STATE OF MICHIGAN

COURT OF APPEALS

COMMUNITY GARAGE INC., Plaintiff-Appellant,	UNPUBLISHED June 19, 2018
v	No. 339300 Ottawa Circuit Court
AUTO-OWNERS INSURANCE CO., Defendant-Appellee.	LC No. 16-004734-CB

Before: MURRAY, C.J., and HOEKSTRA and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying plaintiff's motion for summary disposition and granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff operates a commercial truck repair business located in Hudsonville, Michigan. In June 2016, plaintiff's place of business sustained damage following the failure of several trusses providing structural support to the building's roof. This failure was determined to be attributable to latent construction defects leading to an insufficient load bearing capacity. As a result of the failure of the trusses, the roof began to sag while one of the walls bulged outward due to the sudden pressure overload. Plaintiff immediately hired a construction firm to install temporary shoring to support the roof and prevent further damage. All of the building's walls remained standing, and, although the roof sagged, it also remained intact. However, it is undisputed that the building could not safely be occupied until repairs were completed.

At the time the damage occurred, plaintiff maintained a property, casualty, and liability insurance policy (the "Policy") issued by defendant. Subsection B(2)(k) of the Policy excludes coverage for damage due to collapse except to the extent that coverage "is provided under the Additional Coverage – Collapse" provision under Section D or to the extent that such collapse is attributable to certain specified causes not relevant in this matter. Section D provides, in relevant part,

> D. ADDITIONAL COVERAGE – COLLAPSE
>
> The coverage provided under this Additional Coverage – Collapse applies only to an abrupt collapse as described and limited in D.1. through D.7.

> 1. For the purpose of this Additional Coverage – Collapse, abrupt collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.
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> * * *
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> 3. This Additional Coverage – Collapse does not apply to:
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> a. A building or any part of a building that is in danger of falling down or caving in;
>
> b. A part of a building that is standing, even if it has separated from another part of the building; or
>
> c. A building that is standing or any part of a building that is standing, even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage, or expansion.

Plaintiff made a claim for the cost of repairs to its building, and defendant denied the claim on July 26, 2016, on the ground that the damage was not a covered "collapse" under the terms of the Policy. On October 5, 2016, plaintiff initiated the present action against defendant, bringing claims for breach of contract and declaratory judgment. The parties filed cross motions for summary disposition under MCR 2.116(C)(10), and the trial court denied plaintiff's motion and granted defendant's motion. Noting that the sole issue raised in the parties' motions was whether the damage that occurred was covered under the terms of the Policy, the trial court concluded:

> Under section D.1. of the policy, "abrupt collapse" means a "falling down" or "caving in" of a building or any part of the building. The building has neither fallen down nor caved in. Indeed, the building is still standing. Even the west wall – the site of the bulge – is still standing. And under section D.3. of the policy, the coverage otherwise afforded by section D. does not apply to a building or any part of a building that is "standing." Finally, section D.3.c. of the policy provides that the coverage otherwise afforded by section D. does not apply to a building or any part of a building that is standing even if the building or part of the building shows evidence of bulging. The Court holds that on the undisputed facts, there is no coverage under the Auto-Owners policy.

We review de novo the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint, and the Court is to "consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012) (citation omitted). Summary disposition is appropriate and the moving party is entitled to judgment as a matter of law when the evidence fails to establish a genuine issue regarding any material fact. *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in

the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The construction and interpretation of an insurance policy is a question of law to be determined by the court. *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014). When examining the scope of insurance policy coverage, the traditional principles of contract interpretation apply, and the court is to determine and give effect to the intent of the parties. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). A court is to discern the parties' intent by reading the policy as a whole and construing the policy language in accordance with its plain and ordinary meaning such that technical or strained constructions are avoided. *Radenbaugh v Farm Bureau Gen Ins Co*, 240 Mich App 134, 138; 610 NW2d 272 (2000), quoting *Royce v Citizens Ins Co*, 219 Mich App 537, 542-543; 557 NW2d 144 (1996). A contractual provision is ambiguous "if its language is reasonably susceptible to more than one interpretation," *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000), or "when its provisions are capable of conflicting interpretations," *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). If the Court determines a policy to be ambiguous, " 'the policy will be construed against the insurer and in favor of coverage.' " *Radenbaugh*, 240 Mich App at 139, quoting *Royce*, 219 Mich App at 542-543.

A court must first evaluate whether coverage exists under a policy and next determine whether an exclusion negates coverage. *Hunt*, 496 Mich at 373. It is the insured's burden to demonstrate that a claim falls within the terms of the policy, but the insurer must establish that an exclusion applies. *Id*., citing *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995) and *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982). Although exclusionary clauses "are strictly construed in favor of the insured. . . . [c]lear and specific exclusions must be given effect." *Churchman*, 440 Mich at 567.

On appeal, plaintiff contends that the damage to its building qualifies as a "collapse" within the plain language of the Policy because the roof abruptly caved in. We disagree. Under Subsection B(2)(k), the Policy excludes from coverage damage sustained from a collapse unless coverage applies under Section D. Subsection D(1) defines a collapse as "an abrupt falling down or caving in of a building or any part of a building" such that it "cannot be occupied for its intended purpose." However, Subsections D(3)(b) and (c) expressly exclude from coverage any structure or part of a structure that remains standing, "even if it has separated from another part of the building" or has sustained "cracking, bulging, sagging, bending, [or] leaning . . . ." Here, it is undisputed that, although one of the walls of the building bulges outward and the roof sags, they nonetheless remain intact. In arguing that the building experienced a cave-in within the meaning of the Policy, plaintiff largely ignores the limitations set forth in Subsections D(3)(b) and (c). Plaintiff argues only that Subsections D(3)(b) and (c) are inapplicable because the roof is not "standing" and is instead held up by shoring. However, while the roof may be in imminent danger of caving in were the shoring to be removed, Subsection D(3)(a) excludes from coverage any part of a building that is simply "in danger of falling down or caving in." Accordingly, the present circumstances clearly fall within the precise terms of those limitations.

Plaintiff additionally relies on the deposition testimony of its expert as well as an e-mail written by defendant's Executive General Adjuster, both of whom refer to the damage as a "collapse" or "caving in." Both individuals, however, were using these terms in accordance with

their common usage and not in accordance with their meanings under the Policy. Moreover, the e-mail from defendant's Executive General Adjuster was merely an initial report made before the forensic engineering report was issued, and recommends further consideration of whether the limitations set forth in Subsection D(3) apply. To the extent that plaintiff argues that defendant's Field Claims Representative agreed during deposition that whether the roof caved in was a factual issue, this statement is nothing more than a nonbinding legal conclusion. See MRE 701 (limiting lay witness testimony in the form of opinions or inferences to those that are based on the witness' perception or to those that are helpful to a clear understanding of the witness' testimony); cf. *Maiden v Rozwood*, 461 Mich 109, 130 n 11; 597 NW2d 817 ("The opinion of an expert does not extend to legal conclusions."). Accordingly, we reject plaintiff's argument that the damage at issue in the present case constitutes a collapse under the plain meaning of the Policy language.

Alternatively, plaintiff contends that the limitations set forth in Subsection D(3) of the Policy give rise to ambiguity insofar as they narrow the definition of "collapse" to an event where a building is completely reduced to rubble. Plaintiff reasons that such an interpretation conflates the definitional concepts of "falling down" and "caving in" such that the term "caving in" is rendered meaningless. Again, we disagree.

When possible, conflicts between two clauses of an insurance policy should be harmonized. *Fresard*, 414 Mich at 694. Further, courts will not strain to find ambiguity within a policy. *Churchman*, 440 Mich at 566. Here, the limitations set forth in Subsection D(3) may be readily harmonized with the Policy's definition of the term "collapse" and do not require that the structure fall down or be entirely reduced to rubble in order for there to be coverage. Indeed, Subsection D(1) of the Policy expressly extends coverage to instances of collapse of "a building or *any part of a building*." (Emphasis added). Thus, a building may qualify for coverage for a partial caving in if, for example, a portion of the roof or ceiling were to give way and break open. Under these circumstances, the roof or a portion of the roof would not be standing and the resulting damage would exceed mere "cracking, bulging, sagging, bending, [or] leaning . . . ." Accordingly, the limitations set forth in Subsection D(3) would not apply, and coverage would be available. This example also illustrates the distinction and possibility that a structure may "cave in" without "falling down."

To adopt plaintiff's position and find that the roof caved in would be to render the limitation set forth in Subsection D(3)(c) meaningless. That is, plaintiff's argument conflates the term "sagging" with the term "caving in" such that any sagging of a structure would invariably constitute a caving in and, consequently, a collapse necessitating coverage. Here, giving the terms of the Policy their natural meaning, the roof did not fall down or cave in, but rather merely sagged. The Court may consult a dictionary for the plain meaning of undefined terms in an insurance policy. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515; 773 NW2d 758 (2009). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "sag" as "to droop, sink, or settle from or as if from pressure or loss of tautness," while it defines "cave" as "to fall in or down . . . usu[ally] used with *in*." We conclude that the former definition aptly describes the damage to the roof. Likewise, the west wall of the building was "bulging," and neither fell down nor caved in.

We thus reject plaintiff's argument that the Policy language is inherently ambiguous and hold that the trial court correctly interpreted and enforced the subject Policy.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Michael F. Gadola