[Cite as *Am. Family Ins. Co. v. Taylor*, 2010-Ohio-2756.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
AMERICAN FAMILY INSURANCE COMPANY	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	
	:	
-vs-	:	Case No. CT2010-0014
	:	
J. SCOTT TAYLOR, ET AL	:	
	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Civil appeal from the Muskingum County Court of Common Pleas, Case No. CH2005-0357
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	June 16, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
MARK MADDOX 987 South High Street Columbus, OH 43206	STEVEN E. HILLMAN 425 Metro Place North, Ste. 460 Dublin, OH 43017

Gwin, P.J.

{¶1} Defendant-appellants J. Scott Taylor and Kelly A. Taylor appeal the Muskingum County Court of Common Pleas' Judgment Entries filed January 18, 2009 and March 1, 2010 that granted appellee American Family Insurance Company's motions for summary judgment on appellants' breach of contract and bad faith counterclaims.

{¶2} This case comes to us on the accelerated calendar. App. R. 11.1, which governs accelerated calendar cases, provides, in pertinent part:

{¶3} "(C) Briefs. Briefs shall be in the form specified by App. R. 16. Appellant shall serve and file his brief within fifteen days after the date on which the record is filed. The appellee shall serve and file his brief within fifteen days after service of the brief of the appellant. Reply briefs shall not be filed unless ordered by the court.

{¶4} "(E) Determination and judgment on appeal. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form. The decision may be by judgment entry in which case it will not be published in any form."

{¶5} Additionally, Fifth District Local Appellate Rule 6 provides:

{¶6} "(B). Accelerated Calendar. Pursuant to App.R. 11.1, this Court has adopted an accelerated calendar. The Court shall determine from the docketing statement whether the appeal will be assigned to the accelerated or regular calendar. If the appeal is assigned to the accelerated calendar, oral arguments shall not be scheduled and the matter will be determined upon submission of all briefs."

{¶7} One of the important purposes of accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn*. (1983), 11 Ohio App.3d 158, 463 N.E.2d 655.

{¶8} Further, we note a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [*Citing State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

{¶9} This appeal shall be considered in accordance with the aforementioned rules.

STATEMENT OF THE FACTS AND CASE

{¶10} On or about May 20, 2003, the appellants claim that a storm caused damage to their house. On May 21, 2003, appellant J. Scott Taylor informed appellee that windows in the house were leaking due to seal failure or faulty installation. Appellee denied the claim because the leaking windows and consequential water damages were not covered by the policy of insurance issued by appellee to appellants.

{¶11} Later, appellants amended their claim by stating that not only had the windows leaked, but also that the front doors had blown open in a storm, permitting water to enter their home and cause damage. Appellants further claimed windows had been broken in the storm permitting water intrusion and causing damage. Appellants further claimed to have left a sliding door open, permitting water intrusion and causing

damage. Finally, appellants claimed the French drain around their home was clogged, causing water to accumulate and enter the basement through the foundation walls.

{¶12} Appellee agreed to reconsider appellants' claim, following execution of a non-waiver agreement by appellants on September 3, 2003. The agreement provided, that appellee was not waiving its rights under the policy. According to the agreement:

{¶13} “Because the insured wants the Company to proceed with the handling of any claims or lawsuits arising from this accident as it sees fit, and because the Company wants to proceed with the handling of any claims or lawsuits arising from the accident, but only on condition that by doing so it does not waive any rights it has or admit any liability as to coverage of that policy to this accident.”

{¶14} The agreement further states:

{¶15} “[American Family's] actions shall not be construed as a waiver of any policy defense the company now has, did have, or may have, nor as an estoppel against the company, nor as an admission of liability or company.”

{¶16} Following the signing of the agreement, Thomas D. Ball, Jr., an insurance adjuster for appellee, continued to investigate the claim.

{¶17} Appellee filed a Complaint for Declaratory Judgment on July 11, 2005, (amended July 15, 2005). Appellee sought "a declaration that there is not coverage under the Policy for damages sustained as a result of the defective windows and/or improper installation of the windows at the 1980 Rix Mills Road property."

{¶18} While answering appellee’s Complaint, appellants filed a Counterclaim containing two counts: one for breach of contract and one for bad faith.

{¶19} On March 7, 2007, appellee filed a Motion for Partial Summary Judgment as to appellants' breach of contract claim. Appellee's motion was granted by Judgment Entry filed January 18, 2008. On February 19, 2009, appellee filed a Motion for Summary Judgment as to appellants' bad faith claim. Appellee's motion was granted by Judgment Entry filed March 1, 2010.

{¶20} It is from the trial court's January 18, 2008 and February 19, 2009 Judgment Entries granting the appellee's motions for summary judgment that appellants have timely appealed raising the following three assignments of error:

{¶21} "I. THE TRIAL COURT ERRED WHEN IT GRANTED A SUMMARY JUDGMENT WHEN THE MATERIAL FACTS OF THIS CASE WERE IN DISPUTE. THUS THE GRANTING OF A SUMMARY JUDGMENT WAS INAPPROPRIATE AND SHOULD HAVE BEEN DENIED.

{¶22} "II. THE TRIAL COURT ERRED IN SUSTAINING THE PLAINTIFF/APPELLEE'S MOTION FOR SUMMARY JUDGMENT BY FINDING THAT WERE [sic.] NO DISPUTED FACTS AS TO THE WAIVER BY THE PLAINTIFF/APPELLEE'S OF THE CONTRACTUAL LIMITATION OF ONE YEAR IN WHICH TO BRING A COURT ACTION.

{¶23} "III. THE TRIAL COURT ERRED IN SUSTAINING THE PLAINTIFF/APPELLEE'S MOTION FOR SUMMARY JUDGMENT WHEN IT DISMISSED THE DEFENDANT/APPELLANT'S CLAIM OF BAD FAITH."

I & II

{¶24} This matter reaches us upon a grant of summary judgment. Summary judgment proceedings present the appellate court with the unique opportunity of

reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56(C).

{¶25} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, 604 N.E.2d 138.

{¶26} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co*. (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46.

{¶27} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party.

{¶28} In *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112,***.

{¶29} "The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's

claim.' Id. at 276. (Emphasis added.)" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶36-37, 40-42. (Parallel citations omitted.); *Egli v. Congress Lake Club* 5th Dist. No. 2009CA00216, 2010-Ohio-2444 at ¶ 24-26.

{¶30} In deciding whether there exists a genuine issue of fact, the evidence must be viewed in the nonmovant's favor. Civ.R. 56(C). Even the inferences to be drawn from the underlying facts contained in the evidentiary materials, such as affidavits and depositions, must be construed in a light most favorable to the party opposing the motion. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123, 1127.

{¶31} Appellate review of summary judgments is *de novo*. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241; *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35,506 N.E.2d 212. We stand in the shoes of the trial court and conduct an independent review of the record. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court is found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327.

{¶32} Appellant's first and second assignments of error relates to the propriety of the trial court's granting of summary judgment in favor of the appellee on appellants' counterclaims.

{¶33} Under their first assignment of error, appellants contend they introduced sufficient evidence to withstand summary judgment regarding whether there were acts or declarations by the parties recognizing some hope of adjustment or settlement later on down the road that would have reasonably led the insured to delay in bringing their action under the insurance contract. Appellants point to the affidavit of appellant J. Scott

Taylor in which he averred that Thomas D. Ball, Jr., the adjuster for the appellee, maintained an ongoing dialogue with the appellants from the September 9, 2003 visit and agreed that their claim was covered except for some minor adjustments to the dwelling claim. Further, Mr. Taylor averred that Mr. Ball told appellants that the claim would be paid. Finally, Mr. Taylor averred, "Thomas D. Ball, Jr. had a telephone discussion with the Defendant J. Scott Taylor stating that there was no question about the value and damage to the personal property and only some of the dwelling damage was not going to be paid but that the other 80% of the dwelling damage submitted on the Proof of Claim would be paid. At no time did Mr. Ball state that the claim was denied previously and would not be paid."

{¶34} Further, appellants point to the April 13, 2004 letter from Mr. Ball, which states, in relevant part,

{¶35} "We can however provide coverage for the personal property items that were outside the home and damaged by the wind, and for the flooring in the dining room area that was damaged by the water that came in through the patio door." (Appellee's Supplemental Brief in Support of Motion for Partial Summary Judgment filed November 7, 2007 at Exhibit 24). The trial court found that the policy issued by appellee to appellants contained the following provision:

{¶36} "**Suit Against Us: We** may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year after the loss or damage occurs." (Judgment Entry granting Partial Summary Judgment filed January 18, 2008 at 2). The trial court found that appellants did not commence suit within one year of the occurrence. The trial court further found that the appellants signed a "Non-

waiver Agreement." Id. The Non-Waiver Agreement executed by Mr. Taylor on September 3, 2003 acknowledges, "[t]here is a question as to whether insurance coverage . . . is applicable" to the Taylors' claim. The agreement notes that:

{¶37} "[B]ecause the insured wants the Company to proceed with the handling of any claims or lawsuits arising from the accident as it sees fit, and because the Company wants to proceed with the handling of any claims or lawsuits arising from the accident, but only on condition that by doing so it does not waive any rights it has or admit any liability as to coverage of that policy to this accident." Id.

{¶38} The Non-Waiver Agreement further provides that American Family's "actions shall not be construed as a waiver of any policy defense the company now has, did have, or may have, nor as an estoppel against the company, nor as an admission of liability or coverage".

{¶39} Accordingly, the trial court further found that appellee did not waive the one-year limitation period. We reverse the trial court's judgment on these issues because we conclude there is a genuine issue of material fact as to whether the there were acts or declarations by the parties recognizing some hope of adjustment or settlement that would have reasonably led the appellants to delay in bringing their action under the insurance contract

{¶40} We begin by noting that the Trier of fact has never decided the question as requested by the declaratory judgment action filed by appellee, i.e. whether the damage to appellants' property is or is not covered by the policy of insurance issued by appellee to appellants. Accordingly, the issue of whether the property damage is within

the coverage provided by the policy of insurance is still in dispute and was not resolved by the trial court in ruling on either of appellee's motions for summary judgment.

{¶41} In ruling on the motion for summary judgment, concerning appellants' breach of contract claim the trial court interpreted the April 13, 2004 letter from Mr. Ball to appellants as a denial of coverage and further interpreted the Non-Waiver Agreement executed by Mr. Taylor on September 3, 2003 to support its conclusion that appellants' claims were procedurally barred. However, we find the real question is whether the trial court correctly found no genuine issue of material fact with respect to whether appellee waived the limitations period.

{¶42} It is well settled that a one-year contractual limitations period for bringing suit pursuant to an insurance contract is lawful and enforceable. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427, 429-430, 424 N.E.2d 311. There, however, may be a waiver of a contractual time limitation provision by the insurance company "by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired." Id. at syllabus.

{¶43} Shortly after *Hounshell* was released, the Ohio Supreme Court held that, even when the claim has not been denied during the limitations period, where an "adjuster was attempting to gather information for consideration of the claim, and where no settlement offers were made or any assurances made with respect to the likelihood of future settlement offers, there is no basis for an estoppel of the insurance company's right to enforce the suit limitation provision." *Broadview Sav. & Loan Co. v. Buckeye*

Union Ins. Co. (May 12, 1982), 70 Ohio St.2d 47, 51, 434 N.E.2d 1092. Despite the holding in *Broadview,* Ohio appellate courts have found that reasonable minds could differ as to whether the insurance company waived the one-year contractual limitations period by not officially denying the claim or by leading the insured to believe that the claim was still viable after the contractual limitations period had expired. See *Dieckman v. Prudential Property and Cas. Ins. Co.* (1993), 87 Ohio App.3d 852, 623 N.E.2d 240, (adjuster repeatedly assured innocent spouse that she would be compensated for her interest in the property over and above the mortgage payoff and never denied her claims until after the limitations period); and *Rak v. Safeco Ins. Co. of Am.,* 8th Dist. No. 84318, 2004-Ohio-6284, ¶ 32, (insurer's representations led insured to believe that his claim would be covered and that insurer was working to resolve his claim, but that his claim would not be paid until conclusion of the police investigation/prosecution of the person responsible for stealing insureds' property). *Arp v. American Family Ins. Co.* Sixth Dist. No. L-09-1110, 2010-Ohio-2250 at ¶ 32.

{¶44} We recognize that appellee continually asserted that it was not waiving any of its rights pursuant to the insurance contract. We, however, find that American Family's words and actions are at odds. As such, we find that reasonable minds could differ regarding whether agreeing to pay a portion of the claim, continuing to discuss the resolution of the claim, taking the depositions of appellants, and hiring an expert to re-examine the damage to the premises, was a recognition of liability by appellee’s and whether, because of these actions, appellants held out a reasonable hope of adjustment which caused them not to file suit before the one-year period expired. The issue on the

motion for summary judgment was whether such actions on appellee's part could have reasonably led appellants' to believe that the matter was being settled.

{¶45} We recognize the conundrum faced by a policyholder who submits a claim for loss. Placing no time limit upon the insurer's *investigation*, yet requiring the claimant to file suit within a specified period, in effect penalizes the insured for working with the insurance company while the insurance company attempts to assess its own liability. Allowing insurance companies a virtually unlimited time to investigate while denying the policyholder the same time to sue on the policy, requires the prudent claimant to file suit as a precautionary measure when the one-year deadline approaches, regardless of the status of the claim. In addition to requiring a level of sophistication many claimants may not possess, such an approach encourages needless litigation.

{¶46} Based upon the foregoing, appellant's first and second assignments of error are sustained.

III.

{¶47} In their third assignment of error, appellants maintain that the trial court erred in granting partial summary judgment in favor of appellee on appellants' "bad faith" claim. We agree.

{¶48} To grant a motion for summary judgment brought by an insurer on the issue of whether it lacked good faith in the satisfaction of an insured's claim, a court must find after viewing the evidence in a light most favorable to the insured, that the claim was fairly debatable and the refusal was premised on either the status of the law at the time of the denial or the facts that gave rise to the claim. *Tokles v. Midwestern Indemnity Co.*(1992), 65 Ohio St.3d 621, 630, 605 N.E.2d 936, 943, overruled in part on

other grounds by *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 554. To withstand a motion for summary judgment in a bad faith claim, an insured must oppose such a motion with evidence which tends to show that the insurer had no reasonable justification for refusing the claim, and the insurer either had actual knowledge of that fact or intentionally failed to determine whether there was any reasonable justification for refusing the claim. Id.

{¶49} In the case at bar, the issue of whether the damage was covered under the policy of insurance issued by the appellee to the appellants has never been resolved. It does not appear from the record before us that the trial court has ruled upon the appellee's Complaint for Declaratory Judgment. Thus, whether coverage exits or does not exist has not been determined.

{¶50} Accordingly, the issue of whether the insurer had a reasonable justification for refusing the claim is premature. Therefore, the trial court erred in granting appellee's motion for summary judgment on appellant's bad faith claim.

{¶51} Appellants' third assignment of error is sustained.

{¶52} The judgment of the Muskingum County Court of Common Pleas is reversed and this matter is remanded for proceedings in accordance with our opinion and the law.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

_____

HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN

_____

HON. SHEILA G. FARMER

WSG:clw 0610

[Cite as *Am. Family Ins. Co. v. Taylor*, 2010-Ohio-2756.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

AMERICAN FAMILY INSURANCE COMPANY	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
J. SCOTT TAYLOR, ET AL	:	
Defendant-Appellant	:	CASE NO. CT2010-0014

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Muskingum County Court of Common Pleas is reversed and this matter is remanded for proceedings in accordance with our opinion and the law. Costs to appellee.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER