STATE OF MICHIGAN

COURT OF APPEALS

DENNIS KIBBEY and ELAINE KIBBEY, Plaintiffs-Appellants,	UNPUBLISHED July19, 2011
v	No. 297729 Eaton Circuit Court
AUTO-OWNERS INSURANCE COMPANY, Defendant-Appellee.	LC No. 09-000525-CK

Before: WHITBECK, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's April 9, 2010, order granting summary disposition in favor of defendant on the ground that plaintiffs' homeowners insurance claim was excluded by the policy. On appeal, plaintiffs argue that the trial court improperly applied the language of the policy exclusion and that there remain genuine issues of material fact regarding the cause of the damage to the house. We disagree and affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs have owned a house on Chippewa Lake for approximately 25 years. The house has been insured by defendant for the duration of plaintiffs' ownership. On May 27, 2008, plaintiffs filed a claim for damage to the foundation of the house caused by the superstructure sliding off the foundation. Plaintiffs presented estimates demonstrating that the necessary repairs would cost $28,764. Defendant denied the claim on the ground that it was excluded by multiple provisions of the insurance policy.

Plaintiffs alleged that defendant breached their contract when it denied the claim, made misrepresentations through their agent regarding the scope of the policy, and violated MCL 500.2006, requiring timely payment of insurance benefits. Defendant argued in a motion for summary disposition that plaintiffs' claim fell under policy exclusions for ice and water damage to the foundation, faulty construction, or because plaintiffs failed to protect the property and timely report the loss. Defendant also argued that it is not responsible for statements made by an independent insurance agent and, moreover, the agent's statements could not serve to expand plaintiffs' policy coverage.

Both parties hired engineers to determine the cause and extent of the damage to the house and foundation. Plaintiffs' engineer, Douglas Weir, noted that the house had turned and shifted

off of the foundation, causing the cinderblocks in the foundation to be moved and pulled apart. Weir concluded that the damage was caused by "some severe ice jamming and probably a strong wind off of the lake headed directly toward this house at the same time." The pressure from the combination of ice and wind pushed the superstructure of the house off of the foundation.

Defendant's engineer, Brent DeRose, concluded that the damage to the foundation was caused by "a combination of improper construction as well as long-term damage caused by movement of the home caused by lake ice and wind-driven lake ice seasonally impacting the home." With respect to the improper construction, DeRose noted that the house was not fastened to the foundation, permitting it to be pushed off of the foundation by ice and wind pressure. DeRose also noted that the damage appeared to predate the construction of an addition to the house that occurred in approximately 1996. The addition had not shifted off the foundation as much as the original house. Finally, DeRose observed that there is a free-standing wooden deck in the front of the house that is regularly pushed against the cottage over the course of the winter and has to be adjusted in the spring.

At a hearing on defendant's motion, plaintiffs primarily argued that the main exclusion relied upon by defendant—ice and water—was not relevant because the ice and wind damage described by the engineers occurred to the superstructure of the house and the foundation damage was only an incidental result of this occurrence. The language of the exclusion defendant relied upon is:

> [W]e do not cover loss resulting directly or indirectly from:
>
> * * *
>
> (7) Freezing, thawing, pressure or weight of water or ice, whether driving by wind or not, to a fence, pavement, patio, swimming pool, foundation, retaining wall, bulkhead, pier, wharf or dock.

In a written opinion and order, the trial court concluded that plaintiffs' claim is excluded by the above-quoted exclusion. The court concluded that "the pushing of the ice against the house would be an indirect cause of the damage to the foundation," and declined to address defendant's other arguments. The court granted summary disposition in defendant's favor and, accordingly, dismissed plaintiffs' claims.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009). In ruling on a motion for summary disposition under MCR 2.116(C)(10), "a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the non-moving party." *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact,

and the moving party is entitled to judgment or partial judgment as a matter of law." Issues of contract interpretation are also reviewed de novo. *Hastings*, 286 Mich App at 291.

B. CAUSE OF THE DAMAGE

Plaintiffs first argue that the trial court erred when it concluded that there was no genuine issue of material fact because the parties' competing engineering experts disagreed regarding the exact cause of the damage to the house. We disagree.

The trial court acknowledged the competing expert opinions in its opinion and order, noting that the cause of the damage was in dispute. However, the court's holding was based on plaintiffs' expert's assessment—that the damage was caused by ice and wind damage to the superstructure of the house, indirectly damaging the foundation of the house. See *Scalise*, 265 Mich App at 10 (court must view evidence in light most favorable to non-moving party under MCR 2.116(C)(10)). Based on this favorable assumption, the trial court nevertheless concluded that the homeowners insurance policy excluded plaintiffs' claim. Thus, as we discuss below, there is no genuine issue of material fact regarding the cause of the damage because even when plaintiffs' expert's testimony is credited, summary disposition was proper.

C. POLICY EXCLUSIONS

Plaintiffs next argue that the trial court erred in finding that the homeowners insurance policy excluded the damage in this case. Plaintiffs argue that the language of the policy only excludes damage caused by ice or water to the foundation, not damage caused by ice and water to the superstructure of the house that results indirectly in damage to the foundation. We disagree.

The insurance policy contains the following exclusion for ice and water damage (in relevant part):

> [W]e do not cover loss resulting *directly or indirectly* from:
>
> * * *
>
> (7) Freezing, thawing, *pressure or weight of water or ice*, whether driving by wind or not, to a fence, pavement, patio, swimming pool, foundation, retaining wall, bulkhead, pier, wharf or dock.

The ordinary principles of contract construction apply equally to insurance contracts. *Hastings*, 286 Mich App at 291.

> Thus an insurance policy must be read as a whole to determine and effectuate the parties' intent. The terms of the contract are accorded their plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. Clear and specific exclusionary provisions must be given effect, but are strictly construed against the insurer and in favor of the insured. [*Id*. at 292 (internal citations omitted).]

In this case, plaintiffs argue that because the ice and water exclusion in the policy specifically enumerates 10 auxiliary structures, the "freezing, thawing, pressure or weight of water or ice" must have acted directly on one of these enumerated structures in order to trigger the exclusion. In other words, under plaintiffs' view, their claim for damage to the foundation would only be excluded if the ice and wind off the lake had directly impacted the foundation; moreover, any other damage to the house resulting indirectly from the damage to the foundation would also be excluded.

Defendant argues that the enumerated structures are actually the structures for which a loss is excluded if the loss results "directly or indirectly" from "freezing, thawing, pressure or weight of water or ice." In this case, in defendant's view, coverage of the foundation is excluded regardless of where the water or ice damage occurred, but damage to the house remains covered (unless otherwise excluded).

We agree with defendant. "[C]ontract terms should not be considered in isolation and contracts are to be interpreted to avoid absurd or unreasonable . . . results." *Hastings*, 286 Mich App at 297 (internal citation omitted). Under plaintiffs' proposed reading, coverage would be excluded only if the freezing, thawing, etc., event acted directly on some auxiliary structure, regardless of whether the damage was to the auxiliary structure or to the primary dwelling. However, the purpose of the contract is to insure against loss to the dwelling, with some specified exceptions. *Id*. at 298 (the purpose of the contract must be given "due regard.") By enumerating these auxiliary structures, it is clear that the intent is to exclude coverage of losses to these structures due, directly or indirectly, to "freezing, thawing, pressure or weight of water or ice." In other words, the plain language of the policy excludes coverage of "loss . . . to a fence, pavement, patio, [etc.]"

On the other hand, plaintiffs' reading creates a grammatically incomprehensible phrase in which a loss must result from "freezing, thawing, pressure or weight of water or ice . . . *to a* fence, pavement, patio, [etc.]" to be excluded. We conclude that it is a loss *to* an auxiliary structure—resulting from freezing, thawing, etc.—that is unambiguously excluded from coverage under the policy, not simply any loss traceable to freezing, thawing, etc. *of* or *on* the auxiliary structures. The meaning is clear and there is no reason to engage in the construction exercise proposed by plaintiffs. Thus the trial court did not err when it granted summary disposition in defendant's favor on the ground that plaintiffs' insurance claim was excluded by their policy.

Plaintiffs also argue that other exclusions proposed by defendant in its motion for summary disposition are also not applicable. While exclusionary clauses are to be strictly construed against the insurer, "[i]f any exclusion in an insurance policy applies to a claimant's particular claims, coverage is lost." *Busch v Holmes*, 256 Mich App 4, 6; 662 NW2d 64 (2003). Because we conclude that plaintiffs' claim was excluded by the water and ice clause, we need not consider the applicability of other exclusions.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly