

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM HANKINS,

Plaintiff-Appellee,

v

FREMONT INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 4, 2014

No. 317358
Genesee Circuit Court
LC No. 11-096761-CK

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying its motion for summary disposition in this insurance action. Plaintiff alleged that his home had significant water damage when a pipe in his basement burst. When plaintiff eventually informed defendant insurance company, it denied the claim. The trial court denied defendant's motion for summary disposition. We reverse and remand for judgment in favor of defendant.

I. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review *de novo* a trial court's decision on a motion for summary disposition. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). A motion under MCR 2.116(C)(10) "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotation marks and citations omitted).

B. ANALYSIS

At issue in this case is the condition in plaintiff's home insurance policy requiring him to give "prompt notice" when there has been "a loss to covered property."

"Provisions in liability insurance contracts requiring the insured to give the insurer immediate or prompt notice of accident or suit are common, if not universal. The purpose of such provisions is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims." *Tenneco Inc*, 281 Mich App at 447 (quotation marks and citation omitted). Such provisions require notice within a reasonable time. *Id.* at 447-448. However, delay in notification is not the only relevant factor. *Id.* Rather, "prejudice to the insurer is a material element in determining whether notice is reasonably given and the burden is on the insurer to demonstrate such prejudice." *Id.* at 448 (quotation marks and citation omitted).

As this Court has recognized, "[a]n insurer suffers prejudice when the insureds delay in providing notice materially impairs the insurer's ability to contest its liability to the insured or the liability of the insured to a third party." *Id.* While the question of prejudice generally is a question of fact, it becomes a question of law when only one conclusion can be drawn from the undisputed facts. *Id.* "Michigan law does *not* require an insurer to prove that but for the delay it would have avoided liability." *Id.* (emphasis in original) (quotation marks and citation omitted). Relevant factors to consider in the context of prejudice are the insurer's ability: "(1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4) to contest its liability to its insured." *Id.* at 448-449 (quotation marks and citation omitted).

It is undisputed that plaintiff did not notify defendant of his claim for over five months. During that time, plaintiff hired a workman to repair the pipe and to conduct extensive repairs and remodeling at the house. The workman disposed of all physical evidence of the damage and the repairs. Plaintiff does not even attempt to argue that his notice was prompt. See also *Casey v Auto Owners Ins Co*, 273 Mich App 388, 395; 729 NW2d 277 (2006) ("if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the insurance policy.").

Moreover, defendant was significantly prejudiced by plaintiff's delay. Defendant was unable to determine through its own investigation whether the pipe had burst consistent with coverage, what caused the burst, the extent and scope of damage, whether the repairs were necessary, and whether less extensive repairs would have sufficed. Plaintiff's actions effectively prevented defendant from conducting its own investigation of the incident and the resulting damage.

Plaintiff, however, contends that defendant could have obtained information about the damage from him or the workman, whom plaintiff knew before the incident, and invoices. Yet, plaintiff fails to explain how defendant could have protected its interest and challenged the insurance claim as fraudulent, invalid, or excessive when defendant was entirely restricted to the version of events plaintiff and his workman advanced. *Tenneco Inc*, 281 Mich App at 447. Because of plaintiff's delay, defendant was unable "to investigate liability and damage issues so

as to protect its interests,” “to evaluate, negotiate, defend, or settle a claim or suit,” or “to contest its liability to its insured.” *Id.* at 448-449 (quotation marks and citation omitted).¹

Because plaintiff failed to give prompt notice of his claim, which caused defendant significant prejudice, summary disposition in favor of defendant is warranted. In light of this conclusion, we need not address defendant’s alternate grounds for relief regarding spoliation of evidence or the statute of limitations.

II. CONCLUSION

Plaintiff failed to give defendant prompt notice, as required in the insurance policy, which caused defendant significant prejudice. We reverse the trial court’s denial of defendant’s motion for summary disposition and remand for judgment in favor of defendant. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot

¹ Although plaintiff relies on *Kennedy v Dashner*, 319 Mich 491; 30 NW2d 46 (1947), a majority of the Court did not concur with the lead opinion’s conclusion that the insurer did not suffer prejudice. *Kennedy* is not binding precedent. See *People v Warren*, 462 Mich 415, 427 n 22; 615 NW2d 691 (2000). Moreover, unlike *Kennedy*, the instant case does not involve a police report or any such evidence from a neutral third-party.