Decision file

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Subrogee of Boone Enterprises, t/a Boone's Long Lake Inn,

Plaintiff,

vs

File No. 90-8468-NZ
Consolidated Cases
HON. PHILIP E. RODGERS, JR.

NORTHERN FIRE & SAFETY, INC., a Michigan corporation,

Defendant,

and

NORTHERN FIRE AND SAFETY, INC., a Michigan Corporation,

Plaintiff

vs

ANSUL FIRE PROTECTION, a division of GRINNELL CORPORATION, a foreign corporation,

Defendant.
/

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DECISION AND ORDER

This case arises out of a fire which severely damaged Boone's Long Lake Inn, a popular Grand Traverse County restaurant, on April 17, 1989. Plaintiff paid insured claims for damages to the real and personal property and for lost profits. Defendant sold, installed and, subsequently, modified the Ansul fire suppression system which failed to extinguish the fire as warranted.

The liability portion of the trial took place before the Court and a jury on November 10, 11, and 12, 1992. At the close of all proofs, the Court directed a verdict in favor of the Plaintiff on its complaint for breach of express warranty. Damages were subsequently tried to the Court alone pursuant to the parties' agreement and this Court's order of March 13, 1992. The damage trial occurred on February 25, 1993 and the parties requested an additional twenty-one days in which to file supplemental briefs. The Court has reviewed the testimony, the briefs submitted by the parties and entertained the oral arguments of counsel. It will now provide its findings of fact and conclusions of law. MCR 2.517.

The parties did offer several stipulations which have been helpful to the resolution of the damage issues. They included agreements as to the claimed damages to property and for lost profits. Entitlement to these damages is challenged on several legal grounds which will be discussed ahead. First, the parties stipulated that the actual property damage loss was $645,218.68, of which the insurance carrier paid $635,622.66. The difference represents the insured's personal loss.

Similarly, the parties entered into stipulations regarding the amount of business interruption damages. It was agreed that the total claimed business interruption loss was $109,951.00, of which the insurance carrier had paid $101,786.00. Again, the difference is the insured's personal loss.

The Plaintiff supported its damage claims with the stipulations previously discussed and the testimony of Barry Boone and Richard Guider. Mr. Boone is a principal in the partnership which owns the Boone's Long Lake Inn real property and a major

shareholder in the corporation which operates the restaurant business. Mr. Guider is an executive general adjuster for Adjusting Services Unlimited and specializes in the analysis of business interruption losses.

Before the Court can make a determination regarding allowable damages, several questions must be resolved. First, may Plaintiff assert the personal losses of its subrogees in a case where the insureds are not parties. Second, may Richard Guider offer testimony as an expert witness in a case when he was not disclosed as an expert and where answers to interrogatories directed at Plaintiff's proposed expert opinion testimony did not identify him or disclose his opinions. Third, although Plaintiff and Defendant have agreed as to the losses paid by the insurance carrier, the amount of the total property loss and the total amount claimed for business interruption losses, may all the claimed damages be awarded for the breach of an express warranty on the evidentiary record before the Court. The Court will first address the insureds' unreimbursed losses.

There is no dispute that Plaintiff has paid substantial losses on behalf of its insureds. There is also no dispute that Plaintiff has sought a full recovery for all losses occasioned by it and its insureds since the inception of this litigation. No objection was raised to the failure to name the insureds as parties until a liability finding was entered by the Court.

Unquestionably, the customary procedure within Michigan is to name an insured as a party together with the insurance carrier. It is equally customary for the insurance carrier's counsel to represent both the carrier and the insureds where, as here, the uninsured portion of the loss is de minimis.

The insureds' unreimbursed damages total $17,756.02. This amount represents the difference between the losses claimed by Plaintiff's insureds, Boone Enterprises and Boone's Long Lake Inn, Inc. and the amounts paid by Plaintiff. St. Paul asserts its contractual right of subrogation to seek reimbursement for losses it has paid out on behalf of its insureds. This is not questioned.

Plaintiff also asserts an equitable subrogation right to recover the insureds uncompensated losses, hold them in trust for the benefit of the insureds and disperse the proceeds to them following the resolution of all appeals.

Both parties recognize that there is no Michigan case which has precisely addressed this point. There is certainly no credible claim of surprise or prejudice. The claims were mediated twice and the liability and damage proofs at trial were identical, i.e., in the process of proving what it paid and how those figures were agreed upon, St. Paul was necessarily required to show its investigation of the total loss, the relationship of that loss and its constituent elements to the policy limits and then place those amounts in evidence. While a different procedure might have been followed if the Defendant had stipulated to the amounts paid by Plaintiff as the damages in this case, Defendant chose to challenge those damages. Accordingly, Plaintiff was required to prove what the total losses were, how they were occasioned, what aspect of the losses were reimbursed by the policy and why. These proofs were presented at various points in the liability and damage trials.

The legal relationship of the insurer to its insured upon satisfaction of an insurance loss has long been recognized at Michigan law as one which encompasses all of the insureds rights, as well as the impediments to enforce those rights. Indemnity Insurance Co of North America v Otis Elevator Co, 315 Mich 393; 24 NW2d 104 (1946); Union Insurance Society of Canton v Consolidated Ice Co, 261 Mich 35; 245 NW 563 (1932). Plaintiff is correct in stating the insurer becomes the insureds' assignee and subrogee.

Here, Barry Boone is a principal of both the realty partnership which owns the fire-damaged real estate and the corporation which operates a restaurant on the property. A review of the court file, as well as a review of the evidence introduced in the trials which took place before this Court, unquestionably demonstrates that the insureds were represented by the insurance carrier's counsel for purposes of recovering their uninsured losses.

This procedure is consistent with Michigan's statutory fire insurance law which provides an insurer with subrogation rights against a third party, including contractual and tort causes of action. This statute recognizes that the action may be maintained by either the insured, or the insurer, or by both of them jointly, to recover their respective portions of the loss, "but only to the extent of the loss." MCLA 500.2836(4); MSA 24.12836(4).

This Court remains convinced that the better practice is to simply name the insured as an additional party in the fashion contemplated by the aforementioned statute. However, the fact remains that the concepts of subrogation argued here are equitable and the history of the case indicates neither surprise nor prejudice associated with the defense of the insured's uncompensated losses. The Court, then, finds the analysis in Farmers Insurance Exchange v Arlt, 61 NW2d 429 (ND, 1953) to be persuasive. There, the North Dakota Supreme Court reasoned that a subrogation receipt authorized by the insured provided the insurer with the right to sue either in its own name or in the insureds name. The Court noted that neither the insured nor the insurer have the right to split the cause of action and preclude the other from recovery for their portion of the claim. The Arlt Court, then, held that the party which brought the action was equitably required to bring the whole claim and, upon recovery, to hold the other share in trust. See, also, Flor v Buck, 189 Minn 131; 248 NW 743 (1933) and Hermes v Markham, 78 ND 268; 49 NW2d 238 (1951).

On the facts before this Court, Plaintiff seeks indemnification on its own behalf and on behalf of its insured for those losses occasioned by the fire. Plaintiff does not seek to be personally indemnified for any more than it paid nor do the insureds seek indemnification for any amount greater than the residual between what they have received and what they claim to be the total loss.

This Court finds Plaintiff has pursued a recovery for the total losses occasioned by the fire in accordance with its legal and equitable subrogation rights, that it lacks the authority to

split the cause of action and preclude its insured from recovery and, for those reasons, has worked carefully with its insureds to seek a recovery for all unreimbursed losses. Any recovery made by Plaintiff on behalf of its insureds must be held in trust and disbursed upon a final resolution of all issues in this case. The Court will, then, allow Plaintiff to amend the caption of the complaint to conform to the proofs and list its insureds as parties. MCR 2.118(C).

Defendant Northern next challenges Plaintiff's offer of expert testimony from Richard Guider. As noted above, Mr. Guider is an adjuster who specializes in the analysis of business interruption losses. Defendant objected to Mr. Guider's testimony for the reason that he was not disclosed as an expert witness and his opinions were not described in answers to written interrogatories. Defendant also argued that, in the liability portion of the trial, certain defense witnesses who proposed to offer expert testimony were not allowed to offer such opinions because they were not noticed to the other side as experts and were not deposed regarding proposed opinion testimony.

The Court has carefully reviewed its trial notes with regard to the request for consistency in the application of the Court's procedural rulings. Accordingly, the Court's memory has been refreshed on the motions heard on the opening day of trial, the first of which was the Defendant's motion to strike the testimony of Plaintiff's expert. The Court denied this motion because it found that the interrogatories had been answered and that there was no challenge to the answers as insufficient or non-responsive. The curriculum veta of Plaintiff's expert was provided to the Defendant along with supplemental opinions in the form of answers to interrogatories proffered by Ansul Fire Protection.

In view of the volume of the discovery materials which had been exchanged between the parties, the answers to the interrogatories and the lack of effort to pursue further discovery, the Court was not persuaded that any prejudice was shown and allowed Plaintiff's liability expert to testify.

The issue next arose during the Defendant's presentation of proofs. While the Defendant recites a number of witnesses who he believes were not allowed to offer expert testimony because they were not disclosed as experts, the Court's notes are inconsistent with the Defendant's list. For example, the Court's notes indicate that Mr. Harmer was involved with the installation and design of the 1981 Ansul system. He did not have any involvement with the 1983 modifications and did not review the plan designed for those modifications by Mr. Alt and was in no position to offer any testimony as to whether or not the 1983 modifications complied with Ansul design requirements. Mr. Harmer was not proposed as an expert in cause and origin investigation but did testify at length regarding his negotiations with Mr. Boone, the 1981 installation and the 1981 "bag test" which was performed to satisfy then-required state and local inspections.

The next defense witness was John Whiters, an individual who went to work for the Defendant in 1976. Mr. Whiters testified with regard to the 1981 installation but had no recollection of the equipment in the kitchen in 1981. He also described the "bag test" which was performed in 1981. Mr. Whiters additionally testified that he had no specific recollection of the modifications made to the piping system in 1983 and was unable to have his memory refreshed. Mr. Whiters was not allowed to offer expert opinion testimony. He was not disclosed as an expert witness, had no knowledge of the 1983 modifications and could not have his memory refreshed. Mr. Whiters did not appear to the Court to have knowledge or information useful or helpful to the fact finder.

The defense then called Peter Alt. Mr. Alt began employment with the Defendant in 1978 and was the author of the 1983 modifications to the Ansul fire suppression system at Boone's Long Lake Inn. Mr. Alt testified regarding that installation and a 1989 inspection which was memorialized in a report dated February 21, 1989. The report was received into evidence as Defendant's exhibit A over the objections of Plaintiff. Unfortunately, Mr. Alt could not remember how he had modified the Ansul system in 1983.

Although an effort was made to refresh his memory with a review of post-fire photographs, he could not have his memory refreshed regarding the complete system. Mr. Alt acknowledged that the "plan" of the modifications had no dimensions, was not drawn to scale and evidenced fittings but did not describe their size, except on the supply line. Mr. Alt acknowledged he had no independent recollection of the 1983 configuration at the Long Lake Inn. There was no foundation laid which suggested that Mr. Alt was a cause or origin expert and no offer of proof as to his proposed expert testimony was provided to the Court. While the Court's notes do not indicate that it sustained an objection to Mr. Alt offering expert testimony, there is no doubt that the Court would have sustained any objection to the witness offering opinions regarding the cause or origin of the fire or the configuration of the equipment following the 1983 modifications when no evidence was before the Court indicating expertise or knowledge with respect to those issues.

The defense then offered the testimony of Mike Scanlon, a line cook, who testified regarding his personal observations during the time period in question, including a discussion of the amount of grease present and the cleaning protocol. Again, the Court's notes do not indicate that Mr. Scanlon was offered as an expert and it does not appear that he had any expertise other than in the field of cooking. The proofs closed following Mr. Scanlon's testimony.

The suggestion that other witnesses were not called based upon the Court's rulings during the course of trial is not reflected in the Court's notes. Certainly, no offer of proof was provided and no record made regarding the substance of such testimony.

In contrast to this evidentiary record, the Court must review the procedural history of the file as it relates to the disclosure of Plaintiff's damage expert, Richard Guider. The Defendant does not dispute the fact that Mr. Guider's name was disclosed, but argues prejudice based upon the fact that Mr. Guider was not disclosed as an expert witness. The disclosure occurred on May 21, 1991 in Plaintiff's answers to Defendant's interrogatories where

Mr. Guider was identified as a damage witness. Defendant Northern does not deny that Plaintiff forwarded Mr. Guider's entire damage evaluation to counsel for the Defendant at that time. Mr. Guider was subsequently disclosed on a witness and exhibit list which was exchanged on March 18, 1992. The damage exhibits exchanged on May 21, 1991 formed the basis for the Plaintiff's presentation at two separate mediation hearings and were the factual predicate upon which the Defendant Northern agreed to the amounts of property damage and claimed business interruption losses.

In fact, after reviewing the Court's notes, it is evident that Mr. Guider's testimony was exclusively limited to a discussion of the documents which had been exchanged months earlier. The suggestions of surprise or prejudice ring hollow. Defendant seeks procedural fairness with respect to the Court's trial rulings, but would liken the receipt of Mr. Guider's testimony to the Court's failure to accept opinion testimony from individuals neither schooled in the cause or origin of fires nor with knowledge regarding the 1983 modifications to the Ansul system.

A trial court's decision whether to permit expert testimony is within the sound discretion of the trial judge. Butt v Giammariner, 173 Mich App 319, 321; 433 NW2d 360 (1988); Levinson v Sklar, 181 Mich App 693; 449 NW2d 682 (1989). Refusal to permit an expert to testify is a discovery sanction which is within the discretion of the Court. Where the sanction is the barring of an expert witness resulting in denial of proofs on a portion of a plaintiff's case, the sanction should be exercised cautiously. Middleton v Marqulis, 162 Mich App 218, 223; 412 NW2d 268 (1987); Dean v Tucker, 182 Mich App 27; 451 NW2d 571 (1990). In Dean, supra, a p 32, the Court of Appeals wrote as follows:

> While it is within the trial court's authority to bar an expert witness or dismiss an action as a sanction for the failure to timely file a witness list, the fact that such action is discretionary rather than mandatory necessitates a consideration of the circumstances of each case to determine if such a drastic sanction is appropriate. The corollary to this is that the mere fact that a witness list was not timely filed does not, in and

> of itself, justify the imposition of such a sanction. Rather, the record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it. [citation omitted] That is, while the rules of practice give discretion to the process of administering justice and must be followed, their application should not be a fetish to the extent that justice in a particular case is not done.

In Dean, supra, at pp 32-33, the court also noted a number of factors to be considered by the Court. They were listed as follows:

> (1) whether the violation was willful or accidental, (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses), (3) the prejudice to the defendant, (4) actual notice to the defendant of the witness and the length of time prior to trial that defendant received such actual notice, (5) whether there exists a history of plaintiff's engaging in deliberate delay, (6) the degree of compliance by the plaintiff with other provisions of the court's order, (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive.

Based upon this Court's review of the procedural history of the case, its rulings during the course of the liability trial and the above-mentioned authority, it is this Court's determination that Richard Guider may testify as a damage witness for Plaintiff. Given the parties' stipulations, Mr. Guider's testimony is probative with respect to business interruption losses and their relationship to the net profits recoverable in this case.[1]

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[1]The Court's notes regarding the parties' stipulation regarding damages indicated that there were only two issues: (1) were the losses, in the amounts agreed upon, within the parties' contemplation at the time of the contract; and (2) are the business interruption damages described on Plaintiff's exhibits those net profits recoverable in a contract case. Defendant's counsel stipulated as to the actual loss figure and the amount paid by the Plaintiff pursuant to its policy of insurance and counsel also expressed agreement to the methodology of the business interruption analysis but disputed the legal identity of those figures as the net profits recoverable in a contract case.

As previously noted, this Court entered a liability finding on a breach of express warranty theory. Defendant offers two damage arguments, i.e., the property damages were not within the contemplation of the parties at the time the contract was entered into and Plaintiff's business interruption damages are not net profits recoverable in a contract action. Plaintiff has the burden of proof on its damage claims.

The damages recoverable in this action are those described by the Uniform Commercial Code for breach of warranty. Such damages include property damage and loss of profits. MCLA 440.2714; MSA 19.2714; MCLA 440.2715; MSA 19.2715. The Supreme Court clearly enunciated this rule in Neibarger v Universal Cooperatives Inc, 439 Mich 512; 475 NW2d 294 (1992), a holding which was applied by the trial court to this case in its written decision and order dated October 30, 1992.

In fact, the Court's attention was drawn to the Neibarger precedent by Northern and then Defendant Ansul Fire Protection Company in their respective motions for summary disposition. Both Northern and Ansul argued that Plaintiff's damages were not beyond the contemplation of the parties and were damages which necessarily resulted from defects in the operation of the fire suppression system. Ansul briefed this issue first and Northern adopted Ansul's arguments. These arguments were highly persuasive and ultimately caused the Court to enter its written decision and order striking Plaintiff's tort claims and applying the Neibarger analysis to this commercial litigation.

This Court's opinion has not changed since it issued its prior written decision and order. There remains no reasonable dispute that Barry Boone purchased a fire suppression system to avoid the very property damage and business interruption losses which underlie this litigation.

Plaintiff is correct when it argues that Defendant confuses contemplation of the extent or volume of damage with the nature of the damages themselves. Reasonable business owners know that some businesses grow and others fail. Defendant could have mitigated

its exposure with a limited warranty or insurance.

The parties contemplated that if the fire suppression system did not operate as warranted, the real property would be extensively damaged, the business would be interrupted and profits lost. No other conclusion may reasonably be drawn from the circumstances surrounding the purchase and installation of the system. These circumstances were described by Mr. Boone and Northern's president, Mr. Harmer, and are the subject of the written warranty materials accepted into evidence at the liability trial.

It is this Court's finding that the Defendant is liable to Plaintiff for property damages in the total amount of $645,218.68. Of this amount, Plaintiff is entitled to recover $635,622.66, with the balance being held in trust as the recovery of uninsured losses for the benefit of its insured.

With respect to Plaintiff's claim for business interruption losses, the parties agree that the Uniform Commercial Code does provide remedies for direct, incidental and consequential damages, including property damage and loss of profits which arise from the breach of an express warranty. It is also agreed that an injured party has an obligation to mitigate its loss. Here, the insured repaired the property damage and reopened its business in an impressively short time. No one disputes this fact. Defendant, however, argues that certain expenditures made by the insured do not constitute an element expense in the net profit analysis recognized at law. Uganski v Little Giant Inc, 35 Mich App 88; 192 NW2d 580 (1971). Specifically, Defendant challenges the claim for the wages of key employees whose pay was continued during the period the restaurant was not operating. Defendant also challenges amounts claimed by the insureds as uninsured losses.[2]

While the parties have discussed the business interruption

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[2]The Court has previously discussed this issue in its consideration of equitable subrogation. Plaintiff is before the Court to recover the entire loss and to hold those portions in trust which are recovered for the benefit of its insureds.

analysis and Mr. Guider's commentary on it, the numbers are not disputed. Rather, Plaintiff objects to the equivalency argued by Plaintiff between Mr. Guider's analysis of business interruption losses and the legal concept of net profits. Uganski, supra, stands for the proposition that loss of profit may be determined in any manner which is found to be reasonable under the circumstances. Mathematical precision or absolute certainty is not required. So long as damages are the natural consequence of wrongful conduct and might have been reasonably anticipated by the parties, they may be recovered, provided they are not remote, contingent or speculative. Wolverine Upholstery Co v Ammerman, 1 Mich App 235; 135 NW2d 572 (1965). See, also, Serbinoff v Dukas, 348 Mich 69; 81 NW2d 236 (1957) and Rich v Daily Creamery Co, 303 Mich 344; 6 NW2d 539 (1942).

A review of the Plaintiff's exhibits and Mr. Boone's testimony persuades the Court that the restaurant was very profitable prior to the fire. The analysis has not been challenged in any significant fashion as one lacking a sound foundation in principles of accounting or one predicated on inaccurate data. To the contrary, Plaintiff prepared its calculations with reliance upon existing historical financial data, the accuracy of which was not challenged. Income was projected in a very conservative fashion based upon that historical data.

Given the significant effort made by the insured to reopen the restaurant quickly, expenses were incurred that mitigated the total loss. Defendant's challenge to maintaining key employees who were essential to the prompt reopening of the restaurant and resumption of business so as to mitigate loss is, then, without merit. Had the insured chosen not to maintain these employees, the Court is convinced it could not have reopened as quickly and returned to profitability as promptly. This expense was one necessarily incurred by the Plaintiff in minimizing its total loss and the Defendant's exposure to incidental, direct and consequential damages.

Finally, Defendant challenges Plaintiff's entitlement and that

of its insured to damages for property losses on the theory that the partnership which owned the realty was not in privity of the contract with the Defendant. The commentary to MCLA 440.2313; MSA 19.2313 states as follows:

> Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise. (Official U.C.C. Comment, number 2, emphasis supplied)

White and Summers also addressed this point in their seminal work on the Uniform Commercial Code:

> When the non-privity plaintiff's suit is not based upon 402A or implied warranty, but rather upon the defendant's express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant. Usually courts characterize such cases as express warranty cases, though in some jurisdictions they are classed as misrepresentation cases. The misrepresentation may come through the defendant's advertising, through labels attached to the product, or through brochures and literature about the product. The only limitation is that the plaintiff must be a party whom the defendant could expect to act upon the representation. Of course, any such plaintiff must also state the other elements of his cause of action. (Uniform Commercial Code, Section 11-6, Privity-Express Warranty at p 335 (1972), emphasis supplied)

The Court finds Defendant's privity arguments to be without merit. Defendant admits a contractual relationship with insured corporation which operated the restaurant. It is this corporate entity which suffered the business interruption losses and no privity argument is applicable to it. To the extent that property

damage claims have been made, Defendant argues that the partnership was not in privity of the contract with it. The Plaintiff is before the Court as an assignee and subrogee of its insureds. Those insureds include the partnership which owned the real estate and the business which operated the restaurant. Mr. Boone is a principal in each organization and it was to Mr. Boone that the express warranty was made, the breach of which has led to the damage claims now under consideration. Clearly, the Plaintiff and its insureds are parties, by virtue of their legal relationship to each other and the Defendant's express warranty to Mr. Boone, whom the Defendant could expect to act in reliance upon its representations.

It is this Court's finding that the Defendant is liable to the Plaintiff for total lost profits in the amount of $109,951.00. The Plaintiff is entitled to retain $101,786.00 of this recovery and hold the balance in trust for the benefit of its insured. These funds must be disbursed upon the final resolution of all claims in this case.

The parties must submit a judgment pursuant to the procedure described in MCR 2.602(B) which is consistent with this decision and order. A judgment may provide for the payment of interest at the statutory rate and preserve the issue of sanctions attendant upon the rejection of mediation or a prior offer of judgment. Any requests for sanctions must be submitted within the time deadlines imposed by the relevant court rules. MCR 2.403(O)(8) and MCR 2.405(D).

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 8/20/93