IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN SULLIVAN and CAROLYN SULLIVAN,	)	
	)	No. 515, 2007
Plaintiffs Below, Appellants,	)	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	)	
THE STANDARD FIRE INSURANCE COMPANY,	)	C.A. No. 04C-11-214
Defendant Below, Appellee.	)	

Submitted: January 30, 2008
Decided: February 11, 2008

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

O R D E R

This 11th day of February 2008, it appears to the Court that:

(1) Appellants-plaintiffs John and Carolyn Sullivan appeal a Superior Court decision granting summary judgment to appellee-defendant, The Standard Fire Insurance Company (SFIC). The Sullivans claim that the trial judge erred as a matter of law by interpreting the language of the insurance policy to exclude damages to personal property caused by mold spores. After review, we find the trial judge erred by granting summary judgment. We reverse and remand to the Superior Court for further proceedings in accordance with this Order.

(2) The Sullivans owned a condominium and carried a homeowner's insurance policy issued by SFIC. The policy included coverage for damages to a "Dwelling" (Coverage A) and to "Personal Property" (Coverage C). On July 20, 2001, the Sullivans submitted a claim to SFIC for alleged damages to the condominium and to personal property within the condominium.[1]

The Sullivans alleged that a windstorm blew shingles off the roof, causing the damages *to the condominium*. The windstorm occurred in December 1999 or January 2000, but they did not have the roof repaired until May 2001. Following the windstorm, the Sullivans noticed damp carpets and stains on the ceiling and walls. They also heard water running through the walls. SFIC agreed to pay for the damages to the condominium structure.

The Sullivans also claimed damages to *personal property* inside the condominium. They argued that mold spores developed inside the condominium's walls and insulation after the windstorm opened a hole in the roof and contaminated their personal property. Samples taken on several occasions "establish[ed] the existence of mold in the condominium and even on the furniture

[1] *See Sullivan v. Standard Fire Ins. Co.*, 2007 WL 2473308, at *1 (Del. Super.).

and other personal property."[2] Nonetheless, in October 2002, SFIC informed the Sullivans that their insurance policy did not cover the claimed damage.

On November 19, 2004, the Sullivans filed an action in the Superior Court claiming that SFIC had breached the insurance contract by denying their claim *for personal property* loss. An unanswered Request for Admissions limited by default the Sullivans' claim to the insurance policy's Coverage C, and to one peril listed under that coverage ("windstorm or hail").[3] The relevant language states:

> We insure for *direct physical loss* to the property described in Coverage A [Dwelling] and C [Personal Property] caused *only* by a peril named below [...]
> 2. Windstorm or hail. This peril does not include loss to the inside of a building or the property contained in a building caused by rain, snow, sleet, sand or dust *unless* [i] the direct force of wind or hail damages the building causing an opening in a roof or wall and [ii] the rain, snow, sleet, sand or dust enters through this opening.

At the close of discovery, SFIC moved for summary judgment, which the trial judge granted on August 29, 2007.[4] The Sullivans appealed.

(3) We review a decision granting summary judgment *de novo*.[5] Furthermore, "[t]he Superior Court's interpretation and construction of an insurance

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[2] *Id.* at *2.

[3] SFIC served its request for admissions on November 9, 2006. Because the Sullivans did not respond, the matters requested must be deemed admitted under Superior Court Civil Rule 36.

[4] *See Sullivan v. Standard Fire Ins. Co.*, 2007 WL 2473308 (Del. Super.).

contract is subject to *de novo* review. The scope of the coverage obligation is determined by the language in the insurance policy. Where the language is unequivocal, the parties are bound by its clear meaning. If the language is ambiguous, it will be construed against the insurance company that drafted it."[6]

(4) The Sullivans contend that the trial judge erred as a matter of law by interpreting the relevant language of the insurance policy to exclude damages to personal property caused by mold spores. That language limits the Sullivans' claim for damage to their personal property for the "windstorm or hail" peril.[7] The trial judge, however, made no determination whether "windstorm or hail," as defined in the policy, caused the Sullivans' loss. The insurance contract clearly provides that the "windstorm or hail" peril "*does not include loss to the inside* of a building or the property contained in a building *caused by rain* [...] *unless* [i] the direct force of wind or hail damages the building causing an opening in a roof or wall and [ii] the rain [...] enters through this opening." SFIC does not dispute that

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[5] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999) (citing *Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994)).

[6] *Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 641-42 (Del. 2002) (internal citations omitted) (citing *ABB Flakt, Inc. v. Nat'l Union Fire Ins. Co.*, 731 A.2d 811, 816 (Del. 1999); *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997); *Phillips Home Builders, Inc. v. Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. 1997); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

[7] In particular, neither party relied on the exclusions for "Water Damages" and "Neglect" contained in SECTION I – EXCLUSIONS of the insurance policy or on COVERAGE D – LOSS OF USE.

the windstorm caused an opening in the roof and that rain entered through that opening. Therefore, the Sullivans only need to prove causation — that the rain that entered the condominium through the roof opening caused the "loss" (mold contaminants).

(5) To determine whether the Sullivans met their burden of proving causation, the entire contractual provision must be considered, in particular the language stating that the insurance policy only covers "direct" loss. The trial judge correctly noted that "Delaware Courts have not interpreted the . . . language presently at issue."[8] However, other courts have held that "[w]here insurance against property damage covers only *direct loss*, it has been construed to mean immediate or proximate as distinguished from remote or incidental causes."[9] Therefore, this insurance policy requires proof of proximate cause. Under well-settled Delaware law, "proximate cause exists if a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and

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[8] *Sullivan v. Standard Fire Ins. Co.*, 2007 WL 2473308 at *4.

[9] *Id.* at *3 (emphasis added) (citing *Sorrentino v. Allcity Ins. Co.*, 229 A.D.2d 481 (N.Y. App. Div. 1996); *The Travelers' Indem. Co. v. L. Jarrett*, 369 S.W.2d 653 (Tex. Ct. Civ. App. 1963); *Yunker v. Republic-Franklin Ins. Co.*, 442 N.E.2d 108 (Ohio App. Ct. 1982)); *see also* COUCH ON INSURANCE 3D § 153:13 (2007) ("Under a policy covering 'direct loss' . . . from windstorms, the quoted phrase [is] generally synonymous with proximate cause"); Stephen M. Brent, Annotation, *What Constitutes "Direct Loss" Under Windstorm Insurance Coverage*, 65 A.L.R.3d 1128 (1975) ("It has been held in many cases that the phrase 'direct loss' requires only that the windstorm be the proximate cause of the loss.").

without which the result would not have occurred."[10] Thus, to be entitled to coverage, the Sullivans must prove that rain proximately caused the alleged loss from mold contamination of their personal property and that the loss was a "physical" loss.

(6) The trial judge concluded there was "no evidence that [p]laintiffs' personal property sustained direct physical loss," and granted summary judgment. She did not specifically analyze whether the mold contamination represented a "physical" loss. Because the record discloses evidence that the alleged loss was "physical" sufficient to create a triable issue of fact, we conclude the trial judge should not have granted summary judgment.

The adjective "physical" is defined as "having material existence."[11] Mold spores and other bacteria associated with mold undoubtedly have a "material existence," even though they are not tangible or perceptible by the naked eye. Therefore, mold contamination constitutes a "physical loss" within the meaning of the policy and, assuming all other policy conditions are met, the cost of removing

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[10] *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).

[11] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1987) ("physical … 1a: having material existence, perceptible esp. through the senses and subject to the laws of nature … b: of or relating to material things").

the mold from, or of replacing the personal property may be recovered under Coverage C.[12]

We do note that the Sullivans argued, both to the trial judge and on appeal, that the phrase "physical loss" includes the *loss of use* of personal property. The plain meaning of the word "physical" and the insurance policy's language do not support that contention.[13] Coverage C does not provide indemnity to the Sullivans for any damages resulting from the loss of use of their personal property.

(7) The remaining issue is whether the Sullivans produced sufficient facts to establish that rain proximately caused the "physical loss" to defeat summary judgment. The trial judge's findings on this issue appear contradictory, making it impossible to determine whether she determined that the rain did or did not proximately cause the mold contamination. The trial judge assumed, for purposes

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[12] *See Simonetti v. Selective Ins. Co.*, 859 A.2d 694, 699 (N.J. Super. 2004) (noting that "mold can be both a loss and a cause of loss," that the policy expressly excluded mold as a cause of loss, but did not exclude mold as a loss, and consequently allowing recovery for the cost of removing the mold, thereby implicitly recognizing that mold was a "physical loss" as required under that policy); *see also Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. App. 1997) (holding that asbestos contamination is a "physical loss" to property and that the cost of removal is recoverable). Contrary to the trial judge's conclusion, *Sentinel Management* and the cases it cites are helpful in interpreting the meaning of "physical loss" here because the insurance policies in those cases similarly limited recovery to "direct physical loss."

[13] The policy contrasts "physical injury" and "loss of use" by defining the term "property damage" as "physical injury to, destruction of, or loss of use of tangible property." Moreover, the policy contains a separate coverage dealing with the loss of use of both the dwelling and the personal property contained within (Coverage D). Sullivans have never relied on Coverage D.

of deciding the summary judgment motion, that "there [wa]s *direct* causation between the windstorm and the development of the mold." Yet the trial judge later stated that "[i]n the present case, however, neither water nor wind *directly* caused the damage to the personal property belonging to [p]laintiffs."[14] Those findings cannot be reconciled and cannot, therefore, support summary judgment.

(8) Although these errors alone require reversal and remand, summary judgment on this record is inappropriate for either party. First, the trial judge inappropriately assumed that "the windstorm related water damage was the *only cause* contributing to the mold."[15] SFIC disputes the assertion that *only* the rain that entered through the opening created by the windstorm in the roof caused the mold contamination. SFIC claims other plausible events caused the damage, such as water damage from leaking pipes, the Sullivans' negligence in failing to repair the roof for approximately 18 months, or windstorm water damage. A genuine issue of material fact exists, namely, whether the rain that entered the condominium after the windstorm proximately caused the mold contamination.[16]

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[14] *Sullivan v. Standard Fire Ins. Co.*, 2007 WL 2473308, at *3 (emphasis added).

[15] *Id.* at *4 n.19 (emphasis added).

[16] *See* Super. Ct. Civ. R. 56(c) (stating that summary judgment may be granted where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

Second, the trial judge "assume[d] [that] there is no dispute that the condominium sustained water damage *as a result of the windstorm*."[17] That assumption rests on the false premise that SFIC's payment for damages to the condominium under Coverage A (Dwelling) constitutes an admission that the damages were "caused by a windstorm." As SFIC correctly indicates, Coverage A is an "all risk" coverage.[18] Therefore, no admission of causation by any particular, specific cause should have been inferred from SFIC's payment to the Sullivans under Coverage A.

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[17] *Sullivan v. Standard Fire Ins. Co.*, 2007 WL 2473308, at *3 (emphasis added).

[18] The provision stating that "We insure for direct physical loss to the property described in Coverage A [Dwelling] and C [Personal Property] caused only by a peril named below [...]" was impliedly modified by an endorsement to the policy which changed the nature of Coverage A (Dwelling) to a "non specified perils" coverage (*i.e.*, the insured is covered against "all risks" except those expressly excluded), while Coverage C (Personal Property) remains a "specified perils" coverage (*i.e.*, the insured is covered only against those perils expressly listed). The endorsement provides: "SECTION I – COVERAGE A – DWELLING PERILS INSURED AGAINST is changed as follows: 'We insure against risks of direct physical loss to property described in COVERAGE A EXCEPT [...]'" Therefore, the trial judge incorrectly stated that "coverage under both subsections A and C are [sic] limited to damage caused by one of the specified perils." *Id.* at *2.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and **REMANDED** for proceedings consistent with this Order.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice