2000 Wash. App. LEXIS 93,*

BORTON & SONS, INC., Appellant, v. THE TRAVELERS INSURANCE COMPANY, a foreign insurance company, Respondent.

No. 18100-6-III

COURT OF APPEALS OF WASHINGTON, DIVISION THREE, PANEL TEN

2000 Wash. App. LEXIS 93

January 25, 2000, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: **99 Wn. App. 1010.**

PRIOR HISTORY: Appeal from Superior Court of Yakima County. Docket No: 95-2-02901-8. Date filed: 12/09/1998. Judge signing: Hon. Michael Schwab.

COUNSEL: For Appellant: John J. Carroll, Velikanje Moore & Shore, Yakima, WA.

For Respondent: Bryan G. Evenson, Thorner Kennedy & Gano, Yakima, WA. Jerret E. Sale, Bullivant Houser Bailey, Seattle, WA. Douglas G. Houser, Bullivant Houser Bailey, Portland, OR.

JUDGES: Authored by Kenneth H Kato. Concurring: Frank L. Kurtz, Stephen M. Brown.

OPINIONBY: KENNETH H KATO

OPINION: KATO, J. Borton & Sons, Inc. appeals the summary dismissal of its claims against its insurer, The Travelers Insurance Co., arising from the collapse of the roof of one of its apple storage facilities. The company contends the superior court improperly concluded Travelers' policy did not cover losses attributed to its inability to sell undamaged apples that had been stored in a separate facility. We affirm.

Borton & Sons, Inc. (Borton) grows, stores, and packs apples for sale in domestic and foreign markets. On January 20, 1993, the roof of [*2] one of Borton's storage facilities collapsed from the weight of accumulated ice and snow. At the time, the building contained 70,320 boxes of various varieties of apples, including 13,764 boxes of Fuji apples. All of the apples stored in the building were exposed to the elements as well as to leaking ammonia.

Borton notified Travelers of the collapse, and Travelers sent adjusters to the site. The adjusters requested that Borton repack and sell as many of the apples from the damaged building as it could. Borton then determined which of the apples were unfit for sale, which were fit for sale only to juice processors, and which were fit for sale as whole fruit. Borton repacked and sold 47,420 boxes of apples from the damaged building, including 9,680 boxes of Fuji apples. Borton did not inform buyers that the fruit had been involved in the roof collapse or that it might have been exposed to ammonia.

Borton also sold 1,386 bins n1 of Fuji apples that had been stored in other buildings. However, it was unable to sell 1,089 bins of Fuji apples. These Fuji apples had been stored elsewhere and were not damaged in the roof collapse. Borton gives two reasons for its inability [*3] to sell the Fuji apples: First, it alleges the domestic market for Fuji apples was in its infancy, with a limited customer base. Second, it alleges the sale of "inferior" Fuji apples from the damaged building eroded confidence in Borton's Fuji apples generally, even those that were undamaged.

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n1 Each bin yields approximately 17.4 boxes of Fuji apples.

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Borton's claim with Travelers included losses resulting from its inability to sell the 1,089 bins of Fuji apples that were not damaged by the roof collapse. Travelers refused to pay this portion of the claim.

Borton then filed this action for declaratory judgment, alleging breach of contract and bad faith and seeking actual and treble damages and attorney fees. The parties filed cross-motions for summary judgment. The superior court held the policy did not cover the loss and Travelers did not act in bad faith. The court accordingly granted Travelers' motion for summary judgment and dismissed the claims.

On review of an order granting summary judgment, [*4] an appellate court's inquiry is the same as the superior court's. **Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 451, 842 P.2d 956 (1993).** Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). All reasonable inferences from the evidence must be resolved against the moving party, and summary judgment should be granted only if reasonable people could reach only one conclusion. **Detweiler v. J.C. Penney Cas. Ins. Co., 110 Wn.2d 99, 108, 751 P.2d 282 (1988).**

We first consider the effect of a policy clause that excluded coverage "for loss or damage caused by or resulting from . . . delay, loss of use or loss of market." Borton has alleged that one of the causes of its inability to sell the 1,089 bins of Fuji apples was the undeveloped domestic market for Fuji apples. Travelers contends the "loss of market" exclusion precludes coverage for this type of loss. Borton contends its losses were caused, [*5] not by "loss of market," but rather by "loss of market value." For this distinction, Borton relies on **Boyd Motors, Inc. v. Employers Ins. of Wausau, 880 F.2d 270 (10th Cir. 1989),** in which the plaintiff's retail vehicle inventory was damaged by hail, and repairs did not return the vehicles to their condition before the damage. **Id. at 271.**

The insurer rejected a claim for the difference in value, partly on grounds the loss was excluded by the policy's "loss of market" exclusion. Id. The court held the insurer incorrectly equated the terms "loss of market" and "loss of market value:"

"Market" means the geographical or economic extent of commercial demand for any particular product and generally refers to a more or less identifiable group of prospective purchasers seeking a particular type of product offered by a more or less identifiable group of sellers. See generally Webster's New International Dictionary at 1504 (2d ed. 1950); Black's Law Dictionary at 874 (5th ed. 1979); Encyclopedia Britannica, Vol. 11 at 511 (15th ed. 1982). "Market value," on the other hand, means the price that a product can command in a given (general or particularized) [*6] market. See generally Webster's New International Dictionary at 1504; Black's Law Dictionary at 876. . . . To summarize the contrast between the two terms, "market" refers collectively to matters external to any particular product item, namely those conditions that determine the degree to which supply of that commodity exceeds or falls short of demand, whereas "market value" is a function of qualities (e.g., age, state of repair) inherent in the individual item itself, and refers to the price that that specific article with those qualities would command in a given market. . . . [A] market is lost when, for example, due to delay in distribution, changes in consumer habits, etc., a certain type of product is no longer in demand with its intended purchasers, while what is involved in the present case, in which particular merchandise in Boyd's inventory has allegedly suffered depreciation due to physical alteration (damage and restoration), is a loss of market value.

Id. at 273.

It is undisputed here that the 1,089 bins of unsold Fuji apples were undamaged and marketable in their current condition. Borton's inability to sell them was not because of something [*7] inherent in the apples themselves, but rather (at least in part) because supply exceeded demand in the domestic market. To the extent Borton alleges its loss was the result of conditions in the domestic apple market, the loss is excluded by the "loss of market" exclusion.

Borton contends, however, that the "efficient proximate cause" of its loss was the roof collapse and the resulting sale of inferior apples. The "efficient proximate cause" rule addresses the situation in which a loss is caused by two or more perils, only one of which is covered by the insurance policy. **Findlay v. United Pacific Ins. Co., 129 Wn.2d 368, 372, 917 P.2d 116 (1996); Graham v. Public Employees Mut. Ins. Co., 98 Wn.2d 533, 538, 656 P.2d 1077 (1983).**

Borton contends that, even if the "loss of market" exclusion applies to its loss resulting from conditions of the domestic Fuji apple market, the "efficient proximate cause" rule requires Travelers to pay for the entire loss because it resulted from a covered loss. However, the "efficient proximate cause" rule does not apply to this type of exclusion. In **Witcher Constr. Co. v. Saint Paul Fire & Marine Ins. Co., 550 N.W.2d 1, 5 (Minn. Ct. App. 1996),** [*8] review denied, August 20, 1996, the court addressed an insured's contention that "principles of concurrent causation" overrode a policy's exclusion for "loss caused by delay, loss of market, loss of use, or any indirect loss." The court held:

Principles of dual causation are inapplicable to this type of "exclusion," which explains its regular application to defeat claims for the type of business loss experienced by Witcher. See, e.g., **Boyd Motors, 880 F.2d at 274** (construing an all-risk policy and noting most courts interpret similar exclusions to prevent coverage for indirect or consequential economic loss); **Blaine Richards & Co. v. Marine Indem. Ins. Co., 635 F.2d 1051, 1052, 1056 (2d Cir. 1980)** (interpreting an all-risk policy and concluding the insured could recover the expense of remediating contamination, but that a similar exclusion barred recovery of market losses resulting from the delay); **[Stanley v. Onetta Boat Works, Inc., 431 F.2d 241, 243 (9th Cir. 1970)]** (Koelsch, J., concurring, and arguing underwriter's liability flowed not from the all-risk policy, which excluded consequential losses, but from the insurer's tortious [*9] behavior); **Interpetrol Bermuda, Ltd. v. Lloyd's Underwriters, 588 F. Supp. 1199, 1202 (S.D.N.Y. 1984)** (suggesting that a "general delay clause" could defeat coverage for loss of market under an all-risk policy); **Twin City Hide v. Transamerica Ins. Co., 358 N.W.2d 90, 92** (Minn. [Ct.] App. 1984) (applying an all-risk property policy's exclusion of consequential damages to defeat coverage for the expense of maintaining customer goodwill); see also **Greene v. Truck Ins. Exch., 114 Idaho 63, 753 P.2d 274, 276 n.1 (App. 1988)** (noting an exclusion of consequential loss prevented coverage for lost income under a named-peril policy), review denied (Idaho Jan. 31, 1989); **Riefflin v. Hartford Steam Boiler Inspection & Ins. Co., 164 Mont. 287, 521 P.2d 675, 677-78 (1974)** (same); cf. **Borden, Inc. v. Howard Trucking Co., 425 So. 2d 893, 897 & n.4 (La. Ct. App. 1983)** (applying a similar exclusion and denying coverage for lost production under a liability policy), aff'd in relevant part, **454 So. 2d 1081, 1085, 1091 (La. 1983).**

Witcher Constr. Co., 550 N.W.2d at 6 (footnote omitted).

The "efficient proximate cause" rule does not provide [*10] for coverage of losses that are excluded by a policy's "loss of market" clause. At least to the extent Borton's loss was caused by the limited domestic market for Fuji apples, the superior court properly dismissed its claim.

Of course, Borton also contends its loss was caused at least partially by its sale of "inferior" apples that were directly affected by the roof collapse, which was a covered event. The "loss of market" exclusion on its face does not apply to this allegation. We now address this portion of Borton's claim.

Borton contends the loss resulting from its sale of "inferior" apples was a covered loss under Travelers' policy, which contained a "deluxe property coverage form" providing: "We will pay for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss."

Travelers argues preliminarily that Borton failed to raise this issue before the superior court and thus is precluded from raising it on appeal. "Failure to raise an issue before the trial court generally precludes a party from raising it on appeal." **Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983)** (citing **Seattle-First Nat'l Bank v. Shoreline Concrete Co., 91 Wn.2d 230, 240, 588 P.2d 1308 (1978));** [*11] see RAP 2.5(a). While it is true that most of Borton's superior court briefing on the coverage issue addressed the policy's spoilage endorsement (which we address below), it did quote the language of the "Deluxe Property Coverage Form" on which it relies here. Under the circumstances, we will address the merits of Borton's argument. See RAP 1.2(a).

It is undisputed that the 1,089 bins of Fuji apples, for which Borton seeks compensation, were not damaged physically by the roof collapse.

Borton contends, however, that "direct physical loss" may occur in the absence of any physical damage to the property. The authority on which it relies does not support its argument. In fact, in two of the three cases it cites, there was some physical effect on the covered property that triggered coverage. **Sentinel Management Co. v. New Hampshire Ins. Co., 563 N.W.2d 296 (Minn. Ct. App. 1997)** (asbestos contamination); **Western Fire Ins. Co. v. First Presbyterian Church, 165 Colo. 34, 437 P.2d 52 (1968)** (gasoline contamination). In the third case, **Murray v. State Farm Fire & Cas. Co., 203 W. Va. 477, 509 S.E.2d 1 (1998),** two homes were damaged by rocks [*12] falling from a wall; a third home suffered no damage, but the owners were required to vacate the premises because of the possibility of damage. **Murray, 509 S.E.2d at 5.** The court held all of the homes sustained damage because they were unsafe for habitation. **Murray, 509 S.E.2d at 16-17.**

Murray is distinguishable from this case, in which there was no real or even potential physical damage to the 1,089 bins of Fuji apples. More importantly, Murray is in conflict with Washington law. See **Fujii v. State Farm Fire & Cas. Co., 71 Wn. App. 248, 857 P.2d 1051 (1993),** review denied, **123 Wn.2d 1009, 869 P.2d 1085 (1994).** In Fujii, heavy rainfall caused a landslide on a hillside above the insureds' home. **Fujii, 71 Wn. App. at 249.** Based on an expert's opinion that the landslide damaged the "integrated engineering unit" of the home, the insureds claimed they had suffered a "direct physical loss" under the coverage provision of their policy. **Fujii, 71 Wn. App. at 249.** The court disagreed:

In this case, it is undisputed that there was no discernible physical damage to the dwelling during the effective period of the policy. While the Fujiis' engineer concluded [*13] that the integrated engineering unit had been damaged, he was not free to rewrite the plain terms of the insurance policy by defining "dwelling" in that manner. Under the plain terms of the policy, coverage was triggered by direct physical loss to the dwelling.

Limited coverage for the cost of soil restabilization was provided only if the dwelling sustained a covered loss. Therefore, because the covered dwelling did not sustain a direct physical loss during the effective period of the policy, the trial court correctly granted summary judgment to **State Farm. Fujii, 71 Wn. App. at 250-51;** see **Villella v. Public Employees Mut. Ins. Co., 106 Wn.2d 806, 725 P.2d 957 (1986).**

Similarly here, the 1,089 bins of Fuji apples sustained no physical damage resulting from the roof collapse. Borton's inability to sell the apples was not a "direct physical loss" covered under the deluxe property coverage form.

Borton also contends coverage is required by the policy's spoilage endorsement, which provides that Travelers "will pay for direct loss or damage from spoilage . . . to the Covered Property[.]" Borton points out this language, unlike the deluxe property coverage [*14] form, does not contain a requirement for physical loss or damage. In support of its contention the endorsement's failure to require physical damage requires Travelers to pay for loss of value, Borton cites several authorities from Washington and elsewhere. See **Prudential Property & Cas. Ins. Co. v. Lawrence, 45 Wn. App. 111, 724 P.2d 418 (1986); General Ins. Co. v. Gauger, 13 Wn. App. 928, 538 P.2d 563 (1975); Dundee Mut. Ins. Co. v. Marifjeren, 1998 ND 222, 587 N.W.2d 191 (N.D. 1998).**

However, even assuming the spoilage endorsement anticipated the type of loss Borton suffered here, the endorsement still requires "direct loss or damage from spoilage." Borton argues the Washington Supreme Court, in adopting the "efficient proximate cause" rule, abandoned any analysis of whether damage was direct or indirect. See **Graham, 98 Wn.2d at 537-39.** But Washington courts have not abandoned the requirement that a covered event be the proximate cause of an insured's claimed loss. **Findlay, 129 Wn.2d at 372-78.**

We have defined "proximate cause" as that cause "which, in a natural and continuous sequence, unbroken [*15] by any new, independent cause, produces the event, and without which that event would not have occurred". **Stoneman v. Wick Constr. Co., 55 Wn.2d 639, 643, 349 P.2d 215 (1960).** Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is

regarded as the "proximate cause" of the entire loss.

It is the efficient or predominant cause which sets into motion the chain of events producing the loss which is regarded as the proximate cause, not necessarily the last act in a chain of events. **Graham, 98 Wn.2d at 538** (some citations omitted). The identification of the "efficient proximate cause" usually is a question of fact, but is subject to determination on summary judgment if the facts are not in dispute. See **Findlay, 129 Wn.2d at 373.**

Here, Borton contends its inability to sell the 1,089 bins of Fuji apples was partly the result of the weak market for Fuji apples. As we have explained, the "loss of market" exclusion is unaffected by the "efficient proximate cause" rule. That portion [*16] of the loss is excluded. But Borton also contends its loss was the result of the sale of "inferior" Fuji apples from the damaged building and the resulting erosion of confidence in its Fuji apples generally. Under this theory, the roof collapse arguably was an actual or "but for" cause of Borton's failure to sell the remaining Fuji apples.

However, as the superior court concluded, the roof collapse was not the "efficient proximate cause" of the loss. It is undisputed that Borton itself determined which of the damaged apples were unfit for sale, which were saleable only to juice processors, and which were fit for sale as whole fruit. Borton does not contend Travelers was involved in these decisions in any way. Borton also independently chose not to inform buyers of the whole fruit that it had been involved in the roof collapse. Thus, the roof collapse did not set into motion a natural and continuous sequence that resulted in Borton's inability to sell the remaining Fuji apples.

Instead, its own actions were new, independent events, without which the loss would not have occurred. Borton's actions, not the roof collapse or the spoilage of some apples, were the "efficient [*17] proximate cause" of the loss. The superior court properly concluded the spoilage endorsement did not cover Borton's loss.

Finally, Borton contends it is entitled to compensation for the loss as a mitigation expense. The parties agree an insured generally has a duty to mitigate covered losses by preventing them or minimizing their extent. 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance sec. 178:10 (3d ed. 1996). An insurer has a corresponding duty to compensate the insured for the reasonable expenses incurred in mitigating a loss, even if the expenses are not expressly covered under the policy. Id.; **Brown v. State Farm Fire & Cas. Co., 66 Wn. App. 273, 282, 831 P.2d 1122 (1992).** Whether mitigation efforts were reasonable is judged by the circumstances in existence at the time the efforts occurred. Id. It is undisputed here that Travelers compensated Borton's expenses in repacking the apples that had been stored in the damaged building. It also made up the difference between the full value and the reduced price Borton actually received for the apples it sold.

Borton asks the court to hold that the loss resulting from its inability to sell the 1,089 [*18] bins of Fuji apples was reasonable mitigation expenses. Of course, to the extent the loss was caused by weakness in the market for Fuji apples, it was not an expense at all, but merely was a consequence of market forces and was expressly excluded under the "loss of market" clause of the policy.

As for Borton's separate theory that the loss was the result of its sale of "inferior" apples from the damaged building (and the resulting erosion of confidence in its Fuji apples), the answer is less clear.

Borton argues, essentially, that its sale of "inferior" apples was solely for Travelers' benefit, in response to Travelers' request that it repack and resell as many of the apples from the damaged building as it could.

Neither party cites any authority addressing whether lost income may be compensable as part of an insured's reasonable mitigation efforts. n2

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n2 Borton relies primarily on **Metalmasters of Minneapolis, Inc. v. Liberty Mut. Ins. Co., 461 N.W.2d 496, 500-501 (Minn. Ct. App. 1990),** review denied, December 20, 1990, in which the court held the insured was entitled to repayment of expenses it incurred in preventing rust after a water line ruptured. It is not clear how this holding supports Borton's argument.

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Whatever the merits of Borton's argument in the abstract, however, its loss in this case cannot be considered a reasonable mitigation expense. Even in cases in which lost profits are properly considered as damages in contract or tort actions, they are recoverable only when they are the proximate result of the event at issue. See **Tiegs v. Watts, 135 Wn.2d 1, 17, 954 P.2d 877 (1998); Cannon v. Oregon Moline Plow Co., 115 Wash. 273, 276-81, 197 P. 39 (1921).** Here, Borton's inability to sell the 1,089 bins of Fuji apples was the proximate result of either the limited market for Fuji apples (coverage for which is excluded by the policy) or Borton's own decision to sell the whole fruit as undamaged. Therefore, even if lost profits were compensable as mitigation expenses, Borton's lost profits here were not the proximate result of the roof collapse or its duty to mitigate its losses. The superior court did not err in granting Travelers' motion for summary judgment.

Borton also has appealed the superior court's dismissal of its claim for bad faith in violation of the Consumer Protection Act. An insurer has a statutory duty to act in good faith. **RCW 48.01.030**. A breach of that duty is a per se violation of the Consumer Protection Act, **RCW 19.86.020**. **Gingrich v. Unigard Sec. Ins. Co., 57 Wn. App. 424, 433, 788 P.2d 1096 (1990).** "An insurer breaches its duty by acting without reasonable justification in handling an insured's claims." Id. Because we have concluded there was no coverage for the loss, Travelers acted with reasonable justification in denying this portion of Borton's claim. n3

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N3 Borton also contends the reasonableness of Travelers' actions is a question of fact and thus inappropriate for summary judgment. However, the facts here are not in question, and the only issue is interpretation of the insurance policy, which issue is one of law. See **Gingrich, 57 Wn. App. at 433-34.**

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Borton also points out that an insurer can act in bad faith in handling an insured's claim even if it was correct in determining there was no coverage under the policy. **Coventry Assocs. v. American States Ins. Co., 136 Wn.2d 269, 279, 961 P.2d 933 (1998).** [*21] Borton contends Travelers acted in bad faith by requiring Borton to mitigate its loss but refusing to pay losses associated with its resulting inability to sell the 1,089 bins of undamaged apples. However, it is undisputed that Borton itself chose which apples from the damaged building were unsalvageable, which it would sell as whole fruit, and which it would sell to juice processors. And Borton itself decided not to inform buyers that the apples had been stored in the damaged building. Borton has presented no facts supporting its implication that Travelers in some way required Borton to take these actions.

Certainly an insurer's request that an insured mitigate its losses is not evidence of bad faith. The court properly dismissed Borton's Consumer Protection Act claim.

Under the circumstances, it is unnecessary to consider Borton's remaining claims for prejudgment interest and attorney fees.

We affirm the dismissal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to **RCW 2.06.040**.

Kato, J.

WE CONCUR:

Kurtz, C.J.
Brown, J.