RENDERED: FEBRUARY 27, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-002165-MR

KENTUCKY GROWERS INSURANCE COMPANY APPELLANT

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 11-CI-00329

WANDA JEAN THIELE, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF HIRAM CAMPBELL, JR. APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Kentucky Growers Insurance Company, appeals from a judgment of the Rockcastle Circuit Court finding that a homeowner's policy insuring against "collapse" caused by "hidden insect damage" afforded coverage for damages sustained to a home owned by Appellee, Wanda Jean Theile.

For the reasons set forth herein, we reverse and remand to the trial court for further proceedings.

In 2004, Kentucky Growers issued a homeowner's policy insuring a residence in Rockcastle County, Kentucky, owned by Hiram Campbell, Jr. The policy contained the following incidental coverage provision:

> 8. COLLAPSE – "We" pay for direct physical loss to property covered under Coverages A, B and C involving the collapse of a building or a part of a building caused only by the following:
> . . .
> (b) hidden insect or vermin damage or hidden decay;
> . . .
> Collapse does not mean settling, cracking, shrinking, bulging or expanding.

Campbell died in December 2005, after which the house was occupied by Campbell's granddaughter, Patricia Thiele, and occasionally her mother (Campbell's daughter, Appellant Wanda Thiele (collectively "Thiele")). The homeowner's policy was self-renewing and remained in effect after Campbell's death.

While moving a refrigerator in the kitchen in early January 2011, Thiele observed insect debris, which she discovered was from a significant infestation of termites. Thiele thereafter filed a claim with Kentucky Growers for structural damage resulting from the termites. An adjuster from Kentucky Growers denied coverage without going to or inspecting the residence. Thiele's attorney then sent a letter to Kentucky Growers pointing out the policy provision affording coverage for hidden insect damage. After its corporate office reviewed the letter, Kentucky

Growers again denied coverage. Subsequently, on January 20, 2011, Kentucky Growers issued an endorsement to the homeowner's policy that voided and superseded all prior endorsements and provided the following exclusion:

> It is understood and agreed that "collapse coverage caused by hidden insect damage" is excluded.

On December 29, 2011, Thiele filed an action in the Rockcastle Circuit Court against Kentucky Growers in her individual capacity, as well as executrix of Campbell's estate, seeking a declaration of rights that the homeowner's policy covered the property damage in question. Thiele also sought damages for violations of Kentucky's Unfair Claims Settlement Practices Act. On May 2, 2012, after taking Thiele's deposition, Kentucky Growers filed a petition for a declaratory judgment that the policy excluded coverage for the alleged loss because the house had not "collapsed" as contemplated by the policy. In support of its argument, Kentucky Growers attached several photographs of the house depicting bulging and sinking walls but no actual collapse of the structure.

On September 28, 2012, the trial court entered an order denying Kentucky Growers' motion and entering judgment in favor of Thiele. The Court indentified the "overarching issue" as "the definition of the word 'collapse' as used in the policy." Although the trial court acknowledged that there was no dispute that the floors of the house were still standing, and that the roof and walls were still intact, it nevertheless found that under the majority rule a "collapse" had occurred.

> Though there is no Kentucky case directly on point, the Court finds that, applying the majority rule, there has

> been a collapse of the structure at issue here. "For coverage to be provided, the hidden decay must have caused a 'collapse.' A majority of jurisdictions hold that '[t]he structure need not be in imminent danger of collapse, but the damage to it must substantially impair the structural integrity of the building. That is, the damage must alter the basic stability or structure of the building in order to constitute a collapse." Lee R. Russ, et al., Couch on Insurance, § 153:81 (3d ed. 2012).
>
> To require that the entire building "break down or go to pieces suddenly" would almost completely abrogate Growers' responsibility under this insurance contract to pay for damage caused by hidden inspects. After all, how often does a structure fully collapse in an instant? The more reasonable result is to require that the damage "substantially impair the structural integrity of the building. The Court makes a factual finding that although Thiele's house is still standing, and in fact is even habitable to a certain extent, the structural integrity of the building has been compromised. Numerous photographs in the file represent damage, and in fact, there has been no real disagreement to the fact that damage does exist in the house.

Kentucky Growers thereafter appealed to this Court.

On appeal, Kentucky Growers argues that the trial court erred in finding that the damage to Thiele's house constituted a collapse within the "legal" but not "traditional" sense of the term. Kentucky Growers points out that although the trial court purported to rely on the "majority rule," such contravenes the existing Kentucky law set out in *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. 1962). We must agree.

As the trial court acknowledged, this matter hinges entirely upon the meaning of "collapse" as that term was used in the homeowner's policy. The

interpretation of an insurance policy is a question of law, not of fact. *American Commerce Ins. Co. v. Brown*, 168 S.W.3d 386, 388 (Ky. App. 2004). Accordingly, the trial court's resolution of the issue herein is subject to a *de novo* review in this Court. *Pryor v. Colony Ins.*, 414 S.W.3d 424, 427 (Ky. App. 2013).

In *Curtsinger*, Kentucky's then-highest Court interpreted a policy covering losses caused by "[c]ollapse of the building or any part thereof." 361 S.W.2d at 763. After excessive rainfall had apparently eroded the ground underlying the insured's house, a porch floor and roof had "broken loose from the house, and the front 'had gone down about a foot." *Id.* at 764. Within a month, the insured's house had developed large cracks in the basement wall and floor and a carport roof had sagged and pulled away from the adjoining wall. A jury found that the damage was covered under the insured's homeowner's policy and awarded damages accordingly.

On appeal, the *Curtsinger* Court noted that the legal question was "whether the undisputed facts evidenced a collapse within the meaning of the policy." In finding that they did not, the Court held:

> The word 'collapse' in connection with a building or other structure has a well-understood common meaning. *Webster's Collegiate Dictionary* defines the word as, '(1) To break down or go to pieces suddenly, especially by falling in of sides; to cave in.' A more elaborate judicial definition is given in 14 C.J.S. *Collapse*, p. 1316. *Compare Spears v. Commonwealth*, Ky., 256 S.W.2d 362.
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> . . .

> *Central Mutual Insurance Co. v. Royal*, 269 Ala. 372, 113 So.2d 680, 72 A.L.R.2d 1283, is strikingly like the present case. The house had settled and cracks appeared, running through the walls of the building. The owners heard a 'racket that sounded like something had fallen and broken in the house.' A little later they noticed the walls had cracked on three sides and the foundation was broken and cracked wide open. A segment of the wall had sunk or dropped. The Alabama court, following *Nugent v. General Insurance Co.*, 8 Cir., 253 F.2d 800, and quoting from [*Skelly v. Fidelity & Casualty Co.*, 169 A. 78 ( )], held that the term 'collapse' in relation to a building was without ambiguity and that the condition for which indemnity was sought was not within the coverage of the policy. The few other cases of like character are summarized in Annotations.
>
> It seems to us that the mere subsidence of the floor of the porch, which pulled it and the roof away from the building a few inches, cannot be regarded as the collapse of any part of the building, and that the trial court should have so ruled as a matter of law.

*Curtsinger*, 361 S.W.2d at 764-65.

The trial court herein referenced the *Curtsinger* decision, but nevertheless concluded that it was factually distinguishable because it involved the collapse of a porch, not a dwelling, and did not result from hidden insect damage. Furthermore, the trial court noted:

> The Court finds that *Curtsinger* would not provide the fairest result in this case. To require that the entire building "break down or fall to pieces suddenly" would almost completely abrogate Growers' responsibility under the insurance contract to pay for damage caused by hidden insects. After all, how often does a structure fully collapse in an instant? The more reasonable result is to require that the damage "substantially impair the structural integrity of the building." The Court makes a factual finding that although Thiele's house is still

> standing, and in fact it is even habitable to a certain extent, the structural integrity of the building has been compromised.

Although we do not necessarily disagree with the trial court's opinion that *Curtsinger* results in an unfair result, we must disagree that it is not controlling law. The *Curtsinger* Court's discussion of the term "collapse" is in no manner limited in its application to a porch. Rather, the Court determined that "collapse" in connection with a building or other structure has "a well-understood common meaning." We find nothing in *Curtsinger* to support a varying definition of the term depending on whether the collapse is used to describe a porch, garage or any other part or whole of a building.

As an intermediate appellate court, this Court is bound by published decisions of the Kentucky Supreme Court. Rules of the Supreme Court (SCR) 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor Court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000). In the same vein, the trial court herein was bound by the *Curtsinger* decision regardless of whether such may now be characterized as the minority rule. Furthermore, we must agree with Kentucky Growers that the *Curtsinger* court's definition of "collapse" is hardly an aberration as other jurisdictions agree with such definition. *See State Farm Fire & Casualty Co. v. Slade*, 747 So.2d 293, 326 (Ala. 1999) (no coverage where the insureds could "point to no evidence indicating that any part of their home had actually fallen in, i.e., collapsed, or that the structural integrity of their home was so damaged that

their home was unfit for human habitation."); *Clendenning v. Worcester Ins. Co.*, 700 N.E.2d 846, 848 (Mass. App. Ct. 1998) ("The hidden destructive process must run its full course to be insurable. . . . There are no degrees of collapse. The policy does not cover 'imminent' collapse, as [the insured] argues; it only covers the collapse."); *Heintz v. U.S. Fid. & and Guar. Co*., 730 S.W.2d 268, 269 (Mo. App. 1987)("There must have been a falling down or collapsing of part of the building. A condition of impending collapse is insufficient.")

Even assuming *arguendo* that Kentucky recognized the majority rule espoused by the trial court, we still must conclude that Thiele has failed to prove that the damage to her house constituted a collapse. As the trial court noted, those jurisdictions adopting the majority rule hold that although the structure need not have collapsed or even be in "imminent danger" of collapse, "the damage to it must substantially impair the structural integrity of the building. That is, the damage must alter the basic stability or structure of the building in order to constitute a 'collapse.'" Lee R. Russ, et al., Couch on Insurance, § 153:81 (3d ed. 2012) (quoting *Sandalwood Condominium Ass'n at Wildwood, Inc. v. Allstate Ins. Co.*, 294 F.Supp.2d 1315, 1318 (M.D. Fla. 2003)).

The only proof submitted by Thiele was photographs depicting damaged areas in several rooms of the house, as well as a note from a handyman detailing his estimate of the damage and extent of necessary repairs. We find nothing in the record to conclusively establish that the structural integrity has been "substantially impaired." It is undisputed that the structure herein is standing and,

in fact, is habitable as evidence by the fact that Thiele continues to stay there. Although the house may be so extensively damaged that it may eventually fall down and that repairs are not economically reasonable, we cannot conclude that the evidence supports a finding that the damage falls within the strict definition of "collapse" as established in *Curtsinger* or the more liberal definition adopted in other jurisdictions. As such, the trial court clearly erred in finding that Kentucky Growers was obligated under the homeowner's policy.

For the reasons set forth herein, the Rockcastle Circuit Court's declaratory judgment is reversed and this matter is remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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