

STATE OF MICHIGAN
COURT OF APPEALS

DAVID F. CLARK and ERLENE L. CLARK,

Plaintiffs-Appellants,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
February 14, 2006

No. 256472
Branch Circuit Court
LC No. 03-060350-CK

Before: Meter, P.J., and Whitbeck, C.J. and Schuette, J.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting defendant's motion for summary disposition on their claim for payment under a homeowner's insurance policy. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1997, plaintiffs began selling, via land contract, a single-family residence located in Coldwater to their daughter, Sherilyn Britt, and her husband, Randy Britt. The Britts obtained a homeowner's policy on the property through defendant. The policy designated plaintiffs as "additional insureds" and entitled them to coverage under its Mortgage Clause. After a fire destroyed the home in June of 2002, plaintiffs filed a claim under the policy. Defendant denied the claim on the ground that plaintiffs failed to notify it of a change in occupancy as required by the Mortgage Clause. Plaintiffs filed suit and the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

On appeal, plaintiffs argue that the trial court erred in granting summary disposition to defendant because the Britts' periodic and temporary absences from the home did not constitute a change in occupancy. Plaintiffs contend that the Britts were occupying the home at the time of the fire.

The decision to grant or deny summary disposition is a question of law that this Court reviews de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). Similarly, the proper interpretation of a contract constitutes a question of law subject to de novo review. *Id.*

Under MCR 2.116(C)(10), summary disposition is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A question of material fact exists “when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion under this rule, the trial court must consider “the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.” *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Insurance companies may define or limit the scope of their coverage under an insurance contract as long as its terms lead "to only one reasonable interpretation" and it does not contravene public policy. *Farmers Ins Exchange v Kurzman*, 257 Mich App 412, 418; 668 NW2d 199 (2003). Courts construe the terms of insurance policies in accord with the well-settled principles of contract construction. *Id.*, 417. An insurance contract is clear “if it fairly admits of but one interpretation.” *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003). But ambiguity exists “if, after reading the entire contract, its language can be reasonably understood in different ways.” *Id.* Courts must construe an ambiguous provision in an insurance contract against the drafting insurer and in favor of the insured. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 524 NW2d 185 (1994). But if the provision is clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and popular sense. *Id.* The mere fact that a policy fails to define a particular term does not render it ambiguous. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). Courts must generally enforce unambiguous contracts according to their terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

The Mortgage Clause of the insurance policy at issue states in pertinent part:

The term “mortgagee” includes trustee, land contract holder, or titleholder.

If a “mortgagee” is named in this policy, any covered loss under COVERAGE A [regarding the dwelling] or COVERAGE B [regarding other structures] will be paid to the “mortgagee” and you, as interests appear.

If we deny your claim, that denial will not apply to a valid claim of the “mortgagee,” if the “mortgagee”:

- a. notifies us of any change in ownership or occupancy or any substantial change in risk of which the “mortgagee” is aware;

Defendant argues and the trial court held that, because plaintiffs failed to provide defendant with notice of a change in the Britts’ occupation of the residence, the Mortgage Clause bars plaintiffs from obtaining any recovery under the policy. Because they were in the process of selling the property via land contract, the plaintiffs are mortgagees for the purpose of this

clause.¹ And plaintiffs concede that they never provided defendant with notice of a change. Thus, the sole issue presented on appeal is whether a change in occupancy occurred before the fire.

Because the policy does not define occupancy, we may turn to dictionaries to determine the term's meaning. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000). The *American Heritage Dictionary*, (3rd ed, 1996), p 1251, provides the following pertinent definitions for occupancy:

1. a. The act of occupying or the condition of being occupied. **b.** The state of being an occupant or tenant. **2. a.** The period during which one owns, rents, or uses certain premises or land.

Similarly, Black's Law Dictionary, (6th ed, 1990), p 1078, defines the term as

To take possession of property and use of the same; said e.g. of a tenant's use of leased premises. Period during which a person owns, rents, or otherwise occupies real property or premises.

Further, the *American Heritage*, *supra*, defines occupy as "to dwell or reside in." While *Black's*, *supra*, 1079, states that it means:

To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in; to take or hold possession. Actual use, possession, and cultivation.

Under the *American Heritage* definitions, the occupation of premises depends on whether someone resides or dwells at that location. Thus, if the Britts ceased residing or dwelling at the house in Coldwater, a change in occupancy would have occurred under the Mortgage Clause. Erlene Clark testified that the Britts were merely staying with Sherilyn's brother in Battle Creek part-time because Randy obtained temporary employment in that city. And she stated that the Britts returned to Coldwater on weekends to "get whatever they needed and take care of their dogs." Randy confirmed this testimony and stated that they left the majority of their belongings in Coldwater, taking only some clothing with them to Battle Creek. Although Randy appears to have used a Battle Creek address when filling out employment applications, he testified that he and his wife continued to receive mail at the Coldwater residence. Consequently, reasonable minds could disagree on whether the Britts continued to reside or dwell at the Coldwater property and a genuine issue of material fact exists as to whether a change in occupancy occurred.

¹ Although the Mortgage Clause requires that the insurer first deny a claim by the named insureds before determining whether such denial also applies to the secondary insureds, it appears that defendant did in fact deny a claim made by the Britts. Plaintiffs do not challenge the propriety of such a decision.

A similar result follows based on the definitions of occupancy and occupy provided by Black's Law Dictionary. Under these definitions, occupancy is determined by whether a person has taken possession of a property. Accordingly, a change of occupancy would have occurred if the Britts had given up possession of the home in Coldwater before the fire. Because Randy's testimony provides some evidence that the Britts had not abandoned their possessory interest in the home, the trial court erred in finding that a change of occupancy occurred as a matter of law.

Additionally, what little case law exists in this area supports our conclusion that the trial court erred. In finding a home occupied for the purpose of an insurance contract even though the insured had not yet begun residing there, our Supreme Court in *Shackelton v Sun Fire Office*, 55 Mich 288, 289-292; 21 NW 343 (1884), held:

The necessity for temporary absences on business, or for family convenience or pleasure, is recognized, and the insured is understood to contemplate an assent to them.

Further, this Court in *Smith v Lumbermen's Mut Ins Co*, 101 Mich App 78, 83; 300 NW2d 457 (1980), described "occupancy" as a continuum.

On the one hand, where residents of a house are physically inside the dwelling at the very moment of the incident resulting in the loss, it is apparent that the building is not "vacant or unoccupied." On the other hand, where the building stands totally vacant, devoid of all signs of human habitation when the loss is suffered, it is equally clear that the building is "vacant or unoccupied." A plethora of other possible uses is manifest, however, and the quality or extent of any given use may not readily lend itself to categorization as either vacant or full, occupied or unoccupied.

In the instant case, it is clear that, before Randy obtained employment in Battle Creek, the Britts were occupying the Coldwater house. And even when they were primarily residing in Battle Creek, the property was not devoid of all human habitation. Although the Britts made changes in their living arrangements, a dispute exists as to whether these changes were merely temporary absences for business or family convenience or whether they constitute a change of occupancy. Reasonable minds can disagree as to whether the changes were sufficient to move the house from occupied to unoccupied along the continuum described in *Smith*. Consequently, a question of material fact exists as to whether a change in occupancy occurred under the Mortgage Clause.

In sum, the Mortgage Clause of plaintiffs' insurance policy bars recovery if plaintiffs failed to notify defendant of a change in occupancy. But a genuine issue of material fact exists as to whether such a change occurred when the Britts began spending the majority of their time in Battle Creek. Thus, the trial court erred in finding that a change in occupancy occurred as a matter of law.

Reversed and remanded for further proceedings on plaintiffs' claims. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette