

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT THOMAS and THERESA THOMAS,

Plaintiffs-Appellants,

v

MICHIGAN BASIC PROPERTY INSURANCE
ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
February 12, 2002

No. 226517
Wayne Circuit Court
LC No. 98-826409-NF

Before: White, P.J., Whitbeck, C.J., and Holbrook, Jr., J.

PER CURIAM.

Plaintiffs Robert and Theresa Thomas appeal as of right. They challenge the trial court's order denying their motion for judgment notwithstanding the verdict (JNOV) or a new trial, and additur, granting defendant Michigan Basic Property Insurance Association's motion for partial relief from judgment, and denying their request for case evaluation sanctions under MCR 2.403(O). We affirm in part, reverse in part, and remand for further proceedings.

I. Basic Facts And Procedural History

Fire destroyed the Thomases' Detroit house and its contents in December 1997. According to the insurance adjusters, the fire caused a total loss, which, when added to other associated costs, exceeded the limits of the Thomases' coverage under their policy with the Association. The Thomases then sought the maximum coverage allowed under their policy. First, they requested the \$65,000 coverage for loss of the dwelling. Second, they asked for the \$13,000 coverage for "loss of use" of their home because it was uninhabitable. Third, they asked for money for additional living expenses, which was defined in the policy as "any necessary increase in living expenses [they] incurred" so that their "household" could "maintain its normal standard of living," but only for "the shortest time required for [their] household to settle elsewhere." Fourth, they asked to collect on the loss of contents provision in their policy, which covered up to \$32,500 in lost personal property as determined by its "actual cash value at the time of loss but not more than the amount required to repair or replace." The Association denied the Thomases' claim, accusing them of fraud and arson, prompting this suit.

The case proceeded to a jury trial on a breach of contract theory.¹ At trial, the Thomases presented evidence that the family members, consisting of plaintiffs and their eight children,

¹ The trial court disposed of other claims in the complaint before trial. They are not at issue in this appeal.

were not present at the time the fire started. The Thomases denied setting fire to the home or having anyone else do so. Sergeant Robert Gray of the Detroit Fire Department responded to the fire and subsequently investigated it to determine whether to refer the case to the Arson Squad. He said that he did not detect flammable liquids that might have been used as an accelerant, found nothing else suspicious about the fire, and concluded that it was a result of faulty wiring.

In support of their claim for additional expenses under the policy, the Thomases presented motel and grocery receipts for expenses incurred after the fire, as well as evidence that their mortgage payment for their new home was \$140 more each month than the mortgage payment for their home that had been destroyed. They also provided a detailed list of the personal property destroyed in the fire as evidence that they were entitled to recover for their loss of contents.

According to the Association's witnesses, the Thomases were heavily in debt and arson caused the fire. After the parties finished presenting their evidence, the Association moved to dismiss the Thomases' claims for additional living expenses and loss of contents. The Association argued that the Thomases had failed to present any evidence that the time they spent in the motel was the shortest amount of time necessary for them to relocate or any evidence that the costs incurred while staying in the motel were extra expenses necessary to maintain the family's standard of living. Further, the Association claimed that the Thomases' evidence concerning the cost to replace the contents of their home lost in the fire was inadequate to demonstrate the actual value of those items.

The trial court agreed with the Association, ruling:

I concur with the defendant in this matter. I'm of the opinion plaintiff has failed to sustain the burden of proof as to the two areas being argued, one, the personal property and the other, the additional living expenses incurred by the fire in this matter. I think the language is clear in the contract and there is no dispute as to the contract between the parties.

Accordingly, the trial court granted the Association's motion for a directed verdict on the claim for loss of contents and additional living expenses.

The jury found that the Thomases did not commit arson and that the Association breached the insurance policy. The jury rendered a judgment in the Thomases' favor in the amount of \$68,250, which the parties had stipulated was the amount of allowable damages sustained.² Accordingly, the trial court entered judgment in the Thomases' favor in the amount of \$68,250, with costs, interests and attorney fees to be taxed.

Shortly after the jury rendered its verdict, the Association moved for partial relief from judgment under MCR 2.612(C), seeking a reduction in the judgment amount by \$23,204, which was the amount the insurer for the Thomases' mortgage company had paid for the loss. The Association also sought to withhold fifteen percent of the judgment in accordance with MCL

² This figure apparently represents \$65,000 for the destruction of the house (the policy limit) and \$3,250 which was authorized under the policy for debris removal.

500.2845.³ Finally, the Association asked the trial court to reduce the award by \$1,500, the advance payment it had already given the Thomases.

At the same time, the Thomases moved for mediation (case evaluation) sanctions under MCR 2.403. The case had mediated for \$71,700, which the Thomases had accepted and the Association had rejected. The Thomases also sought JNOV or a new trial on the issue of damages only, and for additur in the amount of \$30,603. They contended that the trial court had erred in directing a verdict in the Association's favor on their claims for additional living expenses and loss of contents.

After hearing arguments, the trial court took the matter under advisement. Several months later, the trial court granted the Association's request for the two setoffs and withholding, thereby reducing the judgment to \$43,545. The trial court concluded that the Thomases were not entitled to sanctions under MCR 2.403 because the verdict was now \$43,545; the Association therefore had, according to the trial court, improved its position by going to trial instead of agreeing to pay the \$71,700 case evaluation figure. The trial court denied the Association's motion for a new trial, concluding that a new trial was not required because the jury's findings were not against the great weight of the evidence. Further, additur was not necessary because the verdict was adequate.

II. Directed Verdict

A. Standard Of Review And Legal Standards

The Thomases argue that the trial court erred when it directed a verdict in favor of the Association on their claims for additional living expenses and loss of contents. This question of law requires review de novo.⁴

In reviewing a trial court's decision to grant a directed verdict, this Court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted."⁵

B. Additional Living Expenses

The Thomases' policy from the Association specifically provided coverage for "any necessary *increase* in living expenses incurred by the insureds to enable their household to maintain its normal standard of living" "for the shortest time required for the household to settle elsewhere." While the Thomases were able to document their post-fire expenses, they did not demonstrate that all these were expenses above and beyond what they normally would have occurred while living in the insured property. For instance, though the Thomases claim that the fire forced them to replace groceries, dishes, and utensils that they already owned with new

³ 1998 PA 216 amended the amount an insurer must withhold, but that amendment is not at issue in this case.

⁴ See *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).

⁵ *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

groceries, and disposable plates and utensil, the only relevant evidence at trial were receipts. There was no testimony that these expenses were for replacements or in addition to their normal living expenses. Additionally, there is no merit to the Thomases claim that the Association is estopped to deny coverage for these items because the Association's adjuster encouraged them to keep their receipts. Unlike the explicit promises by the insurer's agent at issue in *Industro Motive Corp v Morris Agency, Inc.*,⁶ the evidence at trial merely indicated that the adjuster advised the Thomases that they "might be able" to be reimbursed for some of these expenses, not that they actually would be entitled to reimbursement.

With respect to the Thomases' argument that they should be reimbursed for the additional money spent on their monthly mortgage payments for their new home, the language of the additional expenses provision in the policy excludes any such reimbursement. In particular, by defining covered additional expenses in relation to the shortest period necessary for the family to "settle elsewhere," the policy plainly anticipates paying expenses for a transitional period, not the long-term financial consequences of acquiring new housing. By the time the Thomases found their new home on Robson and acquired their mortgage, they had "settled" there.⁷

However, we do agree with the Thomases that the trial court erred in directing a verdict in favor of the Association concerning their claim for coverage of their short-term housing expenses following the fire before they found a new home. All ten members of the Thomas family were made homeless by the fire, causing the family to incur the added expense of living in motels for the ten weeks it took to locate suitable housing. Construing the evidence in favor of the Thomases,⁸ a reasonable jury certainly could have found⁹ that this expense was necessary, an increase over their usual expenses, and incurred for the shortest period required for them to settle elsewhere, making the directed verdict inappropriate.

C. Loss Of Contents

The Thomases also claim that the trial court erred in granting the motion for directed verdict concerning their claim for loss of contents coverage. As we have already noted, the Association's policy provides that covered property losses are settled at "actual cash value at the time of loss but not more than the amount required to repair or replace." Though the policy does not define "actual cash value," the Michigan Supreme Court has defined it as "replacement cost less depreciation."¹⁰ The Thomases' testimony concerning how they calculated the values they attached to the personal property they lost does not directly reveal that they relied on this definition of actual cash value. However, the exhibit included the ages of the property they lost and their testimony and detailed written descriptions of the property did support a conclusion that

⁶ *Industro Motive Corp v Morris Agency, Inc.*, 76 Mich App 390, 392-396; 256 NW2d 607 (1977).

⁷ See Random House Webster's College Dictionary (1997), p 1184 ("settled" means "to cause to take up residence").

⁸ See *Wilkinson*, *supra*.

⁹ See, generally, *Chiles v Machine Shop, Inc.*, 238 Mich App 462, 471; 606 NW2d 398 (1999).

¹⁰ *Smith v Michigan Basic Property Insurance Association*, 441 Mich 181, 196, n 28; 490 NW2d 864 (1992).

these many individual items had some cash value. Viewed in a light most favorable to the Thomases,¹¹ this evidence was sufficient for the jury to evaluate the actual cash value of the property destroyed had they received proper instruction. Thus, we conclude that the trial court's decision to remove this question from the jury's decision by directing a verdict in favor of the Association was erroneous.

III. Relief From Judgment

A. Standard Of Review

The Thomases argue that the trial court erred in granting the Association's motion for relief from judgment, reducing the \$68,250 jury verdict to \$43,546 and allowing the Association to withhold an additional fifteen percent pursuant to MCL 500.2845. Instead, they claim, the trial court should have enforced the Association's stipulation to \$68,250 in damages. We review the trial court's decision to grant relief under MCR 2.612(C) for an abuse of its discretion.¹²

B. The Stipulation

On the last day the jury heard evidence, but before the parties made their closing arguments, the parties engaged in a lengthy discussion concerning instructions on the record outside the presence of the jury. At the conclusion of the discussion, the trial court invited the attorneys into chambers to discuss other matters. There is no record of that discussion. However, the next morning, the attorneys and the trial court made comments on the record that indicate that the parties had agreed to stipulate that the Thomases had sustained compensable damages in the amount of \$68,250 if the jury found that the Association had breached the policy. There are no more details regarding this stipulation, which apparently was never rendered in writing.

A stipulation, which is construed like a contract,¹³ "is given full force and effect and is binding upon the parties unless abandoned or disaffirmed."¹⁴ In this case, there is no dispute that the amount of the stipulation was \$68,250. Yet, we have no way of determining from the record whether the stipulation embraced any other matters, including the setoffs for what the mortgage insurer had already paid, the advance that the Association had already paid the Thomases, or the statutory withholding. As we noted, the parties discussed the stipulation at argument on the motion. However, the trial court's opinion does not mention the stipulation or its consequences, if any. Courts ordinarily refrain from reading additional terms into a contract¹⁵ unless otherwise required by law.¹⁶ With no evidence of an agreement concerning setoffs to enforce or a statutory

¹¹ See *Wilkinson*, *supra*.

¹² See *Blue Water Fabricators, Inc v New Apex Company, Inc*, 205 Mich App 295, 300; 517 NW2d 319 (1994).

¹³ See *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

¹⁴ *Nuriel v YWCA*, 186 Mich App 141, 147; 463 NW2d 206 (1990).

¹⁵ See *Michigan Twp Participating Plan v Federal Ins Co*, 233 Mich App 422, 428; 592 NW2d 760 (1999).

¹⁶ See *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 438 ; 591 NW2d 344 (1998).

mandate concerning whether a stipulated judgment amount is subject to setoffs, the trial court properly concluded that the stipulation did not bar lawful setoffs.

IV. Evaluation Sanctions

Having decided to remand for a new trial, we need not address in any real depth the Thomases' additional argument that the trial court erred when denying their motion for case evaluation sanctions under MCR 2.403(O). The mediation evaluation was for \$71,100 and the jury verdict was for \$68,250, which was not ten percent more favorable to the Association than the evaluation. The trial court should have considered the assessable costs but ignored the post-judgment setoffs when determining the amount of the verdict to decide whether evaluation sanctions were appropriate.¹⁷

V. Conclusion

Because our decision that the trial court erred in granting the Association a directed verdict regarding the Thomases' claims for additional expense for short term housing expenses and for loss of contents coverage, we must remand this case to the trial court for a new trial on these issues. The Association's breach of contract and damages related to the coverage for the structure and cost of removing debris is already settled and not to be tried anew.

On remand, the parties may present evidence with respect to any appropriate setoffs. The trial court shall, based on that evidence, determine which, if any, setoffs should be granted, notwithstanding the stipulation. The trial court shall ensure that any proper setoffs ordered are for amounts that actually have been paid, that the Thomases are no longer liable for the amounts that are setoff, and that the Thomases recover as much as their remaining insurable interest allows within the damages set in the stipulation. With respect to the \$1,500 advance the Association paid the Thomases, the trial court shall assure that the amounts were paid for items that are included in the judgment, or amended judgment, before allowing setoff. As for the fifteen percent setoff in MCL 500.2845, the trial court shall determine whether these amounts have already been paid and make any required adjustments. On remand, the trial court shall also adjust the verdict to include assessable costs in accordance with MCR 2.403(O)(3).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.

¹⁷ See *Hall v Citizens Ins Co of America*, 141 Mich App 676, 689; 368 NW2d 250 (1985); MCR 2.403(O)(3).