RENDERED: DECEMBER 19, 2024
TO BE PUBLISHED

Supreme Court of Kentucky

2023-SC-0220-DG

STATE AUTO PROPERTY & CASUALTY COMPANY; AND GREENVILLE INSURANCE, INC. — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2022-CA-0409
MUHLENBERG CIRCUIT COURT NO. 20-CI-00015

GREENVILLE CUMBERLAND PRESBYTERIAN CHURCH — APPELLEE

OPINION OF THE COURT BY JUSTICE LAMBERT

AFFIRMING AND REMANDING

We must address whether a building insurance policy issued by State Auto Property and Casualty Company (State Auto) to the Greenville Cumberland Presbyterian Church (the Church) provided coverage for the collapse of the Church's roof. We hold that the policy at issue provided coverage, as the Church's roof sustained an actual collapse. *See Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. 1962); *Thiele v. Kentucky Growers Ins. Co.*, 522 S.W.3d 198 (Ky. 2017).

I. FACTS AND PROCEDURAL BACKGROUND

The facts of this case are not in dispute. The Church was insured by a policy issued by State Auto through Greenville Insurance, Inc., the agent. The

one-story sanctuary building and roof support system that is the subject of the underlying claim was somewhere around one hundred and twenty years old and was actively being used as a sanctuary. The policy issued by State Auto stated that it would "pay for direct physical loss of or damage to Covered Property[1] at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." The "Additional Coverages" section of the policy provided in relevant part:

> **d. Collapse**
>
> **(1)** We will pay for direct physical loss or damage to Covered Property, caused by **collapse of** a building or **any part of a building** insured under this policy, if the collapse is caused by one or more of the following:
>
> . . .
>
> **(b)** Hidden decay;
>
> **(c)** Hidden insect or vermin damage;
>
> . . .
>
> **(4)** Collapse does not include settling, cracking, shrinkage, bulging, or expansion.

(Emphasis added). Apart from providing that collapse did not include "settling, cracking, shrinkage, bulging, or expansion" the policy did not define the term collapse. The "Exclusions" section of policy stipulated that State Auto would "not pay for loss or damage caused by or resulting from . . . Collapse, except as provided in the Additional Coverage for Collapse. But if collapse results in a

[1] "Covered Property" included "[b]uildings, meaning the buildings and structures at the premises described in the declarations[.]"

Covered Cause of Loss, [it would] pay for the loss or damage caused by that Covered Cause of Loss." Finally, the policy provided that the owners of the building had a duty to mitigate damage. The policy mandated under its "Duties In The Event Of Loss Or Damage" provision that the Church "must see that the following are done in the event of loss or damage to Covered Property. . . Take all reasonable steps to protect the Covered Property from further damage[.]"

In September 2019, the Church's elders noticed that the fasteners on the building's metal roof were rusting and hired David Zimmerman to replace the roof. On the first day of the project the metal roof, which had been placed atop a pre-existing asphalt shingle roof, was removed. On the second day, Zimmerman noticed that a significant section of the roof had dropped overnight. The Church hired Harold Gaston, a licensed engineer with Gaston Engineering, PSC, to investigate.

Gaston first went to the church on September 7, 2019, but was unable to enter the attic because the access door was too small. Nevertheless, he recommended that the roof replacement project cease immediately because the roof had "experienced a bowing of the wood members in the roof and the roof [had] a curve on both sides." In addition, "[t]he walls, made from bricks stacked in several layers, 3 or more, were bowing outward on each side of the sanctuary." Eleven days later on September 18, Gaston returned to the building and "noticed that the ceiling/roof had dropped a few more inches." By the time of the September 18 visit, the access door to the attic had been made

larger and Gaston was able to enter it. In a September 26, 2019, letter to the Church's elders Gaston opined on his findings:

> The attic is a "stick framed truss" with rough sawn lumber made in such a way that there is a pitched roof with a vaulted ceiling. The wood framing is seated on a wood timber that is affixed to the top of the brick wall on each side. The main sanctuary essentially has four of these "trusses," one at the front, one at the rear, and two equally spaced between those. Several of the trusses have had repairs, and more repairs will be needed due to splitting of the wood trusses. New timber, more modern present day wood has been added to repair more minor issues in the last 20 years.
>
> I inspected the area where the ceiling had dropped in the sanctuary and found that it was not just the ceiling but the entire roof structure. The ends of the trusses, or stick members built into a truss, of the two center trusses had experienced rotting due to long term water infiltration. The trim on the outside had allowed water to enter and these truss tails had stayed wet over a considerable amount of time. It appears that this area on each side had experienced wetness and changing temperature and allowed the truss "tails" to decay. Essentially the tails or seats of the trusses had [rotted] and allowed the truss to basically start sliding down the inside wall. The only thing holding the roof up at the time was the ceiling and roof cross framing, making a frame that was therefore holding the roof in the air. It was at this time that the decision was made to evacuate this area of the building and it was decided that emergency shoring was needed. It was my thought that if nothing was done the roof of the building was imminent to collapse. If this happens, the walls will fall as a secondary collapse due to the way the roof would fall.
>
> . . .
>
> It is my opinion that a long term water leak softened the ends of the trusses causing them to rot and finally fall. The leak was localized to the center two trusses and did not happen to the other wood trusses or to the wood framing material. The rough sawn lumber used in the framing of this building is still hard, very hard, and very dense and is continuing to do its job supporting the structure. Only the ones in the area of the leaks have rotted and are causing this catastrophic situation. The situation needs to be remedied as soon as possible. The temporary supports seem to have [helped] the building from further damage but it is imperative that a better solution be completed in short order. . . I feel sure

> that this is water damage, unknown to exist, over a period of [time] as the cause of the problem.

As a result of Gaston's discoveries, a local construction company "came immediately and added two posts under the falling trusses to stabilize the structure." This was seen as a "short term remedy" and Gaston was adamant that a more permanent repair would be necessary. On September 27, 2019, the Church submitted its claim to State Auto which stated a loss date of September 4 of that year.

On October 22, 2019, State Auto sent the Church a letter informing it that its claim was being denied. Accompanying the letter was a report prepared by licensed engineer Kurt Bergman who had inspected the building on October 2, 2019. The report discussed that, within the sanctuary, there were vertical displacements, i.e., sagging, "of up to 4 inches between the east exterior wall and the roof framing" as well as "[v]ertical misalignments of up to 3.6 degrees" along the western wall of the sanctuary. As for the roof, the Bergman report recounted the following:

> The trusses were sagging in the attic. This is commonly known as truss creep, or truss spreading, and is, to some degree, common with this type of truss. Although the entire attic could not be safely accessed, we measured vertical displacements of up to 2.75 inches at the center of the truss relative to the outer portions. Along the wood trusses, cracking and splitting were on individual chords. . . This was consistent with long-term deformations of the trusses occurring over a period of years. The numerous repairs on the exterior at/near the location of the truss bearing was also consistent with long-term movement. . . Although this resulted in some outward force acting on the east and west exterior walls, it accounted for only a portion of the distress relating to the vertical displacement of the roof.

> At the truss bearing locations, there were also varying degrees of localized deterioration. . . At the west-bearing end, localized deterioration and dark, localized staining was consistent with
>
> incremental decay due to water intrusion events. This deterioration was consistent with long-term decay due to multiple water intrusion events along the roofing terminations. This deterioration was considered to have occurred over many years and did not result in vertical displacement of the truss at the west exterior wall.
>
> At the eastern end of the truss, where vertical displacement was observed, there was extensive deterioration at the end of the truss as well as the wooden top plate of the east exterior wall. The location had deterioration accompanying dark staining and hollowed-out sections of the wood members consistent with wood-digesting insect activity. Such insect-related deterioration often accompanies areas of water intrusion due to the availability of moisture at the food source. These two conditions were also considered to have persisted over a period of many years. . .
>
> As deterioration increased at the eastern-bearing end of the truss on the east exterior wall, the truss migrated downward binding against the inside of the exterior wall. As subsequent sagging of the truss occurred along the iterative movements resulting from thermal expansion and contraction, the truss began to induce additional outward forces on the exterior walls on the east and west sides of the sanctuary. Eventually, after the walls were pushed outward and deterioration at the wood-bearing points and connections to the exterior wall had sufficiently deteriorated, there was no longer adequate bearing to support the truss frame and overhead roof structure, and the truss framing (and ceiling) displaced downward.

Based on the foregoing, Bergman concluded that "partial failure of the roof structure was caused by one or more of: Long-term truss spreading (creep), deterioration caused by rot/decay, [and] insect activity at the perimeter bearing locations of the wood trusses[,]" and that the "observed building conditions resulted from long-term movements in the truss over a period of years." State Auto's denial letter explained that the Church's claim was being denied on the

basis that "this type of loss is not considered a collapse under this form." The letter explained that "[a]n abrupt falling down of the building (or a portion of the building) did not occur due to a 'Specified Cause of Loss' as defined by the policy."

Following State Auto's denial of the claim, the Church filed suit against State Auto and Greenville Insurance on January 16, 2020. The suit alleged that the damage to the church constituted a "collapse" under its policy and that State Auto therefore breached its contract by failing to indemnify the Church. The suit also alleged extra-contractual claims for violations of Kentucky's Unfair Claims Settlement Act[2] against State Auto, common law bad faith against State Auto, and negligence against both State Auto and Greenville Insurance. About two months after the suit was filed, the circuit court granted State Auto's motion to bifurcate the breach of contract claim from the extra-contractual claims for the purposes of trial.

Well over a year later on September 16, 2021, State Auto filed a motion for summary judgment on the Church's breach of contract claim. The motion and its accompanying memorandum of law highlighted that Kentucky's current definition of "collapse" was established in *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762 (Ky. 1962) and was thereafter reaffirmed in *Thiele v. Kentucky Growers Ins. Co.*, 522 S.W.3d 198 (Ky. 2017). That definition is: "'[t]o break

[2] The Church made separate claims under Kentucky Revised Statute (KRS) 304.12-230 ("Unfair claims settlement practices") and KRS 304.12-235 ("Time of payment of claims").

down or go to pieces suddenly, especially by falling in of sides; to cave in.'" *Curtsinger*, 361 S.W.2d at 764 (quoting *Webster's Collegiate Dictionary*)[3]; *Thiele*, 522 S.W.3d at 199 (quoting *Curtsinger*). State Auto asserted that the *Curtsinger* definition required an "actual collapse" of the building to trigger coverage and therefore its state of "imminent collapse" was insufficient.

The Church filed a combined response to State Auto's motion for summary judgment and cross-motion for summary judgment. The response and cross-motion included the original Gaston letter as well as an affidavit from Gaston dated October 12, 2021, in which he attested that, based on his knowledge, experience, and personal observations of the building, it had sustained "a collapse of the roof structure" that was "due to hidden decay[.]" He went on to say that that he witnessed debris being cleaned up including "paint and small wood chips and/or sawdust right underneath where the truss had collapsed." Finally, he clarified:

> In my September 26, 2019 letter, when I stated that "[i]t was my thought that if nothing was done the roof to the building would collapse[,]" I meant that the *entire roof* was imminent to *completely collapse*. It remains my opinion that the roof structure dropped and fell down significantly, which in my opinion is a collapse of part of the building.

In addition to the Gaston letter and affidavit, the Church's response and cross-motion included a letter dated March 20, 2020, from Jordan Yeiser, a licensed engineer with Yeiser Structural, who was hired by counsel for the Church to conduct "a limited visual structural observation" of the building "to determine

[3] The edition relied upon by the *Curtsinger* Court was not specified.

the cause(s) of the collapse of the exterior walls and roof framing." The Yeiser letter opined:

> Based on our observation, the supporting ends of the main roof trusses have exhibited decay. The roof truss bearing experienced sudden failure at the bearing ends resulting in a collapse. Once the bearing failed, the main roof truss began to push on the
>
> exterior walls and full collapse was only prevented due to friction between the truss ends and the exterior wall. This friction engagement temporarily prevented a full collapse of the roof; however, the exterior walls were not able to resist the thrust induced by the failed bearing condition. The exterior walls began to rotate outward which allowed further vertical displacement of the main roof trusses.
>
> The sudden failure of the main roof truss bearing occurred due to the hidden decay of the roof truss bearing ends. At the time of our site visit, there was no evidence of leaks on the interior of the sanctuary in the proximity of the main roof truss bearing. It is our opinion that the moisture (which was not evident from the sanctuary) into the wall system caused deterioration which led to the sudden collapse of the roof framing.

Based on the foregoing, the Church argued that the roof had collapsed, and State Auto was required to indemnify it for losses sustained due to the collapse.

In the alternative, the Church argued that the term "collapse" as used in the policy at issue was ambiguous and therefore must be construed in its favor. The Church first asserted that the policy was ambiguous because it did not define the word collapse, and each party had offered reasonable definitions for plain meaning of that term, citing *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 641 (Ky. 2007) ("Given that the policy contains terms that are not defined, and given that each party has suggested a reasonable interpretation in light of the plain meaning of the words used, we

conclude the policy is ambiguous."). The Church further asserted that ambiguity was created by the conflict between the collapse coverage clause and the clause that imposed a duty upon the Church to mitigate damage. The Church reasoned that "[h]ad [it] done nothing and waited until the entire building collapsed, State Auto would undoubtedly deny the claim based on a failure to mitigate damages in accordance with the [duty to mitigate] provision." But instead, the Church acted promptly by placing bracing to prevent the entire building from collapsing, and now State Auto was asserting that "the roof did not collapse enough[]" to trigger the collapse coverage provision.

After briefing and oral arguments, the circuit court granted summary judgment in favor of State Auto on the breach of contract claim. The entirety of the circuit court's analysis was as follows:

> The Court's determination on these motions turns upon whether the event at the church is a "collapse" as that term is described in the policy and applicable law. Controlling in this case is the Kentucky Supreme Court decision in *Thiele v. Kentucky Growers Insurance Company*, 522 S.W.3d 198, 200 (Ky. 2017). There, the Commonwealth's high court strictly interpreted the word "collapse," essentially reaffirming the "rubble on the ground" standard enunciated in *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762, 764 (Ky. 1962). The policy language at issue in *Thiele* is virtually identical to the language set out in the policy in question in the case at bar. As noted by [State Auto], to rule in [the Church's] favor would require this Court to ignore binding precedent.
>
> Here, the facts, which are not in dispute, establish there has been no "collapse" for which the policy issued by [State Auto] provides coverage. [The Church's] breach of contract claim fails as a matter of law.

On the same day, the circuit court entered separate orders granting summary judgment in favor of State Auto and Greenville Insurance, respectively, for the

Church's remaining extra-contractual claims. The court reasoned that because there was no breach of contract as a matter of law, State Auto could not be held liable for either common law or statutory bad faith. Moreover, the court concluded that the Church could not prove negligence by either State Auto or Greenville insurance "because negligence cannot be premised on contractual duties and bad faith cannot be premised on negligence."

The Church appealed the circuit court's rulings to the Court of Appeals, and a unanimous panel reversed. *Greenville Cumberland Presbyterian Church v. State Auto Prop. & Cas. Co.*, 2022-CA-0409-MR, 2023 WL 3027873 (Ky. App. Apr. 21, 2023). Relying primarily upon Gaston's and Yeiser's observations and findings, the panel held that the definition of collapse under *Curtsinger* and *Thiele*—"[t]o break down or to go to pieces suddenly, especially by falling in of sides; to cave in"—had been satisfied because the evidence established a collapse of part of the building. *Id.* at *2. It reasoned that the *Curtsinger* definition "does not expressly require that something fall all the way to the ground or be reduced to rubble on the ground, as insinuated by the trial court," and that, at any rate, Gaston did observe "debris (a/k/a rubble)" on the ground within the sanctuary. *Id.* at *3.

The Court of Appeals acknowledged that *Curtsinger* and *Theile* were binding precedent but held both cases were factually distinguishable. *Id.* at *5-*6. It highlighted that *Curtsinger* involved damage to a home as a result of a porch floor subsiding and pulling it and the roof away from the building whereas the case at bar involved "the roof structure/framework [dropping]

down significantly obviously (sic) from above—in a fashion more akin to the common understanding of falling in or caving in than the facts of *Curtsinger*." *Id*. at *5. As for *Thiele*, the court reasoned that in that case "there was no dispute that the facts did not show a collapse as defined by *Curtsinger*" and the insured had instead argued in favor of adopting a broader definition of collapse, which this Court rejected. *Id*. at *6.

The Court of Appeals then went on to hold that, assuming arguendo that there had not been a collapse under *Curtsinger* and *Theile*, the collapse coverage policy was ambiguous as applied to these facts and must therefore be construed in the Church's favor. *Id*. at *7. The court first disagreed with the circuit court's finding that *Curtsinger* established a "rubble on the ground" standard regarding the definition of collapse, stating: "The plain meaning of collapse set forth in binding Kentucky precedent does not expressly require that the building (or any part of it) fall all the way to the ground or be reduced to rubble on the ground." *Id*. The Court of Appeals concluded that both parties had presented reasonable interpretations of the collapse provision and accordingly held that it was ambiguous.[4] *Id*. at *7-*8 (citing *Vorherr v. Coldiron*, 525 S.W.3d 532, 543 (Ky. App. 2017) ("'A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent, yet reasonable, interpretations.'")).

[4] As the court found ambiguity based on the parties' differing yet reasonable interpretations, it acknowledged but explicitly chose not to address the Church's additional argument that ambiguity was created by the conflict between the collapse coverage provision and the duty to mitigate provision. *Id*. at *8.

The Court of Appeals held that the circuit court erred by entering summary judgment in State Auto's favor on the issue of coverage. *Id.* at *9. It reversed the circuit court's order granting summary judgment to State Auto and remanded with directions to enter summary judgment in the Church's favor on its breach of contract claim and to conduct further proceedings concerning the Church's extra-contractual claims. *Id.* Thereafter, State Auto appealed the Court of Appeals' ruling and this Court granted discretionary review.

Additional facts are discussed below as necessary.

II. ANALYSIS

A. Applicable legal standards.

The primary issue to be addressed is whether the circuit court properly granted summary judgment in favor of State Auto based upon its ruling that a collapse did not occur. Summary judgment is appropriate "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky.1991); CR[5] 56.03. As summary judgments do not involve fact finding, this Court conducts a *de novo* review, providing no deference to the circuit court's ruling. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (quoting *3D Enters. Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174

[5] Kentucky Rule of Civil Procedure.

S.W.3d 440, 445 (Ky.2005)). In doing so, we must remain mindful "that summary judgment is to be cautiously applied and should not be used as a substitute for trial" and that we must view the evidence "in a light most favorable to the party opposing the motion for summary judgment[,]" resolving all doubts in that party's favor. *Steelvest*, 807 S.W.2d at 483, 480.

The crux of this case is the interpretation of the term "collapse" within an insurance contract. "The construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court[,]" that is likewise subject to *de novo* review. *Morganfield Nat. Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) (citing *Equitable Life Assurance Soc'y of the United States v. Wells*, 101 F.2d 608 (6th Cir.1939)). In general, this Court construes insurance contracts "liberally in favor of the insured." *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223, 227 (Ky. 1994). "Any limitation on coverage or an exclusion in a policy must be clearly stated in order to apprise the insured of such limitations[,]" and all exclusions are to be interpreted narrowly with all questions resolved in favor of the insured. *Id.* Finally, if the language of an insurance policy is unambiguous, it will be "interpreted according to the usage of the average man and as they would be read and understood by him." *Kentucky Ass'n of Ctys. All Lines Fund Tr. v. McClendon*, 157 S.W.3d 626, 630 (Ky. 2005). But, if a policy is ambiguous and is therefore "susceptible to two interpretations, one favorable to the insured and the other favorable to the insurer, the former will be

adopted." *Koch v. Ocean Accident & Guar. Corp.*, 230 S.W.2d 893, 895-96 (Ky. App. 1950).

B. An actual collapse of the roof occurred. Therefore, pursuant to *Curtsinger* and *Thiele*, State Auto was required to indemnify the Church based on the collapse of "any part of the building."

1) *Curtsinger* and *Theile*

The primary issue to be addressed is whether a collapse occurred pursuant to *Curtsinger* and *Thiele*. We begin with a discussion of those precedents.

In *Curtsinger*, Niagara Fire Insurance Company issued a home insurance policy to William and Katherine Curtsinger which included coverage "for direct loss or damage by 'Collapse of the building or any part thereof,' and by 'Landslide[.]'" 361 S.W.2d at 763. The policy did not define the term collapse. The Curtsingers' one-story brick home was built on a hillside, and a screened in porch with a concrete floor was built onto the back of it. *Id.* After several weeks of "unprecedented and excessive" rainfall, the Curtsingers heard a loud noise one evening and awoke the next day to discover that "the porch floor and roof had broken loose from the house, and the front 'had gone down about a foot.'" *Id.* at 764. After Niagara Fire denied the Curtsingers' claim, they filed suit and obtained a judgment in their favor from which Niagara Fire appealed asserting that neither a collapse nor a landslide caused the asserted damage. *Id.*

The *Curtsinger* Court first noted that "insurance against a collapse of a building or any part thereof is uncommon[,]"[6] but in cases involving collapse as an exclusion from liability "it is generally held that the distinctive character as a building or a substantial part thereof must have been lost or damaged in order to bring the condition within the exception." *Id.* (citing Appleman, Insurance Law, § 3080). It then held that "[t]he 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.'" *Id.* It further stated that "a more elaborate judicial definition is given in 14 C.J.S. Collapse, p. 1316" but did not provide that definition. *Id.* Per *Cent. Mut. Ins. Co. v. Royal*, that definition is:

> To break down or fail abruptly and utterly, to cave in; to close by falling or shrinking together, to fall together, or into an irregular mass or flattened form, through loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it, or to fall together suddenly, as the two sides of a hollow vessel; to go to pieces; and to shrink up; as, a tube in a steam boiler collapses.

113 So.2d 680, 682-83 (Ala. 1959); *see also Eaglestein v. Pac. Nat. Fire Ins. Co.*, 377 S.W.2d 540, 545 (Mo. App. 1964) (providing same definition).

[6] While this may have been true in 1962, this Court discerns from the abundance of case law from nearly every other jurisdiction in the country concerning the issue we confront herein that it is no longer the case. *See, e.g.*, Annotation, *What Constitutes "Collapse" of a Building Within Property Insurance Policy*, 71 A.L.R.3d 1072 (1976).

The *Curtsinger* Court then cited and briefly summarized the cases of *Skelly v. Fid. & Cas. Co. of New York*, 169 A. 78 (Pa. 1933) and *Royal*, *supra*, which we discuss in more detail below, before holding 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 a collapse of any part of the building[.]" 361 S.W.2d at 764-65. Nevertheless, the Court held that coverage was available for damage to other parts of the home pursuant to the policy's landslide provision and remanded for a trial "confined to the reasonable cost of repairing the building made necessary by damage directly caused by the landslide." *Id.* at 765.

In *Skelly*, the first case cited in *Curtsinger*, the plaintiff filed a claim under a life insurance policy that provided for double indemnity if a fatal injury occurred "in consequence of the collapse of the outer walls of a building while the [insured] is therein[,]" but did not define the term collapse. 169 A. at 78. The insured was inside a small three-story brick addition to a large three-story hotel when a runaway railroad car ran into a wall of the addition causing the insured's death. *Id.* "The impact of the car tore a hole in the side of the addition and ripped away a small part of two walls thereof, carrying some of the walls through" but "the entire building remained standing[.]" *Id.*

The Supreme Court of Pennsylvania affirmed the trial court's entry of a compulsory nonsuit against the plaintiff. *Id.* at 79. The Court reasoned that "[t]he wall did not collapse; the runaway car tore a hole in it" and "[c]ertainly, the parties when they entered into the contract could not have had in mind

using the words 'collapse of the outer walls of the building' the knocking of a hole in the wall." *Id.* It rejected the plaintiff's contention that the word collapse was ambiguous and concluded that "[i]t is not doubtful of meaning or capable of two interpretations so far as the incidents are concerned which it is sought to make cover, because it does not cover them at all." *Id.* As the term was not ambiguous, the Court applied its plain and ordinary meaning, to wit: "To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up, as a tube in a steam boiler collapses[,]" *id.* (citing 2 Words and Phrases, First Series, p. 1248), and

> [t]o fall together, or into an irregular mass or flattened form, through the loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it.

Id. (citing The Century Dictionary). The *Skelly* Court concluded by holding that "the words 'collapse of the outer walls of the building' used in it could not be held to cover such an accident as. . . a runaway railroad car penetrating through the walls." *Id.*

In *Royal*, the second case cited by *Curtsinger*, Central Mutual Insurance Company issued a home insurance policy to E.C. and Mamie Royal that provided coverage "against all direct loss to the property covered caused by: Collapse of building or any part thereof[,]" but did not define the term collapse. 113 So.2d at 681. The Royals filed a claim under the policy after they noticed that "the walls of the house had cracked on the west end, cast (sic) end, and on

the north end[,]" the concrete foundation was so broken you "could put your finger in it in places[,]" and "it appeared that segments of the wall had sunk or dropped." *Id.* Central Mutual denied the claim after which a jury ruled in favor of the Royals. *Id.*

The Supreme Court of Alabama reversed based on its holding that collapse was an unambiguous policy term and that a collapse did not occur. *Id.* at 682-83. In support of its holding, it cited *Skelly* and the definition of collapse provided by 14 C.J.S. Collapse, p. 1316, *supra*. *Id.* Additionally, the *Royal* Court relied upon *Nugent v. Gen. Ins. Co. of Am.*, 253 F.2d 800, 802 (8th Cir. 1958) (applying Missouri law) and *Rubenstein v. Fireman's Fund Ins. Co.*, 90 N.E.2d 289 (Ill. App. Ct. 1950). In *Nugent*, the Eighth Circuit upheld the trial court's ruling that the settling or sinking of the concrete footings that supported the insured's home did not constitute collapse of part of the building under a policy that provided coverage for "[c]ollapse of building(s) or any part thereof." 253 F.2d at 802. In *Rubenstein*, the Illinois Court of Appeals held that a policy which only insured against "collapse of a building" (as opposed to collapse of *part of* a building) did not provide coverage for damage that occurred after a thirty-six square foot portion of a ceiling fell and damaged various items of personal property. 90 N.E.2d at 292.

Based on the foregoing authority, the *Royal* Court held that the meaning of collapse was clear and unambiguous and that "there was no collapse of the building" and "no collapse of any part of the building" because there was "no falling in, no loss of shape, no reduction to flattened form or rubble of the

building[.]" 113 So.2d at 683. Rather, "[s]ome of the walls appeared to have cracks in them and two or more places in the concrete footing contained cracks[.]" *Id.*

In *Theile*, the other Kentucky case concerning this issue, Wanda Thiele discovered termite damage throughout her home, "including damage to wall paneling and flooring," and attempted to recover pursuant to her policy with Kentucky Growers Insurance Company. 522 S.W.3d at 199. That policy provided coverage for "direct physical loss . . . involving the collapse of a building or part of a building caused by. . . hidden insect or vermin decay[,]" and stated that collapse did not "mean settling, cracking, bulging, or expanding." *Id.* After Kentucky Growers denied Theile's claim she filed suit, and the circuit court issued a ruling in her favor which the Court of Appeals reversed. *Id.*

On appeal to this Court, Theile did not assert that her home or part of it had collapsed pursuant to *Curtsinger*. Rather, she asked the Court to abrogate *Curtsinger* and adopt the "more lenient majority rule" as defined in *Sandalwood Condo. Ass'n at Wildwood, Inc. v. Allstate Ins. Co.*, 294 F.Supp.2d 1315, 1318 (M.D. Fla. 2003), which requires neither actual nor imminent collapse and instead defines collapse to include damage that alters the "basic stability or structure of the building." *Thiele*, 522 S.W.3d at 199-200. The *Thiele* Court declined to adopt a new rule, reasoning that "[t]he meaning of collapse is clear" and that "a significant number of states still adhere to the plain language interpretation of 'collapse[,]'" though it cited only one case from Missouri:

Heintz v. U.S. Fid. & Guar. Co., 730 S.W.2d 268, 269 (Mo. App. 1987), which held that "[t]here must have been a falling down or collapsing of a part of a building. A condition of impending collapse is insufficient." 522 S.W.3d at 200. *Thiele* held that a collapse did not occur under *Curtsinger*. *Id.*

2) Application of *Curtsinger* and *Theile* to the case now before us.

Based on the foregoing, we must now determine whether a collapse occurred pursuant to the policy and the definition established by *Curtsinger* and reinforced by *Theile*.

State Auto contends that *Curtsinger* required "actual collapse" and that the church building therefore did not sustain a collapse because "the walls, ceiling, and roof were still standing and did not 'break down' or 'cave in.'" We agree with State Auto only insofar as it asserts that *Curtsinger* and *Theile* are "actual collapse" cases, and that Kentucky has historically counted itself among the minority of jurisdictions that do not consider the term "collapse" to encompass "imminent collapse," "substantial impairment to structural integrity," or both.[7] Accordingly, if the policy only provided coverage for "collapse of a building," State Auto would be correct. But that is not the case as the policy at issue explicitly provided coverage for "collapse of a building *or any part of a building*,"[8] (excluding "settling, cracking, shrinkage, bulging, or expansion") and the Church's claim was not based on the actual or even the

[7] *See* Annotation, *What Constitutes "Collapse" of a Building Within Property Insurance Policy*, 71 A.L.R.3d 1072 (1976).

[8] Emphasis added.

imminent collapse of the entire building. Rather, it sought coverage for the "actual collapse" of "part of the building": the roof. If this Court were to agree with State Auto's argument that the policy's collapse provision provided no coverage at all until the entire building was "reduced to rubble on the ground," it would render the language providing coverage for collapse of any part of the building completely meaningless. We accordingly decline to do so and hold that collapse coverage was available pursuant to *Curtsinger* if there was an "actual collapse" of "part of the building."

The question now becomes whether there was an actual collapse of the roof that was not merely "settling, cracking, shrinkage, bulging, or expansion." We hold that there was. One day after Zimmerman removed the church's metal roof, he noticed that the roof had dropped significantly overnight. The Church immediately hired Gaston to investigate, and although he was unable to access the attic on September 7, 2019, he recommended that the roof replacement project immediately cease because the roof was noticeably bowing inwards, and the walls of the sanctuary were bowing out. When Gaston went to the church eleven days later, he noticed that the roof had again dropped "a few more inches."

After Gaston was able to access the attic on September 18, he concluded that a long-term water leak had caused the ends of the trusses—the point at which the trusses sat on top of the building's walls—to decay. Once those ends decayed, the roof trusses caved in such that "[t]he only thing holding the roof up at the time was the ceiling and roof cross framing[.]" Based on this

"catastrophic situation," the decision was made to not allow anyone to enter the sanctuary and to install emergency bracing. Gaston opined based on his knowledge and experience that "the roof structure dropped and fell down significantly, which in [his] opinion [was] a collapse of part of the building." Gaston also noted that he saw that debris had fallen to the floor of the sanctuary beneath the area where the trusses collapsed. The Yeiser report came to the same conclusions; based on his inspection of the building, Yeiser opined that "[t]he roof truss bearing experienced a sudden failure at the bearing ends resulting in collapse" and that the only thing keeping the entire building from collapsing was the friction between the truss ends and the exterior wall. Even the conclusions of State Auto's expert, Bergman, demonstrated that the roof structure had entirely failed. In his report, he stated that "after the walls were pushed outward and deterioration at the wood-bearing points and connections to the exterior wall had sufficiently deteriorated, there was no longer adequate bearing to support the truss frame and overhead roof structure, and the truss framing (and ceiling) displaced downward."

As we have stated ad nauseam herein, to constitute a collapse under *Curtsinger* and *Theile*, the damage to the building or part of the building must satisfy the following definition: "[t]o break down or go to pieces suddenly, especially by falling in of sides; to cave in." It is beyond dispute that the church building's roof in this case broke down and caved in: two of the roof's four trusses, both middle trusses, had the point at which they sat on the

exterior walls rot due to hidden long term water exposure and insect damage. These circumstances were anticipated by the policy definition of collapse, as subsection (b) covered "hidden decay" and subsection (c) covered "hidden insect or vermin damage." Once that occurred, the trusses fell down and began pushing against the exterior walls such that the only thing holding the roof in the air was the ceiling and the friction between the decayed truss ends and the walls. The failure of the roof as a supportive structure was so complete that the sanctuary was evacuated and emergency bracing both within the sanctuary and against the outer walls became necessary. Moreover, Gaston observed "paint and small wood chips and/or sawdust" beneath the area where the trusses collapsed. We hold that the foregoing evidence was sufficient to prove that the part of the building, the roof, sustained an actual collapse.

The damage that occurred in this case is clearly distinguishable from that which occurred in both *Curtsinger* and *Theile*. Those cases consequently do not convince us otherwise. In *Curtsinger*, the insureds sought indemnity for collapse of their screened-in porch, but the damage that occurred was the porch pulling away from the home due to subsidence and there is no indication from the opinion that the porch itself did not remain structurally intact. 361 S.W.2d at 763-64. In this case, the roof did not separate from the rest of the building but otherwise remain structurally intact. Instead, the roof completely lost its "distinctive character" as a "substantial part" of the building, *id*. at 764, as it could no longer serve its sole purpose as a supportive structure. In *Theile*, the insured never asserted that her home or part of it had actually collapsed

and instead argued that *Curtsinger* should be overruled in favor of a broader definition of collapse. 522 S.W.3d at 199-200. Here, the Church has asserted and proven that part of the insured property actually collapsed under *Curtsinger*.

The cases relied upon by the *Curtsinger* and *Thiele* Courts are likewise distinguishable. In *Skelly*, a runaway railroad car tore a hole through the wall of the insured decedent's hotel room, but the entirety of the building remained standing. 169 A. at 78. In *Royal*, there were numerous cracks in both the walls and the foundation and it appeared that segments of the wall had sunk, but neither the home nor any part of it had actually collapsed. 113 So.2d at 683. Finally, in *Heintz*, the insured sought indemnification for the collapse of the walls of his home, but the insured acknowledged that the walls had not yet actually collapsed and were instead in a state of imminent collapse. 730 S.W.2d at 269.

In addition to our conclusion that this policy provided coverage for the actual collapse of part of the building, we must further disagree with State Auto's interpretation of the policy on the basis that its interpretation as applied to the circumstances herein would render coverage under the policy illusory. Illusory coverage is

> coverage that is at least implicitly *given* under its provisions and then *taken away*, whether by virtue of a prohibition or exclusion contained in the same policy, or by virtue of a strict legal definition. . . Thus, in the words of one court, "the doctrine of illusory coverage is best applied. . .where part of the premium is specifically allocated to a particular type or period of coverage and that coverage turns out to be functionally nonexistent."

Ritchie v. Turner, 547 S.W.3d 145, 149 (Ky. App. 2018) (quoting *Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 129 (Ky. App. 2012)).

One provision of the policy at issue provided coverage in the event of the collapse of the building or any part thereof. A separate provision of the policy required that "in the event of loss or damage" to the covered property, the Church must "[t]ake all reasonable steps to protect the Covered Property from further damage[.]" Once the Church became aware that the building's roof had collapsed, it took reasonable steps to protect the building from further damage—the collapse of the entire building—by having bracing placed both within the sanctuary and against the outer walls, thereby satisfying its duty to mitigate under the policy. But State Auto then denied its claim based on the fact that the entire building did not fall to the ground. Yet, if the Church had neglected its duty to mitigate and allowed the entire structure to collapse—thereby satisfying State Auto's requirement that the entire structure fall to the ground—State Auto would have undoubtedly denied its claim based on its failure to satisfy its duty to mitigate. State Auto's interpretation of the policy would accordingly leave the Church in a lose-lose situation. Under these circumstances the "[collapse] coverage bought, paid for and reasonably expected [would be] illusory. Such is contrary to the public policy of Kentucky." *Chaffin v. Kentucky Farm Bureau Ins. Cos.*, 789 S.W.2d 754, 757–58 (Ky. 1990); *accord Royal Indem. Co. v. Grunberg*, 155 A.D.2d 187, 189-90 (N.Y. 1990) (holding "[s]ince the policy places an affirmative duty on the insured to maintain and repair all covered property in the event of any loss,

covered or not, defendants are not to be deprived of reimbursement for money they expended to prevent the actual collapse of their dwelling. A construction of the policy faulting them for doing so and triggering coverage only in the event their property was actually demolished or reduced to rubble would be unreasonable, to say the least[.]").

As we have determined that the roof sustained an actual collapse pursuant to *Curtsinger* and *Thiele*, we decline the Church's invitation to overrule those precedents' definition of "collapse" in favor of a definition adopted by a majority of states in various forms encompassing "imminent collapse," "substantial impairment to structural integrity," or both. We likewise decline to address the Church's argument that the policy language was ambiguous.

Based on the foregoing, we hold that the circuit court erred by entering summary judgment in State Auto's favor on the Church's breach of contract claim. The policy provided coverage for the actual collapse of any part of the building, and the Church presented sufficient evidence to demonstrate that its roof actually collapsed. We hereby vacate the circuit court's order granting partial summary judgment on the breach of contract claim and remand with directions to the circuit court to enter partial summary judgment in the Church's favor on its breach of contract claim.

B. The remaining extra-contractual claims are remanded.

As the circuit court ruled in State Auto's favor on the issue of breach of contract, it dismissed the Church's extra-contractual claims summarily

reasoning that if there was no coverage under the policy, neither State Auto nor Greenville Insurance could be held liable for the extra-contractual claims. Accordingly, as the circuit court has not ruled on the extra-contractual claims in the first instance, it would be inappropriate for this Court to take them up at this juncture. However, because we hold that there was coverage under the policy, the Church's extra-contractual claims are once again potentially viable. We therefore vacate the circuit court's orders granting summary judgment in favor of State Auto and Greenville Insurance on the extra-contractual claims and remand for further proceedings.

III. CONCLUSION

Based on the foregoing, we hereby vacate the circuit court's order granting summary judgment to State Auto on the Church's breach of contract claim and remand for entry of summary judgment in the Church's favor on that claim. In addition, we vacate the circuit court's orders granting summary judgment to State Auto and Greenville Insurance on the Church's extra-contractual claims and remand for further proceedings on those claims.

All sitting. Bisig, Conley, Keller, and Thompson, JJ., concur. VanMeter, C.J., dissents by separate opinion in which Nickell, J., joins.

VANMETER, C.J., DISSENTING: I respectfully dissent. Two points. First, no good reason exists for departing from this Court's longstanding definition of the meaning of the word, "collapse," as used in an insurance policy of this type: "to break down or go to pieces suddenly, especially by falling in of sides; to cave in." *Thiele v. Ky. Growers Inc. Co.*, 522 S.W.3d 198, 199 (Ky. 2017); *Niagara*

Fire Ins. Co. v. Curtsinger, 361 S.W.2d 762, 763 (Ky. 1962). Factually, this case is undistinguishable from these earlier cases in that the building, although damaged, has not collapsed.

Second, in changing the settled expectations of the insurance company and the insured, we remand this matter to the trial court for further proceedings on the Church's extra-contractual claims, which presumably means its bad faith claim. The three required elements of an insurance bad faith claim are:

> (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

Indiana Ins. Co. v. Demetre, 527 S.W.3d 12, 26 (Ky. 2017) (quoting *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993)). Given that we have essentially overruled these earlier two cases, thereby holding, albeit wrongly in my view, that the insurer is now obligated to pay the claim under the terms of the policy, how could any fair-minded person argue that the second and third elements of bad faith are met?

The Muhlenberg Circuit Court's judgment should be affirmed in all respects.

Nickell, J. joins.

COUNSEL FOR APPELLANT, STATE AUTO PROPERTY & CASUALTY CO., AND GREENVILLE INSURANCE, INC.:

Perry Adanick
Matthew Francis Xavier Craven
James Patrick Nolan, II
Rolfes Henry Co., LPA

COUNSEL FOR APPELLEE, GREENVILLE CUMBERLAND PRESBYTERIAN CHURCH:

Bartley K. Hagerman
M. Austin Mehr
Mehr Fairbanks Trial Lawyers, PLLC

COUNSEL FOR AMICUS, KENTUCKY DEFENSE COUNSEL, INC.:

Andrew-John Bokeno
Edward M. O'Brien
Wilson Elser Moskowitz Edelman & Dicker, LLP