STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN HERITAGE BANK, Plaintiff-Appellee,	UNPUBLISHED August 12, 2004
v	No. 245832 Oakland Circuit Court
FEDERAL INSURANCE COMPANY, Defendant-Appellant.	LC No. 2000-020266-CK

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

In this insurance dispute, defendant appeals as of right from the trial court's judgment awarding plaintiff damages arising from the loss of electronic data processing property (EDPP). We affirm.[1]

I. Basic Facts and Procedure

This case involves an insurance policy issued by defendant to Mortgage Corporation of America (MCA) that includes property and liability coverage. MCA, the named insured, acquired the insurance policy from defendant through the Loomis & Associates Insurance Agency (the "Loomis Agency"), who under its contract with defendant, is characterized as an independent contractor. MCA filed for bankruptcy, and assigned to plaintiff certain leased computer equipment at MCA's offices. Because the insurance remained effective, MCA instructed the Loomis Agency to modify the insurance policy to cover plaintiff's interest in the

[1] We note that defendant failed to include an applicable standard of review for several issues as required by MCR 7.212(C)(7). Moreover, because defendant's appellate brief is essentially its motion for summary disposition, it does not address the basis of the trial court's decision granting plaintiff summary disposition. An appellate court need not consider granting relief if the appellant fails to address the basis of the trial court's decision. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167; 568 NW2d 365 (1997). This Court, on its own motion or that of plaintiff, could have stricken defendant's brief as nonconforming. MCR 7.212(I). We caution defendant's counsel to adhere to the provisions of the court rules regarding the requirements for filing a brief with this Court, or sanctions for noncompliance may be appropriately ordered. MCR 7.101(P)(1)(b); MCR 7.216(C)(1)(b).

computer equipment. Defendant received this request, but admitted that it had inadvertently failed to formally endorse plaintiff under the insurance policy.

The Loomis Agency nonetheless issued several documents, each entitled, "certificate of liability coverage," to plaintiff. These documents indicated coverage for different "types of insurance," including "commercial general liability," "automobile liability," "excess liability," "workers compensation and employers' liability." Also, the documents specifically listed under an "other type of insurance" catagory, "property coverage (71 locations)." The documents stated that plaintiff was a "Loss Payee and Additional Insured," but did not specify whether this status applied to each type of insurance, to all types of insurance, or a combination of types of insurances. The certificates did specify that each was issued "as a matter of information only and conferred no rights."

After MCA initiated bankruptcy proceedings, plaintiff discovered that the leased computer equipment was missing. Plaintiff filed the instant action after defendant denied its insurance claim in connection with the missing computer equipment, seeking monetary damages or equitable relief under various contract, equitable and statutory theories. In June 2001, the trial court granted summary disposition in favor of plaintiff under MCR 2.116(C)(10) with respect to plaintiff's contract theory. As clarified by the trial court in October 2001, the trial court determined that plaintiff was entitled to coverage as an "additional insured" or a "standard loss payee" under the EDPP subsection of the property section of the insurance policy, subject to a $1,000 deductible applied to each item of claimed property. The amount of plaintiff's replacement and actual cash value loss was established pursuant to an appraisal award, dated August 27, 2002, but was expressly made subject to "all policy terms, conditions and deductibles."

On September 24, 2002, a jury trial was held limited to the question of the number of deductibles to subtract from the appraisal award. The jury, by special verdict, determined that twenty-five deductibles should be subtracted from the appraisal award. On October 9, 2002, the trial court entered judgment in favor of plaintiff, consistent with the jury verdict and appraisal award, of $405,514 for the net actual cash value loss and $509,513 for the net replacement cost loss, plus statutory interest. The latter award was contingent on defendant replacing the equipment as provided in the judgment. The trial court denied defendant's post trial motion for judgment notwithstanding the verdict or a new trial. This appeal followed.

II. Plaintiff's Status Under the Insurance Policy

Defendant first argues that the trial court improperly determined plaintiff was a "standard loss payee" or "additional insured" under the data processing property subsection of the property section of the insurance policy.

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the

light most favorable to the nonmoving party. *Maiden*, *supra*. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Id.* Also, the proper interpretation of a contract is reviewed de novo. *Schmalfeldt v North Pointe Insurance Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

B. Analysis

1. Loss Payee

The parties dispute primarily concerns plaintiff's "loss payee" status under the property section of the insurance policy. Plaintiff maintains it is a "standard loss payee" while defendant claims plaintiff is an "ordinary loss payee." The parties insist that the determination of plaintiff's status in this regard is dispositive. Though we disagree that plaintiff's "loss payee" status is dispositive, we agree with defendant that the trial court erred in finding that plaintiff was a "standard loss payee."

The property section of the contract contains a provision entitled, "Loss Payable Other Than Building," which provides in relevant part:

> For covered property (other than **building**), in which you and a Loss Payee shown in the Declarations have an insurable interest, we will
>
> - adjust losses with you; and
>
> - pay any claim for loss or damage jointly with you and the Loss Payee, as interests may appear. [Emphasis in original.]

This provision does not specifically use the phrases "standard loss payee" or "ordinary loss payee" to indicate a loss payee's status. In *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 383-384; 486 NW2d 600 (1992), our Supreme Court explained that there are two types of loss payable clauses; whether coverage is available depends upon which type of clause has been adopted by the insurer:

> Generally, there are two types of loss payable clauses contained in insurance policies which protect lienholders, the ordinary loss payable clause and the standard loss payable clause. An ordinary loss payable clause directs an insurer to pay the proceeds of a policy to the lienholder, as its interest may appear, before the insured receives payment on the policy. Under this policy, the lienholder is simply an appointee to receive the insurance fund to the extent of its interest, and its right of recovery is no greater than that of the insured. There is no privity of contract between the insurer and the lienholder, and a breach of the conditions of the policy by the insured prevents recovery by the lienholder. Under a standard loss payable clause, a lienholder is not subject to the exclusions available to the insurer against the insured because an independent contract of insurance exists between the lienholder and the insurer. Traditionally, insurers have undertaken the risk that the insured will commit fraud by inserting a standard loss payable clause in the contract for the lienholder's protection.

Here, the provision specifically uses the language, "as interest may appear." The phrase is identical to language employed by our Supreme Court to demarcate an "ordinary loss payee." *Foremost, supra* at 383. Also, leading authorities recognize that an ordinary loss payable clause generally provides that the mortgagee will be paid *as his or her interests may appear*. See 4 Couch, Insurance, 3d, § 65:8, p 65-17, and 5A Appleman, Insurance Law and Practice, § 3335. Therefore, the phrase "as interests may appear" within the controlling, "Loss Payable Other Than Building" provision indicates that plaintiff would be deemed an "ordinary loss payee."

Moreover, a separate provision contained within the property section of the contract indicates that different language would have been used to indicate that a "loss payee" had rights additional to an "ordinary loss payee." This provision, entitled, "Lender/Loss Payee," provides:

> If the Loss Payee shown in the Declarations is a creditor whose interest in **personal property**[2] is established by written evidence and both you and that Loss Payee have an interest in lost or damaged **personal property**, we will
>
> - adjust losses with you; and
>
> - pay any claim for loss or damage jointly to you and the Loss Payee, as interest may appear.
>
> However, your Loss Payee has the right to receive loss payment, even though:
>
> - you failed to comply with terms of this insurance; or
>
> - your Loss Payee starts foreclosure or similar actions on the **personal property**.
>
> * * *
>
> If we make loss payments to your Loss Payee when you fail to comply with the terms of this insurance, you will have to pay us to the extent we pay the Loss Payee. . . . [(emphasis in original).]

As opposed to the "Loss Payable Other Than Building" provision, the above provision further protects the rights of a lender that is a loss payee by providing the right to receive loss payment even though the named insured "failed to comply with terms of this insurance." Such specific language that provides additional rights is characteristic of a standard loss payable clause. Couch, *supra* at 65-17; see also *Foremost, supra* at 387 n 22, 388, 392 n 34, *Federal Nat'l Mortgage Ass'n v Ohio Casualty Ins Co*, 46 Mich App 587, 588-590, 208 NW2d 573 (1973). Had the parties intended plaintiff to be a "standard loss payee," language providing more protection to an unnamed insured's rights would have been employed within the "Loss

---

[2] The Property insurance form defines "personal property" as not meaning "electronic data processing equipment." Therefore, the instant provision is not the applicable loss payable clause.

Payable Other Than Building" provision. Therefore, we conclude that the language of the provision in the instant case provides that plaintiff is a mere "ordinary loss payee." According, the trial court erred in granting plaintiff summary disposition in this regard.

2. Additional Insured

However, as mentioned, we do not find plaintiff's "loss payee" status under the insurance policy dispositive on the question whether plaintiff can file a claim under the policy. There remains an additional question whether plaintiff is an "additional insured" under the policy. The insurance policy does not address the consequence of being endorsed as an "additional insured" under the insurance policy, or a particular section or subsection of the insurance policy. A court may establish the meaning of a term through a dictionary definition. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). An additional insured is defined as "[a] person who is covered by an insurance policy but who is not the primary insured. An additional insured may, or may not, be specifically named in the policy." Black's Law Dictionary, 7th ed, p 811.

Defendant admitted that plaintiff was an "additional insured," but only as to the liability section, and not the property section and therefore not the EDPP subsection. Plaintiff relies on the certificates of insurance that indicate plaintiff is a "Loss Payee and Additional Insured" as evidence that it is an "additional insured" under the property section. Defendant expressly disavows the significance of the certificates of insurance by repeatedly claiming that they are not legally binding. But plaintiff also relies on two letters from Elizabeth Magyar, the Loomis Agency's Commercial Lines Manager in regard to the insurance policy, to Scott Roth, the underwriter of the insurance policy, as evidence that plaintiff was added as an "additional insured," under the property section. The first letter, dated March 17, 1998, requests that Roth,

> [a]dd $271,000 of EDP equipment which is located at various MCA Michigan offices[.] [H]owever, we have listed this amount at the 23999 N.W. Hwy. Location for our reference. Also[] add Additional Insured and Loss Payee for Michigan Heritage Bank for this equipment's lease.

The second letter to Roth, dated May 1, 1998, is in reference to "MCA Financial Corporation Package Policy #3525-58-53," and requests that he "[p]lease add [plaintiff] as additional insured and loss payee for leased equipment."

The first letter clearly refers to the value of the insured property, not to potential liability, and therefore indicates that plaintiff would have properly been added as an "additional insured" under the property section. The second letter confirms this finding and offers further support for the conclusion that plaintiff was to be added "as additional insured and loss payee for leased equipment." Thus, plaintiff has established that it was added as an "additional insured" with respect to the property at issue.

To support its argument on appeal that plaintiff was an "additional insured" only as to the liability section, defendant principally relies on an affidavit from Magyar, in which she states that "the intent of the Certificates of Insurance was to cover [plaintiff's] interest in the leases as a loss payee for property and additional insured for liability only as set forth in paragraph 11, Risks of Loss and Insurance", of the form Lease Agreements." However, Magyar's affidavit

merely addresses her interpretation of the certificates of insurance sent to plaintiff, which, as mentioned, defendant expressly claims are not legally binding. Moreover, a party or witness may not create a factual dispute by submitting an affidavit which contradicts his or her own prior conduct. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). The letters Magyar sent to Roth that clearly reference her intent to endorse plaintiff as "additional insured" with respect to leased equipment contradicts her affidavit. Therefore, Magyar's affidavit does not create a genuine issue of material fact in regard to plaintiff's status as an "additional insured" under the insurance policy.

Defendant also relies on the May 18, 2001, deposition of Kevin Pyne, an assistant vice president and departmental manager for defendant, in which he avers that lessors should only have liability coverage as additional insureds. Pyne explained his conclusion as follows:

> The true request here [by Loomis Agency] should be please add as additional insured lessor and as loss payee. The loss payee comes into play on the property side. The additional insured lessor, which I believe Michigan Heritage Bank is, is provided on our policy automatically and would not necessarily even need to be added with respects to that.

Thus, defendant maintains that Pyne's deposition testimony establishes that defendant's past practices with respect to the endorsement of lessors as "additional insureds" raises a factual question to avoid summary judgment.

First, Pyne's testimony addresses whether defendant *should have* endorsed plaintiff as an "additional insured," under the property section, not whether defendant *actually* intended to endorse plaintiff as an "additional insured" under the property section, but by inadvertence, failed to memorialize this intent. Thus, Pynes' testimony that plaintiff should have been endorsed as an "additional insured" is not relevant to determining defendant's actual intent. Moreover, even if Pynes' testimony were considered evidence of defendant's intent, defendant's endorsements of eight other entities as "additional insureds" under the property section of the insurance policy indicates that defendant does not act in accordance with this proffered intent. Hence, Pyne's deposition testimony does not raise a genuine issue of material facts in this regard. Therefore, the trial court properly granted plaintiff summary disposition on the basis that plaintiff is an "additional insured" under the EDPP subsection.

III. Other Issues Raised In Relation to the Order of Summary Disposition

Defendant raises several issues that it had raised in its response to plaintiff's motion for summary disposition, including issues related to plaintiff's claims for equitable relief, estoppel, third-party beneficiary, and violation of the Uniform Trade Practices Act. The trial court's order granting plaintiff summary disposition was not based upon any of these claims, and therefore, we conclude that defendant's arguments concerning these claims are moot. *B P 7*, *supra* at 359. Indeed, we deem plaintiff to have abandoned its equitable and statutory claims by not seeking an answer from the trial court regarding these claims after the trial court's denial of defendant's cross-motion for summary disposition and before entry of the final judgment. Cf. *People v Riley*, 88 Mich App 727, 731; 279 NW2d 303 (1979) (defendant's failure to follow through on a

motion and request an answer from the trial court constituted an abandonment). Hence, we decline to address the equitable and statutory claims.

Defendant also argues that plaintiff did not have an insurable financial interest in the leased computer equipment. We note that the trial court addressed this issue in its June 2001, decision granting plaintiff summary disposition under MCR 2.116(C)(10). The court specifically determined that plaintiff's ownership interest in the leased equipment provided an insurable interest and that the pledge of collateral in the participation agreements executed by plaintiff with others for specific leases did not deprive plaintiff of its ownership interests. We agree with the trial court.

Defendant's claim that plaintiff had no insurable interest is deficient from the onset because there was no evidence that plaintiff's entire financial interest in all leases was sold. Defendant concedes that not all leases were subject to a sale. Regardless, plaintiff did not sell its ownership interest in the leased computer equipment. Defendant's contrary claim is based on an erroneous assumption that plaintiff's sale of the collateral securing the loans, as used in the participation agreements, meant that plaintiff sold its ownership in the leased computer equipment. Construing the phrase "collateral securing the Loans" as a whole, and giving it its commonly used meaning, *Henderson v State Farm & Casualty Co*, 460 Mich 348, 356; 596 NW2d 190 (1999), the only reasonable inference is that plaintiff did not sell its ownership rights. The word "collateral" means "security pledged for the payment of a loan." *Random House Webster's College Dictionary* (1997), p 257. Hence, even if one assumes that all the leased computer equipment for which plaintiff sought insurance payments was collateral securing loans, as a matter of law, plaintiff nonetheless had an insurable interest as the owner of the leased computer equipment. Accordingly, defendant has not established any reason for disturbing the trial court's grant of summary disposition in favor of plaintiff on this issue.

In addition, in light of the conclusion, *supra*, that the trial court properly found plaintiff an "additional insured," we need not address as moot defendant's argument that the leased computer equipment did not constitute "personal property," under the insurance policy.

IV. Issues Related to Trial

Defendant claims the trial court improperly submitted to the jury the question of how many deductibles should be subtracted from the appraisal award. First, we conclude that this issue need not be addressed because defendant did not object to a jury trial on the issue of the number of deductibles. Rather, at a pre-trial conference, defendant's attorney asserted that "[o]ur feeling is that the umpire did not do what he was required to do by the Court" That "we are now in a position where we either have to ask you to order the umpire to do what he was supposed to do, or we have to come in here and have a jury trial or an evidentiary hearing." Defendant did not object to the jury deciding the question, rather defendant appeared to have requested a jury trial if the trial court decided that the umpire was not to decide the deductible issue. A party's objection at trial on one ground is insufficient to preserve an appellate attack on a different

ground. M*eagher v Wayne State Univ*, 222 Mich App 700, 724; 565 NW2d 401 (1997). Here, defendant's argument is not preserved for appeal, and need not be addressed.[3]

Finally, defendant claims that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or a new trial. An appellate court reviews de novo a trial court's decision to deny a motion for JNOV. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). "We review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. The motion should be granted only if the evidence fails to establish a claim as a matter of law." *Id.* (citations omitted).

Here, the term "occurrence" could reasonably encompass more than one claim, as opposed to defendant's theory that each particular claim constitutes an "occurrence." Therefore, the term is ambiguous, and its meaning under the contract is properly left for the jury to decide. Ascertainment of the meaning of ambiguous contractual language presents a question of fact which must be decided by a jury. *Klapp v United Auto Ins Agency*, 468 Mich 459, 469; 663 NW2d 447 (2003). Defendant's argument assumes that the jury could only have believed its theory. However, a jury is free to disbelieve evidence, even if it stands uncontradicted. *Vargo v Denison*, 140 Mich App 571, 574; 364 NW2d 376 (1985). Moreover, had the jury not believed either theory, then consideration of extrinsic evidence failed to establish the meaning of the ambiguity, and the term was properly construed against the drafter of the contract. *Klapp, supra* at 470-471. Hence, we reject defendant's claim that it was entitled to JNOV with respect to any particular number of deductibles. *Wiley, supra*. Also for these reasons, we cannot conclude that the trial court's decision denying defendant's motion for a new trial pursuant to MCR 2.611(A)(1)(e) was an abuse of discretion. *Bynum v ESAB Group, Inc*, 467 Mich 280, 286; 651 NW2d 383 (2002); *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

---

[3] Moreover, defendant's argument lacks merit. Defendant argues that contract remedies were not exhausted because the appraisal award did not include a number of deductibles. While plaintiff is required to exhaust its remedies under the insurance contract, *Thermo-Plastics R & D, Inc v General Accident Fire & Life Assurance Corp*, 42 Mich App 418; 202 NW2d 703 (1972), defendant has failed to identify any basis for concluding that the appraisal remedy was not exhausted. The statute which defendant relies requires only an appraisal of the loss. MCL 500.2833(1)(m). Thus, defendant has failed to identify on appeal that contract remedies were not exhausted, and therefore has not afforded a basis for finding an error of law. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).