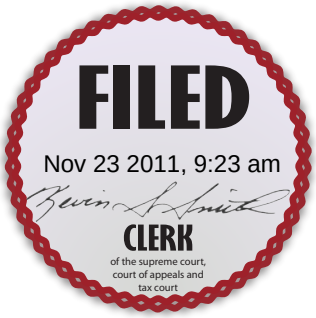

PRO SE APPELLANTS:

KAY KIM
CHARLES CHUANG
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

JOHN C. TRIMBLE
LEWIS S. WOOTON
LEWIS WAGNER, LLP
Indianapolis, Indiana

MARK D. GERTH
KIGHTLINGER & GRAY, LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KAY KIM and CHARLES CHUANG,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 49A02-1106-CT-479
	)	
VILLAGE AT EAGLE CREEK HOMEOWNERS ASSOCIATION c/o Community Association Services of Indiana; and CHUBB CUSTOM INSURANCE COMPANY,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable S. K. Reid, Judge
Cause No. 49D14-1011-CT-48790

November 23, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellants-Plaintiffs, Kay Kim and Charles Chuang (collectively, Appellants), appeal the trial court's summary judgment in favor of Appellee-Defendant, the Village at Eagle Creek Homeowners Association c/o Community Association Services of Indiana (VECHOA) and the trial court's dismissal of Appellants' Complaint against Appellee-Defendant, Chubb Custom Insurance Company (Chubb).

We affirm.

ISSUES

Appellants raise two issues, which we restate as follows:

(1) Whether the trial court properly granted summary judgment to VECHOA; and

(2) Whether the trial court properly dismissed Appellants' Complaint against Chubb for failure to state a claim pursuant to Ind. Trial Rule 12(B)(6).

FACTS AND PROCEDURAL HISTORY

Appellants are residents of the Village at Eagle Creek Condominiums (VEC). They brought this action to recover damages incurred to their condominium unit and personal property due to the toilet overflowing in the condominium unit located above Appellants' unit at various times between 2005 and 2009. They also allege damages to their vehicles, front door, and screen door. At the time of the losses, the Appellants were subject to the Code of By-Laws and Declaration of Horizontal Property Ownership prescribing the rights and responsibilities of the Village at Eagle Creek and its residents.

According to the By-Laws, each condominium owner was responsible for the maintenance, repair, decoration, and replacement within his or her unit, whereas the Board of Directors of the VEC was responsible only for the maintenance and repair of the common areas. Chubb is the property insurer for VEC.

On June 5, 2009, Appellants filed a complaint in small claims court against Shannon and Kyle Love (collectively, the Loves), the residents of the condominium located above Appellants' condominium, seeking $6,000 in property damages caused by the Loves' toilet overflowing. On September 29, 2010, the small claims court awarded Appellants $1,042.86 in damages.

On September 24, 2010, Appellants filed another notice of claim against the Loves in small claims court, seeking $10,000 in damages to the master toilet and master bedroom ceiling and walls, as well as punitive damages. Six days later, on September 30, 2010, Appellants filed a complaint in small claims court against VECHOA and Chubb demanding $100,000 in damages for

> 1. Damages to the Master Toilet and Master Bedroom's Ceilings and Walls Claimed on 9/24/2010. 2. Damages to 2nd bathroom & in front of hallway ceilings & walls and carpet (black water damage) occurred on/about 2009 & December 2005. 3. Damages to the dinning (sic) room & living room ceilings occurred on/about 2009, 2005. 4. Ongoing damages to the front door, vehicles & screen doors. 5. Conspiracy to commit fraud, misleading & withholding information. 6. Racial discrimination. 7. Violation of the condo bylaw by VECHOA Boards & Property managers. 8. Punitive damages. 9. Embezzlement by the VECHOA Boards & property manages. 10. Corrupt Business Practice.

(Appellants' App. p. 127). On October 7, 2010, Appellants filed another complaint against VECHOA and Chubb for actual and punitive damages for the damages identified

in their September 30, 2010 complaint. On October 24, 2010, Appellants filed another complaint against VECHOA only for actual and punitive damages for property damages to the Appellants' condominium. On November 9, 2010, the small claims court held a hearing on Appellants' complaints. As a result of the hearing, Appellants agreed to move forward on their claims against VECHOA only and to dismiss all other parties.

On the same day of the hearing, Appellants filed the current Complaint in the superior court against VECHOA and Chubb, seeking actual and punitive damages in excess of $270,000. On January 5, 2011, after the small claims court was advised of the current cause, the small claims court transferred the case to the superior court for consolidation with this action.

On January 7, 2011, VECHOA filed its Trial Rule 12(E) motion to compel Appellants to make a more definite and clear pleading, which was granted by the trial court on January 24, 2011. On January 27, 2011, Appellants filed their response. Thereafter, on March 31, 2011, VECHOA filed its motion for summary judgment, brief in support thereof, and designation of evidence. On April 6, 2011, Appellants filed a "list of exhibits for jury trial of this matter." (Appellants' App. p. 47). On May 12, 2011, the trial court summarily entered judgment in favor of VECHOA.

With respect to Chubb, we note the following proceedings. On January 10, 2011, Chubb filed its motion to dismiss Appellants' Complaint for failure to state a claim upon which relief can be granted. On May 16, 2011, after conducting a hearing, the trial court granted Chubb's motion and dismissed Appellants' Complaint.

Appellants now appeal by way of a Joint Notice of Appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Summary Judgment*

First, Appellants contend that there are genuine issues of material fact that preclude an entry of summary judgment in favor of VECHOA. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *First Farmers Bank & Trust Co. v. Whorley*, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), *trans. denied*. Thus, on appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id*. at 607-08. In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id*. at 608. The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id*. When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiffs' claim. *Id*. Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id*.

Here, VECHOA filed its motion for summary judgment, memorandum in support thereof, and designated evidence, in which it alleged that pursuant to VEC's By-Laws, VECHOA is not responsible for Appellants' damages to the interior of their condominium or to their vehicles or other personal property located outside. In response, the Appellants filed an exhibit list containing photographs, a layout of the condominium and unauthenticated emails and letters.

As we have previously noted, materials adduced in support of a motion under this rule must be in the form intended or the court will not consider the same. *Freson v. Combs*, 433 N.E.2d 55, 59 (Ind. Ct. App. 1982). An unsworn statement or uncertified exhibit does not qualify. *Id*. However, "[s]ummary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence, but the court shall make its determination from the evidentiary matter designated to the court." Ind. T.R. 56(C).

Nevertheless, reviewing all designated evidence, we must affirm the trial court's summary judgment for VECHOA. Appellants failed to designate any admissible evidence in opposition to VECHOA's motion for summary judgment and thus, did not create a genuine issue of material fact as to any material fact, including whether VECHOA owed any duty to Appellants.

II. *Motion to Dismiss*

Next, Appellants assert that the trial court improperly dismissed their complaint against Chubb for failing to state a claim upon which relief can be granted pursuant to T.R. 12(B)(6). The standard or review of a trial court's grant or denial of a motion to

dismiss for failure to state a claim is *de novo*. *PricewaterhouseCoopers, LLP v. Massey*, 860 N.E.2d 1252, 1256 (Ind. Ct. App. 2007), *trans. denied*. A 12(B)(6) motion tests the legal sufficiency of a claim, not the facts supporting it. *Id*. On review, we view the complaint in the light most favorable to the non-moving party, drawing every reasonable inference in favor of that party. *Id*. We stand in the shoes of the trial court and must determine if the trial court erred in its application of the law. *Id*. We may sustain the trial court's ruling if we can affirm on any basis found in the record. *Id*.

In their Complaint, the Appellants accused Chubb of conspiracy to commit fraud and gross negligence. A civil conspiracy to commit fraud is defined as "a combination of two or more persons, by concerted action, to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. *American Heritage Banco v. McNaughton*, 879 N.E.2d 1110, 1115 (quoting *Huntington Mortgage Co. v. DeBrota*, 703 N.E.2d 160, 168 (Ind. Ct. App. 1998)). However, in Indiana there is no civil cause of action for conspiracy; there is only a civil cause of action for damages resulting from conspiracy. *Sims v. Beamer*, 757 N.E.2d 1021, 1026 (Ind. Ct. App. 2001). Thus, in a cause of action for civil conspiracy to commit fraud, Appellants were also required to establish fraud on the part of Chubb. The essential elements of common law fraud are: 1) a material representation of past or existing facts which 2) was false 3) was made with knowledge or reckless ignorance of its falsity 4) was made with intent to deceive 5) was rightfully relied upon by the complaining party and 6) proximately caused injury to the complaining party. *American Heritage Banco, Inc*., 879 N.E.2d at 1115.

In order to establish their claim for negligence, the Appellants had to allege 1) a duty of care owed by the defendant to the plaintiff, 2) a breach of that duty, and 3) an injury proximately caused by the breach of that duty. *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991). In turn, gross negligence is defined as "[a] conscious, voluntary act or omission in reckless disregard of . . . the consequences to another party." *Northern Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003).

In their Complaint, the Appellants claim

> i. I, Kay Kim, Pro Se, filed property claim against VECHOA insurer-[Chubb] on September 24, 2010 (Claim 0475-1004-2465; Policy # 7958-00-81).
>
> m. [Chubb] closed my claim per telephone conversation on 9/30/2010 with the Adjuster Kimberlyn J. Twiehaus & her supervisor, Sandra Vanmill stated that there is no damage. Therefore they will not issue any estimate.
>
> n. [Chubb], VECHOA, Property Managers, etc. are conspired to commit fraud, lie and gross negligent. (sic).
>
> * * *
>
> 11. For the first time, I, Kay Kim, Pro Se, filed property claim against VECHOA insurer-Chubb on September 24, 2010. (Claim # 0475-1004-2465; Policy 7958-00-81) because I was deceived/misled by the VECHOA Boards and Property managers that they are responsible for any damages done to my property and I have claim myself against immediate upstairs.
>
> * * *
>
> 14. REQUEST FOR RELIEF is as follows and not limited to:
>
> * * *
>
> (d) [Chubb] to pay the Plaintiff, Kay Kim, Pro Se, total of $206,650.00 for Claim I.

(Appellants' App. pp. 17-18, 20, 22).

Appellants' Complaint with respect to Chubb fails to state a claim with legal sufficiency. Nowhere do Appellants allege any facts or elements of the claim which could support their allegations of conspiracy to commit fraud and gross negligence. Merely using the language of the claim is not sufficient to actually raise the cause of action. Therefore, we affirm the trial court's dismissal.[1]

CONCLUSION

Based on the foregoing, we conclude that the trial court properly granted summary judgment to VECHOA and that the trial court properly dismissed Appellants' Complaint against Chubb for failure to state a claim pursuant to Ind. Trial Rule 12(B)(6).

Affirmed.

NAJAM, J. and MAY, J. concur

[1] Insofar as Appellants now raise a claim that the presiding trial court judge was not properly appointed, this claim is waived as it is made for the first time on appeal. *See Huntington v. Riggs*, 862 N.E.2d 1263, 1270 (Ind. Ct. App. 2007), *trans. denied*.