto-Owners, denied defense and indemnity, after which DJ Construction confessed judgment and assigned its claims against Auto-Owners to Swenson and Stewart.

PROCEDURAL HISTORY

Swenson and Stewart sued DJ Construction for water damage, construction defects, and failure to complete a home. After Auto-Owners denied DJ Construction's requests for defense and indemnity, DJ Construction confessed judgment, assigned its claims against Auto-Owners to Swenson and Stewart, and agreed that the judgment would be satisfied solely from Auto-Owners. Swenson and Stewart then sued Auto-Owners. The circuit court granted Auto-Owners summary judgment, concluding that policy exclusions applied and that Auto-Owners had no duty to defend or indemnify. The South Dakota Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Wheeler v. Farmers Mut. Ins. Co. of Neb., 2012 S.D. 83, ¶ 8, 824 N.W.2d 102, 105
- Zephier v. Catholic Diocese of Sioux Falls, 2008 S.D. 56, ¶ 6, 752 N.W.2d 658, 662
- De Smet Ins. Co. of S.D. v. Pourier, 2011 S.D. 47, ¶ 4 n.1, 802 N.W.2d 447, 448 n.1
- Dakota, Minn. & E. R.R. Corp. v. Acuity, 2009 S.D. 69, ¶¶ 14, 17, 771 N.W.2d 623, 628-29
- Schwaiger v. Avera Queen of Peace Health Servs., 2006 S.D. 44, ¶ 7, 714 N.W.2d 874, 877
- Demaray v. De Smet Farm Mut. Ins. Co., 2011 S.D. 39, ¶ 8, 801 N.W.2d 284, 287
- Auto-Owners Ins. Co. v. Hansen Hous., Inc., 2000 S.D. 13, ¶ 10, 604 N.W.2d 504, 509
- Biegler v. Am. Family Mut. Ins. Co., 2001 S.D. 13, ¶ 20, 621 N.W.2d 592, 598-99
- W. Cas. & Sur. Co. v. Waisanen, 653 F. Supp. 825, 827 (D.S.D. 1987)
- State Farm Fire & Cas. Co. v. Harbert, 2007 S.D. 107, ¶ 18, 741 N.W.2d 228, 234
- State Farm Mut. Auto. Ins. Co. v. Wertz, 540 N.W.2d 636, 638 (S.D. 1995)
- N. Star Mut. Ins. Co. v. Kneen, 484 N.W.2d 908, 912 (S.D. 1992)
- City of Fort Pierre v. United Fire & Cas. Co., 463 N.W.2d 845, 847 (S.D. 1990)
- Nat'l Sun Indus., Inc. v. S.D. Farm Bureau Ins. Co., 1999 S.D. 63, ¶¶ 12-13, 596 N.W.2d 45, 47-48
- Culhane v. W. Nat'l Mut. Ins. Co., 2005 S.D. 97, ¶ 27, 704 N.W.2d 287, 297
- Am. Family Mut. Ins. Co. v. Elliot, 523 N.W.2d 100, 102 (S.D. 1994)
- Allstate Ins. Co. v. Smith, 929 F.2d 447 (9th Cir. 1991)
- Alverson v. Nw. Nat'l Cas. Co., 1997 S.D. 9, 559 N.W.2d 234
- Haugan v. Home Indem. Co., 86 S.D. 406, 197 N.W.2d 18 (1972)

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