STATE OF MICHIGAN

COURT OF APPEALS

JOHN CRYER and MARY CRYER,

Plaintiffs-Appellants/Cross-Appellees,

v

HORACE MANN INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
July 6, 2006

No. 259216
Oakland Circuit Court
LC No. 2003-050841-CZ

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

In this insurance coverage dispute, plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). Defendant cross appeals the trial court's order denying its motion for case evaluation sanctions. We affirm.

This case arises out of a backup of raw sewage into plaintiffs' basement as a result of city employees working near the home. Plaintiffs filed a claim with defendant, their homeowner's insurer, for damage resulting from the backup. Defendant denied the claim.

Plaintiffs argue that the trial court erred in granting summary disposition in favor of defendant. We review de novo a trial court's decision on a motion for summary disposition. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). It appears that the trial court granted defendant's motion under MCR 2.116(C)(10) because the court considered documentary evidence outside the pleadings, specifically, the language of defendant's insurance policy. A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Id*. at 31. In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id*. at 31. In addition, we review de novo as a question of law the proper interpretation of a contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

As an initial matter, plaintiffs contend that the trial court erred by allowing defendant to change the basis of its denial of plaintiffs' claim. The facts, however, belie plaintiffs' argument.

Plaintiffs maintain that defendant denied their claim on the basis of the "water damage" exclusion in defendant's policy. Defendant's letter denying coverage, however, explicitly references the exclusion for "contamination" as well as the exclusion for water damage. Therefore, the trial court did not permit defendant to change the basis of its denial from the water damage exclusion to the contamination exclusion. As defendant's letter denying coverage indicates, it relied at least in part on the contamination exclusion from the time that it denied coverage for plaintiffs' claim. Accordingly, we reject this claim of error.

Plaintiffs also contend that the trial court erred by allowing defendant to read into its policy exclusionary language that did not exist at the time of plaintiffs' loss. Specifically, plaintiffs argue that an amendment to the policy excluding coverage for fungi and bacteria related damage did not take effect until nearly two months after the sewer backup in this case. Plaintiffs fail to recognize, however, that defendant and the trial court did not rely on the amendment. Rather, they relied on the exclusion for contamination, which was included in the policy in effect at the time of the sewer backup.[1] Accordingly, the trial court based its ruling on language contained in the policy.

The trial court properly granted summary disposition to defendant on the basis that the contamination exclusion precluded coverage for plaintiffs' claim. When reviewing an exclusionary clause, we read the contract as a whole to determine the intent of the parties. *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004). "Exclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume." *Id*. at 574, quoting *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998). We must examine the contractual language and accord words their ordinary and plain meanings if such meanings are apparent. *Wilkie*, *supra* at 47. If the language is unambiguous, we must interpret and enforce the contract as written. *Hayley*, *supra* at 575.

Here, defendant's policy states that defendant will not pay for losses that result from "contamination." *Random House Webster's College Dictionary* (2001) defines "contamination" as "the act of contaminating," "the state of being contaminated," and "something that contaminates." "Contaminate" is defined as "to make impure or unsuitable by contact or mixture with something unclean, bad, etc.; pollute; taint." Thus, the raw sewage backup that occurred in this case qualifies as "contamination" under the plain meaning of that term. In fact, plaintiffs' complaint states that "the damage sustained included contamination by feces, fungal colonization, Penicillium and a host of other dangerous microbial infestation[s]." Therefore, plaintiffs' claim is excluded under the plain language of the policy.

Plaintiffs further argue that the trial court erred by relying on *Hayley* in granting summary disposition in favor of defendant. In *Hayley*, *supra* at 572, the plaintiffs' home

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[1] The fact that defendant relies on a 1990 edition of the policy, while plaintiffs rely on an earlier edition of the policy, is immaterial. Both editions contain the "wear and tear" exclusion, which specifically excludes coverage for "contamination."

sustained water damage as a result of ice damming on the roof. The damage to the interior of the home was repaired, and the defendant homeowner's insurer paid the plaintiffs' claim for this damage. *Id*. at 572-573. The following year, the plaintiffs discovered a toxic form of mold when they removed ceiling tiles and alleged that the water damage caused the mold. *Id*. at 573. Pursuant to a policy exclusion for loss "consisting of or caused by" mold, the defendant denied the plaintiffs' claim for mold remediation. *Id*. at 573, 575-576. This Court reversed the trial court's denial of summary disposition for the defendant insurer on the basis of the policy exclusion. *Id*. at 574-576. In addition to the mold exclusion, the policy contained a provision stating that the defendant would not cover loss if "there are two or more causes of loss to the covered property" and the predominant cause of the loss is specifically excluded. *Id*. at 575. This Court held that this provision could not reasonably be construed to imply coverage. *Id*. at 576.

Although the trial court relied at least in part on *Hayley* in granting defendant's motion for summary disposition, *Hayley* has very little, if any, impact on the instant case, which hinges on the plain meaning of "contamination." This Court's determination in *Hayley* that the mold exclusion precluded coverage in that case sheds little light on the instant case, the resolution of which involves an interpretation of defendant's policy language. Further, although the plaintiffs in *Hayley* relied on a provision regarding multiple causes of a loss in support of their claim, the instant plaintiffs do not rely on such a provision in this case. Therefore, we fail to perceive the significance of *Hayley* in the context of this case. Notwithstanding this determination, the trial court correctly granted summary disposition in favor of defendant on the basis of the contamination exclusion as previously discussed. Thus, to the extent the trial court erroneously relied on *Hayley* as a basis for its ruling, we will not reverse a correct decision reached for the wrong reason. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

On cross-appeal, defendant first argues that the trial court erred in permitting plaintiffs to pursue personal injury damages. However, in light of our determination that the trial court properly granted summary disposition in favor of defendant, defendant's allegation of error is moot. *City of Warren v Detroit*, 261 Mich App 165, 166 n 1; 680 NW2d 57 (2004).

Defendant next argues that the trial court erred in granting interim relief to plaintiffs in the form of freezing their insurance premium at the rate in effect during the policy period in which the loss occurred. We disagree. Because the ruling on plaintiffs' motion for interim relief was within the trial court's discretion, our review is limited to whether the trial court abused its discretion. An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

At that point in the lower court proceedings, the trial court had granted summary disposition in favor of plaintiffs, who argued that defendant had increased the premium because of their bad credit, attributable to defendant's improper denial of their claim. At the hearing on plaintiffs' motion, defense counsel admitted that he knew nothing about plaintiffs' insurance premium. The trial court ruled that the premium be frozen during the pendency of the litigation at the rate in effect before the litigation began. This ruling did not constitute an abuse of discretion. The trial court possessed equitable authority to grant plaintiffs' motion for interim

relief. MCL 600.601; *In re Forfeiture of $30,632.41*, 184 Mich App 677, 679; 459 NW2d 99 (1990). Defendant did not offer a reason for the premium increase until it moved for reconsideration of the trial court's ruling. The trial court never ruled on the motion for reconsideration, however, because it instead overturned its previous ruling and granted summary disposition in favor of defendant.

Defendant alternatively argues that the power to change or alter insurance rates lies with the insurance commissioner and that the trial court did not have jurisdiction to determine the rate of plaintiffs' insurance premium. However, the trial court was not "setting" or "determining" the rate that defendant was required to charge plaintiffs for their premium, but rather, was merely granting equitable relief to plaintiffs during the pendency of the litigation based on its previous determination that defendant had wrongfully denied plaintiffs' claim. Under similar circumstances involving the Michigan Public Service Commission, our Supreme Court has recognized that the authority to set utility rates is vested in the commission and, therefore, the role of the judiciary regarding rate matters is limited. *Consumers Power Co v Pub Service Comm*, 415 Mich 134, 145; 327 NW2d 875 (1982). The Court noted, however, that courts can in certain circumstances exercise their equitable powers and provide relief from erroneous orders of the commission. *Id.* Thus, by analogy, even if the insurance commissioner alone possesses the power to set insurance premiums, this fact would not altogether foreclose the ability of a circuit court to exercise its equitable powers and grant relief in certain circumstances. Accordingly, the trial court did not abuse its discretion by temporarily freezing plaintiffs' insurance premium.

Defendant next challenges the trial court's denial of its motion for case evaluation sanctions. We review de novo a trial court's decision to grant or deny case evaluation sanctions. *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 465; 702 NW2d 671 (2005). However, because a trial court's decision to deny case evaluation sanctions under the "interest of justice" exception set forth in MCR 2.403(O)(11) is discretionary, we review that decision for an abuse of discretion. *Id.*

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation. [Emphasis added.]

The term "verdict" includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." MCR 2.403(O)(2)(c). If a "verdict" is reached on the basis of such a motion, however, "the court may, in the interest of justice, refuse to award actual costs." MCR 2.403(O)(11); *Harbour*, *supra* at 466.

The purpose of MCR 2.403(O) is to "encourage settlement and deter protracted litigation . . . ." *Haliw v City of Sterling Hts*, 257 Mich App 689, 704; 669 NW2d 563 (2003), rev'd on other grounds 471 Mich 700; 691 NW2d 753 (2005). In *Haliw*, *supra* at 709, this Court stated that "if the trial court finds on the basis of all the facts and circumstances of a particular case and viewed in light of the purposes of MCR 2.403(O) that unusual circumstances exist, it may invoke

the ‘interest of justice’ exception found in MCR 2.403(O)(11).” The *Haliw* Court noted that such unusual circumstances include, but are not limited to, cases of first impression, cases in which the law is unsettled and substantial damages are at issue, and cases that may have a significant effect on third persons. *Id*. at 707.

The purpose of MCR 2.403(O) would not be advanced by granting case evaluation sanctions in this unusual case. Plaintiffs did not needlessly prolong litigation and in fact were the prevailing party in the trial court during much of the proceedings. Indeed, plaintiffs were successful in resisting summary disposition up to the time of the case evaluation and should not be penalized for the trial court changing its position and ultimately granting summary disposition in favor of defendant. Under the circumstances, the trial court did not abuse its discretion in denying defendant’s motion for case evaluation sanctions under the “interest of justice” exception of MCR 2.403(O)(11).

Given our holdings regarding the other issues raised by plaintiffs on appeal, we need not address the remaining issues raised by defendant on cross appeal.

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens