# STATE OF MICHIGAN

# COURT OF APPEALS

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HOPE PHILLIPS,

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

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UNPUBLISHED
March 23, 1999

No. 197346
Wayne Circuit Court
LC No. 95-537964 CK

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant. We affirm.

We review the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The initial burden of factually supporting the motion rests with the moving party. The burden then shifts to the opposing party to establish a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate only if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 197; 534 NW2d 491 (1995).

We find that the trial court correctly granted summary disposition for defendant because plaintiff had no coverage for the frozen pipes peril. In this regard, we find that plaintiff's reliance on the "duties after loss" provision of the insurance policy to establish coverage is misplaced because plaintiff did not claim that the water damaged property was caused by the fire or otherwise came within the ambit of coverage for the fire that occurred on March 16, 1995. Hence, the question whether plaintiff complied with her duties relative to the fire is not relevant. The material question is whether the damage from the frozen pipes that burst on or about April 9, 1995, is a covered peril. This, in turn, is dependent on whether the exclusion specified for the frozen pipes peril applies. It is undisputed that the policy

provides coverage for damage caused by "[f]reezing of a plumbing…system," subject to the following exclusion:

> This peril does not include loss on the **residence premises** while the dwelling is unoccupied, unless you have used reasonable care to:
>
> a. maintain heat in the building; or
>
> b. shut off the water supply and drain the system and appliances of water.

The material question before us is whether the house was "unoccupied" within the meaning of the above exclusion. We do not agree with plaintiff's position that the exclusion should be construed as applying only to absences for such matters as vacations and job assignments, and that a common sense reading of the provision would not give her notice that it applies to a fire-damaged home which is vacated because it is uninhabitable.

Temporary absences such as vacations and job assignments are the type of absences for which the exclusion would not apply. *Shackelton v Sun Fire Office*, 55 Mich 288, 291-292; 21 NW 343 (1884); *Krajenke v Preferred Mut Ins Co*, 68 Mich App 211, 216; 242 NW2d 70 (1976). See also *Smith v Lumbermen's Mut Ins Co*, 101 Mich App 78, 84-85; 300 NW2d 457 (1980). The actual use of a house as a dwelling place is the touchstone for occupancy. *Shackelton, supra* at 292. "The use of the building for storage would not create occupancy. It is the regular presence of inhabitants that makes occupancy." *Coutu v Exchange Ins Co*, 174 AD2d 241, 244; 579 NYS2d 751 (1992). A house is unoccupied when "it ceases to be used for living purposes or as a customary place of human habitation." *Blaylock v American Guarantee Bank Liability Ins Co*, 632 SW2d 719, 721 (Tex, 1982).

Circumstances may arise where an insured can be said to occupy a dwelling, even though there is a temporary absence. However, we hold that an insured's absence that arises because the house ceases to be habitable is unoccupied, as a matter of law, within the meaning of the exclusion for the frozen pipes peril. Our holding is consistent with the rule of reasonable expectations that is applied when construing insurance policies because an insured is held to knowledge of the terms and conditions of an insurance policy, even if the policy is not read. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 324; 575 NW2d 324 (1998). Examined from an objective standpoint, an insured such as plaintiff, reading the exclusion for the frozen pipes peril, cannot reasonably expect coverage when there is no occupancy unless reasonable care has been taken to maintain the heat or shut off the water supply. *Id.* at 316. Hence, as a matter of law, plaintiff had no coverage for the frozen pipes peril unless she used reasonable care to either maintain heat or shut off the water supply. On this issue, we uphold the trial court's grant of summary disposition in favor of defendant because plaintiff did not establish a genuine issue of material fact for trial on either of these issues and defendant is entitled to judgment as a matter of law. MCR 2.116(G)(4); *Quinto, supra* at 362.

Because plaintiff did not have coverage for the frozen pipes peril, we find it unnecessary to address the parties' arguments regarding whether the neglect exclusion in the insurance policy precluded

plaintiff from recovering for the water damage to her personal property. Finally, we decline to consider plaintiff's arguments concerning whether she established other theories of recovery in response to defendant's motion for summary disposition. We deem plaintiff's arguments abandoned because they are insufficiently briefed. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Affirmed.

/s/ Roman S. Gribbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder