

STATE OF MICHIGAN
COURT OF APPEALS

CAPITOL INSURANCE CORPORATION,
subrogee of BROOKLYN MANOR, L.L.C.,

UNPUBLISHED
January 29, 2013

Plaintiff-Appellant,

v

No. 307949
Jackson Circuit Court
LC No. 11-000141-NZ

CONSUMERS ENERGY COMPANY,

Defendant-Appellee.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order denying its motion for summary disposition and granting defendant's motion for summary disposition. The court concluded that defendant was immune from liability. We affirm that part of the trial court's order denying plaintiff's motion for summary disposition, but we reverse the part granting summary disposition to defendant.

On April 19, 2008, a tree limb fell and caused a clamp to fail on the transformer pole located outside of Brooklyn Manor, an apartment complex. When the clamp failed, an electrified or "hot" line fell and merged with a neutral line running to the complex. The energized neutral line sent excessive current into the power junction box located inside the complex, which overheated the line conductors, caused electrical arcing, and ignited surrounding combustibles. Brooklyn Manor suffered significant damage as a result of the fire.

Plaintiff paid Brooklyn Manor for the damages sustained and then filed a subrogation action against defendant based on claims that defendant acted negligently and engaged in an ultra hazardous activity. Plaintiff subsequently requested summary disposition under MCR 2.116(C)(10), arguing that defendant breached its duty of care by failing to install and maintain a ground at the base of the transformer pole that would divert excessive current from flowing into Brooklyn Manor's service panel. Defendant responded and argued that an issue of material fact existed concerning whether the transformer were grounded. Additionally, defendant argued that it was entitled to summary disposition because it was immune from liability under Tariff Rule C1.1. In the alternative, defendant argued that plaintiff's claims were within the primary jurisdiction of the Michigan Public Service Commission (MPSC).

Following a hearing, the trial court denied plaintiff's motion, concluding that a genuine issue of material fact existed; however, the court granted defendant's motion for summary

disposition, concluding that plaintiff's claims were governed by the tariff. Plaintiff's motion for reconsideration was denied without argument.

Plaintiff first argues that the trial court erred when it denied its motion for summary disposition. A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When deciding a motion for summary disposition under MCR 2.116(C)(10), a "court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), 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). A court may not "make factual findings or weigh credibility when deciding a summary disposition motion." *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009).

Plaintiff argued that it was entitled to summary disposition because no reasonable juror could have concluded that defendant's electrical system was properly grounded. The parties agree that the National Electric Safety Code (NESC) calls for grounding rods at the base of the transformer pole. Plaintiff's experts opined that the transformer servicing Brooklyn Manor was not grounded and that the damage to the apartment complex would not have occurred if the transformer had been grounded. In its answer to plaintiff's interrogatories, defendant initially stated that while its system is grounded, the transformer located outside Brooklyn Manor "did not have a ground wire because the electrical design did not call for that particular pole to have a physical ground attached."

Later, however, defendant amended its answer and stated that the transformer was grounded at its base. It supported its amended answer with deposition testimony and affidavits, including the deposition testimony of Ross Ard, an electrical engineer, who asserted that the transformer was grounded at the base of the pole. Ard further opined that the damage to Brooklyn Manor was the result of improper grounding at the entrance to Brooklyn Manor. Ard stated that the building was built without grounding rods, a violation of the NESC.

Plaintiff argues that defendant's experts are not competent to testify because they did not observe the transformer until after it was repaired. This argument goes to the weight and credibility of the evidence. When the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *White v Taylor Distributing Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007). Accordingly, the trial court properly denied plaintiff's motion because a genuine issue of material fact exists concerning whether the transformer in issue was properly grounded.

Plaintiff also argues that the trial court erred when it concluded that defendant is immune from liability because the damage to Brooklyn Manor was caused by a variation in the service characteristics and thus is governed by Tariff Rule C1.1. We agree. Tariffs are ordinarily to be applied according to their plain meaning. *CenturyTel of Michigan v Pub Serv Comm*, 245 Mich App 351, 360; 627 NW2d 632 (2001). Tariff Rule C1.1 provides in relevant part:

The Company shall not be liable for interruptions in the service, phase failure or reversal, or variations in the service characteristics, or for any loss or damage of any kind or character occasioned thereby, due to causes or conditions

beyond the Company's reasonable control, and such causes or conditions shall be deemed to specifically include, but not be limited to, the following: acts or omissions of customers or third parties; operation of safety devices except when such operation is caused by the negligence of the Company; absence of an alternate supply of service; failure, malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood; fire; riot; labor dispute or disturbances; or the exercise of authority or regulation by governmental or military authorities.

We are guided by the MPSC's interpretation of identical tariff language. *In re complaint of Church Mut Ins Co*, order of the Public Service Commission, entered October 12, 2006 (Case No. U-14331). In *Church*, Jamestown Reformed Church was damaged when a power line detached from a utility pole during a blizzard. *Id.* at 1. The power line blew against the church building and started a fire. Church Mutual Insurance Company covered the loss and filed a complaint based on theories of negligence, nuisance, and trespass. *Id.* "The trial court dismissed the trespass and nuisance claims on grounds that the real cause of action was negligence, and dismissed the negligence claim on grounds that it properly belonged before the [MPSC]." *Id.* at 2. After this Court affirmed the grant of summary disposition, the case went before the MPSC, which concluded that the tariff was not applicable to the facts. *Id.* at 8. The MPSC stated in relevant part:

Church, in its petition and its motion for summary disposition, presents a situation in which there was no interruption in service to Jamestown, no phase failure or reversal, and no variation in the characteristics of service to Jamestown. Church does not complain about the service it received from Consumers; Church complains that Consumers was responsible for starting the fire by failing to properly maintain the distribution line that fell on the church.

* * *

B10.1 is a tariff provision that anticipates a particular set of problems, more commonly referred to as power surges or interruptions, and the direct and consequential losses that occur thereby. The set of facts presented involve a fire allegedly caused by a distribution line brought down in a blizzard. Tariff B10.1 does not apply to this set of facts." [*Id.* at 8-9.]

Like the plaintiff in *Church*, plaintiff in the case at hand is not complaining about the service it received from defendant. Rather, the crux of plaintiff's complaint is that defendant was negligent in failing to properly install and maintain a system ground at the base of the

transformer servicing Brooklyn Manor. This was not simply a variation in the service it received from defendant; consequently, the tariff does not apply.¹

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR7.219, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly

¹ Because the trial court erred in granting defendant's motion for summary disposition, we will not entertain plaintiff's argument that the court erred in dismissing the case with prejudice and not sending it to the MPSC for resolution.