

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANDREW KOKAS,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF  
AMERICA,

Defendant-Appellant.

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UNPUBLISHED  
September 13, 2012

No. 303592  
Jackson Circuit Court  
LC No. 09-003887-CK

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right from the jury verdict in favor of plaintiff. We affirm.

This litigation arises out of an insurance coverage dispute. Plaintiff alleged that defendant breached a homeowner's insurance policy by failing to provide coverage for structural damage to a portion of plaintiff's home known as the kitchen nook. Specifically, plaintiff alleged that there was evidence of defective construction, hidden decay, and collapse such that the policy coverage provisions were invoked. Plaintiff alleged that the damage occurred after a heating loss and ice event in the winter of 2009. On the contrary, defendant asserted that a sudden event did not cause the damage, but rather there was gradual erosion that caused the condition to occur over time. It was further alleged by defendant that the property did not "collapse," but rather, earth movement occurred, and therefore, it was not required to reimburse plaintiff in accordance with the terms of the policy. After hearing conflicting testimony regarding the cause of the damage to the kitchen nook and conflicting interpretations regarding the policy's coverage and exclusion provisions, the jury disagreed with defendant's evidence and interpretation and rendered an award in favor of plaintiff.<sup>1</sup>

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<sup>1</sup> On appeal, defendant contends that plaintiff admitted that the condition occurred before the winter of 2009, evidenced by the fact that he obtained estimates to fix the problem "[i]n 2008 or 2009." An appellate brief must contain a statement of all material facts, both favorable and unfavorable, presented fairly without argument or bias. MCR 7.212(C)(6). A brief that does not conform to the requirements of the court rule may be stricken. MCR 7.212(I). Our review of the

Defendant first contends that the trial court erred by denying its motion for directed verdict when the term “collapse” did not encompass the circumstances surrounding plaintiff’s damages. We disagree. A trial court’s decision on a motion for a directed verdict is reviewed de novo. *Genna v Jackson*, 286 Mich App 413, 416; 781 NW2d 124 (2009). In reviewing the trial court’s decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference and resolving conflicts in the evidence in the nonmoving party’s favor, to determine whether a question of fact existed.<sup>2</sup> *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). “If reasonable persons, after reviewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury.” *Taylor v Kent Radiology, PC*, 286 Mich App 490, 499-500; 780 NW2d 900 (2009). In deciding the motion for the directed verdict, it is the trial court’s responsibility to determine the credibility and weight of the trial testimony, being free to credit or discredit any testimony. *King v Reed*, 278 Mich App 504, 523 n 5; 751 NW2d 525 (2008). “Generally, directed verdicts are viewed with disfavor.” *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

In *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010), this Court set forth a concise statement of the rules governing interpretation and construction of insurance contracts:

The rules of contract interpretation apply to the interpretation of insurance contracts. The language of insurance contracts should be read as a whole and must be construed to give effect to every word, clause, and phrase. When the policy language is clear, a court must enforce the specific language of the contract. However, if an ambiguity exists, it should be construed against the insurer. An insurance contract is not ambiguous if its provisions are subject to more than one meaning. An insurance contract is not ambiguous merely because a term is not defined in the contract. Any terms not defined in the contract should be given their plain and ordinary meaning, which may be determined by consulting dictionaries[.] [Citations omitted.]

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record reveals that plaintiff denied having estimates in 2007 and 2008, and obtained estimates after the event in the winter of 2009. Despite the noncompliance with the court rule, we will nonetheless address the issues raised on appeal.

<sup>2</sup> Defendant’s statement of the issue regarding collapse challenges only the trial court’s ruling regarding the directed verdict, not the ultimate verdict. However, in the discussion section of the collapse issue, defendant discusses the trial testimony as a whole, not the evidence solely presented at the time of the directed verdict motion. Because defendant did not raise a challenge with regard to the jury verdict regarding collapse, only the trial court’s directed verdict decision, *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 139; 676 NW2d 633 (2003), we do not address the ultimate verdict or the proofs submitted after the motion for directed verdict was made. Although the proofs were taken out of order, the trial court noted that its directed verdict decision would only consider the proofs at the time the motion was made.

“An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy.” *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995); see also *Besic v Citizens Ins Co*, 290 Mich App 19, 25; 800 NW2d 93 (2010). The burden of proving coverage rests with the insured, but the insurer is obligated to prove that an exclusion to coverage applies. *Heniser*, 449 Mich at 161 n 6; *Besic*, 290 Mich App at 25; *Auto Club Group Ins Co v Booth*, 289 Mich App 606, 610; 797 NW2d 695 (2010). An insurance company may not be held liable for a risk it did not assume. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007).

In the present case, plaintiff obtained effectively a “deluxe” policy that was only available for a three-month period. The policy provided, in relevant part, with regard to “collapse”:

8. **Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

b. hidden decay;

f. use of defective material or methods in construction, remodeling or renovation.

Although the policy at issue did not provide a definition for the term “collapse,” it did specify what did not constitute a collapse: “Collapse does not include settling, cracking, shrinking, bulging or expansion.”

The application of the undefined term “collapse” was addressed in *Dagen v Hastings Mut Ins Co*, 166 Mich App 225, 226; 420 NW2d 111 (1987). There, the plaintiff hired a plumber to connect her home to the city water system, but the plumber advised her that her home was “ready to fall down.” At the request of plaintiff’s insurance agent, her home was inspected, and it was concluded that her floor joints were badly rotted and the home was buckling on the outside. The plaintiff’s policy at the time contained a provision governing collapse, but did not define collapse, merely providing that it did not include “cracking, shrinkage, bulging, or expansion.” The defendant moved for summary disposition, alleging that the home had not collapsed, but was merely in “danger of collapse,” and the trial court agreed. *Id.* at 226-228. On appeal, this Court rejected the contention that the term “collapse” is limited to only instances where the structure had caved in or fallen down. *Id.* at 230. Rather, in the absence of a specific definition to that effect in the policy, a factual issue may be submitted to trier of fact regarding whether the sagging floors and bulging walls were so impaired as to destroy the efficiency of plaintiff’s home as a habitation. *Id.* at 230-231. In the absence of an express definition of “collapse” in the policy, the plaintiff raised a genuine issue of material fact in support of her claim that the home had collapsed within the meaning of the policy. *Id.* at 231.

In the present case, defendant asserts that plaintiff failed to present evidence that the home had collapsed or “caved in” according to the dictionary definition or was uninhabitable because of some impairment of the structure. However, our review of the record reveals that plaintiff testified that the home “sagged” to such an extent that a tennis ball would roll across the

room without prompting. During direct examination, plaintiff also played a video<sup>3</sup> for the jury delineating the separation of the kitchen nook from the remainder of the home. Plaintiff testified regarding his knowledge of his policy, his research regarding insurance policies, the fact that his denial letter cited a policy other than his own, and his interpretation regarding collapse. Additionally, at the time of the directed verdict motion, plaintiff presented a plumber and a civil engineer to testify regarding the condition of the home and the cause of the condition. The civil engineer opined that the house was “bowing” and “out of plumb.”

On the contrary, at the time of the motion, defendant’s adjuster testified that he issued a denial letter premised on a policy that plaintiff did not have. The adjuster also asserted that, in order to collapse, the home had to fall “down” or “in,” but acknowledged that the policy did not contain any such language. He testified that the structure had to fall “somewhere.” When asked if there was a degree of fall to constitute a collapse, he testified that there was no specific degree, and it was subject to his interpretation as the adjuster. The adjuster also noted that he had the burden of proving an exclusion from coverage. He also testified that plaintiff’s policy was written such that everything was covered and limited things were subtracted (“This policy is written to say we’ll cover anything . . . start with everything, and then, subtract the things we need to subtract[.]”).

Viewing the evidence in the light most favorable to the nonmoving party, we cannot conclude that the trial court erred in denying the motion for directed verdict. *Smith*, 269 Mich App at 427-428. The issue was properly presented to the jury because reasonable persons could reach different conclusions regarding the cause of the claim and the burden of proving the exclusion. *Heniser*, 449 Mich at 161 n 6; *Taylor*, 286 Mich App at 499-500. Here, plaintiff presented evidence that the kitchen nook had fallen away from the home based on the measures he took to separate this portion of the home from the remainder due to instability and heat issues. He presented a videotape of the home’s separation or sagging. Defendant’s adjuster admitted that the policy did not define “collapse,” but expressly testified that plaintiff’s policy was a deluxe policy designed to cover everything and then delineate exclusions. The term “collapse” in the policy was not defined to require a complete “fall down” or “fall in” of the kitchen nook, which defendant’s adjuster acknowledged. In light of the evidence presented at the time of the directed verdict motion, the trial court did not err.

Next, defendant argues that the jury’s verdict that the damage to the home was not the result of earth movement was against the great weight of the evidence. We disagree. A trial court may grant a new trial if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). An appellate may “overturn a jury verdict only if it is against the great weight of the evidence.” *Wischmeyer v Schanz*, 449 Mich 469, 485; 536 NW2d 760 (1995). The trial court’s decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An abuse of discretion occurs

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<sup>3</sup> Defendant, the appellant, must provide a full record on appeal. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). The exhibits containing the photographs of the condition of the home as well as this video were not submitted with the record on appeal.

when the ruling results in an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). “When a party challenges a jury’s verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact.” *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). Thus, we defer to the jury’s determination regarding the credibility of witnesses. *Id.* at 406-407. When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm’rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). A jury’s verdict must be upheld even if arguably inconsistent provided that there is any interpretation of the evidence that offers a logical rationale for the jury’s findings. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000). “Every attempt must be made to harmonize a jury’s verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.” *Allard*, 271 Mich App at 407 (internal quotations and footnotes omitted).

We cannot conclude that the trial court abused its discretion by denying the motion for new trial. In the present case, there was conflicting evidence regarding earth movement. The jury resolved the issue contrary to the position of defendant. In light of the fact that witnesses testified to diametrically opposed versions of causation, the resolution of the issue belonged to the jury, and it must be upheld when supported by a logical rationale of the evidence. *Bean*, 462 Mich at 31; *Bera*, 373 Mich at 314.

Defendant also asserts that the trial court erred in instructing the jury. We disagree. Claims of instructional error are reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 537; 780 NW2d 618 (2009). Reversal premised on instructional error is not required “unless refusal to take this action appears to the court inconsistent with substantial justice.” MCR 2.613(A). The trial court’s jury instructions must include all elements of the plaintiff’s claim and should not omit material issues, defenses, or theories of the parties which the evidence supports. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008) (citation omitted). Error requiring reversal does not occur if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Id.*

Defendant contends that the trial court inappropriately extended the *Dagen* decision by instructing that the jury could consider “whether the superstructure of the breakfast nook ... was so compromised that it was no longer fit for habitation[.]” We disagree. It was the position of defendant’s adjuster that there had to be a total collapse in order to fall within the policy coverage. However, the plain language of the policy addressing coverage revealed that physical loss was covered for collapse of “part of a building.” The trial court’s instruction reflected the policy language at issue and did not improperly enlarge the *Dagen* decision.

Defendant’s theory of the case was that no collapse occurred within the dictionary definition of the term and that no constructive collapse occurred because the supporting superstructure of the home was habitable. Plaintiff’s theory of the case was that a collapse occurred because the supporting superstructure of the breakfast nook was uninhabitable and the nook fell or dropped as evidence by the sagging and the report of its experts that the nook was no longer flush with the residence. The instructions given by the trial court set out the dictionary definition of the term “collapse” and also set out the concept of constructive collapse, and the

instructions were consistent with the provision in defendant's policy that a collapse could involve only "part of a building." Accordingly, the trial court's collapse instruction was proper where the parties' theories of collapse and the applicable law were adequately and fairly presented to the jury. *Moore*, 279 Mich App at 223.

Defendant further contends that the trial court erred by awarding penalty interest for over twenty-two months when proof of plaintiff's loss was not submitted until the eve of trial. We disagree. This Court review a trial court's award of penalty interest for clear error. *Williams v AAA Mich*, 250 Mich App 249, 265; 646 NW2d 476 (2002).

Under the Uniform Trade Practices Act (UTPA), MCL 500.2001 *et seq.*, "when an insurer fails to pay a claim on a timely basis, a claimant may seek penalty interest." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 554; 741 NW2d 549 (2007). MCL 500.2006(1) provides that "[a] person must pay on a timely basis to its insured . . . the benefits provided under the terms of its policy . . . or, in the alternative, the person must pay to its insured . . . 12% interest, as provided in [MCL 500.2006(4)], on claims not paid on a timely basis." MCL 500.2006(3) provides that "[a]n insurer shall specify in writing the materials that constitute satisfactory proof of loss not later than 30 days after receipt of a claim[.]" MCL 500.2006(4) provides that "[i]f benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured . . . directly entitled to benefits under the insured's contract of insurance."

The insurance policy between plaintiff and defendant provides that in case of a loss to covered property, the insured must "give prompt notice to us or our agent"<sup>4</sup> Plaintiff provided prompt notice to defendant, as acknowledged in defendant's letter to plaintiff stating that it "received a notice of a loss or claim reported to have occurred on or about March 7, 2009." Under MCL 500.2006(3), defendant was required to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim[.]" There is no indication in the record that defendant specified in writing the materials that constituted a satisfactory proof of loss within 30 days after receiving plaintiff's claim. When an insurance company does not comply with MCL 500.2006(3), the insured is excused from submitting proof of loss and the matter shall proceed as if a satisfactory proof of loss had been submitted. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 486; 717 NW2d 341 (2006). Because defendant did not comply with MCL 500.2006(3), plaintiff was excused from submitting proof of loss. *Id.* Because defendant did not pay plaintiff benefits on a timely basis, under MCL 500.2006(4), "the

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<sup>4</sup> The policy also provides that the insured must "send to us, within 60 days after our request, your signed, sworn proof of loss . . ." However, MCL 500.2006(3) requires insurers to "specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of a claim[.]" There is no indication that defendant specified in writing the materials that constitute a satisfactory proof of loss *after* it received plaintiff's claim, or that it ever requested a signed, sworn proof of loss as set out in its own policy.

benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum[.]”

As set out above, defendant did not comply with MCL 500.2006(3) because it failed to specify in writing the materials that constituted a satisfactory proof of loss within 30 days after receiving plaintiff’s claim. This failure excused plaintiff from submitting proof of loss. *Angott*, 270 Mich App at 486. Because defendant did not pay plaintiff benefits on a timely basis, MCL 500.2006(4) mandated that it pay penalty interest. Accordingly, the trial court’s award of penalty interest to plaintiff was not clearly erroneous.

Lastly, defendant contends that the trial court erred by denying its motion for remittitur when plaintiff failed to present evidence of the additional living expenses. We disagree. This Court reviews a trial court’s decision regarding remittitur for an abuse of discretion. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). This Court reviews all of the evidence in the light most favorable to the nonmoving party. *Id.* “If the award for economic damages falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed.” *Id.* The determination regarding remittitur is premised on the objective criteria relating to the conduct of the trial or the evidence presented, and the power should be exercised with restraint. *Id.* Deference is accorded the jury’s assessment of damages. *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001). The adequacy of the amount of the damages presents an issue for the jury to resolve, and a verdict should not be set aside merely because “the method the jury used to compute damages cannot be determined.” *Heaton*, 286 Mich App at 538.

A review of the record reveals that plaintiff would have to move from his home for four to six months during the home repairs. Therefore, plaintiff noted that he would be required to move to a hotel and pay for meals during the construction period. Additionally, defendant’s adjuster was questioned regarding the policy coverage during the repair period. The adjuster acknowledged that when there is a “covered claim,” plaintiff was entitled to living expenses. With regard to the amount of living expenses, he further acknowledged that there was no cap on the amount payable for living expenses. Rather, if a covered claim, plaintiff was entitled to “the reasonable standard to maintain the same standard of living.” In closing argument, plaintiff’s counsel represented that \$100 per day would be reasonable. The jury award of \$14,000 equates to between \$83 and \$125 a day if plaintiff had to relocate for four to six months. The trial court rejected defendant’s contention that the jury award was speculative, noting that the cost of a hotel and meals was within the common knowledge of a juror. In light of the testimony of defendant’s adjuster regarding reasonableness and viewing this evidence in the light most favorable to plaintiff, we cannot conclude that the trial court’s decision constituted an abuse of discretion. *Silberstein*, 278 Mich App at 462.

Affirmed. Plaintiff, the prevailing party, may tax costs.

/s/ Karen M. Fort Hood  
/s/ Mark J. Cavanagh  
/s/ Kirsten Frank Kelly