IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 3, 2009 Session

ELIZABETH FUGATE v. TENNESSEE FARMERS INSURANCE COMPANIES

Appeal from the Chancery Court for Claiborne County
No. 16128 Billy Joe White, Chancellor

No. E2009-01060-COA-R3-CV - FILED DECEMBER 2, 2009

Elizabeth Fugate ("Plaintiff") had a homeowners insurance policy issued by Tennessee Farmers Insurance Company ("Defendant"). In April 2007, a retaining wall on Plaintiff's property collapsed. Defendant denied the claim asserting, among other things, that the collapse was caused by built up water pressure and that the retaining wall had been defectively constructed. Defendant asserted that both of these causes of the collapse were covered by policy exclusions. Following a trial, the Trial Court determined that the retaining wall had been properly built and there was insurance coverage pursuant to the policy. The Trial Court entered a judgment in favor of Plaintiff for $18,680. We conclude that the Trial Court improperly considered personal knowledge which he possessed when deciding this case. Accordingly, we vacate the judgment and remand this case for a new trial before a different trial judge.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. MCCLARTY, J., joined.

John T, Johnson, Jr., Knoxville, Tennessee, for the Appellant, Tennessee Farmers Insurance Companies.

David H. Stanifer and Lindsey C. Cadle, Tazewell, Tennessee, for the Appellee, Elizabeth Fugate.

OPINION

Background

This declaratory judgment action was filed by Plaintiff in December 2007 claiming certain property damage to her house was covered by the terms of a homeowners insurance policy issued by Defendant. The property damage occurred when a retaining wall located on Plaintiff's property collapsed.

Defendant denied the claim, asserting that the damage was caused by water pressure and/or improper construction, both of which are excluded under the policy. The insurance policy exclusions at issue in this case provide as follows:

> **We** cover accidental direct physical loss to property insured under **Coverage A - Dwelling** and **Coverage B - Other Structures**. **We** do not cover such loss resulting directly or indirectly from:
>
> 1. a. Wear and tear, marring or scratching, deterioration, inherent vice, latent defect . . . ;
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> b. rust, fungus, corrosion, wet or dry rot;
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> c. condensation;
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> * * *
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> g. settling, cracking, shrinkage, bulging or expansion of pavement, patios, foundations, walls, floors, roofs, ceilings, ...
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> * * *
>
> 4 Freezing, thawing, pressure, or weight of water or ice, whether driven by wind or not, to a fence, pavement, patio, swimming pool, foundation, retaining wall . . . .
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> * * *
>
> Additional SECTION 1 Exclusions
>
> Under SECTION 1 **we** do not cover any loss resulting directly or indirectly from any of the excluded events listed below. **We** do not cover such loss for anyone regardless of (a) the cause of

the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss.

* * *

3. Water damage caused by:

   a. flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind; or

   b. water below the surface of the ground, including water and soil which exerts pressure on or flows, seeps, or leaks through any part of a building, sidewalk, driveway, foundation, swimming pool, or other structure.

* * *

10. Defect, weakness, inadequacy, fault, or unsoundness in:

    a. planning, zoning, development, surveying, siting;

    b. design, specifications, workmanship, construction, grading, compaction;

    c. materials used in construction or repair, or

    d. maintenance;

    of any property (including land structures, or improvements of any kind) whether on or off the **residence premises**.

(all emphasis in the original)

The trial was conducted in March 2009. It was agreed prior to trial that Plaintiff was insured by Defendant and the issue for resolution was whether the collapse of the retaining wall was covered by the insurance policy. We will limit our discussion of the trial proof to that proof addressing the cause of the collapse of the retaining wall.

Plaintiff testified that the house was built in 1975 and the retaining wall was constructed at that time. The retaining wall has steps and there also is a light fixture. Plaintiff testified that she does not know what caused the retaining wall to collapse. The collapse occurred in April of 2007. Plaintiff asserted that the retaining wall was properly constructed and the "driveway was fixed to where it drained off in the other direction." Plaintiff stated that her driveway is asphalt and the water flows off the asphalt into the yard, away from the retaining wall.

Mitch Edwards ("Edwards") was called by Plaintiff. When asked what he did, Edwards stated "[g]rade work, dozer work, heavy equipment stuff." Edwards inspected the retaining wall at Plaintiff's request. According to Edwards, "[w]e cleaned up the old wall, hauled it off, and built a new wall back." During this process, Edwards located in the old wall a "3-foot wide footer the full length of the wall." There was 12-inch cinder block on the footer. Edwards stated that, in his opinion, the 3-foot wide footer was sufficient for the previous wall. The previous wall also contained DuroWire, which strengthens the wall. Edwards stated there also was gravel behind the original retaining wall. However, Edwards stated that he did not find any rebar.

The next witness was Mike Johnson ("Johnson"), also called by Plaintiff. Johnson has been a brick mason for thirty-four years. Johnson stated that a three-foot wide footer would be more than sufficient for that particular retaining wall. Johnson added that because the retaining wall was only 3 to 6 feet high, the standard that was used when the retaining wall was built in 1975 was such that rebar would not have been used. Johnson added that due to the low height of the retaining wall, rebar probably would not be used even today. When asked if he knew what caused the retaining wall to fall, Johnson stated "I have no idea."

Lucas Cabbage ("Cabbage") is a claims representative for Defendant. According to Cabbage, on April 12, 2007, Plaintiff made a claim regarding the collapse of the retaining wall. Cabbage testified that Plaintiff's loss description was as follows:

> After the storms on 4/3/07, insured noticed a large crack in her driveway. Last night during the rain, the insured['s] retaining wall fell.

Because he did not know what caused the retaining wall to collapse, Cabbage hired Shield Engineering to ascertain the cause of the collapse.

The final witness was Raymond Tant ("Tant"), an engineer with both a Bachelor's and Master's degree in civil engineering from the University of Tennessee. Tant currently is employed at Shield Engineering, Inc. According to Tant:

> [T]he area that we work in is primarily tied to construction, and through my career, we have been involved in the construction process of buildings, the design of buildings, observing how they are constructed to verify they're put together properly, as well as doing forensic work, looking at damage to structures.

At Defendant's request, Tant inspected the collapsed retaining wall on Plaintiff's property. Tant was asked to determine what caused the wall to collapse. Tant was not aware of any dispute between Plaintiff and Defendant, and was not aware of what was or was not excluded under the language of the insurance policy. Tant prepared a report which detailed his findings. Tant concluded that the wall failed due to water pressure which occurred because of improper construction methods used by the contractor when the retaining wall originally was built. According to the report:

> The failed wall was constructed with un-reinforced [concrete masonry units] (no reinforcing steel or grout), no layer of free draining stone or toe drain, and no visible weep holes to relieve hydrostatic pressure. In addition, soil backfill was used directly behind the wall and a separate footing was not observed.

Tant stated at trial that it was his opinion that because of the way the retaining wall had been constructed, the wall could not resist the partially saturated soil "which would have had a hydrostatic pressure to it, and then pushing against it, it would have pushed the wall over."

Following the trial, the Trial Court issued its ruling and made the following observations from the bench:

> Well, let me make one comment about this matter. Of course, I really don't know Mitch Edwards. I know nothing about him. But Mike Johnson, I've known since he was in high school. I watched him play high school basketball. I watched his son play high school basketball and watched him play at LMU. He's been a bricklayer and is considered in this community as the best there is. . . . [H]e certainly is respected in this community as a bricklayer and a block layer and a wall builder. And has been doing it, according to his testimony, for 34 years . . . . So this Court certainly gives his testimony respected weight. He's an honest man and would not lie for anybody.
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> * * *
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> Mr. Tant has a Master's degree from UT and is an expert engineer. . . . Mr. Tant says . . . [the collapse] was caused by improper design. All right, he says there was no footer, could not find a footer. . . . Mike Johnson found a 3-foot footer. . . .
>
> Mt. Tant found no wire, no footer and no grout, and Mr. Johnson testified that in 1975 when this wall was built that grout was not used and was not customary in the field, and that the wire that was used strengthened the wall and it had drainage gravel behind it and

> it was properly built, according to his standards. And there's nobody in my opinion that would know more about a wall than Mike Johnson. I'd say he's built a thousand of them.

The Trial Court then concluded that because Tant did not see what was there to be seen (*i.e.*, the existence of a footer, etc.), his opinion was not valid. The Trial Court then concluded that the retaining wall was not improperly constructed and entered a judgment for Plaintiff in the amount of $18,680.[1]

Defendant appeals claiming it is entitled to a new trial because the Trial Court based its decision, at least in part, on personal knowledge of Plaintiff's witness, Mike Johnson. Alternatively, Defendant claims that the Trial Court erred when it found the collapse of the retaining wall was covered under the terms of the policy.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Vaughn v. Shelby Williams of Tennessee, Inc.*, 813 S.W.2d 132 (Tenn. 1991), our Supreme Court observed:

> There is ample authority for the proposition that a judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer outside of the judicial proceedings. 9 Wigmore, *Evidence*, § 2569 at 723 (1981). Judicial knowledge upon which a decision may be based is not the personal knowledge of the judge, but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role. *State v. Henderson*, 221 Tenn. 24, 424 S.W.2d 186, 188 (1968). No judge is at liberty to take into account personal knowledge which he possesses when deciding upon an issue submitted by the parties. *Laurance v. Laurance*, 198 Or. 630, 258 P.2d 784, 787 (1953). In other words, "[i]t matters not what is known to the judge personally if it is not known to him in his official capacity." *Galbreath v. Nolan*, 58 Tenn. App. 260, 429 S.W.2d 447, 450 (1967).

Vaughn, 813 S.W.2d at 133.

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1 This is the amount it cost Plaintiff to repair the retaining wall. This amount was not disputed at trial.

It is clear that the Chancellor has known Johnson for a long time. This is, of course, going to happen from time to time at trials. However, we think the Chancellor went too far and inadvertently allowed his personal knowledge of and respect for Johnson to impact his decision. A fair reading of the opinion is such that the Chancellor had such a high opinion of Johnson because of his personal knowledge about Johnson, that the Chancellor likely was going to believe whatever Johnson said. Much of the knowledge the Chancellor had and expressed about Johnson was what he learned "as an individual observer outside the judicial system." *See Vaughn*, 813 S.W.2d at 133. The Chancellor was not "at liberty to take into account personal knowledge which he possesses when deciding upon an issue submitted by the parties." *Id*. In our opinion, that is what happened in this case, and the judgment must be vacated.

We vacate the judgment in its entirety, and remand for a new trial. On remand, this case is to be assigned to a different trial court judge and set for trial.

All remaining issues are pretermitted. We express no opinion as to the merits of either party's position on the substantive issues to be tried on remand.

Conclusion

The judgment of the Trial Court is vacated. This case is remanded to the Trial Court for further proceedings consistent with this Opinion, including the assignment of a different trial court judge for the new trial, and for collection of the costs below. Costs on appeal are taxed to the Appellee, Elizabeth Fugate.

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D. MICHAEL SWINEY, JUDGE