



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**DESERT MOUNTAIN PROPERTIES LIMITED PARTNERSHIP v.
LIBERTY MUTUAL FIRE INS. CO.**
CV-10-0339-PR

PARTIES:

Petitioner: Liberty Mutual Fire Insurance Co. (“Liberty Mutual”).

Respondent: Desert Mountain Properties, L.P. (“DMP”).

FACTS:

DMP contracted with general contractor The Weitz Company to build fifty hillside homes. After completion, the houses had settlement and drainage problems and patio cracks. DMP hired a consultant who concluded there was a “very substantial soils issue involving poor compaction of fill material” under the homes. Floor slabs had cracked and water infiltration made things worse. Eventually, all fifty homes required some repair. After purchaser complaints about the defects and resulting damage, DMP paid to repair the damages.

In May 2001 it sent a notice of claim seeking coverage and reimbursement from its insurer, Liberty Mutual, under its commercial general liability (“CGL”) insurance policies covering from August 1999 to November 2001. DMP wanted to get repairs done in the summer. Liberty Mutual said it needed more information before it could decide whether there was coverage. It warned DMP it was a) not authorizing the repair work and b) not taking a position on whether work should begin.

No one filed any lawsuits or formal claims against DMP. Before the coverage response had come from Liberty Mutual, DMP made more repairs during the summer of 2001. In October 2001 DMP filed suit against Weitz claiming Weitz was responsible for the construction defects that caused the damage that made the repairs necessary.

DMP provided Liberty Mutual with all the requested documents in November 2002. In February 2003, Liberty Mutual denied coverage based on the policies’ voluntary payment and known loss exclusions. DMP sued Liberty Mutual for breach of contract and breach of duty of good faith. The trial court ruled for Liberty Mutual on the bad faith claim. It concluded that DMP could not recover the cost of repairing the poorly compacted soil, but could recover money it spent to repair property damage that *resulted* from soil settlement. Liberty Mutual argued the CGL policies’ plain language did not cover the costs of fixing the risks DMP chose to accept by building the homes on defectively compacted soils. DMP presented evidence of its damages for repair costs, consulting fees and attorney’s fees incurred in the Weitz suit. Net of what DMP had recovered from Weitz, it asked the jury for \$1.5 million in damages.

The jury found Liberty Mutual had breached its insurance contract and awarded DMP \$500,000. The trial court granted DMP its attorney's fees and costs and denied Liberty Mutual's motion for judgment as a matter of law (JMOL) or new trial. Liberty Mutual appealed.

The court of appeals affirmed. It held Liberty Mutual's policies covered expenses DMP incurred in repairing property damage resulting from the soil settlement even though no homeowner had sued DMP for the damage. The proper inquiry is not whether the final remedy for a claim lies in contract or in tort, but whether an "occurrence" has caused "property damage." It also held the broad form property damages exclusion does not keep the policy from covering *damage to non-defective property* resulting from faulty workmanship. It held the superior court properly denied Liberty Mutual's motion for judgment as a matter of law under the voluntary payments clause.

ISSUE:

The court of appeals erred by holding that an insured's contractual liability for damage that only caused economic loss is covered under a Commercial General Liability ("CGL") insurance policy.

The court of appeals erred in its interpretation of the "Contractual Liability Exclusion ("CLE")," by holding that the clause only applies to an insured's "assumption of another's liability, such as an agreement to indemnify or hold harmless another."

The court of appeals erred by holding that DMP's voluntary expenditures to repair property damage caused by construction defects were the result of a "legal obligation" to pay "damages" when the undisputed evidence established that DMP was not ordered by any court or governmental agency to undertake the repairs.

Definitions:

Breach of contract: Failure of a party to a contract to live up to the obligations promised in the agreement.

Breach of duty of good faith: Failure of a party to a contract to deal fairly with the other party.

Broad form property damages exclusion: Provision in a liability contract that says the policy does not cover damage to the insured's own property. Property insurance is intended to insure against damage to the insured's property, such as from fire or collision.

Commercial general liability ("CGL") insurance: Insurance bought to cover liability the insured incurs to a third party arising from an occurrence during the policy period.

Judgment as a matter of law (JMOL): Legal entitlement, without further facts having to be proven,

to a favorable judgment (i.e., winning the case or issue within the case).

Known loss exclusion: Policy provision that excludes coverage for losses that the insured knew about before the policy's coverage begins.

Voluntary payments clause: Policy provision that discourages an insured from settling or paying claims without consulting the insurer, to give the insurer control over the claims and settlement process.

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