STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH SMITH,

Plaintiff-Appellant,

v

AMERICAN FEDERATION INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 27, 2002

No. 234472
Kent Circuit Court
LC No. 00-008745-NZ

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff Deborah Smith appeals as of right the trial court's order granting summary disposition to defendant American Federation Insurance Company pursuant to MCR 2.116(C)(10). Though American Federation filed a third-party complaint against Smith's former[1] husband, David Smith, neither he nor that complaint are involved in this appeal. This case is being decided without oral argument pursuant to MCR 7.214(E). We reverse and remand.

I. Basic Facts And Procedural History

In January 1996, Smith purchased a twelve-year-old mobile home in Wyoming, Michigan for approximately $18,000. American Bankers Insurance Company initially provided her insurance for her new home and was paid through her mortgage company. In February 1999, Smith decided to sell her home where she was living with her children, but she was unable to find a buyer. When Smith learned that she was pregnant in October 1999, she reportedly decided not to sell her home because it would be better for her children to stay in the home. On October 27, 1999, Smith purchased a homeowner's policy from American Federation because it offered lower premiums than her existing policy.

In the early evening hours of December 30, 1999, a fire started in Smith's family room. According to the Wyoming Fire Department's report, the family Christmas tree contributed most to the "fire spread." Though the fire was "confined to [the] room of origin," the home was

[1] The record indicates that Smith "filed" for divorce from Smith. Because it is not at all dispositive in this case, we assume that the couple was granted a divorce.

evidently uninhabitable following the fire. The fire department was unable to determine what caused the fire, listing the heat source, item first ignited, and type of material first ignited all as "undetermined" and describing the "cause of ignition" as "under investigation." Nothing in the report from the fire department directly stated that arson caused or was suspected of having caused the fire.

Within twenty-four hours of the fire, Smith contacted American Federation to inform it of her intent to file a claim. When American Federation told Smith that she would have to submit to an examination under oath, she informed American Federation that she intended to contact an attorney to learn about her rights. Smith gave the insurer the name of the firm, Garlington and Associates, that she eventually retained about five weeks later, on February 8, 2000. However, on January 27, 2000, before Smith actually retained the firm, American Federation sent a letter to the firm demanding that Smith submit to an examination under oath on February 7, 2000, and produce dozens of documents. Those documents included: her tax returns for three years; credit card and bank statements; extensive income information; loan statements and repayment documents; all keys to the home; home repair records; evidence of every check written since October 1999 on an account in which Smith had an interest; information about all debts for the past year; and information about any of Smith's legal actions and previous insurance claims. The letter reminded Smith and the firm that her insurance policy included a condition informing her of the specific steps she had to take when she had a loss, which included providing the insurer with any "information" it needed "to investigate the loss." The letter stated that if Smith did not have any of the documents listed, she had to get copies from whatever government agency, business, or other entity "originally generated the document." The letter also "advised" Smith "that absent production of the above-identified documents," her "poof of loss will not be deemed satisfactory pursuant to MCLA 500.2006."

An attorney for American Federation appeared at the firm's offices to conduct the examination on February 7, 2000, but learned that Smith had not yet retained the firm, and so cancelled the examination. Because of the mix-up concerning when the firm began representing Smith, American Federation sent a new demand letter for Smith to the firm on February 10, 2000. This letter was substantively the same as the first demand letter. Smith submitted to the examination under oath and produced a large number of documents by American Federation's deadline.

On February 25, 2000, American Federation sent a letter to Smith's attorney demanding that she produce additional documents in lieu of another examination under oath. American Federation had previously requested some of these documents, such as the completed sworn statement in proof of loss, in its first two letters to Smith. Smith had evidently produced some of these documents, but in a few cases, a page was missing. The insurer also requested additional documents for the first time, including: monthly statements from utilities for October, November, and December 1999; the bill of sale and copy of check or money order for Smith's car; documentation of the cost of books, tuition, other expenses, and financial aid for Smith's enrollment at Grand Rapids Community College; and information concerning a certificate of deposit Smith had cashed. American Federation gave Smith two weeks to produce these documents. Smith apparently provided the bulk of these documents by March 9, 2000, a day before the deadline. The attorneys for both parties then exchanged a series of letters in which

each asserted or disputed whether Smith had provided all the requested documents to which she had access.

On May 10, 2000, American Federation, through its claim representative, informed Smith that it was denying her claim, explaining:

> There is no coverage available for a loss which is intentionally caused by an insured or at his or her direction. Please be advised that under the laws of Michigan, civil policy defenses of arson require the establishment by a majority of the evidence that the fire loss to you [sic] mobile home was incendiary in nature. This differs from the requires of our Criminal Justice System that the proof be presented beyond a reasonable doubt. *We feel from our extensive investigation into this matter we can establish by a majority of the evidence that the fire to your mobile home was incendiary in nature, therefore, not covered under our policy of insurance with you. . . .*[2]

The insurer claimed that its investigator had determined that "the fire was non-accidental in nature, and the fire started in the area of the home by the Christmas tree. Accidental causes have been ruled out in this fire." The insurer asserted that it had statements from witnesses "refut[ing]" Smith's statements in her examination under oath, noting that she was having financial difficulties, had been unable to sell her home, and was being evicted before the fire. The insurer emphasized that there was no coverage for Smith "because insurance applies only in circumstances of accidental loss and the subject loss was intentionally set by or on behalf of Deborah Smith." Further, there was no coverage "because Deborah Smith has intentionally misrepresented facts material to American Federation's investigation of the claim including, but not necessarily limited to, her connection with the fire." Nothing in the letter indicated that American Federation was denying the claim because Smith had failed to produce requested documents. Following the letter, Smith forwarded an additional document, which had been sent to her only after American Federation denied her claim.

In September 2000, Smith sued American Federation alleging breach of contract for the insurer's refusal to pay her claim and that the insurer had violated the Uniform Trade Practices Act, MCL 500.202 et seq., in refusing to pay the claim. Among its six affirmative defenses included in the answer to the complaint, American Federation claimed that Smith had breached the insurance policy's "cooperation clause." American Federation asserted that the cooperation clause had required Smith to produce the documents it requested, but she had "intentionally failed and refused" to produce them.

American Federation filed a motion to compel Smith to produce documents it had requested in a set of interrogatories it had sent Smith. Though Smith had provided bank statements for October, November, and December 1999, unlike in its earlier demand letters, in its interrogatories American Federation had asked for statements for the entire year. Smith had likewise produced a limited set of statements from most of her credit cards, and had failed to provide any statements for four different credit cards. In response to the motion, Smith

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[2] Emphasis added.

forwarded copies of some of the requested documents that she had recently obtained. She insisted that she had given American Federation all the documents in her possession at the time she responded to the interrogatories, that she had provided the insurer with information about the accounts even when she could not furnish the relevant statements, and that she was never able to obtain any information regarding one of the accounts in her name. The trial court never ruled on this motion.

On March 12, 2001, American Federation filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Though American Federation asserted that the Wyoming Fire Department had determined that the fire was caused by arson, its sole argument in support of the motion was that Smith's failure to produce every document requested in the prelitigation phase and in discovery in this case amounted to a pattern of willful noncompliance with her obligation under the terms of the policy requiring cooperation. This, American Federation contended, was a material breach of the insurance policy, and therefore barred Smith from recovering under the contract.

In response to the motion for summary disposition, Smith and her attorney filed a joint affidavit in which they averred in pertinent part:

> 1. Before Defendant's March 10, 2000, deadline for the production of documents, Plaintiff had to the best of her ability substantially and willfully complied with Defendant's demand for production by delivering not less than 39 different collections of variously requested documents that were within her possession, custody or control. (See attached list.)
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> 2. By March 10, 2000, the only requested document that Plaintiff had not yet produced was the printout from the lienholder on the mobile home showing Plaintiff's payment history.
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> 3. As of May 26, 2000, Plaintiff had willfully and fully complied with all of Defendant's demands through consistent, lawful, and timely cooperation pursuant to the insurance contract and the response time of the businesses that had to duplicate and forward the various documents.

The attached list individually identified the thirty-nine "collections" of documents that Smith had given to American Federation; each collection ranged from a single document to several statements for individual accounts. Smith filed an individual affidavit in which she gave an overview of her decision to purchase the mobile home, sell it, switch insurers, and then keep the mobile home. Noting the somewhat confusing sequence in which she sought counsel and first received notice that American Federation was demanding that she submit to an examination under oath and produce a "plethora" of documents, Smith said that she "made a good faith and diligent effort to obtain all documents requested and to willfully comply with Defendant's demand for documents." She said that at the February 24, 2000, examination under oath she "produced all document that [she] was able to obtain and that were then within [her] possession, custody or control." Though she "did not then have all of the documents demanded by Defendant," Smith said that she "willfully complied to the best of [her] ability with Defendant's demand and delivered 21 exhibits of documents, totaling about 70 pages, and effectively detailing [her] financial condition prior to the fire." Smith's attorney also submitted his own,

separate affidavit, in which he again stated that Smith had done her best to fulfill American Federation's demands for documents. Further, he said that after a number of telephone conversations with American Federation's attorney "from December 5, 2000 through January 5, 2001, and corresponding reviews of documents submitted to date, Defendant acknowledged that Plaintiff had substantially complied with its request for production." Attached to this affidavit were copies of Smith's attorney's handwritten notes from the examination under oath noting the numerous documents given to the insurer at that time.

At the hearing on the motion for summary disposition, the trial court first inquired about the motion to compel Smith to produce additional documents. Smith's attorney indicated that American Federation had withdrawn its motion to compel because it had agreed that "all the documents had been produced at that time and there was no need to proceed with the motion to compel." The trial court then indicated:

> It strikes me, were I in the position of Ms. Smith, or anyone being sought to produce documents, that which was sought by the defense insurance company, is readily accessible. Specifically, credit card records. And I am of the opinion that, fire or not, there is an independent means by which this material could have and should have been produced and wasn't. Now, why is that? Not why do I have the opinion, but why didn't she produce that which she has access to?

Smith's attorney disagreed with the trial court's characterization of Smith's conduct, saying that Smith had given American Federation all but one document that was in her custody or control before the March 10, 2000, deadline. American Federation's attorney said that, though it received many documents, it did not receive all the documents it requested and Smith should have produced other documents that "she could have easily obtained." The lack of documents allegedly prevented American Federation from "having a complete and full financial review of the cash flow of the insured up to the date of the loss . . . ." Smith's attorney, however, noted that American Federation had not asked for all the documents from the very beginning of its investigation, but had added to the list of documents it was seeking as time passed. The implication was that the trial court should not look at every document that Smith had failed to produce as noncompliance with the requests from the very beginning of the investigation in February 2000. Smith's attorney also suggested that American Federation may not have been aware that she had produced all the requested document because, per American Federation's explicit instructions in its February 25, 2000, letter to Smith, she had sent the documents to Ken Stewart, American Federation's claim representative.

Turning to the precedent on which American Federation was relying, *Thomson v State Farm Ins Co*,[3] Smith's attorney claimed that the case was distinguishable because it involved an insured who refused to submit to an examination under oath. In this case, to the contrary, Smith had willingly submitted to examination under oath. Further, Smith's attorney argued, *Thomson* emphasized that willful noncooperation could constitute a breach of contract, but there was no evidence that any noncooperation in this case was willful. In fact, Smith's attorney noted, American Federation had never cited noncooperation or Smith's alleged failure to produce

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[3] *Thomson v State Farm Ins Co*, 232 Mich App 38; 592 NW2d 82 (1998).

requested documents when it denied her claim, instead contending that the fire was arson. Had American Federation really believed that Smith still possessed or had access to documents it needed, Smith's attorney maintained, there would have been no reason for it to withdraw its motion to compel her to produce additional documents.

American Federation's attorney responded that the affidavits Smith had filed should be discounted because "the case law has repeatedly identified that affidavits that are self-serving or by witnesses that have credibility issues are those that are to be discounted by the trial court in a summary disposition setting." Further, defense counsel argued, Smith had failed to present any evidence contradicting the statements in the letters from American Federation's attorney claiming not to have received requested documents. In part, this argument picked up on the trial court's statement at the beginning of the hearing expressing that it hesitated to take into consideration an affidavit from plaintiff's counsel.[4]

The trial court announced its ruling from the bench, explaining that it was clear that American Federated had asked for documents numerous times. Acknowledging that the insurer had expanded its requests for documents somewhat, the trial court said:

> That aside, we have a situation, in my opinion which is different from full compliance and a new set of demands by the insurance company, followed by full compliance in yet another burdensome set of demands imposed on the insured by the insurance company. I believe that there has been, on the part of the defendant, a willingness to accommodate the insured until she got counsel, and once counsel was obtained, consistent requests for the same material being made of the insured. And while I do have a suggestion in affidavit that compliance was had, I have no contemporaneous proof which would lead me to believe that in fact those materials were presented. It would be oh so simple to have been able to nip this in the bud, had compliance been had, to show that in fact those requests which were made were being honored in their limited scope, and resubmit that proof with cover letters to document it.
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> Here I believe the distinction to be made is that while the plaintiff may have submitted all things in her possession, she did not submit those things to which she had access, despite repeated requests, and the repeated nature of these requests, leading me to conclude that what was being sought of her was rejected in a patter of constant rejections. I don't know that I need say anything more than that, because I'm impressed that the same material was being sought on several occasions. And so I do, upon everything presented to me, respectfully grant the motion for summary disposition and leave to the plaintiff her appellate rights. Thank you very much.

The parties now raise the same arguments in this appeal.

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[4] Not the attorney arguing the motion.

II. Standard Of Review

This Court reviews de novo a trial court's decision to grant a motion for summary disposition.[5]

III. Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[6] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[7] "The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."[8] Only if there is no factual dispute would summary disposition be appropriate.[9] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[10]

The nature of this appeal requires this Court to consider the effect of the written insurance policy. Thus, the legal standards this Court applies when construing contracts are also relevant. "The primary goal of contract interpretation is to honor the intent of the parties. If the contract language is clear and unambiguous, then its meaning is a question of law for the court to decide."[11] These standards for contract construction ordinarily intersect with the analytical framework for summary disposition at the place where the court considering the motion must determine whether a question of material fact exists, that is, whether there is a dispute regarding whether Smith violated the cooperation clause.[12]

IV. Cooperation

Smith's insurance policy with American Federation includes a section entitled "What to Do When You Have a Loss." The section requires the insured to inform the police promptly of any loss from theft, burglary, or robbery, and provides instructions on the different ways the insured can contact the insurer, as well as the information the insured will need to file a claim.

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[5] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[6] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[7] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[8] *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[9] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[10] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[11] *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999) (citations omitted).

[12] See *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

The contract then says, "If we need other information to investigate the loss, we will ask you for it. We may require this information in writing." After instructing the insured to protect property against further loss, the contract states:

> We may require that you file with us a notarized statement of loss within 90 days after the loss. You may be required to show us the damaged property and submit to examination under oath. You will be required to cooperate with us in our effort to investigate the accident or loss, settle any claims against you and defend you. If you fail to cooperate, we have the right to deny you coverage in this policy.

The parties refer to this last provision as the cooperation clause. American Federation claims that Smith breached this cooperation clause when it is read in conjunction with the preceding clause requiring an insured to provide it with information, including information in writing, to further the insurer's investigation. Citing *Thomson, supra*, American Federation claims that dismissal with prejudice through the summary disposition mechanism is the proper result for this breach.

The cooperation clause, as well as the clause requiring Smith to provide American Federation other information, are unambiguous, and therefore need no construction. Thus, the remaining question is whether, under *Thomson*, American Federation was entitled to summary disposition because Smith allegedly failed to provide it with every document it requested. To answer this question, we must examine the record in light of this Court's decision in *Thomson*.

Thomson involved a homeowner's insurance policy between State Farm and William and Susan Thomson that barred the Thomsons from suing to enforce the policy if they failed to comply with the policy provisions, including an examination under oath at the insurer's request.[13] The Thomsons submitted a claim for a relatively large loss of property from a commercial storage facility.[14] State Farm, suspicious that the Thomsons were alleging that the property had been stolen when there were no signs of forced entry into the storage facility, decided to investigate the claim.[15] Although the Thomsons submitted various pieces of information to its insurers, a State Farm agent conducted and recorded an interview with William Thomson at his home as part of this investigation.[16] After conducting this interview, State Farm demanded that the Thomsons submit to examinations under oath.[17] The Thomsons' attorney objected on their behalf, contending that the Thomsons had already provided information to State Farm and "had not indicated what areas needed clarification."[18] After the Thomsons sued for coverage, State Farm moved for summary disposition, which the trial court denied. Following

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[13] *Thomson, supra* at 40, 41.

[14] *Id*.

[15] *Id*. at 41, n 1.

[16] *Id*. at 41.

[17] *Id*. at 42.

[18] *Id*.

this Court's decision in *Yeo v State Farm Ins Co*,[19] State Farm moved for reconsideration of the trial court's decision to deny summary disposition, prompting the Thomsons to inform State Farm that they were willing to submit to examinations under oath in light of *Yeo's* clarification of their duty to do so.[20] The trial court then ordered the Thomsons to submit to the examinations under oath, but denied the motion for reconsideration.[21]

State Farm obtained leave to appeal the trial court's decision to deny reconsideration.[22] The *Thomson* panel then examined the *Yeo* decision, explaining that *Yeo* held that an insurer may enforce a clause in an insurance contract requiring an insured to submit to an examination under oath as "'a condition that must be satisfied before an insured has the right to bring an action against'" the insurer.[23] Nevertheless, the *Thomson* panel noted, *Yeo* had not resolved "whether dismissal should be with or without prejudice."[24] The *Thomson* panel concluded that the nature of the noncompliance – whether the noncompliance was "wilful" – determined whether cases had to be dismissed with prejudice.[25] Considering a variety of cases, the *Thomson* panel concluded that

> "wilful noncompliance" in the context at hand refers to a failure or refusal to submit to an EUO or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a *deliberate* effort to withhold material information or a *pattern of noncooperation* with the insurer.[26]

Applying that definition to the question left undecided in *Yeo*, the *Thomson* panel held that

> if the noncompliance [with the examination under oath] is wilful, the dismissal must be with prejudice; if the noncompliance is not wilful, the dismissal must be without prejudice. We further hold that henceforth, the insured must show that there was not a deliberate effort to withhold material information (as opposed to a knowing failure to submit to an EUO) or a pattern of noncooperation with the insurer.[27]

On the facts of the case it was considering, the *Thomson* panel concluded that the trial court had erred in denying reconsideration because, though they had not acted wilfully, the Thomsons had not complied with the request for an examination under oath as permitted under the

[19] *Yeo v State Farm Ins Co*, 219 Mich App 254; 555 NW2d 893 (1996).

[20] *Thomson*, *supra* at 42-43.

[21] *Id*. at 43.

[22] *Id*.

[23] *Thomson*, *supra* at 44, quoting *Yeo*, *supra* at 257.

[24] *Thomson*, *supra* at 45.

[25] *Id*.

[26] *Id*. at 50 (emphasis in the original).

[27] *Id*. at 55.

homeowner's policy.[28] Thus, State Farm was entitled to summary disposition, although that effective dismissal was without prejudice.[29]

In at least one important way, *Thomson* is different from this case. There was absolutely no doubt from the record in *Thomson* that the insureds had declined to submit to the examinations under oath that State Farm had demanded. As a result, the *Thomson* panel was able to move directly to considering how to characterize and decide the effect of that noncompliance. We agree with American Federation that, as an abstract legal premise, *Thomson* potentially applies to this case. Though the parties have not presented us with any published case law from Michigan that extends *Thomson* beyond disputes regarding examinations under oath, we are certain that it applies to cases in which the dispute concerning documents requested as part of the insurer's investigation authorized in the insurance policy. We reach this conclusion because, in defining the term "wilful noncompliance," *Thomson* clearly drew within its purview cases involving an insured's failure to "cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim."[30] In this case, American Federation relied on its explicit rights under the contract to ask Smith to provide it with information, including documents, and to insist that Smith cooperate with the investigation.

Nevertheless, American Federation makes a huge leap in logic in assuming, like the trial court, that the record is settled and demonstrates as a matter of undisputed fact that Smith failed to comply with the requests for documents and refused to cooperate in the investigation. There is no dispute that Smith submitted to the examination under oath. Though it had to be rescheduled once because of the confusion regarding her attorneys, she evidently answered all the questions to American Federation's satisfaction because the insurer never asked her to submit to another examination. Giving Smith as the nonmovant the benefit of all reasonable doubts,[31] we infer from the affidavits, lists of documents provided, and the fact that American Federation revised and expanded the list of documents it was requesting that she provided the bulk of documents that the insurer wanted by the March 10, 2000, deadline. This was less than three months after the fire and just over six weeks from the January 27, 2000, letter in which American Federation first requested documents from Smith. Further, she did not merely stop at the documents she had in her possession. According to correspondence in the record, Smith actively sought the documents American Federation requested from the businesses and entities that originally generated account statements or kept records regarding her accounts. She again forwarded this information to American Federation. That American Federation directed Smith in writing to send documents to its claims adjuster, rather than its attorney, at least partially explains why the attorneys for both parties could have differing views regarding whether Smith complied with the request for documents.

Further, we gather from Smith's testimony that not every statement she failed to give American Federation even existed. For instance, though American Federation asked for Smith's

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[28] *Id*. at 56.

[29] *Id*.

[30] *Id*. at 50.

[31] *Atlas Valley Golf, supra* at 25.

water bills for October, November, and December 1999, she testified at the examination under oath that she received her first water bill in December 1999 because, before then, water had been included in her lot fee; there were no earlier billing statements. American Federation also acknowledged that Smith provided it with her water bill spanning December 1999 and January 2000 by March 9, 2000, but continued to ask for earlier water bills two months later.

Without a doubt, American Federation hotly contested Smith's assertion that she had sent all the information requested. However, its argument at the hearing on the motion for summary disposition dismissing Smith's evidence as self-serving was not legally accurate. A witness may not contradict previous testimony in a subsequent affidavit in order to defeat a motion for summary disposition.[32] However, an affidavit that does not contradict previous testimony is an otherwise appropriate means to create a record before a trial court rules on a motion for summary disposition.[33] American Federation never claimed that Smith's affidavits ever contradicted her testimony. Also, while the decision of Smith's attorney to make himself a witness to the facts surrounding document production might be problematic in other respects,[34] MCR 2.116(G)(2) does not limit who may submit an affidavit in support or opposition to a motion for summary disposition. Therefore, contrary to defense counsel's argument and the trial court's suggestion at the hearing, the trial court must consider all the evidence on the record, including an affidavit from an attorney.

As support for its argument that Smith demonstrated a pattern of noncooperation, American Federation provided copies of its request for documents in the various letters and interrogatories it sent Smith. However, those letters only indicate that there was a material factual dispute regarding Smith's alleged breach of the cooperation clause. More importantly, as we mentioned, the trial court was unwilling to take the assertions in the affidavits of Smith and her attorney, along with contemporaneous notes of documents provided and the changing lists of documents American Federation requested, as contrary evidence that Smith had actually provided the documents to American Federation. Instead, the trial court accepted the fact that American Federation had continued to request documents as conclusive proof that those documents had not been provided. Yet, the allegations in American Federation's letters that it had not received the documents Smith sent were just as unsupported by independent proof as Smith's allegations that she had sent the documents.

Plainly put, the motion for summary disposition revolved around a credibility contest. Indeed, American Federation implicitly conceded at the hearing on the motion, when it described the affidavits Smith filed in this case as "self-serving," that it was asking the trial court to decide this case on the basis of what it assumed to be its superior credibility.[35] The trial court was not

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[32] See *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991).

[33] See MCR 2.116(G)(2).

[34] See MRPC 3.7.

[35] See, generally, *Reeves v Kmart Corp*, 229 Mich App 466, 481, n 8; 582 NW2d 841 (1998), questioned on other grounds *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 74; 600 NW2d 348 (1999) ("The trial court noted that it found Hayter's affidavit to be self-serving. Because it was undisputed that Session's facilities were located one-quarter mile south of the site of the accident and Hayter had used the exit ramp many times previously, the veracity of

(continued…)

entitled to give more weight to the evidence provided by the party it thought was more believable.[36] This dispute was a question of fact that should have been submitted to a jury.

We also think it bears mentioning that both the trial court and American Federation seem to have lost sight of an important factor reflected both in the insurance policy and in *Thomson*. Specifically, we refer to the language in the insurance policy regarding necessity and the language in *Thomson* concerning materiality. Under the terms of the insurance policy in this case, American Federation does not have carte blanche to investigate *all* matters when an insured files a claim. Instead, the policy says that if American Federation "*need[s]* other information *to investigate the loss*," it can ask that the insured to provide it.[37] Similarly, *Thomson* defines the wilful noncompliance that entitles an insurer to have an insured's suit dismissed with prejudice as a "deliberate effort to withhold *material* information."[38]

To look solely at American Federation's requests for documents creates the distorted perception that the parties dispute some aspect of a financial transaction or Smith's financial history. Instead, as American Federation made amply clear when its claims representative denied Smith's claim in writing in May 2000, this information was material only to Smith's motive to set the fire. We do not mean to imply that American Federation lacks the right to request complete information relevant to an insured's alleged motive to commit arson. However, Smith's compliance with the document requests should be viewed in light of the materiality of the information the insurer was seeking. For example, if some concept of materiality, even if particularly broad, were not at all relevant to defining when an insured has cooperated fully with an investigation, then an insurer would be able to avoid paying legitimate claims simply by asking the insured to provide a completely unrelated document that is impossible to obtain. To push this logic even further, if some concept of necessity, even if particularly broad, were not at all relevant to defining when an insured has cooperated fully with an investigation, then an insurer would be able to avoid paying legitimate claims simply by asking the insured to provide copies of the same document over and over again until the insured ultimately refuses.

The information that American Federation sought may have been material, discoverable, and a proper part of the investigation, but its relatively cumulative nature comes close to the second hypothetical example we posed. Four months before Smith filed suit, American Federation asserted that it had sufficient evidence of arson – including an alleged financial

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(…continued)

Hayter's testimony is open to doubt. Nevertheless, a court may not weigh credibility in deciding a motion for summary disposition.").

[36] See *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999), quoting *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993) ("In deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility."); see also *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973) ("[Where the truth of a material factual assertion of a movant's affidavit depends on the affiant's credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted.").

[37] Emphasis added.

[38] *Thomson*, *supra* at 50, 55 (emphasis altered).

motive – to deny the claim. Smith's examination under oath and the many documents she provided American Federation allowed it to reach this conclusion, suggesting that Smith had complied with the requests even before American Federation denied her claim. That Smith continued to provide additional documents as they came into her possession after she filed suit presents, at minimum, a dispute regarding her full compliance with the insurer's request for cooperation. Smith's attorney also stated in an affidavit that American Federation had been satisfied with the documents she had produced as of December 2000 or January 2001, which is why it withdrew the motion to compel. Even without this affidavit, under the view of the evidence favoring Smith that we must apply,[39] the decision to withdraw the motion to compel can be construed as a concession that the insurer had received all the documentation it needed and had requested to establish this motive. That inference is fair not only because it is logical, but because American Federation has never disputed Smith's representation of the reasons for the decision to withdraw the motion.

Viewed as a whole, the record reveals questions of fact concerning whether Smith actually provided American Federation with the documents she had in her possession and which she could acquire, as she claimed. Because it is impossible to say definitively whether she cooperated with the investigation by turning over all the documents in her possession and available, or whether she engaged in a pattern of noncooperation, summary disposition was inappropriate. Without a record establishing a *deliberate* effort to withhold material information or a pattern of noncooperation with the insurer, we need not attempt to apply *Thomson* any further to determine whether the alleged misconduct was wilful.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray

[39] *Atlas Valley Golf, supra* at 25.