STATE OF MICHIGAN

COURT OF APPEALS

IVAN MCDOWELL and OLIVIA MCDOWELL,

Plaintiffs-Appellants/Cross-Appellees,

v

MOORE INSURANCE SERVICES, INC.,

Defendant-Appellee,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 20, 2006

No. 267853
Hillsdale Circuit Court
LC No. 05-000061-CH

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's orders granting summary disposition in favor of defendants Auto-Owners Insurance Company (Auto-Owners) and Moore Insurance Services, Inc. (Moore Insurance), pursuant to MCR 2.116(C)(10). The trial court determined that Auto-Owners was not liable for damage to plaintiffs' home under a homeowners insurance policy because the policy excluded coverage for damages caused by vandalism where the home has been vacant for 30 or more days. The court also determined that defendant Moore Insurance did not misrepresent the scope of coverage under the policy. Defendant Auto-Owners has filed a cross-appeal, arguing that the trial court erred in finding that a separate exclusion pertaining to water damage was not applicable. We affirm.[1]

[1] Contrary to what both defendants argue, plaintiffs did not untimely file their claim of appeal, thereby depriving this Court of jurisdiction. The time for filing an appeal may be extended by a timely filed motion for postjudgment relief. MCR 7.204(A)(1)(b). The record discloses that plaintiffs timely filed an amended complaint on November 16, 2005, and that this matter was not
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Plaintiffs owned two homes in Hillsdale, one on Kim Drive and one on North Lakeview. Both were insured by defendant Auto-Owners. Plaintiffs obtained the insurance coverage through defendant Moore Insurance. Richard Moore wrote a standard homeowners policy for the Kim Drive house on May 29, 2003, and renewed the existent homeowners policy on plaintiffs' Lakeview house. In the early summer of 2003, plaintiffs moved out of their Lakeview house and thereafter resided at the Kim Drive house. Plaintiffs subsequently used the Lakeview house only for storage while waiting to sell it. Plaintiffs never slept at the Lakeview house after moving into the Kim Drive house, and no one else occupied the Lakeview house.

In August 2004, a window and a yard light at the Lakeview house were broken and an outside hose was turned on and left running. The hose drained the well, and water saturated the ground and seeped into the lower level of the Lakeview house, causing extensive damage. A police investigation revealed that several juveniles were questioned and one juvenile was implicated as the person who turned on the hose. The juvenile was charged and found not guilty of malicious destruction of a building over $20,000 for the water damage, but guilty of malicious destruction of a building between $200 and $999.

Plaintiffs filed a claim for the water damage with Auto-Owners, which denied the claim on the basis of a provision that excluded coverage for damages resulting "directly or indirectly" from "vandalism or malicious mischief or breakage of glass or safety glazing materials if the dwelling has been vacant for more than 30 consecutive days just before the loss." Plaintiffs thereafter brought this action, alleging that their claim was improperly denied by Auto-Owners, and alleging fraud and misrepresentation by defendant Moore Insurance concerning the scope of coverage. Both defendants moved for summary disposition. The trial court granted Moore Insurance's motion after finding that Richard Moore had not misrepresented the nature or extent of plaintiffs' coverage, and did not owe plaintiffs a special duty regarding the scope of coverage. The trial court also determined that there was "no genuine issue as to any material fact regarding the fact that plaintiffs' alleged damage resulted from vandalism that occurred when plaintiffs' property had been vacant for more than 30 consecutive days before the loss."

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a claim. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs argue that the trial court erred in relying on an alleged admission in their answer to Auto-Owners's motion for summary disposition to conclude that there was no genuine issue of material fact with regard to whether the alleged damage was caused by vandalism.

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resolved until the trial court entered an order on January 9, 2006, granting defendants' motion to strike the complaint and denying plaintiffs leave to file an amended complaint. Plaintiffs' claim of appeal was filed on January 19, 2006, and, therefore, was timely filed under MCR 7.204(A)(1)(b).

There are two types of admissions that may occur in a civil case, judicial and evidentiary, and they are treated differently. *Radtke v Miller, Canfield, Paddock & Stone,* 453 Mich 413, 419; 551 NW2d 698 (1996). A judicial admission under MCR 2.312 is a "formal concession" to a request "for admission within the time for completion of discovery." *Id.* at 419, 420. "[T]he term 'admission' has a "distinct and narrow meaning in MCR 2.312," and "assigning the term a casual definition . . . is not consistent with the purpose of the rule[.]" *Id.* at 425.

The alleged "admission" on which the trial court relied in this case appears in plaintiffs' answer to defendant Auto-Owners's motion for summary disposition. The motion listed the grounds for summary disposition, but did not make any request for admission. We agree that plaintiffs' response did not amount to a judicial admission that the damage to plaintiffs' home was caused by vandalism.

Nonetheless, we conclude that summary disposition was properly granted in favor of Auto-Owners because plaintiffs failed to establish a genuine issue of material fact regarding whether the house was vandalized. In their complaint, plaintiffs alleged that the damage "may or may not have been caused by vandalism." In support of its motion for summary disposition, Auto-Owners presented evidence factually supporting its contention that vandalism was the cause of the damage to plaintiffs' home. Plaintiffs did not offer any evidence suggesting that the damage was attributable to some other cause. Plaintiffs' mere allegations that the damage may not have been caused by vandalism are insufficient to avoid summary disposition. Rather, plaintiffs were "required to present evidentiary proofs creating a genuine issue of material fact for trial." *Smith v Globe Life Ins Co,* 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). It is not enough to merely argue that a record "might be developed." *Id.* The trial court properly concluded that plaintiffs failed to demonstrate a genuine issue of material fact with regard to whether the damage was caused by vandalism.

We also reject plaintiffs' argument that summary disposition was improper because the terms "vacant" and "vandalism or malicious mischief," as used in the insurance policy, are ambiguous. "The interpretation of contractual language is an issue of law that is also reviewed de novo on appeal." *Morinelli v Provident Life & Accident Ins Co,* 242 Mich App 255, 261; 617 NW2d 777 (2000). "[A] clause in an insurance policy is valid as long as it is clear, unambiguous, and does not contravene public policy." *Allstate Ins Co v Keillor (After Remand),* 450 Mich 412, 419; 537 NW2d 589 (1995). "[W]e examine the language in the contract, giving it its ordinary and plain meaning if such would be apparent to a reader of the instrument." *Wilkie v Auto-Owners Ins Co,* 469 Mich 41, 47; 664 NW2d 776 (2003). We will not create ambiguity where none exists." *Keillor, supra* at 419.

The submitted evidence demonstrated that plaintiffs moved out of the Lakeview house in early summer 2003, that plaintiffs never slept in the house after they moved out, that the house remained unoccupied for more than a year before the damage occurred, and that plaintiffs had no intent of living or residing at the house. The only evidence concerning the cause of the damage was that a group of juveniles broke a window and a light, and turned on a hose and left it running until the well dried up. Applying the ordinary and plain meaning of the phrases "vacant for more than 30 consecutive days" and "vandalism or malicious mischief," we agree that the exclusionary clause at issue is not ambiguous and that the trial court properly interpreted and applied the exclusion to conclude that coverage was barred. Compare *Ranspach v Teutonia Fire Ins Co,* 109 Mich 699, 700; 67 NW 967 (1896).

Plaintiffs also argue that the vandalism exclusion is not implicated unless there was an actual intent to cause the resulting damage. Because plaintiffs did not raise this issue below, it is not preserved and this Court's review is limited to plain error affecting plaintiffs' substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004). Plaintiffs' argument is not supported by the language of the insurance policy, which specifically applies to damages resulting "directly *or indirectly*" from acts of vandalism or malicious mischief. Thus, we find no plain error.

For these reasons, the trial court did not err in granting Auto-Owners's motion for summary disposition. In light of our decision, it is unnecessary to address Auto-Owners's claim on cross appeal.

Plaintiffs next argue that the trial court erred in granting summary disposition in favor of defendant Moore Insurance. Plaintiffs contend that the trial court improperly analyzed their claim of fraud and misrepresentation using a negligence standard, and improperly made findings of fact. Regarding the latter claim, plaintiffs do not specify which of the trial court's statements involved an alleged factual finding on a disputed issue. Accordingly, any argument in this regard has been waived because of inadequate briefing. *Blazer Foods, Inc, v Restaurant Properties*, 259 Mich App 241, 253; 673 NW2d 805 (2003).

The trial court analyzed plaintiffs' claim against Moore Insurance by applying *Harts v Farmers Ins Exch*, 461 Mich 1, 8-10; 597 NW2d 47 (1999), in which the Court held that "an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage" unless there is a special relationship between the agent and the insured. The trial court reviewed the evidence submitted by the parties and concluded that Richard Moore merely advised plaintiffs that the Lakeview house would continue to have the same coverage that was in place before plaintiffs moved out, which was an accurate statement. Therefore, under the factors set forth in *Harts*, *supra* at 10-11, a special relationship did not exist.

Plaintiffs argue that there was sufficient evidence of a special relationship because Richard Moore promised that there would be coverage for the Lakeview home as if it were owner-occupied. Although plaintiffs contend that Richard Moore's deposition testimony supports this assertion, plaintiffs do not identify the specific testimony on which they rely. Plaintiffs may not leave it to this Court to search for factual support for their argument. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

The submitted evidence demonstrated that Richard Moore was asked to renew the existing policy on the Lakeview house, which he did. There is no indication that that the parties contemplated that the house would remain unoccupied for an extended period at the time the policy was renewed, and there is no evidence that plaintiffs asked any questions or sought Moore's advice regarding the nature or extent of coverage beyond renewal of the policy then in place. Although plaintiff Ivan McDowell testified that he relied on his agent to make decisions, plaintiffs did not present evidence that any inquires or promises were made. We agree with the trial court that the evidence failed to show a special relationship giving rise to a special duty to advise plaintiffs regarding the scope of their coverage.

We also conclude that plaintiffs failed to establish a prima facie case of misrepresentation or fraud. To establish misrepresentation or fraud, plaintiffs must prove that (1) defendant made a

material representation; (2) it was false; (3) defendant knew it was false when it was made, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) defendant made it with the intention that it should be acted upon by plaintiffs; (5) plaintiffs acted in reliance on it; and (6) plaintiffs thereby suffered injury. *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992). Here, the evidence failed to show that Richard Moore made a material misrepresentation concerning the nature and extent of coverage. Furthermore, plaintiffs admitted that they did not read the insurance policy. It was plaintiffs' obligation to read the policy and, if they had, they would have been aware of the exclusion for vandalism where the house remains vacant for 30 or more days. *See Harts*, *supra* at 8 n 4. The trial court did not err in granting defendant Moore Insurance's motion for summary disposition.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray