STATE OF MICHIGAN

COURT OF APPEALS

THOMAS KENNEDY and KRISTIN KENNEDY, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED August 4, 2011
v	No. 294955 Marquette Circuit Court
AUTO-OWNERS INSURANCE COMPANY and HOME-OWNERS INSURANCE COMPANY, Defendants-Appellants/Cross-Appellees.	LC No. 07-045044-CK

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

RONAYNE KRAUSE, P.J. *(concurring in part and dissenting in part).*

I concur entirely with the majority's determination that there is a genuine question of fact as to whether plaintiffs actually ran out of propane. I also agree that the insurance policy is unambiguous, and plaintiffs' failure to sell the house was properly excluded as potential consequential damages. However, I respectfully believe that the majority misreads the insurance policy, and I respectfully conclude that the denial of consequential damages altogether is overly broad.

To summarize the situation, plaintiffs had two houses, one of which (hereinafter, "the house") they kept vacant but habitable, with the thermostat set at 55 degrees. Two water pipes nevertheless burst and caused extensive damage. The house's redundant furnaces were fuelled by propane, and as the majority excellently explains, there is a genuine question of fact whether plaintiffs' propane tanks ran out of propane. Furthermore, again as the majority explains, the trial court erred in concluding that this factual question was immaterial. Plaintiffs had the house listed for sale, but they were unable to sell it and it eventually went into foreclosure. The majority properly explains that the failure to sell and subsequent foreclosure lack a sufficient link to the water damage to be considered consequential damages.

In reverse order, however, I would not preclude *any* possibility of plaintiffs recovering consequential damages. Plaintiffs' inability to repair the damage from the burst pipes because of defendants' denial of their insurance claim *could* itself cause further damage to the house over time. For example, mold, deterioration of the structure from exposure to environmental stresses, or the inevitable decay of any structure that sets in if it is not lived in, all would certainly be

within the contemplation of the parties. It is obvious and well-known that unresolved problems only get worse over time, never better, particularly when water damage is involved. Furthermore, this would be a loss directly from the nonperformance of the contract, assuming a jury ultimately finds in plaintiffs' favor regarding the sufficiency of their precautions or their propane levels. I agree that the failure to sell the house and the foreclosure are not consequential damages, but I cannot agree with the implication that there are not, at least theoretically, other consequential damages potentially available.

More significantly, the insurance policy at issue required plaintiffs to "take precautions to . . . maintain heat in the building." Both parties assert that this is unambiguous, although ambiguity is a question of law, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003), to which parties may not stipulate. Naturally, plaintiffs assert that only *some* precautions need to be taken, whereas defendants assert that *reasonable* precautions must be taken. I note with some interest that the specific policy endorsement explicitly deleted a requirement that the insured *actually* maintain heat in the building, replacing it with the requirement of "taking precautions." The precautions unambiguously do not necessarily have to be successful—therefore, the policy exclusion would not be triggered even if plaintiffs did in fact run out of propane.

I agree with the majority that the contract itself is not ambiguous. As they state, a precaution is defined by the dictionary as "a measure taken in advance to avert possible harm or misfortune" or "caution employed beforehand; prudent foresight." The plain language of the contract does not specify whether a *de minimus* amount of precaution will suffice or whether some quantum of care beyond that is called for. I think that if this Court recognizes that "prudent foresight" is part of the definition, the policy calls for the latter. Therefore, the plaintiffs need not take *successful* precautions to maintain heat in the building, but they must take *reasonable* precautions. In any event, allowing merely "some" precautions could lead to an absurd result, such as satisfying the policy requirements if plaintiffs had merely lit a candle somewhere in the basement—that would be a precaution, but obviously a blatantly unreasonable one. This must be a jury question.

The majority concludes that "the precautions required by the policy are to maintain heat in the home, which fundamentally requires a heat source." I cannot find any support for this conclusion in the policy, case law, dictionary, or any other reference or authority. Plaintiffs had redundant heat sources, and they also had redundant mechanisms to monitor the heat—both of which were calculated to facilitate the maintenance of heat in the home. The fact that the monitoring systems would require human intervention at some point might arguably make them poor or unreliable precautions, but that goes purely to evaluating *how reasonable* the precaution is, not what it was designed to accomplish. Again, the reasonableness would be for the jury to decide.

In summary, I agree that there is a genuine question of material fact as to whether plaintiffs ran out of propane, and I agree that plaintiffs' inability to sell the house and foreclosure are not permissible items of consequential damages. However, I would hold that the insurance policy requires reasonable precautions to maintain heat, which may or may not be directly heat-generating acts, and I would further hold that there may possibly be items of consequential damages *directly* caused by the unrepaired water damages.

/s/ Amy Ronayne Krause