COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

DIANE M. ZUK, et al.,	:	**CASE NO. 2014 CVH 01501**
Plaintiffs	:	
vs.	:	**Judge McBride**
ACUITY INSURANCE COMPANY	:	**DECISION/ENTRY**
Defendant	:	

Haynes and Snyder, W. Stephen Haynes, counsel for the plaintiffs Diane M. Zuk and W. Kenneth Zuk, 204 North Street, Batavia, Ohio 45103.

Mannion & Gray Co., LPA, Judd R. Uhl and Patrick B. Healy, counsel for the defendant Acuity Insurance Company, 909 Wright's Summit Parkway, Suite 230, Ft. Wright, Kentucky 41011.

This cause is before the court for consideration of a motion for partial summary judgment filed by the defendant Acuity Insurance Company.

The court scheduled and held a hearing on the motion for partial summary judgment on April 17, 2015. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceedings, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

The court must grant summary judgment, as requested by a moving party, if "(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) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or

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[1] Civ. R. 56(C); *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977); and, *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993).
[2] *Engel v. Corrigan*, 12 Ohio App.3d 34, 35, 465 N.E.2d 932 (8th Dist.1983); *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378 (6th Dist.1983); *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).
[3] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).
[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.

is it "so one-sided that the party must prevail as a matter of law[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden 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 material fact on the essential element(s) of the nonmoving party's claims.[9] 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.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

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[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).
[8] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[9] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); and, *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 674 N.E.2d 1164 (1997).
[10] Id.
[11] Id.

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

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[12] Id.
[13] Id.
[14] *Baughn v. Reynoldsburg*, 78 Ohio App.3d 561, 563, 605 N.E.2d 478 (10th Dist.1992).
[15] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *Welco Indus., Inc.*, supra, 67 Ohio St.3d at 346; and, *Gockel v. Eble*, 98 Ohio App.3d 281, 292, 648 N.E.2d 539 (8th Dist.1994).
[16] *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 659, 612 N.E.2d 1295 (9th Dist.1992).
[17] Civ.R.56(E); *Carlton v. Davisson*, 104 Ohio App.3d 636, 646, 662 N.E.2d 1112 (6th Dist.1995); and, *Smith v. A-Best Products Co.*, 4th Dist. Scioto No 94 CA 2309, 1996 WL 80533 (Feb. 20, 1996).
[18] *Carlton*, supra, 104 Ohio App.3d at 646; *Brannon v. Rinzler*, 77 Ohio App.3d 749, 756, 603 N.E.2d 1049 (2nd Dist.1991).

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

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[19] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).
[20] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); and, *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[21] *Loopco Indus., Inc.*, supra, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

FINDINGS OF FACT

In viewing all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the plaintiffs, who are the non-moving parties, the court makes the following findings of fact:

On November 10, 2014, plaintiffs Diane M. Zuk and W. Kenneth Zuk filed the present action against defendant Acuity Insurance Company alleging breach of contract and bad faith. Acuity Insurance Company now moves for partial summary judgment as to the bad faith claims and the claim for punitive damages.

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[23] *Wing*, supra, 59 Ohio St.3d at 111.
[24] Civ.R.56(D); *Holeski v. Lawrence*, 85 Ohio App.3d 824, 834, 621 N.E.2d 802 (11th Dist.1993).

Diane Zuk and W. Kenneth Zuk reside at 3487 Saint Annes Turn, Cincinnati, Ohio.[25] This property was insured by defendant Acuity Insurance Company from November 1, 2013 through November 1, 2014.[26]

On November 18, 2013, Mr. Zuk learned when he returned from out of town that several homes in the area had been damaged by high winds on November 17th.[27] A ground-level visual inspection "revealed what appeared to be abnormalities in the roof at the southwest corner of the residence."[28] Mr. Zuk called Acuity Insurance's claims number and notified his agent, Lynn Moore, about the issue.[29] On November 27, 2013, Jay Machcinski, an employee of Acuity Insurance, spoke to Diane Zuk, and she informed him that she and her husband had a roofer inspect their home after the last storm and that there were no shingles missing.[30]

Jay Machcinski did a ground-level inspection of the roof on December 3, 2013 and made the decision to have an independent contractor inspect the roof.[31] Acuity then contracted with Donan Engineering to inspect the plaintiffs' roof.[32] On December 23, 2013, Jeffrey Ellis, an employee of Donan Forensic Engineering, conducted the roof inspection.[33] Ellis found a loose shingle on one slope of the roof where "nails had been improperly located high on the shingle[,]" and also found nearby shingles that were missing nails or had nails driven through them.[34] He found no creased, torn or missing

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[25] Affidavit Opposing Partial Summary Judgment by Diane M. Zuk at ¶ 1; and, Affidavit Opposing Partial Summary Judgment by W. Kenneth Zuk at ¶ 1.
[26] Id.
[27] W. Kenneth Zuk Aff., Exhibit A at ¶ 3.
[28] Id.
[29] Id.
[30] Affidavit of Jay Machcinski at ¶¶ 2 and 4.
[31] Id. at ¶ 5.
[32] Id. at ¶ 6.
[33] Id.; Defendant's Exhibit B; W. Kenneth Zuk Aff., Exhibit A at ¶ 4; and, Diane Zuk Aff. at ¶ 2.
[34] Defendant's Exhibit B at pgs. 2-3.

shingles on the eave of any slope of the roof and found no torn or missing shingles on the ridges or hips.[35] Ellis did find that "a number of decorative overlay sections exhibit granule loss and surface cracking."[36] He also noted that, as the adhesion self-seal strips on the roof degrade, poorly fastened shingles become more exposed and this causes "an asphalt shingle roofing system to become more prone to wind damage as it ages."[37]

The report submitted by Jeffrey Ellis concluded that there were no creased, torn, or missing shingles consistent with wind damage and that the one loose shingle Ellis did find was due to improper nailing.[38] Based on the report, Acuity Insurance sent a letter to the plaintiffs on January 13, 2014 denying their claim and the file was then closed.[39]

Mr. Zuk states in his affidavit that he hired Justin Eno of Sterling Home Services in April 2014 to inspect the roof and he personally observed Mr. Eno lifting up shingles on the southwest corner of the roof by merely touching the edges.[40] Mrs. Zuk similarly attests that she watched a third party on the roof show where several shingles had been damaged by wind.[41] Mr. Zuk requested that Mr. Machcinski inspect the roof with Mr. Eno present in emails in April 2014 but the claim was not reopened and no further inspection occurred.[42] Both Mr. Zuk and Mrs. Zuk state in their affidavits that some damaged shingles have blown off or fallen off of the roof.[43]

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[35] Id. at pg. 2.
[36] Id. at pg. 3.
[37] Id. at pg. 4.
[38] Id.
[39] Machcinski Aff. at ¶¶ 8-9.
[40] W. Kenneth Zuk Aff., Exhibit A at ¶ 8.
[41] Diane Zuk Aff. at ¶ 3.
[42] W. Kenneth Zuk Aff., Exhibit A at ¶ 10. See also, Plaintiffs' Exhibit D.
[43] W. Kenneth Zuk Aff. at ¶ 9; and, Diane Zuk Aff. at ¶ 5. See also, Plaintiffs' Exhibit H-1, H-2 and H-3.

On February 27, 2014, Acuity Insurance received another claim for property damage from the plaintiffs related to interior water damage to a room in the residence.[44] Acuity Insurance adjuster John O'Leary states in his affidavit that, on February 28, 2014, Acuity Insurance received a call from one of the plaintiffs stating that they would be out of town but that the company could contact their assistant, Melissa Allen, to gain access to the home to inspect the damage.[45] Mr. Zuk states in his affidavit that Mr. O'Leary had been asked not to inspect the premises until the plaintiffs' returned.[46]

John O'Leary met Melissa Allen at the plaintiffs' home on March 5, 2014 and investigated the water damage.[47] O'Leary prepared an estimate of $876.84 to repair the damage and a check was issued on that same day for that estimate amount minus the plaintiffs' deductible.[48] He also emailed Mr. Zuk and stated that it appeared the damage was the result of an ice dam which formed on the roof and that the only damage he observed was to "the ceilings, walls, and carpet, all of which were dry at the time of inspection."[49] Acuity's claim file for the interior water damage was then closed.[50]

Mr. Zuk avers that Mr. O'Leary did not lift any carpet and "made only a cursory inspection[,]" although the court would note that Mr. Zuk was not present for the inspection.[51] In response to an email from Mr. Zuk, Mr. O'Leary states that he would not take up the carpet without the homeowners' permission and that photographs sent to him did indicate some damage.[52] Mr. O'Leary goes on to write that "[i]f there are any

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[44] Affidavit of John O'Leary at ¶ 3. See also, W. Kenneth Zuk Aff., Exhibit A at ¶ 9.
[45] Id. at ¶ 4.
[46] W. Kenneth Zuk Aff., Exhibit A at ¶ 9.
[47] Id. at ¶ 5.
[48] Id. at ¶¶ 5-6.
[49] Defendant's Exhibit D.
[50] O'Leary Aff. at ¶ 6.
[51] W. Kenneth Zuk Aff., Exhibit A at ¶ 9.
[52] Plaintiffs' Exhibit E.

required repairs to the subfloor in the closet and if the carpet can not (*sic*) be satisfactorily cleaned, then you can have the contractor contact me directly and we will evaluate any supplemental estimate."[53] Mr. O'Leary indicates in that email that he did not observe any mold at the time of his inspection "either from the carpet or in the basement looking up towards the subfloor."[54]

On October 6, 2014, the plaintiffs received a letter from Barbara Jensen of Acuity Insurance notifying them that their homeowners' coverage would be terminated as of November 11, 2014 due to "claims occurring November 17, 2013 and February 13, 2014 the roof has deteriorated on the home.[55]

LEGAL ANALYSIS

(A) BAD FAITH

"Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer."[56] " * * * [T]he liability arises from the breach of a positive legal duty imposed by law due to the relationships of the parties."[57] "This legal duty is the duty imposed upon the insurer to

[53] Id.
[54] Id.
[55] Id., Exhibit A at ¶ 11.
[56] *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 452 N.E.2d 1315 (1983), paragraph one of the syllabus.
[57] Id. at 276, citing *Battista v. Lebanon Trotting Assn.*, 538 F.2d 111, 117-118 (6th Cir.1976); and *Saberton v. Greenwald*, 146 Ohio St. 414, 66 N.E.2d 224.

act in good faith and its bad faith refusal to settle a claim is a breach of that duty and imposes liability sounding in tort."[58]

"Mere refusal to pay insurance is not, in itself, conclusive of bad faith."[59] "As part of its duty, an insurer must 'assess claims after an appropriate and careful investigation' and reach conclusions as a result of 'the weighing of probabilities in a fair and honest way.'"[60]

"* * * [I]n an insurance context, 'the insurer's failure to pay a claim need not involve bad intent or malice to amount to 'bad faith.' "[61] "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."[62] "An insurer lacks reasonable justification for denying a claim when its refusal to pay is predicated on an arbitrary or capricious belief that the insured is not entitled to coverage."[63] "However, denial of a claim may be reasonably justified when 'the claim was fairly debatable and the refusal is premised on either the status of the law at the time of the denial or the facts that gave rise to the claim.' "[64]

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[58] Id.
[59] Id. at 277.
[60] *Dorsey v. Campbell Hauling*, 10th Dist. Franklin No. 02AP-961, 2003-Ohio-3341, ¶ 19, quoting *Motorists Mut. Ins. Co. v. Said*, 63 Ohio St.3d 690, 590 N.E.2d 1228, (1992), overruled on other grounds.
[61] *Barker v. American Standard Ins.*, 6th Dist. Wood No. WD-03-093, 2004-Ohio-4144, ¶ 22, quoting *Stefano v. Commodore Cove E., Ltd.*, 145 Ohio App.3d 290, 293, 762 N.E.2d 1023 (9th Dist.2001), citing *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 1994-Ohio-461, 644 N.E.2d 397 (1994).
[62] *Zoppo* at paragraph one of the syllabus.
[63] *Barker*, supra, 2004-Ohio-4144 at ¶ 22, citing, *Hoskins*, supra, 6 Ohio St.3d at 277.
[64] *Barbour v. Household Life Ins. Co.*, N.D. Ohio No. 1:11CV110, 2012 WL 1109993, *5, quoting *Tokles & Sons, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 630, 605 N.E.2d 936 (1992); and citing *Corbo Properties, Ltd. v. Seneca Ins. Co., Inc.*, 771 F.Supp.2d 877, 880 (N.D.Ohio 2011).

"Summary judgment * * * is appropriately granted to the defendant on a claim of bad faith where the record is devoid of any evidence tending to show a lack of good faith on the part of the defendant."[65]

A lack of good faith on the part of the insurer can be found where the insurer's investigation ignores information or fails to explore evidence which tended to support the plaintiffs' claims.[66] A question of fact on the issue of bad faith was found where the insurer limited its investigation of stolen merchandise to an investigation its own insured and ignored the finding of its own adjuster that a rival business may have been responsible for the theft.[67] The court found that there was at least a question of fact as to whether the insurer conducted a fair, objective and impartial investigation and had any reasonable justification for denying the claim.[68]

In a case involving a medical policy, the court noted that, while the insurance company did not seek to interview the claimant's treating physician, there was no requirement in law that the insurer do so or go beyond a typical medical records review.[69]

In a case involving a claim for mold damage to a home, the insurer retained two experts during its investigation, one who issued a report that the mold resulted from design defects in the home's ventilation system and another who found that the mold was due to improper maintenance of cedar siding.[70] At the time the insurer sent a letter declining coverage, the insured had not forwarded a copy of any report from their own

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[65] *Barker*, supra, at ¶ 22, citing *Labate v. Natl. City Corp.*, 113 Ohio App.3d 182, 190, 680 N.E.2d 693 (9th Dist.1996).
[66] *Barbour*, supra, at *9, discussing, *Zoppo*, supra, 71 Ohio St.3d at 555-556.
[67] *Bucci v. Nationwide Ins. Co.*, 7th Dist. Mahoning No. 90CA83, 1991 WL 274273, *7.
[68] Id.
[69] *Barbour*, supra, at *9.
[70] *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 40 (8th Dist.2008).

expert.[71] The appellate court found that there was no evidence of bad faith on the part of the insurer.[72]

A claim for hail damage to roof shingles was examined by another court and summary judgment was granted to the insurer.[73] The trial court found that the insurer met its burden under the summary judgment standard of demonstrating that it obtained expert reports which found that any existing damage to the roof was not caused by hail damage.[74] The insured failed to meet its reciprocal burden of providing a qualified expert opinion that the claimed damage to the shingles was the result of hail damage.[75] The appellate court upheld the trial court's decision, finding that no genuine issue of material fact remained as to the insured's claim for bad faith.[76]

Similarly, the denial of a claim for cracking in the wall of a condominium unit was found to have not been made in bad faith where the insurer hired an independent insurance adjustor who, along with an independent engineer, inspected the damage and found that the cracking was due to settling which had been caused by water damage.[77] Further, although that initial finding of water damage was later disproved, at the time of the insurer's denial of the claim it had performed an "appropriate and careful investigation" and had weighed the probabilities in a fair and honest way.[78]

An insurer's denial of a claim for fire damage did not lack good faith when the insurer relied on a report prepared by an independent fire investigation firm and

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[71] Id.
[72] Id. at ¶¶ 38-40.
[73] *Charlesgate Commons Condominium Assn. v. W. Reserve Group*, 6th Dist. Lucas No. L-14-1039, 2014-Ohio-4342, ¶¶ 4-6.
[74] Id. at ¶¶ 6 and 16.
[75] Id. at ¶ 16.
[76] Id.
[77] *La Plas Condo. Assn. v. Utica Natl. Ins. Group*, 3rd Dist. Hancock No. 5-04-15, 2004-Ohio-5347, ¶¶ 2 and 17.
[78] Id. at ¶ 17.

interviews with various witnesses to determine that the fire was incendiary in origin and, thus, the result of arson.[79]

In the case at bar, with regard to the denial of the claim for wind damage to the roof, Acuity Insurance hired an independent contractor to examine the roof. Jeffrey Ellis prepared a report after examining the roof which indicated that he did not find any wind damage to the plaintiffs' roof and that the one loose shingle he found was due to improper installation. There was no conflicting report or evidence in the file and Acuity denied the claim and closed the file. Several months later, the plaintiffs attempted to have the file re-opened and the claim reexamined but there was still no expert report supporting their contention that any damaged shingles were due to wind damage. Further, the plaintiffs have submitted no legal support for the idea that hearsay statements contained in an affidavit of the insured regarding what a contractor related to him would be proper evidence supporting a claim. Seeing damaged or loose shingles does not mean that condition was caused by wind damage to the roof.

Acuity Insurance performed a reasonable investigation into the claim for wind damage to the roof and its expert determined that there was no such damage. Therefore, even making all inferences in favor of the plaintiffs, there can be no genuine issue of material fact as to this claim for bad faith and the defendant is entitled to judgment as a matter of law on this claim.

The other claim, which is for water damage to an interior room, is a closer question. An Acuity Insurance adjuster responded to the claim and inspected the room for the claimed damage. He found some damage to the ceilings, walls, and carpet, which were dry at the time of the inspection. He prepared an estimate for the damage

[79] *Corbo*, supra, 771 F.Supp.2d at 881-882.

he observed and sent a check for that amount minus the applicable deductible and the case file was closed.

This was clearly not a denial of coverage and, in fact, a check was sent to the plaintiffs for the amount of damages the adjuster found during his inspection. However, "* * * the duty of good faith extends beyond those scenarios involving an outright denial of payment of a claim."[80] Even in cases where a claim is ultimately paid, " 'the insurer's foot-dragging in the claims handling and evaluation process could support a bad-faith cause of action.' "[81] "In *Zoppo*, * * * the court stated that an insurer has an affirmative duty to adequately investigate a claim."[82]

The adjuster did not interview the homeowners about their claimed damages and he did not pull up the carpet despite knowing that the claim was for water damage. When Mr. Zuk sent further inquiries regarding the claim and sent documentation of damage not covered by Mr. O'Leary's estimate, O'Leary's response was that he would not take up the carpet without the homeowners' permission and that the plaintiffs could submit an estimate for any further damages. There is no indication that Mr. O'Leary requested permission to take up the carpet either before or after his inspection. However, Mr. O'Leary's April email does indicate that he examined both the carpet and the floor in the basement looking up towards the subfloor and observed no mold damage at either location.

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[80] *Drouard v. United Servs. Auto. Assn.*, 6th Dist. Lucas No. L-06-1275, ¶ 16, citing *TOL Aviation v. Intercargo Ins. Co.*, 6th Dist. Nos. L-05-1308 and L-06-1050, 2006-Ohio-6061, ¶ 50.
[81] Id., quoting *Unklesbay v. Fenwick*, 2nd Dist. Clark No. 2005-CA108, 2006-Ohio-2630, ¶ 15; and citing *Mundy v. Roy*, 2nd Dist. Clark No. 2005-CA-28, 2006-Ohio-993.
[82] *DiGiacomo v. Westfield Companies*, 7th Dist. Mahoning No. 96-CA-239, 1999 WL 1138580, *5, citing *Zoppo*, supra, 71 Ohio St.3d at 558.

The court finds, under the summary judgment standard and making all inferences in favor of the plaintiffs as the non-moving parties, that there are genuine issues of material fact remaining in the case at bar as to whether the defendant handled the claim for damage to the interior room in bad faith, specifically whether the insurer conducted an adequate investigation of the claimed damages. As such, summary judgment must be denied as to this claim.

(B) PUNITIVE DAMAGES

The defendant also moves for summary judgment on the plaintiffs' claim for punitive damages relating to the bad faith claim.

"Punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud, or insult on the part of the insurer."[83] Actual malice has been defined as " 'that state of mind under which a person's conduct is characterized by hatred or ill will, a spirit of revenge, retaliation, or a determination to vent his feelings upon other persons.'"[84] Actual malice was later defined as " '(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.' "[85] The fact that a party is entitled to compensatory damages

[83] *Hoskins*, supra, 6 Ohio St.3d 272 at paragraph two of the syllabus.
[84] Id. at 277, quoting *Columbus Finance v. Howard*, 42 Ohio St.2d 178, 183-184, 327 N.E.2d 654 (1975).
[85] *Stewart v. Siciliano*, 985 N.E.2d 226, 2012-Ohio-6123, ¶ 16 (11th Dist.2012), quoting *Zoppo*, supra, 71 Ohio St.3d at 558, quoting *Preston v. Murty*, 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.

for bad faith does not automatically mean that said party is entitled to exemplary damages.[86]

In the case at bar, the remaining bad faith claim involves damage to an interior room due to water leaking into the room. The court has found that, while Acuity Insurance did investigate the claim, there is a question of fact as to whether the investigation was reasonable and adequate under the circumstances. However, there is no evidence before the court that the defendant's conduct in investigating the claim was characterized by hatred, ill will or a spirit of revenge. Further, there is no evidence that the defendant exhibited a conscious disregard for the rights and safety of the plaintiffs that had a great probability of causing substantial harm. Additionally, there is no evidence of fraud or insult on the part of the defendant.

Acuity Insurance's adjuster examined the room where the water damage was claimed to have occurred. While he did not pull up the carpet, he examined the carpet and the floor in the basement looking up toward the subfloor under that carpet. The court has found that whether this was an adequate investigation is a question of fact. However, the court finds that there is no question of fact that this one disputable inadequacy in the investigation would not satisfy the standard of actual malice, fraud or insult.

As a result, the defendant's motion for summary judgment shall be granted as to the plaintiffs' claim for punitive damages.

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[86] *Helmick v. Republic-Franklin Ins. Co.*, 39 Ohio St.3d 71, 75, 529 N.E.2d 464 (1988), citing *Hoskins* at 278. See also, *Siciliano*, supra at ¶ 14.

CONCLUSION

The defendant's motion for partial summary judgment is well-taken and is hereby granted as to the plaintiffs' claim for bad faith regarding wind damage to the shingles on the roof of their home and as to the plaintiffs' claim for punitive damages.

The defendant's motion for partial summary judgment is not well-taken and is hereby denied as to the plaintiffs' claim for bad faith regarding water damage to an interior room of their home.

A case management conference, which will involve the scheduling of a trial in the case, shall be held in this case on June 19, 2015 at 10:45 a.m.

IT IS SO ORDERED.

DATED: 6-5-15

Judge Jerry R. McBride