[Cite as *La Plas Condo. Assn. v. Utica Ntl. Ins. Group*, 2004-Ohio-5347.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

LA PLAS CONDOMINIUM ASSOCIATION I AND II

PLAINTIFF-APPELLANT — **CASE NO. 5-04-15**

v.

UTICA NATIONAL INSURANCE GROUP — **O P I N I O N**

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: **Civil Appeal from Common Pleas Court**

JUDGMENT: **Judgment Affirmed**

DATE OF JUDGMENT ENTRY: **October 4, 2004**

ATTORNEYS:

DENNIS M. FITZGERALD
Attorney at Law
Reg. #0003266
400 South Main Street
Findlay, Ohio 45840
For Appellant

THOMAS E. SWITZER
Attorney at Law
Reg. #0067851
175 South Third Street, 7th Floor
Columbus, Ohio 43215
For Appellee

ROGERS, J.

{¶1} Plaintiff-Appellant, La Plas Condominium Association I and II ("La Plas"), appeals a judgment of the Hancock County Court of Common Pleas, granting Defendant-Appellee's, Utica National Insurance Group ("Utica"), motion for summary judgment. On appeal, La Plas asserts that the trial court erred in granting summary judgment because issues of material fact existed. Upon review of the record, we find that there is no issue of material fact that the damage was caused by settling and that settling is excluded under La Plas' insurance policy. Therefore, the judgment of the trial court is affirmed.

{¶2} In December of 2000, La Plas received a report of damage to condominium unit number thirty-nine. The damage consisted of cracks in the wall of the unit. At that time, La Plas was insured by Utica. La Plas filed a claim for the damage pursuant to the Utica policy.

{¶3} In February of 2001, Jeffery Slack, an independent insurance adjuster, was hired by Utica to investigate the claim made by La Plas. At that time, Slack visited unit number thirty-nine to view the damage. Subsequently, Slack returned to La Plas with an SEA engineer. During this visit, Slack and the engineer inspected the damage and took pictures. However, no excavation was performed.

{¶4} In March of 2001, following the investigation, Slack reported to Utica that:

> **I conducted my inspection with the engineer from S.E.A Consulting on 2/22/01. The water line enters the unit from the east approximately 10 foot from the southeast corner. This water line is plastic 1 ½ inch in diameter and passes under the footer. The crawl space under this unit is covered with black plastic. When this plastic is moved the stone in the area of the water line is damp, but dry in other areas. There is a visible space between the foundation and the bottom plate. The report from S.E.A. indicated the opinion that this water line is leaking causing the settling noticed and the subsequent cracking to the unit.**

{¶5} In May of 2001, Slack sent a follow-up report to Utica, correcting an error in the initial report. According to Slack, since the initial report, a plumber had evaluated the damage and could find no trace of water damage.

{¶6} In June of 2001, Utica sent a letter to La Plas, denying coverage and refusing to pay for the damage. According to Utica, its investigation revealed the damage was the result of "normal settlement." Utica included in its letter the relevant exclusions under the policy to support its denial, which included damage caused by earth movement; water; material factors, including settling, cracking, bulging, shrinking or expanding; and faulty, inadequate, defective or negligent construction or workmanship.

{¶7} Subsequently, La Plas hired Darrel Maute and Elliott Leveling, Inc. to repair the damage to unit thirty-nine. To make the necessary repairs, Maute was

required to excavate around the property. La Plas was billed for the necessary repairs.

{¶8} In November of 2001, Maute sent a letter to Utica, stating the following:

> **On August 22, 2001, I inspected the exterior corner of the condo unit located at 39 LaPlas at the request of LaPlas Condo Association. After doing so, it was quite apparent that the footing below the wall had cracked and settled, creating structural damage. * * ***
> **From my experience with this type of work, there are some likely causes for such structural failure of this kind. The possibilities would include improper soil compaction or footing capacity at the time of construction, inordinate amount of water erosion around the footings, or prolonged dry weather conditions that can lead to clay based soil shrinking and creating a lack of support under the footings.**
> **I spoke with our crew chief that performed the repair work, and he indicated that there was no obvious, clear cause for the settlement discovered during excavation and repair. * * *.**

{¶9} In October of 2002, La Plas filed a complaint for declaratory judgment and bad faith. After properly filing an answer, Utica moved for summary judgment.

{¶10} In its motion for summary judgment, Utica claimed that it was entitled to summary judgment because La Plas had admitted that the cause of the damage was settling and that damage caused by settling was excluded under the insurance policy. Specifically, Utica asserted that in the deposition of J. Roland Hahn, plaintiff's designated litigation representative and chairman of the La Plas'

Condominium Association insurance committee, Hahn verified the cause of the damage was settling based on the above letter sent to Utica by Maute. Utica then went on to cite the following exclusions from La Plas' policy:

> **B. EXCLUSIONS**
> **1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.**
> * * *
> **2. We will not pay for loss or damage caused by or resulting from ay of the following:**
> **a. Material Factors**
> * * *
> **(3) Settling, cracking, bulging, shrinking or expanding.**
> * * *
> **d. Acts or Omissions**
> * * *
> **(2) Faulty, inadequate, defective or negligent:**
> * * *
> **(b) Design, testing, specifications, workmanship, repairs, construction, renovation, remodeling, grading, earth compaction.**

{¶11} Finding that Utica had met its burden, in that it established that there was no genuine issue as to any material fact, the trial court granted Utica's motion for summary judgment. It is from this judgment that La Plas appeals, presenting the following assignment of error for our review.

> **THE COMMON PLEAS COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR APPELLEE BECAUSE ISSUES OF MATERIAL FACT EXISTED IN THE CASE AT BAR.**

{¶12} In the sole assignment of error, La Plas contends that a genuine issue of material fact exists as to the adequacy of Utica's investigation into La Plas' claim for damages. Additionally, La Plas contends that there are genuine issues of material fact as to whether Utica breached its fiduciary duty. We disagree.

{¶13} It is well-established under Ohio law that a court may not grant a motion for summary judgment unless the record demonstrates: (1) that no genuine issue of material fact remains to be litigated; (2) that the moving party is entitled to judgment as a matter of law; and (3) that, after construing the evidence most strongly in the nonmovant's favor, reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *Horton v. Harwick Chemical Corp*. (1995), 73 Ohio St.3d 679, 686-687. In ruling on a summary judgment motion, the trial court is not permitted to weigh evidence or choose among reasonable inferences; rather, the court must evaluate evidence, taking all permissible inferences and resolving questions of credibility in favor of the nonmovant. *Jacobs v. Racevskis* (1995), 105 Ohio App.3d 1, 7. Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the adverse party. *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485.

{¶14} Appellate review of summary judgment determinations is conducted on a de novo basis. *Griner v. Minster Bd. of Edn.* (1998), 128 Ohio App.3d 425, 430. Therefore, this Court considers the motion independently and without deference to the trial court's findings. *J.A. Industries, Inc. v. All American Plastics, Inc*. (1999), 133 Ohio App.3d 76, 82. Further, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co*., 148 Ohio App.3d 596, 2002-Ohio-3932, ¶ 25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 222.

{¶15} In its complaint, La Plas asserted a claim for bad faith. Additionally, La Plas filed a declaratory action, seeking a determination as to whether the damage was covered under the policy.

{¶16} In Ohio, an insurer has a duty to its insured to act in good faith in the handling and payment of an insured's claims. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, para. two of the syllabus; *Hahn's Elec. Co. v. Cochran,* 10th Dist. No. 01AP-1391, 2002-Ohio-5009, ¶ 41, appeal not allowed 98 Ohio St.3d 1537, 2003-Ohio-1946. As part of its duty, the insurer must "assess claims after an appropriate and careful investigation" and reach conclusions as a result of "the weighing of probabilities in a fair and honest way." *Motorists Mut. Ins. Co.*

v. Said (1992), 63 Ohio St.3d 690, 699, overruled on other grounds, *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, para. one of the syllabus, certiorari denied (1995), 516 U.S. 809, 116 S.Ct. 56. An insurer fails to act in good faith where it refuses to pay a claim and the refusal is "not predicated upon circumstances that furnish reasonable justification therefore." *Zoppo,* supra. Reasonable justification is lacking where an insurer arbitrarily or capriciously refuses to pay a claim. *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 188. An insurer, however, is entitled to refuse a claim where the claim is "fairly debatable" and the insurer's refusal is based on a genuine dispute over either the facts giving rise to the claim or the status of the law at the time the claim was denied. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 630, rehearing denied (1993), 66 Ohio St.3d 1417.

{¶17} In the case sub judice, Utica had sufficient reasonable justification to deny La Plas' claim. Utica hired an independent insurance adjustor, Slack, to perform an investigation. Slack, along with an independent engineer both inspected the damage. Based upon those inspections, Slack recommended Utica deny La Plas' claim, finding that the settling had been cause by water damage. Even though Slack's initial finding of water damage was later disproved, at the time of Slack's recommendation and Utica's denial of La Plas' claim, Utica had performed an "appropriate and careful investigation." *Motorists Mut.*, supra.

Additionally, upon review of the record, we find that Utica reached its conclusion as a result of "the weighing of probabilities in a fair and honest way." Id.

{¶18} Furthermore, based upon the evidence in the record, we find that there is no issue of material fact, in that the damage was caused by settling and that settling was excluded under the policy. First, Utica's independent insurance adjustor and the independent engineer both determined that the cause of the damage was "normal settling." While Utica may have been unsure of the cause of that settling, it did conclude that the damage was, nonetheless, caused by settling. Additionally, La Plas' own representative and excavator both stated unequivocally that the damage was caused by settling. Specifically, Hahn stated the damage was caused by settling in his deposition, and the letter sent to Utica by Maute stated that the cause of the damage was settling. While Maute also was unclear of the exact cause of the settling, his letter clearly states that settling had caused the damage.

{¶19} Turning to the insurance policy, we note that it is well settled that an insurance policy is a contract and the relationship between the insured and the insurer is purely contractual in nature. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 109. Insurance coverage is determined by reasonably construing the contract "in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed."

King v. Nationwide Ins. Co. (1988), 35 Ohio St.3d 208, 211. "Where provisions of a contract of insurance are reasonably susceptible to more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured." Id. at syllabus (citations omitted). However, where the intent of the parties to a contract is evident from the clear and unambiguous language used, a court must not read into the contract a meaning not contemplated or placed there by an act of the parties to the contract. *Gomolka v. State Auto. Mut. Ins. Co.* (1982), 70 Ohio St.2d 166, 168.

{¶20} Here the policy language is clear and unambiguous, and damage caused by settling is specifically excluded under the policy. Accordingly, we cannot say that the trial court erred in granting summary judgment, and the sole assignment of error is overruled.

{¶21} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J. and CUPP, J., concur.

/jlr