COMMONWEALTH OF KENTUCK
SUPREME COURT
CASE NO. 2023-SC-0220-D

STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY, *ET AL*. — APPELLANTS

v. ON APPEAL FROM THE

COURT OF APPEALS
CASE NO. 2022-CA-0409

MUHLENBERG CIRCUIT COURT
CASE NO. 20-CI-00015

GREENVILLE CUMBERLAND PRESBYTERIAN CHURCH — APPELLEE

REPLY BRIEF OF APPELLANTS
STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY
AND GREENVILLE INSURANCE, INC.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the Reply Brief of Appellants State Auto Property & Casualty Insurance Company and Greenville Insurance, Inc. was served this 19th day of December, 2023 as follows: electronically filed with the Kentucky Supreme Court, c/o Hon. Kelly Stephens, Clerk of the Supreme Court of the Commonwealth of Kentucky, State Capitol, 700 Capital Avenue, Room 235, Frankfort, Kentucky 40601; and one copy each by regular United States mail to: Hon. M. Austin Mehr, Hon. Bartley K. Hagerman, Mehr, Fairbanks & Peterson Trial Lawyers, PLLC, 201 West Short Street, Suite 800, Lexington, Kentucky 40507; and Hon. Brian W. Wiggins, Judge, Muhlenberg Circuit Court, Muhlenberg County Judicial Building, 136 S. Main Street, P.O. Box 776, Greenville, Kentucky 42345.

Respectfully submitted,

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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. The Church has the Burden Proving the Insured Building Sustained a "Collapse"

Contrary to the Church's argument on p. 9-10 of its Appellee Brief, multiple policy exclusions (such as "wear and tear," "decay," "deterioration," "hidden or latent defect," and the like) – not just the collapse exclusion – were cited in State Auto's October 22, 2019 coverage decision letter and admittedly apply to the underlying insurance claim. Record on Appeal at 111-263. Indeed, the Church has continually admitted that the issue with the insured building's roof structure stems from the ends of the middle trusses having deteriorated and "decayed" over many decades and the defect being "hidden." E.g., Appellee Brief, citing evidence from Steve Joyce, David Zimmerman, Harold Gaston, and Jordan Yeiser regarding such "hidden decay." Because of this, the only coverage potentially provided by the policy for this claim (and the only coverage at issue in this appeal) is the "Additional Coverage" for "Collapse." Record on Appeal at 111-226.

The Church, as the party seeking to establish the applicability of the "Additional Coverage" for "Collapse," has the burden of proving that the insured building did, in fact, sustain a "collapse." E.g., N. Am. Acc. Ins. Co. v. White, 80 S.W.2d 577, 578 (Ky. 1935).

II. State Auto's Position is that a Portion of the Insured Building Must have Actually Collapsed for Coverage to be Available – and that did Not Occur

Contrary to the Church's argument on p. 6 of its Appellee Brief, State Auto does not argue "that the entire structure must be reduced to a pile of rubble on the ground." Rather, State Auto's argument is that a portion of the insured building must have "actually collapsed" under the definition of "collapse" established in Thiele v. Ky. Growers Ins. Co., 522 S.W.3d 198 (Ky. 2017), and Niagara Fire Ins. Co. v. Curtsinger, 361 S.W.2d 762 (Ky. 1962). Appellant Brief at p. 11-18.

The Church's entire argument is essentially that a collapse occurred because: 1) its engineers, Messrs. Gaston & Peterson, subjectively opined that a collapse happened; and 2) Mr. Gaston saw "paint and small wood chips and/or sawdust" that was "being cleaned up from the floor" of the insured building. But the term "collapse" in the context of a property insurance policy has been given a definitive legal meaning by this Court, and the Church's "*ipse dixit* argument regarding an alternative standard is incompatible with well-accepted precedent, and thus unpersuasive." Fresh v. Commonwealth, 2009-SC-000797, 2011 Ky. Unpub. LEXIS 41, *13 (Apr. 21, 2011). And, in Kentucky (as well as in other states requiring "actual collapse"), "not every debris-producing event is a collapse of part of a building." Council Tower Assn. v. Axis Specialty Ins. Co., 630 F.3d 725, 728 (8th Cir. 2011) (applying Missouri law).

As a matter of law, for there to be coverage under a property insurance policy for "collapse," Kentucky requires an "actual collapse." State Auto's position does not "rest[] largely on a misunderstanding of Gaston's letter" or "ignore[] the fact that the [ends of the middle] roof trusses rotted and failed." Appellee Brief at p. 14. Rather, State Auto's position is based entirely upon this Court's well-established definition of the term "collapse," case law from Kentucky and other states interpreting that definition, and the undisputed facts of record. ***Post-loss*** photographs irrefutably illustrate that the insured building did not sustain a "collapse" under the Curtsinger / Thiele standard:

In short, portions of the insured building's roof structure bowing or sagging or sliding or dropping few inches does not constitute a "collapse" as that term has been defined by this Court and its predecessor (and the courts of numerous other states, including Ohio and Missouri, that, like Kenutcky, follow the "most stringent interpretation" of the term "collapse").

III. The Policy is Not Ambiguous

Contrary to the Church's argument on p. 10-11, 22-24 of its Appellee Brief, the term "collapse" is not ambiguous simply because it is undefined in the policy. This Court has explicitly recognized: "Of course, failing to define a term does not always, or even often, result in an ambiguity." Davis v. Progressive Direct Ins. Co., 626 S.W.3d 518, 521 (Ky. 2021). This is particularly so when the term at issue has been given a definitive legal meaning (here, via Curtsinger and Thiele) and becomes "a legal term of art which [State Auto] incorporated into its contract with [the Church]." Scottsdale Ins. Co. v. Flowers, 513 F.3d 546, 566 (6th Cir. 2008). The Church's suggestion that "[c]ommon sense dictates that a collapse may occur . . . more slowly, over time" directly contradicts the Curtsinger / Thiele standard.

Similarly, the Church's "catch-22" argument on p. 11-12, 19 of its Appellee Brief is not only entirely immaterial to the question before this Court (i.e., the continued validity

and scope of the Curtsinger / Thiele standard), it completely ignores the fact that, as the Church's engineer, Mr. Gaston, noted, the ~120-year-old insured building's "roof had over many years experienced a bowing" and the Church failed to investigate the cause of that bowing or attempt to remedy it. In fact, had the Church undertaken such an investigation at any point in time during the decades before this claim was filed, it would have discovered the decaying ends of the middle trusses and could have undertaken corrective action to protect the insured building and reinforce the roof structure before the ends of the middle trusses completely deteriorated. The Church seeks nothing more than to "rewrite" its insurance policy to "enlarge the risk" underwritten by State Auto and obtain coverage not provided. That is strictly prohibited by Kentucky law. St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, 870 S.W.2d 223, 226-227 (Ky. 1994).

IV. Nothing has Changed Since Thiele to Support Changing Kentucky Law

"Concomitant with a high court's duty to 'say what the law is,' is the duty to . . . maintain stability and consistency in the law." Gasaway v. Commonwealth, 671 S.W.3d 298, 328 (Ky. 2023). "The doctrine of *stare decisis et non queita movere* (to stand by precedent and not to disturb settled points) was embedded in the law prior to the admission of this Commonwealth to the Union." Tucker v. Tri-State Lawn & Garden, 708 S.W.2d 116, 117 (Ky. App. 1986). "Unlike some jurisdictions, *stare decisis* has real meaning to this Court." Calloway Cty. Sheriff's Dept. v. Woodall, 607 S.W.3d 557, 583 (Ky. 2020) (Keller, J., concurring); see Gasaway, 671 S.W.3d at 328 (noting "Kentucky's strong and longstanding commitment to stability in the law."). "*Stare Decisis* compels us to decide every case with deference to precedent." Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, 286 S.W.3d 790, 795 (Ky. 2009); accord Cook v. Popplewell, 394 S.W.3d 323, 330 (Ky. 2011) ("[T]he *stare decisis* doctrine is entitled to great weight, and

is adhered to unless the principle established is clearly erroneous."). *Stare decisis* "is the means by which we ensure that the law will not merely change erratically . . . [and] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." Osborne v. Keeney, 399 S.W.3d 1, 16-17 (Ky. 2012). It "is vital that there be stability in the courts in adhering to decisions deliberately made after ample consideration." Ballard Cty. v. Ky. Cty. Debt Commn., 162 S.W.2d 771, 773 (Ky. 1942).

The Church argues on p. 25-27 of its Appellee Brief that this Court should abandon long-standing Kentucky law. Just as the appellant did in Thiele, the Church "requests that we abrogate Curtsinger, and instead adopt the more lenient majority rule." 522 S.W.3d at 199. But nothing has changed since Thiele was decided a mere six years ago to support a departure from the established rule. As this Court explained:

> We have consistently held that the words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning. The meaning of "collapse" is clear. Moreover, a significant number of states still adhere to a plain language interpretation of "collapse." Therefore, we believe that Curtsinger was rightly decided and see no reason to depart from its holding.

Id. at 200 (internal citations omitted).

Indeed, this case illustrates the very purpose of the "actual collapse" standard followed by Kentucky and numerous other states. It is a bright-line rule that leaves no room for interpretation or ambiguity as applied. It avoids courts getting bogged down in the weeds and parties arguing over, as the Church rhetorically asks on p. 18 of its Appellee Brief, "How many more pieces of the building needed to cave in and fall to the floor in order for a collapse to have been deemed to occur?" Under the "actual collapse" standard, the answer is clear and immediately obvious: either a building (or part of a building) has

fallen down or caved in so as to "lose its distinctive character as a building," or it hasn't. Cent. Mut. Ins. Co. v. Royal, 113 So. 2d 680, 683 (Ala. 1959) (cited by Curtsinger at 764).

V. The Muhlenberg Circuit Court Properly Entered Summary Judgment in Favor of State Auto on the Bad Faith and Negligence Claims for Reasons Independent from the Coverage Issue

The Court of Appeals was incorrect when it wrote: "[T]he trial court did not substantively address the merits of other claims alleged in the complaint in its orders other than to dismiss them as dependent on the existence of coverage." Opinion at p. 21-22. While this statement may be true regarding the negligence claim against Greenville (failure to procure a sufficient amount of insurance), it is ***not*** accurate regarding the bad faith and negligence claims against State Auto.[1]

In its March 28, 2022 Order, the Muhlenberg Circuit Court explicitly granted summary judgment to State Auto on the bad faith and negligence claims for reasons entirely separate and independent from the "existence of coverage," as follows:

> Additionally, given the "fairly debatable" issue of whether there had been a "collapse" for which the policy issued by Defendant State Auto provides coverage, Plaintiffs bad faith claims fail as a matter of law. Messer v. Universal Underwriters Ins. Co., 598 S.W.3d 578 (Ky. App. 2019).
>
> Further, Plaintiff fails to state a valid negligence claim against State Auto as a matter of law because negligence cannot be premised on contractual duties and bad faith cannot be premised on negligence. Nami Resources Co. v. Asher Land & Mineral, 554 S.W.3d 323 (Ky. 2018), and

[1] And, thus, the Church's statement on p. 6 of its Appellee Brief that "[t]he Court of Appeals unanimously reversed . . . each of the trial court's summary judgment rulings" is likewise false. The Court of Appeals "express[ed] no opinion on the merits of" the Church's bad faith and negligence claims against State Auto. Opinion at p. 22. Also, of note, the Church's assertion on p. 28-29 of its Appellee Brief that the bad faith claims were completely bifurcated from the breach of contract claim is likewise false. In its March 10, 2020 Order, the Muhlenberg Circuit Court bifurcated the bad faith claims only for purposes of trial and (incorrectly) denied State Auto's motion to bifurcate and stay discovery regarding the bad faith claims.

United Servs. Auto. Ass'n v. Bult, 183 S.W.3d 181 (Ky. App. 2003).

The Church's failure to address these matters in its Brief filed with the Court of Appeals is precisely why State Auto argued (both in the Court of Appeals and on p. 18-19, 24 of its Appellant Brief filed in this Court) that the Church waived / abandoned any appeal regarding summary judgment entered on those bases. And that is also why State Auto's Appellant Brief included "a lengthy analysis of the Church's bad faith and negligence claims" (to which the Church notably did not respond in its Appellee Brief). Appellee Brief at p. 28.

Regardless, as detailed on p. 18-25 of State Auto's Appellant Brief, the Muhlenberg Circuit Court properly entered summary judgment in favor of State Auto on the bad faith and negligence claims for reasons independent from the coverage issue.

CONCLUSION

Insurance coverage for "collapse" is triggered only if there is an "actual collapse." While the Church's building may have been in poor condition because the "roof had over many years experienced a bowing" and "had dropped a few more inches," the building and roof were still standing. No "collapse" as defined by Kentucky law ever occurred.

No genuine issue of material fact exists. The Muhlenberg Circuit Court correctly analyzed the issues of law and properly granted summary judgment in favor of State Auto and Greenville on all claims asserted by the Church. Its Orders should be affirmed, and the Opinion of the Court of Appeals should be reversed.

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WORD-COUNT CERTIFICATE

I hereby certify that, in accordance with Rule 31(G)(3)(b), the Reply Brief of Appellants State Auto Property & Casualty Insurance Company and Greenville Insurance, Inc. contains 2,231 words.

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