Filed 7/15/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TRB INVESTMENTS, INC. et al., Plaintiffs and Appellants, v. FIREMAN'S FUND INSURANCE COMPANY, Defendant and Respondent.	F045816 (Super. Ct. No. 250247) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Law Office of Timothy L. Kleier, Timothy L. Kleier; Mark A. Ginella for Plaintiffs and Appellants.

Hager & Dowling, Jeffery D. Lim and Jessica M. Johnson for Defendant and Respondent.

-ooOoo-

This case requires that we decide whether a renovation to an existing commercial building falls under the "under construction" exception to the vacancy exclusion of a property insurance policy. We conclude that the term "under construction" does not encompass these types of renovations.

FACTUAL BACKGROUND

Plaintiffs, TRB Investments, Inc., Fran Mar Company, Coldwater Farms, LLC, P & R Almond Orchards, Inc., Thomas-Cattani Incorporated, and 1731 Chester Group (plaintiffs), are a group of local businesses that develop and manage commercial real estate. In November 2000, plaintiffs acquired a former bank building located at 1731 Chester Avenue in Bakersfield, intending to renovate it. After acquiring the building, plaintiffs added it to an existing insurance policy through defendant Fireman's Fund Insurance Company that was issued in 1999 and covered another commercial property owned by plaintiffs.

The Salvation Army leased the building until the end of 2000. In November 2000, prior to the expiration of the Salvation Army's lease, efforts to remodel the building began; specifically, materials containing asbestos were removed. After the Salvation Army's lease expired, the property was not occupied by any tenant.

In January 2001, an architectural firm and a general contractor were hired to provide renovation and design services for the building. In May 2001, the architects did designs for exterior and interior modifications to the building. Work on the project was delayed because a number of potential tenants were interested in the building. However, the architect and the contractor were able to take preliminary steps, such as conducting inspections and contacting the city planning department.

In May 2001, plaintiffs entered into an agreement with a new tenant, Goodwill Industries. The lease agreement provided that the building would be built to suit the needs of Goodwill. The architect began making specific designs for the improvements to the building that were requested by Goodwill, including initial floor plans. In addition, demolition specifications were made, as well as an agreement to begin work immediately.

In June 2001, the insurance policy covering the building was renewed. The renewed policy contained the following vacancy clause:

> "If loss or damage occurs to a building that has been vacant for more than 60 consecutive days prior to the occurrence of that loss or damage, we will:

"a. not pay for any loss or damage cause by:

"1. Vandalism;

"2. Sprinkler leakage, unless you have protected the system against freezing;

"3. Building glass breakage;

"4. Water damage;

"5. Theft, or

"6. Attempted theft.

"b. Reduce the amount we would otherwise pay for the loss or damage by 15%.

"A building is vacant when it does not contain enough business personal property to conduct customary operations.

"Buildings *under construction* are not considered vacant." (Italics added.)

On June 11, 2001, the contractor walked through the building and discussed the scope of the design and work for the project. The contractor also walked through the building with various subcontractors on June 20, 2001. The subcontractors immediately began work on the building's electrical and air conditioning systems. Work was performed on the building from June 29, 2001 through July 14, 2001. That work included removing the electrical main panel covers, walls around the two main panels and subpanels, unneeded circuits and floor boxes, and exposed electrical lines; tracing circuitry; testing circuitry; checking and pressurizing the air conditioning system; and starting compressors.

On Monday, July 16, 2001, the architect discovered a large amount of standing water in the building. The cause was later determined to be a failure of the water heater located on the top floor of the building. It occurred during the weekend of July 14 through July 16, 2001.

As a result of the water damage, plaintiffs tendered a claim to Fireman's Fund. On August 28, 2001, Fireman's Fund notified plaintiffs about the possibility of a problem with coverage due to the vacancy endorsement. On December 7, 2001, Fireman's Fund denied coverage for the water loss, explaining that the building had been vacant for over 60 days when the loss occurred. The denial letter also observed that tenant improvements did not begin until August 16, 2001, which was 30 days after the occurrence of the water loss. From June 2002 through May 2003, plaintiffs requested three times that Fireman's Fund reconsider its denial of coverage, and each time Fireman's Fund denied the request.

PROCEDURAL HISTORY

Plaintiffs filed a complaint in Kern County Superior Court on May 19, 2003, alleging the following causes of action: breach of the duty of good faith and fair dealing and breach of an insurance contract. Plaintiffs also sought declaratory relief, requesting that Fireman's Fund pay the benefits for the building's water damage. On July 3, 2003, Fireman's Fund answered plaintiffs' complaint.

Fireman's Fund filed a motion for summary judgment, arguing that, as a matter of law, the company did not breach the insurance contract with plaintiffs because a building renovation cannot be considered "construction" pursuant to the vacancy exception for buildings "under construction."[1] On January 26, 2004, plaintiffs filed an opposition to Fireman's Fund's motion for summary judgment.

On March 4, 2004, the trial court granted Fireman's Fund's motion for summary judgment. The court found:

> "'[C]onstruction' as contained as an exception to the vacancy exclusion in the subject policy to mean the creation of something new, as distinguished from the repairing or improvement of something already existing as

[1]Fireman's Fund also argued that the company did not act in bad faith because there was a genuine dispute as to coverage, and that plaintiffs' claim for punitive damages should be dismissed.

> opposed to 'repairs' which includes restoring by replacing a part or putting together what is torn or broken. [Citation.] As pointed out in *Myers v. Merrimack Mutual Fire Insurance Company* [(7th Cir. 1986) 788 F.2d 468], at page 472, 'This distinction is in accord with the probable purpose of this clause. Such a clause balances a willingness to extend coverage through the construction period with a desire to guard against excessive vandalism that occurs when a dwelling is vacant, … and the interpretation urged by Plaintiff would intolerably alter this balance by greatly extending the "construction" period to include any time during which some repairs or renovations are being made. The "construction" period cannot go on forever.'"

Plaintiffs filed a motion for reconsideration, which was denied.

On March 17, 2004, plaintiffs filed a motion for leave to amend their complaint to assert three new causes of action: waiver/estoppel, reformation, and misrepresentation/fraud. This motion was also denied by the trial court. In denying the motion to amend, the court explained that plaintiffs were attempting to amend the complaint to assert new causes of action that were available to them at the time the complaint was originally filed, and that Fireman's Fund would be substantially prejudiced if the amendment was permitted at this stage of the litigation.

A notice of the entry of judgment was filed.

DISCUSSION

I. Motion for summary judgment

On appeal, plaintiffs argue that the court erred in granting Fireman's Fund's motion for summary judgment. Specifically, they contend that under both the plain meaning and reasonable expectation of the insured rules of contract interpretation, the renovation of the building is considered construction for purposes of the vacancy exclusion to the insurance policy. Plaintiffs assert that the court incorrectly followed the minority view held by jurisdictions outside of California that renovations are not considered construction and contend that the majority view favors their interpretation of the insurance policy.

Fireman's Fund, on the other hand, argues that the court applied the correct definition of under construction, which requires *new* construction and does not include renovation. Fireman's Fund further asserts that even if renovations were within the under-construction exception to the vacancy exclusion, the actions taken by the architects and the contractor do not amount to renovation, but instead constituted repairs to the building.

A. Standard of review

An insurer is entitled to summary judgment "if the evidence establishes as a matter of law that there is no coverage." (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.) In reviewing an order granting a motion for summary judgment, "'we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.'" (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1057, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Moreover, where the facts are undisputed, the interpretation of an insurance contract is a question of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) We are not bound by the trial court's interpretation of an insurance policy, but must independently interpret its provisions. (*Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 216.)

B. Principles of insurance policy interpretation

In *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, the California Supreme Court explained the rules that apply when interpreting an insurance policy:

> "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.) Thus, if the meaning a lay person would

> ascribe to contract language is not ambiguous, we apply that meaning. [Citations.] [¶] If there is ambiguity, however, it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. (Civ. Code, § 1649.) If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. (*Id.*, § 1654.)" (*AIU Ins. Co. v. Superior Court, supra,* 51 Cal.3d at pp. 821-822.)

These principles were further clarified by the California Supreme Court in *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254. In that case, the court stated:

> "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. [Citation.] The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.] On the other hand, '[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.' [Citations.] This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, '*the objectively reasonable expectations of the insured*.' [Citation; italics added.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer. [Citation.] [¶] In summary, a court that is faced with an argument for coverage based on assertedly ambiguous policy language must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy. [Citation.] This is because '*language in a contract* must be construed in the context of that instrument as a whole, and in the circumstances of that case, and *cannot be found to be ambiguous in the abstract*.' [Citations.]" (*Bank of the West v. Superior Court, supra,* 2 Cal.4th at pp. 1264-1265.)

Ambiguity occurs when an insurance policy provision is capable of two or more constructions, both of which are reasonable. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.) To determine whether both constructions are reasonable, the term must be considered in light of the language of the whole policy "'and cannot be found to be ambiguous in the abstract.' [Citation.]" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648 (*MacKinnon*); *Bank of*

the West v. Superior Court, *supra*, 2 Cal.4th at p. 1264.) The law requires that "[w]ords used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.) The question of ambiguity is a question of law. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal.4th at p. 867; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.) Where no ambiguity exists, we need not consider the insured's reasonable expectations. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37-38.)

Policy exclusions are strictly construed. (*MacKinnon*, *supra*, 31 Cal.4th at p. 648.) In contrast, exceptions to exclusions are broadly construed in favor of the insured. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1193.)

> "'[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again "any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect." [Citation.] Thus, "the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language." [Citation.] The exclusionary clause "must be *conspicuous, plain and clear*."' [Citation.] This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded. [Citation.] The burden is on the insured to establish that the claim is within the basic scope of coverage and on the insurer to establish that the claim is specifically excluded. [Citation.]" (*MacKinnon*, *supra*, 31 Cal.4th at p. 648, fn. omitted.)

In sum, our goal is to determine the mutual intention of the parties at the time the policy was created, and intent should be inferred, if possible, solely from the written terms of the policy. (*AIU Ins. Co. v. Superior Court*, *supra*, 51 Cal.3d at pp. 821-822.) "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is

given to them by usage' [citation], controls judicial interpretation. [Citation.]" (*Id.* at p. 822.)

C. Applicability and vacancy exclusion for "under construction" to renovations of an existing building

Applying the principles of insurance policy interpretation to this matter of first impression in California, we are persuaded that the court correctly decided that the term under construction in the subject policy does not include renovations to an existing building.

First, the plain meaning of the word construction, in its ordinary and popular sense, does not include steps taken to renovate an existing building. The words construction and renovation are not synonymous—they do not encompass the same type of action that may be done to a building and their use in the insurance policy does not create an ambiguity. Construction is defined as "the act of putting parts together to form a complete integrated object," and the "creation of something new, as distinguished from the repair or improvement of something already existing." (Webster's 3rd New Internat. Dict. (1986) p. 489; Black's Law Dict. (6th ed. 1990) p. 312, col. 2.) To renovate, on the other hand, is defined as "restor[ing] to life, vigor or activity," and "clean[ing] up, replac[ing] worn and broken parts in, [and] repair[ing]." (Webster's 3d New Internat. Dict., *supra*, at pp. 1922-1923; Webster's New World Dict. (2d college ed. 1982) p. 1203.)

In our view, based on these definitions, construction envisions the building of a new structure and requires the putting together of various parts in order to bring the building to a point of readiness for occupancy, while a renovation does not. A building under renovation is readily able to be occupied but requires some repair and improvements in order to meet the aesthetic or business needs of the occupant. That was the case here. The Salvation Army occupied and leased the building without any renovation for a period of time. Once the Salvation Army vacated, the building was

capable of being immediately occupied by and leased to another tenant; however, the new tenant, Goodwill, negotiated a build-to-suit lease to allow for improvements and changes to be made to the building in order to meet their business needs. Goodwill chose not to occupy the building until the changes were completed. However, the fact that these improvements and repairs were being made to the building did not render the building unable to be occupied—the essential structural parts of the building remained despite the renovations. As a result, the building was not under construction for the purposes of the vacancy exclusion.

The Colorado Court of Appeal's decision in *Aetna Cas. & Sur. Co. v. Transamerica Title Ins. Co. of Colo.* (Colo.App. 1970) 480 P.2d 585 supports this view. In *Aetna Casualty*, a building was occupied by two business tenants when it was damaged by fire. (*Id.* at pp. 585-586.) Due to the fire damage, tenants were unable to occupy the building. (*Id.* at p. 586.) While the building was being reconstructed, vandalism occurred. (*Ibid*.) The insurance company denied coverage on the basis that the building was unoccupied for more than 30 days even though the policy contained an exception to the vacancy clause that stated "'a building in process of construction shall not be deemed vacant.'" (*Ibid*.) The court held that the vacancy clause did not come into effect because the building itself was not able to be occupied. (*Id.* at pp. 586-587.)[2] This holding supports the logic behind the under-construction exception to the vacancy

[2]In their appellate brief and at oral argument, plaintiffs argued that they have repeatedly asked for an example of when the under-construction exception to the vacancy exclusion is applicable to an existing building, and they assert that they have never been provided an answer to this question. An answer to this question was given by Fireman's Fund at the summary judgment hearing and in their appellate brief, and the answer closely resembles the factual situation presented in the *Aetna* case. Fireman's Fund claims that under its interpretation of the policy, "[i]f the building burned down, … [t]hey can build a new building at the same location. That would be under construction under our interpretation."

exclusion contained in most insurance policies—a building under construction is unable to be occupied, therefore it cannot be considered vacant. A building being renovated, on the other hand, is able to be occupied during the period of renovation (admittedly with some inconvenience to the occupants). Therefore, renovation is not a logical exception to the vacancy exclusion.

Second, there is no evidence that the parties gave a different meaning to the term construction so that renovations would be included. Plaintiffs contend that, when they purchased the insurance policy, Fireman's Fund knew the building was vacant and that plaintiffs intended to renovate it to fit the needs of a not-yet-identified commercial tenant. Yet, they have cited to no evidence establishing this knowledge. This is why plaintiffs' reliance on *Patton v. Aetna Ins. Co.* (N.D. Miss. 1984) 595 F.Supp. 533 is misguided. In *Patton*, there was evidence presented that the insurance company knew the owner of the property was going to renovate the building when he purchased the policy. Consequently, it was reasonable to construe construction as including the alterations that the owner made to the building while transforming the home into a convenience store. (*Id.* at p. 535.) In this case, no evidence of this type was presented by plaintiffs.

Third, we conclude that if the policy had wanted to include renovations as an exception to the vacancy exclusion, it would have said so. Fireman's Fund specifically excludes "[b]uildings in the course of construction, renovation, or addition" from the cancellation endorsement attached to the policy. This is evidence that Fireman's Fund considered renovations and additions to be distinct from construction and expressly chose not to except these circumstances from the vacancy exclusion. (See, e.g., *Liberty Mut. Ins. Co. v. Blandford* (W.D. Ky., Sep. 1, 1999, Civ. A. No. 3:98CV-6-S) 1999 WL 33756670, *3, *4 [renovations were not included in the under-construction exception to the vacancy exclusion].)

Fourth, our interpretation of the term construction is consistent with the purpose of a vacancy clause—to prevent vandalism and ensure the prompt discovery of damage

(whether caused by a third person or elements such as fire or water). (See *Myers v. Merrimack Mut. Fire Ins. Co.* (7th Cir. 1986) 788 F.2d 468, 472 [vacancy clause balances a willingness to extend coverage through construction period to guard against excessive vandalism occurring in a vacant building].) Buildings under construction will usually have workers on the property on a daily basis, which deters potential vandals and encourages the early discovery of fire or water damage. Renovation, however, does not require daily involvement with the property.

For example, here, workers were not in the building on a regular basis during the relevant times of the renovation process. Plaintiffs admit that the electricians had worked at the building for barely one full week in the two weeks prior to the damage, and the electrical subcontractor admitted that he only periodically visited the building between June 29, 2001 and July 14, 2001. Further, the architect logged only 46 hours of work in the month prior to the damage, and there is no indication whether any of this work actually took place at the building. Because the renovation work in this case did not occur on a daily basis and instead occurred only periodically, there was no one present to guard against vandalism or discover possible damage to the building as would have occurred had the building been under construction. Additionally, buildings under construction will normally have a definite completion date, while renovations need not and may extend over a protracted period of time. As correctly recognized by the court in *Myers*, "[t]he 'construction period' cannot go on forever" and thus renovations should not be covered under the vacancy exception. (*Myers v. Merrimack Mut. Fire Ins. Co.*, *supra*, 788 F.2d at p. 472.)

Finally, many state and federal courts concur with our interpretation that the term under construction does not include renovations to an already existing structure. For example, in *Myers*, *supra*, the Seventh Circuit Court of Appeals found that a building was not "'in [the] process of construction'" and consequently was considered vacant for the purposes of the vacancy exclusion to the insurance policy. (*Myers v. Merrimack Mut.*

Fire Ins. Co., supra, 788 F.2d at pp. 469-470, 472.) The Court of Appeals of Georgia held in *Travelers Indem. Co. v. Wilkes County* (1960) 102 Ga.App. 362 [116 S.E.2d 314] that "the word 'construction' imports the building or erection of something which theretofore did not exist; the creation of something new rather than the repair or improvement of something already existing." (*Id.* at p. 364.) In *Jerry v. Kentucky Cent. Ins. Co.* (Tex.Ct.App. 1992) 836 S.W.2d 812, the Court of Appeals of Texas decided that the term construction did not include repairs and thus a home that had received new locks, doors, and porch was not under construction for the purposes of the vacancy exclusion. (*Id.* at pp. 815-816.) (See also *Crescent Co. of Spartanburg, Inc. v. Insurance Co. of North America* (1976) 266 S.C. 598, 603 [225 S.E.2d 656, 658] ["[t]he 'in process of construction' clause was obviously designed to extend coverage for houses during normal periods of construction"].)[3]

We conclude that the trial court correctly ruled that the term under construction in this insurance policy did not include renovations to the existing building. Of course, our decision does not prevent property owners from purchasing insurance policies that would cover periods of renovation during which the property is not occupied. They need only negotiate and pay for the coverage.

---

[3]We decline to rely on dicta in the case of *Warren Davis Properties V, L.L.C. v. United Fire & Casualty Co.* (Mo.App. S.D. 2003) 111 S.W.3d 515, issued by the Missouri Court of Appeals, which suggests that the definition of construction includes renovation. (*Id.* at p. 522.) The court's opinion is unpersuasive because the court ultimately decided not to address whether the construction exception to the vacancy exclusion applied. (*Ibid*.) Instead, it ruled on whether there had been an instructional error concerning an estoppel defense asserted by the insured that the insurance company had waived the application of the vacancy exclusion since it knew the building was vacant when the company issued the policy. (*Ibid*.)

II. Motion to amend

After the trial court granted Fireman's Fund's motion for summary judgment, plaintiffs filed a motion to amend the complaint to assert three new causes of action: waiver/estoppel, reformation, and misrepresentation/fraud. The court denied this motion, reasoning that plaintiffs were attempting to assert causes of action that were available to them when the complaint was originally filed, and that Fireman's Fund would be substantially prejudiced if the amendment were permitted at this stage of the litigation. Plaintiffs assert that the court erred in denying their motion.

A. Standard of review

The standard of review in the denial of a motion to amend a complaint under Code of Civil Procedure section 473 is abuse of discretion. (Code Civ. Proc., §§ 473, 576; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 487.) A trial court has wide discretion in granting or denying leave to amend a complaint, and the ruling of the trial court will be upheld unless a manifest or gross abuse of discretion is shown. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613; *Record v. Reason* (1999) 73 Cal.App.4th 472, 486.) Courts have held that unwarranted delay, without more, can be a valid reason for denying a motion to amend. (*Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940.)

B. Analysis

We conclude that the trial court did not abuse its discretion in denying plaintiffs' motion to amend. "Time and knowledge are important factors to be considered when granting or denying a motion to amend." (*Stockton v. Ortiz* (1975) 47 Cal.App.3d 183, 194, citing *Curtis v. 20th Century-Fox Film Corp.* (1956) 140 Cal.App.2d 461, 465.) In this case, the complaint was filed on May 19, 2003, and a trial date was set for May 24, 2004. Plaintiffs waited 10 months before filing the motion to amend on March 17, 2004, which was only two months prior to the start of trial and one month prior to the close of discovery. Plaintiffs must have known early in the litigation process that, if they were to

lose on the issue of whether under construction included renovations to an existing building, they would need to assert causes of action for waiver/estoppel, reformation, and misrepresentation/fraud in order to hold Fireman's Fund liable. Consequently, they should have pleaded these theories in the initial complaint or sought to amend at an earlier date. To allow plaintiffs to amend would have put Fireman's Fund in the position of defending against a theory and cause of action for which they were not prepared, which likely would have required a delay in the trial date and an extension of the close of discovery.

DISPOSITION

The judgment is affirmed. Costs are awarded to Fireman's Fund.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Cornell, J.

_____
Gomes, J.