# STATE OF MICHIGAN

# COURT OF APPEALS

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CLEMENT C. SUTTMANN and HOLLY C. SUTTMANN,

Plaintiffs-Appellants and Cross-Appellees,

v

WOLVERINE MUTUAL INSURANCE CO., MICHAEL LAKE, and ADJUSTING SERVICES UNLIMITED, INC.,

Defendants-Appellees and Cross-Appellants.

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UNPUBLISHED
December 21, 1999

No. 211904
Leelanau Circuit Court
LC No. 97-004093 NZ

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10) on plaintiffs' claims for breach of contract, tortious interference with an attorney-client relationship, bad faith—failure to prosecute a claim and failure to negotiate a settlement, and unfair claim settlement practices. Defendant Wolverine Mutual Insurance Co. (hereafter Wolverine) cross-appeals, challenging the trial court's holding that a constructive collapse occurred at plaintiffs' home. We affirm.

Plaintiffs purchased their house on June 30, 1993, and insured it through Wolverine. Beginning in January 1994, plaintiffs began to sustain losses on the home, which they attributed to damage caused by the weight of ice and snow. Although Wolverine agreed to pay approximately $11,000 for repairs to the interior of the house, it insisted on a complete assessment of the cause of the damage before any further payment consideration. Approximately one year after the original damages were claimed, plaintiffs reported new damages with the house. Defendants' structural engineering expert inspected the house and identified numerous structural problems. The engineer described the house's condition as "warped and deflected due to inadequate initial construction and excessive roof loading due to the

abnormal buildup of ice caused by a roof system that had inadequate insulation and ventilation." Plaintiffs eventually submitted proofs of loss totaling $99,363.75 in damages.

Plaintiffs filed this lawsuit, contending that they had performed their duties under the policy by giving prompt notice of the damages, protecting the property from further damage, making reasonable and necessary repairs to protect the property including replacing the roof and central beam, and providing sworn proofs of loss. Plaintiffs alleged that Wolverine had not countered with a different estimate or formally denied plaintiffs' claim and had made only a partial payment on plaintiffs' claims. Plaintiffs alleged that their house had constructively collapsed, and Wolverine should have provided coverage of all of their damages under the policy's collapse provision.

The trial court granted defendants' motion for summary disposition on plaintiffs' breach of contract claim, concluding that the damage to plaintiffs' house was caused by inadequate and defective design, faulty and inadequate and defective workmanship and construction, and inadequate materials, and that, under a policy exclusion, there was no coverage for these causes of damages. The court further concluded that there had been a constructive collapse in plaintiffs' house, meaning there was evidence of a substantial impairment to its structural integrity, but the collapse occurred when the certificate of occupancy was issued, at which time the house was not covered by defendant Wolverine's insurance policy. The court also granted summary disposition to defendants on plaintiffs' remaining claims.

I

On appeal, plaintiffs argue that the trial court erred as a matter of law in finding no coverage under the policy's collapse provision within the Additional Coverages subsection because the court found that a constructive collapse had occurred, the Exclusions section did not apply to the Additional Coverages, and there was no concurrent causation language that applied to the Additional Coverages section.

This Court reviews a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Id.* In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The construction and interpretation of an insurance contract is also reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). In reviewing a dispute concerning an insurance policy, a court must look to the language of the policy and interpret it in

accordance with established principles of contract construction. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353-354; 596 NW2d 190 (1999). A court must not hold an insurance company liable for a risk it did not assume. *Id.* at 354. The "insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161, n 6; 534 NW2d 502 (1995), quoting *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 424-425; 531 NW2d 168 (1995).

Although plaintiffs argued that the weight of ice and snow had caused their house to collapse, the trial court ruled that the legal cause of plaintiffs' damages was latent deficiencies such as defective design, construction, and workmanship rather than the weight of ice and snow. The court determined that a reasonable winter occupancy and heating of the home "inevitably lead to excessive ice buildup secondary to defective roof construction and collateral consequences throughout a structure incapable of carrying the second-story load as well as normal roof loads." Therefore the damages were not covered because the policy specifically excluded damages caused by faulty, inadequate or defective design, specifications, workmanship, construction or materials.

Plaintiffs contend that the trial court erred in its interpretation of the insurance policy, when it determined that the Additional Coverages subsection, including the collapse provision, incorporated the Exclusions section. In support of this argument, plaintiffs rely on the affidavit of their property expert, who stated that the policy is "quite clear" that the Exclusions section applies only to the Perils Insured Against section and not to Additional Coverages. The expert also opined that "to apply the concurrent causation doctrine would have the effect of making the addition coverage grant for Collapse [illusory]." Plaintiffs acknowledge that there is no Michigan law on point with their concurrent causation argument. However, Michigan appellate courts have explicitly refused to apply concurrent causation theory to find coverage where there is an unambiguous exclusion. See *Vanguard Ins Co v Clarke*, 438 Mich 463, 473-474; 475 NW2d 48 (1991); *United States Fidelity & Guaranty Co v Citizens Ins Co of America*, 201 Mich App 491, 495-496; 506 NW2d 527 (1993). Thus, this portion of plaintiffs' argument has no merit. As the trial court found, "snow and ice damage to homes that satisfied applicable codes when they were built or remodeled is compensable and covers losses to both covered structures and personal property."

Coverage under an insurance policy is lost if any one exclusion is applicable to the claims at issue. *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 695; 327 NW2d 286 (1982). Exclusionary clauses that are not ambiguous or against public policy will be enforced. *Id.* at 694. The Wolverine policy proscribes coverage for losses caused by "Faulty, inadequate or defective (1) planning, zoning, development, surveying, siting; (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction; (3) materials used in repair, construction, renovation or remodeling; or (4) maintenance of part or all of any property whether on or off the residence premises." Therefore, the insurer has specifically excluded damages directly caused by defective design and construction, which the trial court determined was the proximate cause of the damages asserted by plaintiffs.

We reject plaintiffs' argument that the Exclusions section does not apply to the collapse provision. As a covered peril, collapse is included within Additional Coverages because it otherwise

was specifically excluded under Perils Insured Against. Under Additional Coverages, the policy allows some coverage for collapse under very specific conditions, including collapse caused by those Perils Insured Against listed under Coverage C (which includes the weight of ice or snow). These specific risks for which the insurer will cover damages caused by collapse, as well as the exclusions for which the insurer will not provide coverage, are not ambiguous and should be enforced. Moreover, enforcing the policy exclusions does not render the additional coverage for collapse illusory as plaintiffs contend. The Collapse provision continues to provide specific additional coverage that would not otherwise be covered under the terms of the contract.

II

Next, plaintiffs argue that the trial court erred in ruling that, under their occurrence-based insurance policy, a collapse for purposes of triggering coverage occurred when the house was completed and certified for occupancy, and not when plaintiffs experienced damages.

Michigan courts have recognized the concept of constructive collapse in such cases as *Dagen v Hastings Mut Ins Co*, 166 Mich App 225, 230-231; 420 NW2d 111 (1987) and *Vormelker v Oleksinski*, 40 Mich App 618, 630-632; 199 NW2d 287 (1972), which hold that a collapse has occurred where the factfinder would reasonably conclude that the supporting structure to the building was so impaired as to destroy the building's use for habitation.[1] We find that the trial court did not err in concluding that plaintiffs' house was constructively collapsed before the policy went into effect. The only evidence regarding the structural integrity of the house was presented by the engineering expert, who stated that the house was structurally deficient from the planning stages and opined that these structural deficiencies "were the sole cause of the physical damage to the dwelling." As the trial court correctly ruled, if the house was as structurally deficient as built, it was not fit for habitation at the very beginning and thus was constructively collapsed.

Plaintiffs argue that their policy is occurrence-based and a collapse is an occurrence. According to plaintiffs, the term "collapse" is synonymous with the concept of "accident" in Michigan case law. However, the cases cited by plaintiffs in support of this proposition employ the terms "collapse" and "accident" synonymously in a nonlegal sense to refer to something other than the collapse of a building and do not support plaintiffs' argument.[2] Plaintiffs also cite *Frankenmuth Mut Ins Co v Picard*, 440 Mich 539, 547; 489 NW2d 422 (1992), in which the Supreme Court determined that "an 'accident' is evaluated from the standpoint of the injured person, rather than the insured." We note that this holding has been abrogated in more recent cases, and the Supreme Court has ruled that an accident is evaluated from the standpoint of the insured, not the injured party. See *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 114, n 6; 595 NW2d 832 (1999). Finally, plaintiffs' reliance on the trial court's decision in plaintiffs' suit against the builders is misplaced, because that suit has no bearing on the present case. Defendant Wolverine can only be found liable for risks it undertook in the policy it issued to plaintiff.

III

Plaintiffs next argue that, in finding no coverage under the insurance policy, the trial court declared some facts to be undisputed, which actually were in dispute. First, plaintiffs contend that the trial court erred in determining that "no winter occupancy had taken place prior to the winter of 1993-94." Plaintiffs contend that evidence was before the court from the deposition of plaintiff Clement Suttmann, in which he indicated that plaintiffs had responded to a newspaper ad for the sale of the house sometime in November 1992, and the previous owners were living in the house. However, plaintiffs did not attach this page of the deposition with their response to defendants' motion for summary disposition and did not argue this point before the trial court. This testimony was therefore not before the trial court when it granted summary disposition.[3] We will not consider arguments not supported by the record. *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 674 (1997). Plaintiffs also contend that the only evidence that the house was not used in the winter is the structural engineer's report, which is hearsay. However, plaintiffs themselves offered the report as documentary evidence to oppose defendants' motion for summary disposition, and the report was incorporated into the engineer's affidavit, which was relied upon by defendants in their motion for summary disposition. Because plaintiffs did not refute the engineer's assertion, they failed to establish that a genuine issue of disputed fact existed regarding the house's occupancy during prior winters. *Quinto, supra* at 362.

Plaintiffs next contend that the trial court erred in finding as an undisputed fact that structural deficiencies were the sole cause of the damage to their house. This fact also came from the affidavit of the engineer, who was the only construction and building expert used by any of the parties. His opinion testimony on the cause of damage to plaintiffs' house is admissible under MRE 702 and MRE 704. The only evidence plaintiffs offered to counter the engineer's opinion were statements made by insurance adjuster Lake that the winter of 1994 was severe and caused "excessive snow and ice build up" and "extreme snow loads." These comments are not sufficient to dispute the engineer's expert opinion that the structural deficiencies of the house allowed the excessive buildup of ice and snow on the house's roof and therefore do not create an issue of genuine fact regarding the cause of the damages to plaintiffs' house.

Finally, plaintiffs argue that the trial court erred when it concluded that both parties relied on the same engineering expert for this litigation. However, plaintiffs submitted reports from defendants' expert as documentary evidence in support of their opposition to defendants' motion for summary disposition and did not rely on reports or affidavits from any other structural or engineering experts. Plaintiffs have not refuted the trial court's statement that both parties relied on the expert testimony of the same engineer.

IV

Plaintiffs contend that the trial court erred in ruling that Wolverine did not intentionally interfere with their relationship with their former attorneys. Plaintiffs had initially filed suit against the builders and sellers of the house, alleging negligence, breach of warranty, and silent fraud. After paying the initial claim, the insurer exercised its subrogation rights by entering this lawsuit as a plaintiff. Plaintiffs argue that Wolverine used plaintiffs' attorneys without plaintiffs' consent and negotiated a settlement to the detriment of its insured. The trial court found that defendant Wolverine was pursuing "a lawful contract subrogation right" when it contacted plaintiffs' attorneys and joined itself as a plaintiff in the lawsuit

plaintiffs were pursuing. While Wolverine had no duty to pursue its subrogation action, it enjoyed a contractual right to do so although ultimately it abandoned the claim and did not enter into a settlement.

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). "To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference." *Id.* at 699. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference. *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989).

We agree with the trial court that Wolverine's actions were motivated by its contractual right to subrogation of funds collected by plaintiffs from third parties for the damages to their house. Thus, Wolverine's actions were taken for a legitimate business reason and do not constitute improper motive or interference. Although plaintiffs allege that ex-parte settlement negotiations and communications took place even after they found new legal representation, they point to no portion of the lower court record that would factually support these allegations. Plaintiffs argue that the trial court erred when it concluded that it was undisputed that Wolverine abandoned the litigation. Because Wolverine was exercising its contractual rights to subrogation, the question of whether it abandoned the litigation was not a material fact in the trial court's grant of summary disposition on plaintiffs' claim for tortious interference.

V

Next, plaintiffs argue that the trial court erred in finding that Wolverine did not act in bad faith either in its entrance into plaintiffs' lawsuit against the builders and former owners of the house or in the settlement of plaintiffs' claim. The Supreme Court discussed the law of bad faith as it applies to insurers in *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136-137; 393 NW2d 161 (1986):

> Contrary to holdings in some other jurisdictions, bad faith should not be used interchangeably with either "negligence" or "fraud." Michigan has reached this conclusion in the past. Accordingly, we define "bad faith" for instructional use in trial courts as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.
>
> Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith

> exists, even though the insurer's actions were not actually dishonest or fraudulent. [Footnotes omitted.]

As noted above, Wolverine was exercising a contractual right to subrogation when it entered into plaintiffs' lawsuit against the builders and former owners, and therefore its actions could not be said to constitute bad faith. Plaintiffs have also not shown that defendants acted in bad faith in processing their claims for damages. Although plaintiffs assert that they submitted timely proofs of loss to which Wolverine did not respond, the record does not support this contention. The insurance policy required plaintiffs to submit proofs of loss within sixty days of the insurer's request. Nonetheless, letters from claims adjuster Lake to plaintiffs demonstrate an ongoing failure to submit proofs of loss despite requests from defendants and numerous grants of time extensions for the submissions. Throughout this period, Lake continuously warned that repairs undertaken to structurally improve the house would not be covered. The letters requesting the submission of proofs of loss begin June 22, 1994, where plaintiffs were also informed that the estimate for their roof replacement would not be covered under their policy. Sworn proofs of loss were not submitted until June 5, 1995, when plaintiffs claimed $99,613.75 in damages caused by the weight of ice and snow. No estimates were submitted to substantiate the repair costs, and Lake recommended that Wolverine reject the proofs of loss on each claim and involve legal counsel.

This evidence does not support plaintiffs' contention that they submitted timely proofs of loss. While it appears that Wolverine did not communicate its rejection of the proofs of loss in a timely manner, this failure, even if negligent, does not amount to bad faith where Wolverine properly refused to pay the claims.

VI

Next, plaintiffs argue that trial court erred as a matter of law when it held that the insurer had not violated certain provisions of the Uniform Trade Practices Act, MCL 500.2001 *et seq.*; MSA 24.12001 *et seq.* Plaintiffs alleged that defendants committed acts and omissions described in pertinent portions of MCL 500.2026(1); MSA 24.12026(1), which proscribes:

> [u]nfair methods of competition and unfair or deceptive acts or practices in the business of insurance, other than isolated incidents, [arising from] a course of conduct indicating a persistent tendency to engage in that type of conduct[.]

This Court has previously ruled that there is generally no private cause of action under MCL 500.2026(1); MSA 24.12026(1). *Young v Michigan Mut Ins Co*, 139 Mich App 600, 606; 362 NW2d 844 (1984). Further, the Supreme Court has stated that practices affecting a single policyholder are "isolated incidents" and do not amount to unfair trade practices. *Shavers v Attorney General*, 402 Mich 554, 604, n 27; 267 NW2d 72 (1978). Therefore, plaintiffs' allegations under this statute do not state a cause of action, and the trial court did not err in dismissing them.

Plaintiffs also alleged that by failing to pay their benefits under the insurance policy in a timely manner and by failing to pay within sixty days of receipt of proofs of loss the remainder of the claims,

defendants violated MCL 500.2006(1) and (3); MSA 24.12006(1) and (3). However, the trial court did not err in dismissing this claim because plaintiffs can have no claim for interest if there was no coverage under their policy of insurance with Wolverine.

VII

We address two final issues. Plaintiffs maintain that the trial court abused its discretion in concluding that a collapse occurred before the policy was in effect when, in plaintiffs' case against the builders and sellers, the same court determined there had been no occurrence. In the earlier suit, the builders admitted negligence and a consent judgment was entered. However, their insurer, Hastings Mutual Insurance Co., was determined not to be liable for the judgment because the trial court found that no "occurrence" had taken place under the policy that the insurer issued to the builders.[4] These cases concern different insurers and different policies of insurance. The trial court did not abuse its discretion in construing these policies individually. Each insurer assumed a different risk and should be held liable only for the risk assumed.

On cross appeal, defendants contend that the trial court's observations regarding "constructive collapse" are unnecessary to its holding and, therefore, dicta. Defendants contend there was no collapse within the meaning of the policy at issue and encourage this Court to adopt a more circumscribed definition of collapse. Defendants' argument that the trial court erred in finding a constructive collapse is without merit. According to defendants' own expert witness, the "entire house structure has warped and deflected." In considering a motion for summary disposition, the court must give the benefit of any reasonable doubt to the party opposing the motion and inferences are to be drawn in favor of that party. *Dagen*, *supra* at 229. A reasonable inference to be drawn from the engineer's reports is that plaintiffs' house was in a dangerous condition and not reasonably fit for habitation and thus was at least constructively collapsed.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] The trial court acknowledged that a Washington state federal district court in *Allstate Ins Co v Forest Lynn Homeowners Ass'n*, 892 F Supp 1310 (WD Wash, 1995) reached a similar conclusion in an opinion that plaintiffs argued was persuasive authority. We note that this opinion was withdrawn by *Allstate Ins Co v Forest Lynn Homeowners Ass'n*, 914 F Supp 408 (WD Wash, 1996).

[2] See *Antcliff v State Employees Credit Union*, 414 Mich 624, 639-640; 327 NW2d 814 (1982) (a products liability action, in which the defendant manufactured a power scaffold that collapsed in an "accident"); *Bialochowski v Cross Concrete Pumping* Co, 428 Mich 219, 223; 407 NW2d 355 (1987), abrogated by *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 223-224; 580 NW2d 424 (1998) (an action determining whether worker's compensation insurer entitled to reimbursement from plaintiff's third party tort recovery, in which the plaintiff was injured when a boom collapsed upon him in an "accident"); and *Glittenberg v Doughboy Recreational Ind, Inc*, 436 Mich 673, 692; 462 NW2d 348 (1990) (citing *Antcliff*, *supra*).

[3] Moreover, the page cited by plaintiffs and submitted to this Court on appeal does not support plaintiffs' factual allegations.

[4] We note that this holding was reversed by this Court in *Clement C Suttmann v William H Nedow*, unpublished opinion of the Court of Appeals, issued February 2, 1999 (No. 204421). This Court held that the plaintiffs' complaint against the builders sufficiently alleged an "occurrence" and an "accident" to invoke coverage under the builders' Hastings Mutual policy.