STATE OF MICHIGAN

COURT OF APPEALS

DALLAS HAYLEY and CHRISTINE HAYLEY, Plaintiffs-Appellees, v ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	FOR PUBLICATION June 22, 2004 9:15 a.m. No. 245233 Wayne Circuit Court LC No. 01-122249-CK Official Reported Version

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

BANDSTRA, J.

Defendant Allstate Insurance Company appeals by leave granted the trial court's denial of its motion for summary disposition of all plaintiffs Dallas and Christine Hayleys' claims pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). We reverse.

I. Facts

Plaintiffs' home sustained water damage in 1999 because of ice damming on their roof. The damage consisted primarily of flooding of the carpeting in a bedroom and the family room. Plaintiffs submitted a claim for this damage to defendant, their homeowner's insurer, which defendant paid. The damage was repaired and, at the time, plaintiffs believed the problem had been resolved. Subsequently, in 2000, plaintiffs discovered a toxic form of mold in their home when they removed suspended ceiling tiles in their utility room. Plaintiffs discovered that mold was growing on approximately one-fourth of the unfinished drywall ceiling above the suspended tiles. Clean Air Management, Inc., investigated the problem and advised plaintiffs that the mold was stachybotrys, a toxic form of mold. Plaintiffs alleged that the mold was caused by the 1999 water damage and requested that defendant reopen the 1999 claim to cover the cost of its removal. However, defendant refused to pay for any claim associated with the mold discovered in 2000.

Plaintiffs thereafter brought this action, alleging claims for breach of contract, violation of the Uniform Trade Practices Act (UTPA),[1] intentional infliction of emotional distress, gross

[1] MCL 500.2001 *et seq.*

negligence, and breach of a duty of good faith. The parties presented conflicting evidence in the trial court regarding the cause of the mold. However, defendant conceded at oral arguments that, for the purpose of this appeal, the mold was caused by the 1999 ice damming. Both plaintiffs allege that they have experienced physical symptoms and ailments related to their exposure to the mold, forcing them to move out of their home in 2001. Defendant moved for summary disposition of all claims, the denial of which led to this appeal.

II. Legal Analysis

We review de novo a trial court's determination regarding a motion for summary disposition.[2] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.[3] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[4] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[5] Summary disposition is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[6]

A. Policy Exclusion

Defendant contends that the trial court erroneously denied its motion for summary disposition regarding plaintiffs' breach of contract claim, as defendant's policy specifically excludes coverage for mold damage. We agree.

This Court summarized the guidelines for enforcing exclusionary clauses in insurance policies as follows:

> Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume.[7]

---

[2] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[3] *Id.* at 129-130.

[4] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[5] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001); MCR 2.116(G)(5).

[6] *Auto-Owners, supra* at 397.

[7] *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998).

When reviewing an exclusionary clause, we read the contract as a whole to effectuate the overall intent of the parties.[8] Where the language is clear and unambiguous, the insurance policy must be enforced as written.[9]

Defendant's policy contains the following exclusion from coverage:

> *Losses We Do Not Cover Under Coverages A and B:*
>
> We do not cover loss to the property described in Coverage A—Dwelling Protection or Coverage B—Other Structures Protection consisting of or caused by:
>
> * * *
>
> In addition, we do not cover loss consisting of or caused by any of the following:
>
> 15. a) . . .
>
> * * *
>
> d) rust or other corrosion, mold, wet or dry rot; . . .
>
> * * *
>
> 23. We do not cover loss to covered property described in Coverage A—Dwelling Protection or Coverage B—Other Structures Protection when:
>
> a) there are two or more causes of loss to the covered property; and
>
> b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 22 above.

We agree with defendant that ¶ 15(d) clearly excludes both losses caused by mold and losses consisting of mold damage. Further, contrary to plaintiffs' arguments, ¶ 23 does nothing to extend coverage to such losses. To the contrary, ¶ 23 further identifies losses that "[w]e do not cover" in a limiting fashion and that paragraph cannot reasonably be construed to an opposite effect, i.e., to somehow extend coverage to losses not otherwise covered. Further, the paragraph only applies where "there are two or more causes of loss." Here, there is only one cause of loss, the water backup that resulted from the ice dam. Defendant paid for covered losses resulting from that cause to the extent they were not excluded from coverage, as mold is. Finally, we disagree with the dissent's conclusion that Steven Bell admitted in his deposition that defendant

---

[8] *Pacific Employers Ins Co v Michigan Mut Ins Co*, 452 Mich 218, 224; 549 NW2d 872 (1996).

[9] *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999).

would pay for mold remediation if caused by a covered water backup. Instead, Bell only stated that mold remediation might occur during the process of remediating some other loss that was covered by the policy. Such incidental mold remediation did not occur here as the water damage was corrected, at defendant's expense, before the mold problem developed.

B. Uniform Trade Practices Act

Defendant further argues that the trial court should have dismissed plaintiffs' claim under the UTPA, wherein plaintiffs requested an award of twelve percent penalty interest pursuant to MCL 500.2006 on the basis that defendant had unreasonably denied their claim. In light of our conclusion that defendant appropriately rejected plaintiffs' claim, we agree.

C. Intentional Infliction of Emotional Distress

Finally, defendant contends that the trial court erred in denying summary disposition of plaintiffs' claim for intentional infliction of emotional distress. We agree.

To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress."[10] The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."[11] It is for the trial court to initially determine whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery.[12] But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery.[13]

The failure to pay a contractual obligation or insurance benefits does not amount to outrageous conduct, even if it is done in bad faith or wilfully.[14] In a contractual setting, a tort claim must be based instead on the breach of a duty distinct from the contract.[15] Plaintiffs failed to sufficiently allege or present evidence that defendant did anything more than refuse to pay their claim. Contrary to plaintiffs' suggestion, defendant did not force them to remain in their home while they disputed the denial of their claim. Nor have plaintiffs shown that the handling of their claim involved extreme and outrageous conduct on the part of defendant's agents.

---

[10] *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999).

[11] *Id*.

[12] *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999).

[13] *Id*.

[14] *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 864 (1994).

[15] *Runions v Auto-Owners Ins Co*, 197 Mich App 105, 109; 495 NW2d 166 (1992), quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

Therefore, the trial court improperly denied defendant's motion for summary disposition of plaintiffs' intentional infliction of emotional distress claim pursuant to MCR 2.116(C)(10).

Plaintiffs concede that defendant is entitled to summary disposition regarding their claims of gross negligence and breach of a duty of good faith. Therefore, we dismiss those claims without further review.

We reverse and remand for entry of an order granting defendant summary disposition of all plaintiffs' claims. We do not retain jurisdiction.

Schuette, P.J., concurred.

/s/ Richard A. Bandstra
/s/ Bill Schuette