

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.

COOPER, J. (*dissenting*).

I respectfully dissent from the opinion of my colleagues. The plain language of Allstate's insurance policy provides for coverage for an otherwise excluded loss if the predominant source of the loss was a covered event. I would, therefore, affirm the trial court's denial of defendant's motion for summary disposition regarding plaintiffs' breach of contract and Uniform Trade Practices Act (UTPA) claims.

I. Policy Exclusion

I also agree with defendant that ¶ 15(d) purports to exclude both losses caused by mold and losses consisting of mold damage. However, ¶ 23 of the policy recognizes that there may be more than one cause of a loss to covered property. Under ¶ 23, if there is more than one cause contributing to the loss, coverage is still available so long as the predominant cause of the loss is not excluded under the policy.¹

Paragraph 23 appears to embody the *efficient proximate cause rule*, or the theory of dual or concurrent causation, as it is known in Michigan. Michigan has no precedential authority expressly adopting or denying the theory of dual or concurrent causation. As the Allstate policy expressly provides for governance under this doctrine, it is unnecessary to determine whether

¹ Compare *Sunshine Motors, Inc v New Hampshire Ins Co*, 209 Mich App 58, 59-60; 530 NW2d 120 (1995) (coverage for flood damage was completely barred where insurance policy expressly excluded coverage for losses caused both directly, and indirectly, by flooding).

Michigan must adopt the doctrine as a matter of policy to dispose of this case. For purposes of interpreting the contract, it is necessary to discuss the doctrine.

In an unpublished opinion, a panel of this Court declined to adopt the theory of dual or concurrent causation where the exclusionary provision at issue was an "anticoncurrent causation" clause.² The policy in *Dahlke v Home Owners Ins Co* excluded loss "caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss: . . . mold" ³ In *Vanguard Ins Co v Clarke*,⁴ our Supreme Court declined to apply the doctrine to "to nullify an unambiguous insurance policy exclusion" ⁵ *Vanguard* is similarly uninformative, as the Court was silent regarding the applicability of the doctrine to an insurance policy containing an express concurrent causation provision.

We must, therefore, look to other jurisdictions for guidance.⁶ Illinois, the state in which this insurance policy originated, provides no direction to interpreting the current insurance policy as it has questioned the introduction of tort principles of causation into the interpretation of insurance policies.⁷ The clearest interpretation of this rule comes from the Alaska Supreme Court.

"When a loss is sustained by a sequence or concurrence of at least two causes, one covered under [an insurance] policy and the other excluded under the policy, the cause setting the chain of events in motion is the cause to which the

² *Dahlke v Home Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2003 (Docket No. 239128), slip op at 4.

³ *Id.* at 2.

⁴ *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991).

⁵ *Id.* at 466.

⁶ For examples of other states that have adopted the efficient proximate cause rule, see *State Farm Fire & Cas Co v Von Der Lieth*, 54 Cal 3d 1123; 2 Cal Rptr 2d 183; 820 P2d 285 (1991); *Frontis v Milwaukee Ins Co*, 156 Conn 492; 242 A2d 749 (1968); *Chase v State Farm Fire & Cas Co*, 780 A2d 1123 (DC App, 2001); *Jussim v Massachusetts Bay Ins Co*, 415 Mass 24; 610 NE2d 954 (1993); *Fawcett House, Inc v Great Central Ins Co*, 280 Minn 325; 159 NW2d 268 (1968); *Toumayan v State Farm Fire & Cas Co*, 970 SW2d 822 (Mo App, 1998); *Western Nat'l Mut Ins Co v Univ of North Dakota*, 2002 ND 63; 643 NW2d 4 (ND, 2002); *Alf v State Farm Fire & Cas Co*, 850 P2d 1272 (Utah, 1993); *Allstate Ins Co v Raynor*, 143 Wash 2d 469; 21 P3d 707 (2001).

⁷ *Allstate Ins Co v Smiley*, 276 Ill App 971; 659 NE2d 1345, 1354 (1995).

loss is attributed" Other courts have defined efficient proximate cause to mean the predominant cause, rather than the first in time.^[8]

The determination of the cause of the loss is a question of fact.⁹

Paragraph 23 purports to provide coverage, even for specifically excluded losses, where the predominant cause of loss is a covered event. The majority inaccurately interprets ¶ 23 and the testimony of Steven Bell. Mr. Bell admitted in his deposition that defendant would pay for mold remediation if caused by a covered water loss.¹⁰ Furthermore, defendant's appellate counsel admitted at oral arguments that, for purposes of this appeal, the mold *was* caused by the

⁸ *C P v Allstate Ins Co*, 996 P2d 1216, 1228 (Alas, 2000), in part quoting *State Farm Fire & Cas Co v Bongen*, 925 P2d 1042, 1043 n 1 (Alas, 1996). See also 7 Couch on Insurance, 3d, § 101.46, pp 101-140 to 101-141, § 101.57, pp 101-152 to 101-153.

⁹ *Von Der Lieth*, *supra* at 1132, citing *Garvey v State Farm Fire & Cas Co*, 48 Cal 3d 395; 257 Cal Rptr 292; 770 P2d 704 (1989).

¹⁰ A fair reading of the following testimony from Mr. Bell's deposition indicates that Mr. Bell did in fact admit that defendant would pay for the remediation of mold caused by a covered loss.

Q. A house catches on fire, the firefighters go in to suppress the fire and water ends up in the house and it's not initially cleaned up and mold results, is it covered?

A. The initial fire loss is covered.

Q. What about the resulting water loss?

A. The water loss is part of the fire damage; therefore, it's covered also.

Q. Okay. And if it happens to be mold resulting from that, is it covered?

* * *

A. It depends on whether it's part of the actual water loss and is taken care of.

Q. So sometimes Allstate Insurance Company, under these homeowners policies will, in fact, pay for the remediation of mold?

A. Typically, it's part of the actual structure damages.

Q. Okay. But there are times when mold remediation is paid by Allstate under a homeowners policy?

A. Yes. [Deposition of Steven Bell, April 3, 2002, pp 33-34.]

covered 1999 ice damming. Accordingly, I would find that the trial court properly denied defendant's motion for summary disposition.

II. Uniform Trade Practices Act

I also disagree with the majority's decision regarding plaintiffs' claim under the UTPA. In light of the conclusion that the Allstate policy clearly covers mold loss incidental to a primary covered loss, and in light of Mr. Bell's admission of coverage, in addition to plaintiffs' evidence linking the mold to the 1999 ice damming condition, I believe there is a genuine issue of material fact concerning whether plaintiffs' claim was reasonably in dispute. Therefore, I would find that the trial court properly denied summary disposition regarding this claim.

Accordingly, I would affirm the trial court's denial of defendant's motion for summary disposition with regard to plaintiffs' breach of contract and UTPA claims and reverse the trial court's denial with regard to plaintiffs' claim of intentional infliction of emotional distress.

/s/ Jessica R. Cooper