

STATE OF MICHIGAN
COURT OF APPEALS

RANDALL JOHNSON,

Plaintiff-Appellee,

v

STATE FARM FIRE & CASUALTY
COMPANY,

Defendant-Appellant.

UNPUBLISHED

October 28, 2008

No. 278267

Genesee Circuit Court

LC No. 06-083594-CK

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

PER CURIAM.

In this insurance dispute arising from an arson fire of a vacant rental home, defendant State Farm Fire & Casualty Company appeals by leave granted from the trial court's order granting partial summary disposition in favor of plaintiff. We affirm.

Defendant issued plaintiff an insurance policy for a rental home owned by plaintiff. The home was destroyed by fire in January 2005. The cause of the fire was determined to be arson. Although plaintiff was not linked to the arson, defendant denied liability under a policy provision that excluded coverage for losses caused by "vandalism and malicious mischief . . . if the dwelling has been vacant for more than 30 consecutive days immediately before the loss." The trial court determined that there was no genuine issue of material fact that the dwelling had been vacant for 30 days, and then held that the exclusion for "malicious destruction or vandalism does not encompass . . . arson," because other parts of the policy referred to arson and malicious destruction or vandalism separately. Accordingly, the court denied defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10), and granted summary disposition in favor of plaintiff under MCR 2.116(I)(2) ("[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party").

A trial court's grant of summary disposition is reviewed de novo on the entire record to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

This case involves the interpretation of an insurance policy. "In interpreting a contract, [a court's] obligation is to determine the intent of the contracting parties." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). "[A]n

unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy." *Id.* "[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). "If the language of the contract is unambiguous, we construe and enforce the contract as written." *Quality Products, supra* at 375. Conversely, a "contract is ambiguous when its provisions are capable of conflicting interpretations." *Klapp, supra* at 467.

Turning to the contract in this case, the declarations page of defendant's policy states that it is an "all perils" policy, and provides:

We insure for accidental direct physical loss to the property described in Coverage A [dwelling] and Coverage B [personal property], except as provided in Section I - Losses Not Insured.

The Losses Not Insured section provides, in pertinent part:

1. We do not insure for loss to the property described in Coverage A and Coverage B either consisting of, or directly and immediately caused by, one or more of the following:

* * *

g. vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant[.]

The phrase "vandalism and malicious mischief" is not defined in defendant's policy. Other jurisdictions have differed concerning whether the phrase includes arson. Defendant cites several cases in which a vandalism exclusion was found to encompass a claim arising from an arson fire. See, e.g., *American Mut Fire Ins Co v Durrence*, 872 F2d 378, 378-379 (CA 11, 1989), *Costabile v Metro Prop & Cas Ins Co*, 193 F Supp 2d 465, 467-479 (D Conn, 2002), *Estes v St Paul Fire & Marine Ins Co*, 45 F Supp 2d 1227, 1229-1230 (D Kansas, 1999), *Battishill v Farmers Alliance Ins Co*, 139 NM 24, 25-29; 127 P3d 1111 (2006), and *Bear River Mut Ins Co v Williams*, 153 P3d 798, 800-801 (Utah App, 2006); see also *Brinker v Guiffrida*, 629 F Supp 130, 132-136 (ED Pa, 1985). Conversely, plaintiff cites several cases in which courts concluded that a vandalism exclusion did not preclude coverage for a fire caused by arson to vacant property. See, e.g., *United Capital Corp v Travelers Indemnity Co*, 237 F Supp 2d 270, 271-278 (ED NY, 2002), *Nationwide Mut Fire Ins Co v Nationwide Furniture, Inc*, 932 F Supp 655, 656-657 (ED Pa, 1996), and *MDW Enterprises, Inc v CNA Ins Co*, 772 NYS2d 79, 81-83; 4 AD3d 338 (2004).

We disagree with defendant that the cases may be distinguished on the basis of whether they involve "all risk" policies or "named perils" policies. Many of the cases cited by both parties involve "all risk" policies, see *Costabile, Estes, Battishill, and Bear River, supra*, which are cited by defendant, and *United Capital Corp and MDW Enterprises, supra*, which are cited

by plaintiff. We conclude that because fire and vandalism are listed as separate perils in other parts of defendant's policy, the "all risk" nature of the policy does not provide a solid basis for determining whether arson is excluded from coverage as a form of vandalism.

Instead, we turn to the language actually used by the parties to determine what they agreed upon. In doing so, we look to a dictionary to determine the commonly understood meaning of these undefined terms. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). The *Random House Webster's College Dictionary* (2d ed) defines "vandalism" as the "deliberate destruction or damage of private or public property," *id.* at 1419, and defines "arson" as "the malicious burning of another's property or, sometimes, one's own property, as in an attempt to collect insurance," *id.* at 75.

We agree that, "by definition, arson is an act of vandalism." *United Capital Corp, supra* at 275 (quotation and citation omitted). However, "in common speech vandalism and arson are separate, distinct activities." *Id.* (quotation and citation omitted). More significantly, "[u]nder the policy, fire and vandalism are treated differently." *Id.* (quotation and citation omitted).

Following the definitions section of defendant's policy, the policy summarizes the various coverages provided to plaintiff. Under coverage A, the policy covers "the dwelling on the residence premises shown in the Declarations used principally as a private residence, including structures attached to the dwelling," as well as construction materials, carpeting, and outdoor antennas. The policy also provides coverage for personal property (coverage B), and loss of rents (coverage C), neither of which refers to fire or vandalism. Under "additional coverages," the policy provides:

3. **Trees, Shrubs and Other Plants.** We cover outdoor trees, shrubs, plants or lawns, on the **residence premises**, for loss caused *by the following Losses Insured: Fire* or lightning, Explosion, Riot or civil commotion, Aircraft, Vehicles not owned or operated by a resident of the **residence premises**, *Vandalism or malicious mischief* or Theft. The limit of liability

4. **Fire Department Service Charge.** We will pay up to \$500 for your liability assumed by **contract** or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Loss Insured. No deductible applies to this coverage. This coverage may increase the limits otherwise applicable.

* * *

8. **Arson Reward.** *We will pay \$1,000 for information, which leads to an arson conviction in connection with a fire loss to property covered by this policy.* This coverage may increase the limits otherwise applicable. However, the \$1,000 limit shall not be increased regardless of the number of persons providing information.

* * *

11. **Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

a. *fire*, lightning, explosion, windstorm or hail, smoke, aircraft or vehicles, riot or civil commotion, *vandalism*, leakage from fire extinguishing equipment, volcanic action, falling objects, weight of ice, snow or sleet, water damage, breakage of building glass, all only as insured against in this policy[.] [Italics added; boldface in the original.]

The Losses Insured section follows and provides:

We insure for accidental direct physical loss to the property described in Coverage A and Coverage B, except as provided in Section I - Losses Not Insured.

As previously noted, the Losses Not Insured section provides:

1. We do not insure for loss to the property described in Coverage A and Coverage B either consisting of, or directly and immediately caused by, one or more of the following:

* * *

g. vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant[.]

Part 2 of the Losses Not Insured section adds that the policy does “not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events,” which include enforcement of building codes, earth movement, water damage, neglect, war, and nuclear hazard. However, the policy specifically states that it does “insure for direct loss by fire” resulting from earth movement, water damage, or nuclear hazard. The remainder of the policy does not specifically mention either fire or vandalism.

Thus, the policy generally insures the dwelling from all perils, except those specifically listed. When listing the additional coverages provided, however, the policy lists “fire” and “vandalism or malicious mischief” as separate perils. By contrast, the exclusion mentions only “vandalism or malicious mischief.” Moreover, the policy specifically provides an “*arson reward*” as an “additional coverage,” without any exclusion for buildings that have been vacant for 30 days at the time of the arson. This is the only portion of the policy that specifically refers to “arson.” There would be no reason to offer an arson reward as additional coverage if arson was not considered to be a peril covered by the policy. No vandalism reward is offered.

As required by Michigan law, the policy provides coverage for *direct losses caused by fire*, including fires resulting from otherwise excluded perils such as earth movement, water

damage, and nuclear hazard. The policy also covers fire department service charges. At no point does the policy explicitly exclude direct losses caused by arson.

Viewing the policy as a whole, we conclude that it is not ambiguous, and that fire and vandalism are considered to be two different perils. Because arson is a specific kind of fire—as contrasted to a form of vandalism—we conclude that arson coverage is not precluded by the vandalism exclusion.¹

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray

¹ Additionally, to the extent that the vandalism exclusion encompasses arson, the exclusion would be contrary to Michigan law because it precludes coverage for a direct loss caused by fire. MCL 500.2833(1) lists various provisions that a fire insurance policy *must contain*. In particular, § 2833(1)(b) provides that “the policy *shall* provide, at a minimum, *coverage for direct loss by fire and lightning* and pro rata coverage for 5 days for insured property removed to another location if it is moved to preserve it from damage by a covered peril.” (Emphasis added.) Under § 2833(1)(e), a fire insurance policy must also list “[t]hose perils that are not covered under the policy.” Section 2833(2) states that, “[e]xcept as otherwise provided in this act, each fire insurance policy issued or delivered in this state pursuant to subsection (1) shall contain, at a minimum, the coverage provided in the standard fire policy under former section 2832.”

In the present case, adopting defendant’s interpretation of “vandalism and malicious mischief” would allow defendant to deny coverage for a direct loss caused by fire where a home has been vacant for “30 consecutive days,” rather than “sixty consecutive days” as provided in the § 2832 standard policy. MCL 500.2832(b). Therefore, under MCL 500.2860, the vandalism exclusion is “absolutely void,” and defendant “shall be liable” to plaintiff “in the same manner and to the same extent as if the provision were not contained in the policy.” See *Randolph v State Farm Fire & Cas Co*, 229 Mich App 102, 105-106; 580 NW2d 903 (1998).

Moreover, because fire and vandalism are different perils, “arson” is not excluded by the vandalism exclusion. Thus, under § 2833(1)(e), if defendant wanted to exclude coverage for direct losses caused by *arson* of a dwelling that has been vacant for more than 60 days – as permitted by former § 2832 – it would need to specifically list “arson” as an excluded peril. It did not do so. Accordingly, defendant cannot rely on the vandalism exclusion to deny plaintiff’s claim for direct loss caused by arson.