STATE OF MICHIGAN

COURT OF APPEALS

LEGAL SERVICES PLAN OF EASTERN MICHIGAN,

Plaintiff-Appellant,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant/Cross-Plaintiff-Appellee,

and

ABBOTT CONSTRUCTION, INC.,

Defendant/Cross-Defendant,

and

WADE-TRIM MANAGEMENT, INC.,

Defendant/Cross-Defendant,

and

WADE-TRIM, INC.,

Defendant/Third-Party Plaintiff/Cross-Plaintiff,

and

INDIANA INSURANCE COMPANY,

Third-Party Defendant.

UNPUBLISHED
April 30, 2009

No. 278110
Genesee Circuit Court
LC No. 06-083314-CK

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting summary disposition in favor of defendant/cross-plaintiff-appellee, Citizens Insurance Company of America ("Citizens"). On appeal, plaintiff argues that the trial court erred in granting summary disposition in favor of Citizens because, under an insurance contract between plaintiff and Citizens, Citizens was required to cover the cost of damage to plaintiff's building caused by construction in front of the building, and water damage to the building's interior. We affirm.

The dispute in this case arises from an insurance policy issued to plaintiff by Citizens, providing coverage of plaintiff's business premises from September 6, 2002, to September 6, 2003. In late June 2003, the city of Flint began a construction project that involved replacing the sidewalk and planting trees near plaintiff's building. Abbott Construction, Inc. ("Abbott"), performed the construction work, and Wade-Trim, Inc., oversaw the project. Plaintiff's basement, the east end of which ran under the sidewalk, was occupied by commercial tenants. During the process of removing layers of concrete from the sidewalk, workers from Abbott and Wade-Trim came into the basement several times, with plaintiff's permission, to make sure that nothing came through into plaintiff's basement.

Although the concrete covering plaintiff's basement was old and in bad shape, Abbott employees apparently did not put down any type of waterproofing material to cover the opened sidewalk before leaving for the holiday weekend of July 4, 2003. It rained very hard over the weekend, and, on July 7, 2003, a large amount of water, about 20 inches deep, was discovered in plaintiff's basement. An engineer with Wade-Trim testified that a major storm had deposited a large amount of rain in a short period of time, and, because the curb had been removed, "water rushing off of the road and down the hill was able to spill off into this open area where there was no curb and no sidewalk." The water flowed downhill and through a hole in the wall of plaintiff's basement. The hole was apparently an old coal chute that had become unsealed during the construction, possibly by a bulldozer.

Although multiple parties, including Abbott and Wade-Trim, participated in the lower court proceedings, Citizens and plaintiff are the only parties to this appeal. Plaintiff argues that the court erred in finding that exclusions in Citizens' policy precluded coverage of the damage to plaintiff's building caused by water and "construction activity." We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriate "if there is no genuine issue of regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*.

"Clear and specific exclusionary clauses must be given effect because an insurance company cannot be liable for risks it did not assume," and "[c]overage under a policy is lost if any exclusion in the policy applies to an insured's particular claims." *Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004), quoting *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998). "When reviewing an exclusionary clause, we read the

contract as a whole to effectuate the overall intent of the parties." *Hayley*, *supra* at 575. "Where the language is clear and unambiguous, the insurance policy must be enforced as written." *Id*.

The relevant provisions of the insurance contract at issue are set forth in Citizens' Insurance Policy, form CP 10 30 10 00, "CAUSES OF LOSS-SPECIAL FORM":

> **A. Covered Causes of Loss**
>
> When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
>
> **1.** Excluded in Section **B.,** Exclusions; or
>
> **2.** Limited in Section **C.,** Limitations;
>
> that follow.
>
> **B. Exclusions**
>
> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> * * *
>
> **g. Water**
>
> **(1)** Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not . . .
>
> * * *
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. But if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by the Covered Cause of Loss.
>
> **a.** Weather conditions. But this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in Paragraph 1. above to produce the loss or damage.
>
> **b.** Acts or decisions, including the failure to act or decide, of any person, group, organization, or governmental body.
>
> **c.** Faulty, inadequate or defective:
>
> **(1)** Planning, zoning, development, surveying, siting:

> **(2)** Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
>
> **(3)** Materials used in repair, construction, renovation or remodeling; or
>
> **(4)** Maintenance;
>
> of part or all of any property on or off the described premises.
>
> * * *
>
> **C. Limitations**
>
> The following limitations apply to all policy forms and endorsements, unless otherwise stated.
>
> **1.** We will not pay for loss of or damage to property, as described and limited in this section. In addition, we will not pay for any loss that is a consequence of loss or damage as described and limited in this section.
>
> * * *
>
> **c.** The interior of any building or structure, or to personal property in the building or structure, caused by or resulting from rain, snow, sleet, sand or dust, whether driven by wind or not, unless:
>
> (1) The building or structure first sustains damage by a Covered Cause of Loss to its roof or walls through which the rain, snow, sleet, ice, sand or dust enters; or . . .

The trial court did not err in holding that there was no genuine issue of material fact with respect to whether Citizens was required to pay for the water damage to plaintiff's basement because the policy's "surface water" exclusion applies. Although "surface water" is not defined in the policy, under Michigan case law, "'[s]urface waters' are defined as 'waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence.'" *Kernen v Homestead Dev Co*, 232 Mich App 503, 511 n 7; 591 NW2d 369 (1998), quoting *Fenmode, Inc v Aetna Casualty & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942).

Here, the evidence establishes that rain collected on the ground surface and flowed into plaintiff's basement through an opening in the wall. When the rainwater fell on the street and began to pool and flow, it became "surface water," and did not cease to be surface water when it flowed into plaintiff's basement. Under Michigan case law, water ceases to be "surface water" only "by percolation, evaporation, or by reaching some definite watercourse or substantial body of water into which [it] flow[s]." *Fenmode*, *supra*. The trial court did not err in granting summary disposition for Citizens because the policy specifically and unambiguously excludes damage caused directly or indirectly by surface water.

Plaintiff argues that the "water" exclusion does not preclude coverage in this case by attempting to distinguish *Vanguard Ins Co v Clarke*, 438 Mich 463; 475 NW2d 48 (1991), overruled in part on other grounds *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 58; 664 NW2d 776 (2003). In *Vanguard*, the Michigan Supreme Court considered a case in which this Court applied the rule of "concurrent causation" to reverse summary disposition for the insurer. The Supreme Court noted that a minority of courts in other jurisdictions had applied the theory "to impose insurance liability notwithstanding an explicit policy exclusion" in cases involving "the convergence of two or more causes of an indivisible injury to the insured," and where "one of the causes falls within the coverage of the insurance policy." *Id*. at 466. The Supreme Court reversed, finding that this Court had "erred in subordinating the explicit auto-related exclusion of the insurance policy to the doctrine of concurrent causation." *Id*. at 471. Plaintiff argues that here, in contrast to *Vanguard*, the construction activity, which is a covered cause of loss, was the single proximate cause of the damage to plaintiff's building. However, as plaintiff acknowledges, *Vanguard* simply held that, where an unambiguous exclusion applies, coverage is precluded. In this case, coverage is precluded because the "surface water" exclusion applies.

Nor did the trial court err in granting summary disposition with respect to any damage to plaintiff's building caused by "construction activity." This is an excluded cause of loss because it is encompassed by the "acts or decisions" exclusion set forth in Special Form B.3.b. Under that provision, Citizens is not required to pay for damage caused by "[a]cts or decisions, including the failure to act or decide, of any person, group, organization, or governmental body." Because the construction activity constitutes "acts," any damage caused by that activity is not covered. If the construction activity had resulted in a covered cause of loss, Citizens would be required to pay for the damage caused by the covered cause of loss; however, as already discussed, surface water is not a covered cause of loss.

Finally, we agree with plaintiff that the exclusion for "weather conditions" does not preclude coverage of the loss from water damage in this case, because that exclusion only applies if weather conditions contributed with a cause or event excluded in Paragraph 1 of the Special Form to produce the loss or damage, and none of the causes in Paragraph 1 are relevant here. Similarly, the exclusion for faulty, inadequate or defective construction or renovation, B.3.c., is not a basis for granting summary disposition for Citizens with respect to any damage caused by the construction because whether the construction activity at issue in this case was "faulty, inadequate or defective," is a question of fact. However, "[c]overage under a policy is lost if any exclusion in the policy applies to an insured's particular claims." *Hayley*, *supra* at 574.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot