STATE OF MICHIGAN

COURT OF APPEALS

KIMBALL & RUSSELL, INC.,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

UNPUBLISHED
January 9, 1998

No. 206402
Wayne Circuit Court
LC No. 87-730765-CK

ON REMAND

Before: Corrigan, C.J., and Murphy and Jansen, JJ.

PER CURIAM.

This case is on remand from the Supreme Court "for consideration of the issues left unaddressed by the Court of Appeals." 456 Mich 855 (1997). We now turn to those issues raised by defendant. Finding no issue to require reversal, we affirm the jury's verdict in plaintiff's favor.

I

This case has a long procedural history, but a recitation is necessary to understand this appeal. This case arises out of a loss that occurred on April 16, 1987. Plaintiff is a wholesale distributor of paints, stains, doors, and other building materials, and its inventory is stored in a warehouse in the City of Wixom. The warehouse contains steel-shelf rows which are attached to roof girders with three-quarter inch steel banding wrapped twice around. On the day in question, a rack containing paint fell over or was knocked over onto a forklift hi-lo truck that had been parked in an aisle. At that time, the warehouse foreperson, Jack Laitila, and another employee were restocking shelves in the warehouse with hi-lo trucks. Laitila parked his hi-lo in the middle of the aisle and walked toward the end of the row to view other inventory when he heard a noise behind him. Laitila turned around and observed the shelves falling over into the center of the aisle. The shelves fell onto the hi-lo, turned it over, and threw it against storage racks on the other side of the aisle. Those racks also fell as a result of the hi-lo hitting them, and cans of paint and stain spilled onto the floor.

Plaintiff had an "all-risk" insurance policy with defendant. Plaintiff notified defendant the day after the spill, and an adjuster was sent to investigate. Defendant ultimately denied plaintiff's claim based upon a policy provision which excluded coverage for collapse. Defendant did agree to pay

$16,332.31 for the clean-up cost only, although plaintiff claimed a loss of inventory and damage to the building in the amount of $134,198.66. Plaintiff filed suit on December 28, 1987, in the Wayne Circuit Court alleging breach of contract, fraud, estoppel, and bad faith denial of coverage.

Both parties later moved for summary disposition. The trial court granted summary disposition in favor of plaintiff, ruling that there was no factual dispute that the "ensuing peril" language in the collapse exclusion covered the loss of inventory. Defendant then appealed to this Court. In relevant part, this Court held the following:

> The language of the policy in question is clear and unambiguous. Coverage is provided for losses caused by ensuing perils which are not otherwise excluded. Losses caused by collapse, other than the collapse of a building, are excluded. The loss of inventory was caused by the collapse of the storage rack. It was not caused by a non-excluded ensuing peril. We reject plaintiff's claim that a non-excluded ensuing peril occurred when the paint and stain cans collided with each other and the concrete floor. The trial court erred in ruling that coverage was provided for plaintiff's loss of inventory under the ensuing peril provision of the policy. [*Kimball & Russell, Inc v Citizens Ins Co of America,* unpublished opinion per curiam of the Court of Appeals, issued April 23, 1992 (Docket No. 125683), slip op, p 2].

This Court reversed and remanded to the trial court. Plaintiff moved for a rehearing of the opinion. Rehearing was granted in an unpublished order dated August 3, 1992, and this Court further directed that the trial court was to enter judgment in favor of defendant.

Plaintiff filed an application for leave to appeal to the Supreme Court. The Supreme Court, in an order dated May 25, 1993, vacated the order granting rehearing insofar as it directed the trial court to enter a judgment for defendant and remanded to the Wayne Circuit Court for further proceedings. Importantly, in its order, the Supreme Court stated that the "fact that the Court of Appeals found [the collapse] argument to be lacking in merit is not dispositive because the trial court still could determine that what occurred is not a 'collapse' within the meaning of this all risk policy."[1] Defendant again moved for summary disposition in the trial court asking it to decide the collapse issue as a matter of law. The trial court denied defendant's motion. It understandably expressed confusion with the Supreme Court's order. The trial court understood the order to mean that the term "collapse" in the insurance policy was ambiguous and could not be determined as a matter of law. The trial court permitted the case to go to a jury.

Trial began on November 3, 1993 and ended on November 10, 1993. The major issue to be decided at trial was whether the shelves collapsed within the meaning of the insurance policy. Because this was an all-risk policy, coverage was presumed unless defendant proved that there was a collapse such that there was no coverage for the loss. A special verdict form was given to the jury. The verdict form first asked the jury to determine whether defendant had proved that the loss was caused by a collapse within the meaning of the policy. If that question was answered affirmatively, then the jury had to determine issues relative to the applicability of coverage under the "Collapse Additional Coverage" provision. The jury returned a verdict in favor of plaintiff finding that defendant had failed to prove that

the loss was caused by a collapse. A judgment in the amount of $232,191.80 in damages, interest, and costs was awarded to plaintiff in an order dated February 4, 1994.

Defendant then appealed to this Court. This Court reversed the jury's verdict and remanded for a judgment in favor of defendant. This Court ruled that defendant should have been granted a directed verdict on the issue of the Collapse Additional Coverage because the shelves, as a matter of law were not part of the building (did not constitute a fixture under the insurance policy so that there would be coverage). *Kimball & Russell, Inc v Citizens Ins Co of America*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 1996 (Docket No. 173343). Plaintiff filed an application for leave to appeal to the Supreme Court. The Supreme Court vacated the October 11, 1996 judgment and remanded to this Court for consideration of the issues left unaddressed by this Court in an order dated August 29, 1997. Specifically, the Supreme Court stated:

> Contrary to the holding of the Court of Appeals, the issue of coverage of the plaintiff's loss under the Collapse Additional Coverage provision in the policy was not dispositive of the plaintiff's claim. That theory was an alternative to plaintiff's principal and independent theory that the loss was covered by the "all-risk policy" because it did not fall within a "collapse" exclusion. The circuit court judgment entered in plaintiff's favor was based solely on the latter theory which supports plaintiff's claim regardless of whether coverage does not exist under the Collapse Additional Coverage provision. [456 Mich 855 (1997)].

We now address the issues left unaddressed by this Court in the previous appeal.

II

In the appeal, defendant essentially raised two issues. It first claimed that the policy did not provide coverage for the loss as a matter of law because: (1) the loss sustained by plaintiff resulted from a collapse within the meaning of the policy exclusion, and (2) plaintiff's loss was not covered under the Collapse Additional Coverage in the policy. Second, defendant claimed that, alternatively, it was entitled to a new trial because the trial court erred in refusing to instruct the jury regarding the definition of collapse.

First, defendant argues that the insurance policy did not provide coverage for the loss sustained as a matter of law because the loss resulted from a collapse within the meaning of the policy as a matter of law. Defendant raises several subissues in this regard. It argues that the trial court erred in submitting interpretation of the term "collapse" to the jury because that question was one of law for the court and because the Supreme Court's order of May 25, 1993 did not require submission of this legal issue to the jury. It further argues that the term "collapse" means falling down due to structural failure and is not limited to "falling straight down." Thus, defendant argues that there was no material factual dispute regarding whether the rack collapsed within the meaning of the policy and that the trial court erred in denying its motion for summary disposition or, alternatively, that it is entitled to judgment notwithstanding the verdict (JNOV).

First, we do not agree that the trial court misread the Supreme Court's order of May 25, 1993. The order specifically states that "the trial court still could determine that what occurred is not a 'collapse' within the meaning of this all risk policy." Defendant asserts that the trial court should have interpreted the term "collapse" as a matter of law. Although we agree that the meaning of "collapse" is a term that is clear and unambiguous, the real issue in this case is not the definition of the term "collapse," but, rather, whether what *occurred* was a collapse within the meaning of the insurance policy. Thus, the Supreme Court's order cannot be read as removing the factual question of whether what occurred was a collapse within the meaning of the policy from a trier of fact.

Defendant's contention that the term "collapse" means falling down due to structural failure and is not limited to falling straight down *as a matter of law* is similarly unavailing. The definition of the term "collapse" is not really the issue here. Rather, the question for the jury was whether what occurred in the warehouse was a collapse within the meaning of the policy. There is nothing inherently difficult to understand about the word collapse that a jury could not understand and apply to the evidence as presented to it. Therefore, the issue of whether there was a collapse within the meaning of the policy was a question of fact for the jury to resolve and properly left for the jury by the trial court.

Even if the trial court erroneously ruled that the Supreme Court's order required submission of the case to the jury, we believe that the trial court reached the correct result. That is because, contrary to defendant's assertion, there is a material factual dispute regarding whether what occurred was a collapse. Plaintiff presented sufficient evidence to create a factual dispute as to whether the shelves collapsed or were knocked over. At his deposition, Jack Laitila testified that he left his hi-lo in the aisle near the shelves. He acknowledged that some hi-los would coast if they were left in gear. Further, another hi-lo driver was driving toward the area where the shelves fell. A trier of fact could infer that either hi-lo made contact with the shelves, thus causing them to fall. There was additional testimony from plaintiff's expert, Jack Bradge, that there was no metal fatigue or flaw in the steel shelving such that there was no structural inadequacy causing the shelves to collapse. Also, as plaintiff notes, the second set of shelves were clearly knocked over by the hi-lo, as it was turned over by the first set of shelves.

Accordingly, the trial court did not err in denying defendant's motion for summary disposition because there was a material factual dispute as to whether the shelves actually collapsed, or were somehow knocked over. Taking the evidence presented in a light most favorable to plaintiff and drawing reasonable inferences from that evidence, there was a material factual dispute as to whether the shelves actually collapsed. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Accordingly, the trial court reached the correct conclusion in denying defendant's motion for summary disposition even if it employed the wrong analysis and we, therefore, affirm the trial court's decision that the jury had to determine whether what occurred in this case was a collapse within the meaning of the insurance policy. See *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997) (this Court will not reverse where the right result is reached for the wrong reason).

Defendant's claim that it is entitled to a JNOV even if the trial court properly denied its motion for summary disposition is without merit. Defendant never challenged the sufficiency of the evidence in the trial court by moving for a directed verdict or JNOV regarding this issue of whether what occurred was a collapse within the meaning of the insurance policy. Therefore, it has waived any argument that it is entitled to a JNOV because of insufficient evidence due to its failure to raise the issue in a timely

motion at trial and where there is no showing of compelling or extraordinary circumstances amounting to a miscarriage of justice. *Napier v Jacobs*, 429 Mich 222, 237-238; 414 NW2d 862 (1987).

III

Defendant alternatively argues that it is entitled to a new trial because the trial court erred in refusing to instruct the jury regarding the definition of the term "collapse." At trial, counsel requested that the trial court give a definition of the term "collapse" and devised a definition. The trial court declined to give an instruction to the jury regarding the definition of the term "collapse," finding the term to be unambiguous.

When a party requests an instruction that is not covered by the standard jury instructions, the trial court may, in its discretion, give additional instructions on the applicable law not covered by the standard jury instructions. *Phinney*, *supra*, p 530. Additional instructions must be concise, understandable, conversational, nonargumentative, applicable, and accurately state the law. *Id.;* MCR 2.516(D)(4).

The trial court did not abuse its discretion in declining to give defendant's requested definition of collapse. Terms used in an insurance policy are either clearly defined within the policy or are given their commonly used meaning. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Omitting the definition of a word that has a common usage does not create an ambiguity in the policy. *Id.* Further, insurance policies, like contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if the term is clear and unambiguous, it is to be taken and understood in its plain, ordinary, and popular sense. *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 181; 468 NW2d 498 (1991). In this case, the term "collapse" has a common usage, is not ambiguous, and should properly have been given its commonly used meaning. Collapse is not a legal term that requires definition for the jury to understand. A jury can easily understand the meaning of the term "collapse" in the insurance policy, give it its common and ordinary meaning, and determine whether what occurred was a collapse within the meaning of the policy.

The trial court properly instructed the jury regarding the term "collapse" and the jury's obligations in this case. Because the term "collapse" is clear and unambiguous, the jury was to give the term its commonly used, plain, ordinary, and popularly understood meaning. Accordingly, the trial court did not abuse its discretion in declining to give the jury defendant's requested instruction on the definition of "collapse."

Affirmed.

/s/ Maura D. Corrigan
/s/ William B. Murphy
/s/ Kathleen Jansen

[1] We note that the order, as it appears in the Michigan Reports, does not contain this language. See 442 Mich 911 (1993).