STATE OF MICHIGAN

COURT OF APPEALS

RANDY APPLETON and TAMMY APPLETON,

Plaintiff-Appellees/Cross-Appellants,

v

WESTFIELD INSURANCE COMPANY,

Defendant,

and

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
August 31, 2006

No. 260875
St. Joseph Circuit Court
LC No. 02-000814-NZ

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

In this insurance case, defendant Auto-Owners Insurance Company (hereinafter "defendant") appeals by leave granted from the trial court's order that denied its motion for summary disposition. Plaintiffs cross appeals, challenging the trial court's denial in part of their cross motion for partial summary disposition. We affirm in part, reverse in part, and remand for further proceedings.

On December 13, 2001, a fire destroyed plaintiffs' home, which was insured by defendant and Westfield Insurance Company. Both companies required that a proof of loss form be filed within sixty days of the loss. Because there were two insurance policies, the parties allegedly agreed that Westfield would adjust the claim and apportion the loss with defendant. This agreement was purportedly memorialized in a letter sent by defendant's agent to plaintiff Randy Appleton, dated February 5, 2002. On January 11, 2002, Westfield sent plaintiffs a proof of loss form with instructions to complete and return it no later than March 12, 2002. However, plaintiffs alleged that a representative of Westfield failed to maintain appointments during which he would assist plaintiffs in the preparation of the form. By, at the latest, February 13, 2002, plaintiffs had retained counsel to represent them in relation to the fire at their home. On May 15, 2002, plaintiffs' attorney forwarded to Westfield and defendant a copy of plaintiffs' proof of loss.

With regard to the fire remnants, on December 14, 2001, a canine unit arrived at plaintiffs' home to conduct a sweep for accelerants. As a result of the canine sweep, samples were taken from three areas of the home for testing. However, there is no indication in the record that accelerants were found in the home. Nonetheless, an investigation report concluded that the "cause for this fire is incendiary in nature through human intervention." The insurance policy at issue contained a provision that required the insured to protect the property from further loss or damage and to exhibit the damaged property to defendant as often as may be reasonably required. The day after the fire investigation, plaintiff Randy Appleton removed the debris from the premises. He alleged that he was given authorization to do so by defendant's representative and also relied on his prior contacts with insurance companies involving other properties. However, in the February 5, 2002 letter, the claim adjuster expressly stated that authority for demolition of the home had not been granted.

Defendant ultimately denied plaintiffs' claim, contending that plaintiffs breached the terms of the insurance policy by failing to file the proof of loss by March 12, 2002, and by destroying the home without defendant's or Westfield's permission. Westfield also denied plaintiffs' claim based on their failure to timely file a proof of loss and filed a successful declaratory action in federal court on this basis. Plaintiffs subsequently commenced this action on July 23, 2002, against both insurance companies. Westfield was dismissed from the action and is not a party on appeal. Defendant eventually filed a motion for summary disposition based on plaintiffs' failure to timely file the proof of loss and failure to protect and preserve the property. Plaintiffs contested defendant's motion and also filed a motion of their own, claiming that defendant was estopped from raising the defenses of failure to file a proof of loss, and was also barred from raising the defenses of arson, fraud, or false swearing. Plaintiff Tammy Appleton also asserted that, as an innocent coinsured, she was entitled to her portion of the insurance proceeds. The trial court denied defendant's motion for summary disposition and granted plaintiffs' motion in part to the extent that it barred defendant from raising the defense of failure to timely file a proof of loss. The court denied the remainder of plaintiffs' motion.

I. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 278. When deciding a motion under this subrule, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party to determine whether there is a genuine issue of fact for trial. *Id.*; MCR 2.116(G)(3)(b). "[W]here the truth of a material factual assertion of a movant's affidavit depends on the affiant's credibility, there inheres a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted." *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973). Summary disposition is suspect where motive and intent are at issue or where the credibility of the witness is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994).

II. Defense of Failure to Timely File a Proof of Loss

The trial court prohibited defendant from raising the defense of plaintiffs' failure to timely file a proof of loss because it found that defendant failed to comply with MCL 500.2006(3). That statute provides in pertinent part:

> An insurer shall specify in writing the materials which constitute a satisfactory proof of loss not later than 30 days after receipt of a claim unless the claim is settled within the 30 days.

The trial court concluded that the proof of loss form sent by Westfield did not satisfy defendant's obligation under the statute.

Assuming without deciding that the trial court correctly concluded that defendant and Westfield did not comply with MCL 500.2006(3),[1] nonetheless, it was error to grant partial summary disposition in plaintiffs' favor and bar defendant from raising the defense of failure to timely file a proof of loss. In *Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 142; 433 NW2d 380 (1988), the plaintiff argued that "her duty to supply a sworn proof of loss within sixty days is contingent upon defendant's performance of a condition precedent created by MCL 500.2006(3)." The Court declined "to rule as a matter of law that performance by an insurer under § 2006(3) is a condition precedent to an insured's duty under § 2832(1) to provide a sworn proof of loss."[2] *Id*. at 144. Instead, it held that "a breach of such duty is a factor relevant to

---

[1] Based on the terms of the policy, the proof of loss had to be submitted within sixty days. Plaintiffs were apprised of this requirement when they received a $2,000 advance payment from defendant. However, the parties allegedly entered into an agreement that included Westfield which provided for the investigation and apportionment of loss by Westfield. This purported agreement is not signed by all parties. The letter documenting the agreement provides that defendant was "holding in abeyance, any further adjustment/investigation of the loss on behalf of [defendant]…as our involvement is simply to reach apportionment of the loss when concluded directly with Westfield Insurance Company." This alleged agreement contemplates apportionment of loss and does not address the impact of any denial of a claim by Westfield on plaintiffs' relationship with defendant. Moreover, this purported agreement does not address the import of any denial by Westfield regarding the compliance with the terms of defendant's policy and any payment of the claim by defendant. Defendant failed to brief the issue of whether this document constituted a binding agreement and any impact on the terms of its insurance policy. Parties to a contract may bargain to modify the contract by later agreement. *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005). However, the parties dispute the context and meaning of this letter, which is not plain on its face, and plaintiff Randy Appleton averred that he did not intend the interpretation alleged by defendant. A factual dispute exists that precludes resolution of this issue, particularly in light of the limited briefing. *Brown*, *supra*; *Vanguard*, *supra*. Accordingly, we assume without deciding that there was noncompliance as ruled by the trial court.

[2] MCL 500.2832, which contained the form of the Michigan standard fire policy, was repealed in 1992. 1990 PA 305. Its provisions are currently contained in MCL 500.2833. The specific duty of the insured is that an action may be commenced only after the insured has complied with all requirements under the insurance policy. MCL 500.2833(1)(q).

whether an insurer is estopped from asserting as a defense to payment of an otherwise valid claim the failure on the part of the insured to file a proof of loss." *Id.*

The *Dellar* Court found that under the circumstances of that case, a question of fact existed whether the defendant insurer had waived or was estopped from raising the plaintiff's failure to timely file a proof of loss as a defense, particularly when the functional equivalent of a proof of loss was presented. *Id*. at 148. The plaintiff contended that she never received a proof of loss form. The defendant asserted that it was mailed to her. *Id*. at 142. The plaintiff also did not receive a copy of her insurance policy until after the filing deadline, despite several requests. The Court further noted:

> [W]hatever purpose might exist for the requiring of the filing of a sworn proof of loss, such purpose was fulfilled. Clearly there was immediate notice, a full investigation, a pending criminal charge, and an examination of the plaintiff by defendant. A sworn proof of loss would add nothing in the context of this case, and its functional equivalent already existed.
>
> Again, defendant-insurer continued to deal with plaintiff after expiration of the sixty-day period by conducting the examination and by returning the contents evaluation form requesting more information. [*Id*. at 148.]

Plaintiffs argue that, unlike *Dellar*, defendant here should be barred from raising their failure to timely file a proof of loss as a defense because there is no dispute that defendant did not send them a proof of loss form or a copy of their insurance policy. We disagree. First, plaintiffs mistakenly rely on *Struble v Nat'l Liberty Ins Co of America*, 252 Mich 566; 233 NW 417 (1930), for the proposition that defendant's failure to provide a copy of the insurance policy is an automatic waiver of the defense of failure to timely file a proof of loss. *Struble* indicates that whether an insurer is estopped from raising the defense depends on the insurer's actions. Mere failure to send a copy of the insurance policy does not, by itself, estop an insurer from raising the defense of failure to timely file a proof of loss. The burden of proving waiver or estoppel is on the plaintiff. *Id*. at 569.

In *Struble*, the plaintiff had just renewed his policies and had not yet received copies before a fire destroyed his home. *Id.* at 567. He requested copies of the policies several times, but never received them and in fact, the defendant's agent deliberately did not send them because she did not believe they were of any use after the fire. *Id*. at 567-568, 570. The plaintiff did not even know the identity of the insurer because he had dealt solely with his agent. *Id*. at 570-571. The *Struble* Court found that, under those circumstances, the defendant was estopped from asserting the defense of failure to timely file a proof of loss because it was the defendant's actions that prevented the plaintiff's compliance. *Id*. at 571. *Struble* does not set forth an affirmative duty on the part of the insurer to send an insured a copy of the insurance policy after a claim is filed. The question regarding estoppel is whether the insurer's actions or lack of action prevented the insured's compliance with the policy provisions.

In this case, defendant asserted that a copy of the insurance policy was mailed to plaintiffs on April 25, 2001, shortly after the policy went into effect. Randy Appleton was equivocal about whether he had ever received a policy, and Tammy Appleton made no averments on the subject. In a letter from plaintiffs' counsel to defendant, dated April 3, 2002,

counsel requested a copy of defendant's insurance policy "so that I can be sure we all are referencing the same documents." The statement that counsel desired a copy of the policy for comparison purposes suggests that counsel already had a copy. Even if plaintiffs did not have a copy of the policy, plaintiffs were able to eventually complete a proof of loss. There is no indication that defendant's failure to provide the insurance policy prevented plaintiffs from complying with the policy's proof of loss requirement. Moreover, even if the date of the letter agreement, February 5, 2002, is used as the beginning of the 60-day timeframe for filing the proof of loss, plaintiffs did not request the policy until April 3, 2002, two days before that filing deadline. Furthermore, plaintiffs' counsel never informed defendant that a copy of the policy was needed in order to complete the proof of loss. Accordingly, plaintiffs are not entitled to summary disposition based on estoppel to preclude defendant from asserting the policy's proof of loss requirement when there is a factual disparity in the evidence regarding the prior mailing and receipt of the policy, and there is no indication that any failure to send a copy of the policy after the claim affected their ability to timely comply with the policy's proof-of-loss requirement. *Brown, supra*; *Vanguard, supra*.

We also disagree with the trial court that defendant should be estopped from raising the defense because Westfield's agent failed to help plaintiffs fill out the proof of loss. Plaintiff Randy Appleton stated that at the time it was agreed that Westfield would take the lead in adjusting the claim, Westfield's agent "promised to come out very soon and help [plaintiffs] fill out the Proof of Loss form." But plaintiffs subsequently retained counsel a month before the proof of loss was due. At that point, Westfield and defendant were prohibited from direct interaction with plaintiffs, which caused Westfield to implicitly withdraw its offer of help. Plaintiffs still had ample time to timely file the proof of loss with the aid of their attorney and did eventually complete the proof of loss without any assistance from Westfield.

This case is distinguishable from *Compton v Michigan Millers Mut Ins Co*, 150 Mich App 454, 461; 389 NW2d 111 (1986), wherein the Court held that summary disposition was improper because the insured claimed reliance on the insurer's assertion that it would prepare the proof of loss form. In that case, the insurer prepared the form, but not in the amount requested by the plaintiffs. *Id*. at 460. The Court held that there was a question of fact whether the plaintiffs were able to obtain blank forms or were forced to rely on the defendant's prepared forms. *Id*. at 461. Here, plaintiffs had blank forms that were sent by Westfield and Westfield's offer was only one of assistance, not total preparation.

We also note that the question whether defendant should be estopped from raising the defense of failure to timely file the proof of loss hinges on the validity of the letter agreement as a modification of the insurance policy, because any prejudice to plaintiffs as a result of defendant's noncompliance with MCL 500.2006(3) could be cured by setting the start of the 60-day period for filing the proof of loss at February 5, 2002, the date the parties' agreement was reduced to writing. It is defendant's position that the evidence clearly establishes that the letter agreement is a valid modification of the policy. The cash advance receipt that Randy Appleton received from defendant on the day of the loss informed plaintiffs of the need to file a proof of loss. Based on this evidence, there can be no dispute that plaintiffs knew that a proof of loss needed to be filed under defendant's policy. Indeed, plaintiffs present no evidence to suggest that they were informed otherwise.

However, there is also no evidence that affirmatively establishes that plaintiffs understood that filing a proof of loss with Westfield would satisfy defendant's filing requirement. In order to modify a contract, "[t]he modification must be by mutual consent, and a modification is mutual if there is clear and convincing evidence of a written agreement to waive the terms of the original contract." *Adell Broadcasting Corp, supra*. That the parties consider it to be to their mutual advantage to modify the agreement establishes sufficient consideration. *Id*.

The letter agreement specifically states, "In summary, it was agreed that you would submit your claim along with your Sworn Statement of Proof of Loss and supporting documentation directly to Westfield Insurance Company . . . ." But defendant did not clarify that this submission satisfied their filing requirement as well. Plaintiff Randy Appleton submitted an affidavit in which he averred, "When I agreed to let Westfield take the 'lead' in adjusting this claim, I did not foresee that there would be a problem with the timeliness of the filing of the Proof of Loss Statement" because Westfield's agent promised to help plaintiffs fill out the form. "Consequently, I didn't even think of how that may relate to Auto-Owners." But Appleton also stated, "The idea that Auto-Owners could use Westfield's claim that I didn't file Westfield's Proof of Loss in a timely manner was never intended or even talked about" and "Had Auto-Owners requested me to fill out of Proof of Loss form, I would have done so."

Randy Appleton further averred that in the beginning of February 2002, he no longer wanted to deal just with Westfield, but was told "that wasn't going to happen." It is not clear whether this statement refers to a time before or after the letter agreement was received by plaintiffs. If after, Randy Appleton's statement could be taken as objecting to the letter's terms. However, plaintiffs' counsel did not object on plaintiffs' behalf to the terms of the letter agreement after receiving a copy from Westfield and being notified that all documents sent to Westfield would be shared with defendant. Moreover, plaintiffs' counsel's subsequent conduct of sending documents directly to Westfield appears to indicate their agreement with the terms of the letter agreement.

For these reasons as well, we conclude that a question of fact exists regarding the effect of the letter agreement as it pertains to defendant's proof-of-loss filing requirement, and consequently, a question of fact exists whether defendant should be estopped from raising plaintiffs' failure to timely file a proof of loss as a defense. As noted earlier, the burden is on plaintiffs to prove estoppel. *Helmer v Dearborn Nat'l Ins Co*, 319 Mich 696, 700; 30 NW2d 399 (1948); *Struble, supra* at 569. Therefore, the trial court erred to the extent that it precluded defendant from raising the defense.[3]

III. Defenses of Arson, Fraud, and False Swearing

[3] We agree that case law provides that an insured's failure to tender a proof of loss within sixty days precludes a claim under the policy because compliance with the requirement is considered a condition precedent to the liability of the insurer. *Auto-Owners Ins Co v Gallup*, 191 Mich App 181, 183-184; 477 NW2d 463 (1991). Therefore, if plaintiffs fail to establish that defendant is estopped from relying on the defense, noncompliance with the sixty day period bars recovery.

Good faith requires that the insurer give notice to the insured of all defenses on which it intends to rely. *Smith v Grange Mut Fire Ins Co of Michigan*, 234 Mich 119, 122-123; 208 NW 145 (1926). Generally, once an insurer has denied coverage to its insured and has stated its defenses, the insurer has waived or is estopped from raising new defenses. *Michigan Twp Participating Plan v Fed Ins Co*, 233 Mich App 422, 436; 592 NW2d 760 (1999). Plaintiffs argue that because defendant did not specifically deny their claim on the basis of arson, fraud, or false swearing, defendant is precluded from later raising these defenses.

Here, however, defendant did not neglect to mention these other defenses in its denial letter or simply reserve "all rights and defenses." See *Sanborn v Income Guaranty Co*, 244 Mich 99, 103-104; 221 NW 162 (1928) (only reason for denial was that the plaintiff did not establish that the decedent's death was accidental and thus, this was the only defense available to the defendant). Rather, defendant specifically denoted these other defenses in its denial letter and also raised them in its affirmative defenses that were filed along with its answer to plaintiffs' complaint. We therefore conclude that plaintiffs were sufficiently on notice at the time coverage was denied that defendant was not waiving these other defenses. Therefore, the trial court did not err in denying plaintiffs' motion for partial summary disposition on this basis.

IV. Factual Question Regarding Fraud and False Swearing

Plaintiffs' assert that defendants may not raise this defense because any fraud or false swearing must have occurred before the claim was denied. Because plaintiffs present no authority in support of this argument, we conclude that it is waived. Plaintiffs may not simply announce their position and leave it to this Court to search for authority to support it. *City of Mt Pleasant v State Tax Comm*, 267 Mich App 1, 6; 703 NW2d 227 (2005).

V. Innocent Coinsured

The parties agree that if plaintiff Tammy Appleton is an innocent coinsured, then she is entitled to benefits under the insurance policy, even if it is proven that plaintiff Randy Appleton committed arson. See *Borman v State Farm Fire & Cas Co*, 446 Mich 482, 488-489; 521 NW2d 266 (1994); *Lewis v Homeowners Ins Co*, 172 Mich App 443, 449; 432 NW2d 334 (1988). Plaintiffs argue that the trial court erred in concluding that there was a factual question for trial regarding Tammy Appleton's status as an innocent coinsured.

With respect to the defense of arson, plaintiffs asserted in their brief in opposition to defendant's motion for summary disposition that there was no dispute that Tammy Appleton was not involved in the fire. Plaintiffs, however, did not raise this specific issue in their own motion for summary disposition. Consequently, defendant did not respond to it below.[4] Despite the issue not having been directly raised by plaintiffs in their motion, the trial court appeared to

[4] Defendant responded to this issue only in the context of arguing that Tammy Appleton was not an innocent coinsured with respect to the defense of failure to timely file the proof of loss. Defendant did not respond to plaintiffs' assertion that Tammy Appleton was not involved in the fire.

address the merits, but concluded that plaintiffs were not entitled to summary disposition on this issue because there was a question of fact whether Tammy Appleton was an innocent coinsured.

If plaintiffs had properly asserted this issue in their own summary disposition motion, and supported the motion with appropriate evidentiary materials, instead of merely raising the issue in response to defendant's motion for summary disposition, then the burden would have shifted to defendant to demonstrate through evidentiary materials below that a genuine issue of material fact existed with regard to Tammy Appleton's alleged "innocence" relative to a defense of arson. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). But because the issue was not properly raised in plaintiffs' motion, defendant had no duty to respond, *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000), and the trial court was not required to determine whether there was a genuine issue of material fact for trial. In sum, plaintiffs were not entitled to summary disposition and the trial court reached the right result by denying partial summary disposition to plaintiffs on this issue.

Plaintiffs also argue that Tammy Appleton was not part of the agreement with Westfield and, therefore, she is an innocent coinsured with respect to any defense based on a failure to timely file a proof of loss. Plaintiffs further argue that Tammy Appleton is an innocent coinsured because there is no dispute that she was not part of the debris removal. We conclude that the innocent coinsured doctrine is not applicable to these defenses. The issue of the debris removal relates to whether plaintiffs satisfied a condition of the insurance policy that required them to preserve the property and make it available for inspections. Failure to file a timely proof of loss is a condition precedent under the contract. The innocent coinsured doctrine protects the right of an innocent plaintiff to recover despite the wrongdoing of another insured. The wrongful acts contemplated are those that would absolve an insurer from liability under a policy exclusion for fraud or intentional acts, such as arson. See, e.g., *Borman, supra* at 492; *Williams v Auto Club Group Ins Co*, 224 Mich App 313, 316; 569 NW2d 403 (1997); *Ramon v Farm Bureau Ins Co*, 184 Mich App 54, 62; 457 NW2d 90 (1990); *Lewis, supra* at 488-449. The doctrine is not applicable to an insured's failure to satisfy a condition precedent under a policy.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood