

[Cite as *Hickory Groves 339, L.L.C. v. Cincinnati Ins. Co.*, 2016-Ohio-3408.]
IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

HICKORY GROVE 339, LLC, :
dba HICKORY GROVE COUNTY :
MARKET, :
 :
Plaintiff-Appellant, : Case No. 15CA38
 :
vs. :
 :
THE CINCINNATI INSURANCE : DECISION & JUDGMENT
COMPANY, : ENTRY
 :
Defendant-Appellee. :
 :

APPEARANCES:

George J. Cosenza, Parkersburg, West Virginia, for appellant.

Adam M. Barnes, Walsh, Barnes, Collis & Zumpella, P.C., Pittsburgh, Pennsylvania, for appellee.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-7-16
ABELE, J.

{¶ 1} The Washington County Common Pleas Court granted The Cincinnati Insurance Company's (Cincinnati Insurance) motion for summary judgment on the breach-of-contract claim of Hickory Grove 339 LLC, dba Hickory Grove County Market (Hickory Grove). Hickory Grove had sought coverage under Cincinnati Insurance insurance company for damage to its convenience store stemming from a June 2012 derecho¹. The policy included coverage for loss caused by the partial or complete suspension of utility service from damage to

¹ A derecho is “a large fast-moving complex of thunderstorms with powerful straight-line winds that

utility-generating plants, switching stations, substations, transformers, and transmission lines, but excluding overhead transmission and distribution lines.

{¶ 2} In its sole assignment of error, Hickory Grove asserts that the trial court erred by granting Cincinnati Insurance's motion for summary judgment. In particular, Hickory Grove argues that genuine issues of fact exist concerning whether a direct, physical loss to a transformer caused the loss of electrical power. Hickory Grove asserts that it provided circumstantial evidence to create a genuine issue of fact concerning its breach-of-contract claim. However, the only evidence it specifically cites on appeal is an e-mail from an American Electric Power (AEP) representative that details that the electrical outage occurred from June 29, 2012 to July 6, 2012 and that it involved "138 Wires down & Broken poles." Hickory Grove's independent insurance agent also apparently conceded in his deposition that this e-mail did not provide sufficient evidence to support coverage under the insurance policy extension. This e-mail, that the independent agent cited in his deposition to support the claim that transformer damage caused Hickory Grove's damages, specifies that during the storm a three-phase pole was broken and then replaced, not that a transformer had been damaged or replaced. Thus, the independent agent admitted that the e-mail did not state that a damaged transformer caused the power loss, but rather that he had merely assumed that the transformer was damaged when the pole was broken.

{¶ 3} Because our de novo review of the summary-judgment evidence establishes that the trial court properly concluded that the insurance policy did not provide coverage for

Hickory Grove's claimed losses, we overrule the assignment of error and affirm the trial court's judgment.

I. FACTS

{¶ 4} Hickory Grove operates the Hickory Grove County Market convenience store in Vincent, Ohio. From September 2011 to September 2014, Cincinnati Insurance provided insurance to Hickory Grove under a Businessowners Package Policy. The insurance policy included a utility-services exclusion that precluded coverage for loss caused by a power failure, or the failure of other utility services supplied to the premises, if the failure occurred away from the premises. However, the policy also included a utility-services-coverage extension that provided coverage to the premises for loss caused by the suspension of utility services from utility-generating plants, switching stations, substations, transformers, and transmission lines (excluding overhead transmission and distribution lines):

p. Utility services.

You may extend the insurance provided under this policy, including the insurance provided in **Section I – PROPERTY, A. Coverages, 5. Additional Coverages, c. Business Income and k. Extra Expense**, to apply to “loss” caused by the partial or complete suspension of the utility services listed below. The partial or complete suspension of services must be caused by direct physical “loss” to those services from a Covered Cause of Loss.

* * *

(2) Power Supply Services, meaning the following types of property supplying electricity, steam, or natural gas to the “premises”:

(a) Utility generating plants;

(b) Switching stations;

(c) Substations;

(d) Transformers; and

(e) Transmission lines, excluding overhead transmission and distribution lines.

{¶ 5} On June 29, 2012, a derecho affected parts of West Virginia and Southern Ohio, including the Hickory Grove convenience store. According to Hickory Grove, the derecho caused the store to lose electrical power and to incur damage to inventory and business income.

Although Cincinnati Insurance agreed to pay Hickory Grove \$5,000 under the policy's spoilage coverage and approximately \$1,000 to settle the claimed overtime and labor costs, it denied liability for any additional damages.

{¶ 6} In July 2014, Hickory Grove filed a complaint and alleged that Cincinnati Insurance's failure to pay its claim for additional losses constituted a breach of contract. After Cincinnati Insurance denied additional liability under the policy, it filed a motion for summary judgment with attached depositions and exhibits. Hickory Grove, in turn, filed a memorandum in opposition, along with a deposition and exhibits.

{¶ 7} Our review of the materials that the parties submitted to the trial court establishes that Hickory Grove representative Jennifer Burton initially contacted AEP to determine whether the policy covered the power outage. In an April 12, 2013 email, an AEP customer service representative advised Burton that the power outage “was not due to any substation or transmission tower being damaged.” In a subsequent AEP e-mail that same day, AEP advised Burton that its records showed that an outage was first reported at Hickory Grove’s store on June 29, 2012, that service was restored a week later on July 6, 2012, and that the incident involved “138 Wires down & Broken poles.”

{¶ 8} David Padden, Hickory Grove's independent insurance agent, testified that he attempted to develop evidence on behalf of Hickory Grove to support its claim. Padden contacted AEP in an attempt to obtain evidence of a downed transformer that would have supplied electrical power to the convenience store so as to trigger the policy's coverage. Padden agreed that the source of the store's power loss occurred away from the store so that coverage would generally be precluded under the policy's utility-services exclusion, but he asserted that coverage resulted from the utility-services-coverage extension. Padden, however, eventually conceded that he received no evidence from AEP that the power outage was caused by damage to utility generating plants, switching stations, substations, or transmission lines that were not overhead transmission or distribution lines. Padden testified that he received evidence from AEP that damage to overhead transmission and distribution lines caused the outage, but that the policy did not provide coverage for these losses. Consequently, Padden concluded that coverage could be established only with evidence that damage to a transformer caused the outage. Padden further agreed that the two April 12, 2012 e-mails from AEP to Hickory Grove representative Jennifer Burton (the first stating that the outage was not due to damage to a substation or transmission tower and the second stating that 138 wires were down along with broken poles) were insufficient to establish coverage under the policy's utility services coverage extension.

{¶ 9} According to Padden, he personally contacted AEP and, by a December 19, 2013 email, he received a forwarded response from an AEP employee that included a photograph of a pole that had been broken during the storm and noted that a new pole had been installed to replace it:

I believe this is the pole that was broken during the storm. This is an older photograph from Google. It is [a] three phase construction with a crossarm and transformer. A new 45' pole was installed when the pole broke during the storm.

There was a three phase pole on the main line east of Layman Station that was broken during the storm that would definitely have affected this customer as they are near the southern end of the circuit. There were numerous other damaged facilities in the area including crossarms and at least two other broken poles. Keep in mind this was the largest storm to ever strike AEP Ohio. The result was over 2,000 broken poles, 4,000 broken crossarms, and many miles of downed conductor. * * *

(*Id.* at 26-29, Ex. 5)

Although Padden initially claimed that this e-mail provided evidence that a damaged transformer had caused the outage, he eventually conceded that the December 19, 2013 e-mail did not state that a damaged or inoperable transformer caused the power loss, which the additional coverage provision requires.

{¶ 10} Appellant also admitted that Hickory Grove did not receive evidence from AEP that any transformer had been replaced. Padden testified that Hickory Grove's position that it had coverage under the utility-services-coverage extension is based on the assumption that when the pole snapped, the attached transformer was also damaged. He again acknowledged, however, that Hickory Grove did not receive evidence from AEP to support that assumption. Padden admitted that would have been possible that AEP replaced the broken pole and used the same transformer because the transformer could have remained undamaged and operable.

{¶ 11} In a very detailed decision, the trial court determined that no evidence exists to create a genuine issue of material fact that a direct physical loss to a transformer caused the loss of power to the store so as to entitle Hickory Grove to coverage under the policy's

utility-services-coverage-extension provision. Thus, the trial court entered summary judgment in favor of Cincinnati Insurance on the breach-of-contract claim and dismissed the complaint. This appeal followed.

II. ASSIGNMENT OF ERROR

Hickory Grove assigns the following error for review:

THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND ITS FINDING THAT THERE IS NO GENUINE ISSUE OF FACT THAT THE LOSS OF POWER TO THE MARKET ON JUNE 29, 2012 WAS CAUSED BY DIRECT PHYSICAL "LOSS" TO A TRANSFORMER.

III. STANDARD OF REVIEW

{¶ 12} Hickory Grove asserts that the trial court erred by granting summary judgment in favor of Cincinnati Insurance when genuine issues of material fact remain concerning its coverage under the policy's utility-services-coverage-extension provision.

{¶ 13} Generally, appellate courts apply a de novo standard of review to an appeal from a summary judgment based on an insurance contract. *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 12; *see also Willis v. Gall*, 2015-Ohio-1696, 31 N.E.3d 678, ¶ 10 (4th Dist.) (“[t]he interpretation of a written contract, such as an insurance policy, is a matter of law that we review de novo”).

{¶ 14} Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact; (2) the moving party is entitled to

judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made. Civ.R. 56(C); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 29 (4th Dist.). The moving party has the initial burden to inform the trial court of the basis for the motion and to identify the parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party satisfies this initial burden, the non-moving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts to show that genuine issues exist for trial. *Id.*; *Schultheiss v. Heinrich Ents., Inc.*, 2016-Ohio-121, ___ N.E.3d ___, ¶ 15 (4th Dist.).

{¶ 15} "The fundamental goal when interpreting an insurance policy is to ascertain the intent of the parties from a reading of the policy in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect." *Laboy v. Grange Indemn. Ins. Co.*, 144 Ohio St.3d 234, 2015-Ohio-3308, 41 N.E.3d 1224, ¶ 8. In the absence of an express contractual definition or resultant manifest absurdity, we will construe words and phrases contained in an insurance policy in accordance with their plain and ordinary meaning. *Id.*, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus; *see also Wayne Mut. Ins. Co. v. McNabb*, 2016-Oho-153, ___ N.E.3d ___, ¶ 20 (4th Dist.).

{¶ 16} With these principles providing the framework for our analysis, we now address the merits of Hickory Grove's argument.

IV. LAW AND ANALYSIS

{¶ 17} In its sole assignment of error, Hickory Grove asserts that the trial court erred by granting Cincinnati Insurance's motion for summary judgment. In particular, Hickory Grove contends that genuine issues of fact remain whether a direct physical loss to a transformer caused the store's loss of electrical power.

{¶ 18} In its complaint, Hickory Grove claimed that Cincinnati Insurance breached the insurance contract by refusing to recognize Hickory Grove's claim for coverage for losses resulting from the electrical power outage from the June 2012 derecho. " 'In order to succeed on a breach of contract claim, a party must prove the existence of a contract, the party's performance under the contract, the opposing party's breach, and resulting damage.' " *Martin*, 2015-Oho-3168, 41 N.E.3d 123, at ¶ 36, quoting *DePompei v. Santabarbara*, 8th Dist. Cuyahoga No. 101163, 2015-Ohio-18, ¶ 20.

{¶ 19} In the case sub judice, the dispositive issue is whether Cincinnati Insurance's rejection of Hickory Grove's claim, under the utility-services-coverage extension provision, breached the policy's terms. Generally, the insured has the burden to prove a loss and to demonstrate coverage under a policy of insurance. *Sharonville v. Am. Emps. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 19; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 35. Here, the policy provided coverage under the utility-services-coverage-extension provision for losses caused by the suspension of utility services from utility-generating plants, switching stations, substations, transformers, and transmission lines (excluding overhead transmission and distribution lines). Hickory Grove's independent insurance agent admitted, however, that the power outage was not caused by damage to utility-generating plants, switching stations, substations, or transmission lines that

were not overhead transmission or distribution lines. Thus, the parties agreed that to establish coverage, Hickory Grove needed evidence that damage to a transformer caused the power outage.

{¶ 20} Hickory Grove argues on appeal that “while this catastrophic event prevented the identification of the particular transformer or electric pole failure that caused [its] power outage, there is sufficient circumstantial evidence that would create a genuine issue of fact to deny a motion for summary judgment.” “Circumstantial evidence” is “[e]vidence based on inference and not on personal knowledge or observation.” *Black’s Law Dictionary* 595 (8th Ed.2004); *see also State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 158; *Snider v. Carpenter*, 4th Dist. Athens No. 00CA030, 2000 WL 33226315, * 2 (Dec. 22, 2000). Circumstantial and direct evidence possess the same probative value and in some instances certain facts can be established only by circumstantial evidence. *State v. Moon*, 4th Dist. Adams No. 08CA875, 2009-Ohio-4830, ¶ 16, citing *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991). In some cases, circumstantial evidence may prove to be more certain, satisfying, and persuasive than direct evidence. *State v. Sexton*, 3d Dist. Union No. 14-13-25, 2015-Ohio-934, ¶ 69.

{¶ 21} In its appellate brief, to support its view that circumstantial evidence proves its claim, Hickory Grove relies on the second AEP April 12, 2012 e-mail to Hickory Grove that states that the outage occurred on June 29, 2012 and that the outage involved 138 wires down and broken poles. Once again, however, Hickory Grove’s independent agent, David Padden, provided uncontroverted deposition testimony that this e-mail did not provide evidence that damage to a transformer caused the outage and did not support the argument for coverage

under the policy's utility services coverage extension provision. In fact, the AEP December 19, 2013 e-mail that Padden relied on to support Hickory Grove's claim, stated only that a pole had been broken and had been replaced. As Padden conceded at his deposition, this e-mail did not state that a damaged transformer caused the power outage, and that his assumption to the contrary is merely an assumption that the evidence received from AEP does not support.

{¶ 22} In essence, we agree with the trial court's conclusion that circumstantial evidence does not support Hickory Grove's claim, and that Padden's speculative assumption is not premised on a reasonable inference from the evidence. Generally, speculation and unsupported conclusory assertions are insufficient to meet the nonmovant's reciprocal burden under Civ.R. 56(E) to withstand summary judgment. *See Bank of New York Mellon v. Bobo*, 2015-Ohio-4601, ___ N.E.3d ___, ¶ 13 (4th Dist.). In viewing circumstantial evidence, an inference can be disregarded as speculative if the evidence does not support the inference. *See, e.g., State v. Saunders*, 4th Dist. Hocking No. 13CA10, 2013-Ohio-3771, ¶ 17. It is not permissible to draw an inference from a deduction that is too uncertain or speculative, or that raises merely a conjecture or possibility. *Mahvi v. Stanley Builders*, 11th Dist. Geauga No. 2004-G-2607, 2005-Ohio-6581, ¶ 28, citing *Bragg v. Swann Super Cleaners, Inc.*, 10th Dist. Franklin No. 80AP-840, 1981 WL 3082 (Mar. 26, 1981).

{¶ 23} Therefore, after our de novo review of this matter we believe that the trial court correctly concluded that no evidence exists to create genuine issues of material fact that a direct physical loss to a transformer caused the power outage in June 2012 so as to entitle it to coverage under the policy's utility-services-coverage-extension provision. Thus, we overrule Hickory Grove's sole assignment of error.

V. CONCLUSION

{¶ 24} In summary, the trial court properly granted summary judgment in favor of Cincinnati Insurance on Hickory Grove's breach-of-contract claim. The summary-judgment evidence established that the insured policy's utility-services-coverage-extension provision did not cover the loss that Hickory Grove suffered.

{¶ 25} Accordingly, having overruled Hickory Grove's sole assignment of error, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.