STATE OF MICHIGAN

COURT OF APPEALS

ACORN INVESTMENT CO., Plaintiff-Appellant, v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION, Defendant-Appellee.	FOR PUBLICATION November 27, 2012 9:00 a.m. No. 306361 Wayne Circuit Court LC No. 07-726774-CZ

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders denying its motion for case evaluation sanctions and the assessment of debris removal expenses. Because plaintiff did not obtain a "verdict" entitling it to case evaluation sanctions under MCR 2.403(O)(2)(c) and it waived its claim for debris removal expenses, we affirm.

This case arises out of a fire that occurred on plaintiff's property in Detroit on May 27, 2007. Plaintiff filed a claim with defendant, its fire insurance carrier, which defendant denied on the basis that the policy had been canceled effective May 16, 2007. Plaintiff then filed this action against defendant, and the trial court granted summary disposition in plaintiff's favor, ruling that defendant's notice of cancellation was insufficient to effectively cancel the policy. Thereafter, the parties agreed to submit this case to an appraisal panel to determine the value of plaintiff's loss. The appraisal panel issued an appraisal award determining that $20,877 was the actual cash value of plaintiff's loss. Plaintiff then filed a motion for entry of judgment, which also sought case evaluation sanctions and debris removal expenses. The trial court entered a judgment in plaintiff's favor in the amount of the appraisal award plus interest but declined to award case evaluation sanctions or assess debris removal expenses.

Plaintiff first argues that the trial court erroneously denied its request for case evaluation sanctions because it obtained a "verdict" within the meaning of MCR 2.403(O)(2)(c), which entitled it to actual costs. A trial court's decision whether to impose case evaluation sanctions is a question of law subject to de novo review on appeal. *Cusumano v Velger*, 264 Mich App 234, 235; 690 NW2d 309 (2004). Likewise, the interpretation of a court rule is a question of law that we review de novo on appeal. *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 28; 666 NW2d 310 (2003).

The underlying purpose of case evaluation is "'to encourage settlement and deter protracted litigation by placing the burden of litigation costs'" on the party that rejected the case evaluation and required the case to proceed to trial. *Id*. at 32, quoting *Broadway Coney Island, Inc v Commercial Union Ins Cos*, 217 Mich App 109, 114; 550 NW2d 838 (1996). MCR 2.403(O) provides, in relevant part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. . . .
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

"In applying MCR 2.403(O)(2), this Court has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated." *Jerico Constr, Inc*, 257 Mich App at 30. This Court has expressly warned against "impermissibly expand[ing], by judicial fiat, the specific and precisely worded definition of 'verdict' to include any order ending any part of a case by whatever method, thereby rendering the limiting language of MCR 2.403(O)(2)(a)-(c) nugatory." *Id*. at 31-32.

This Court has recognized that the appraisal process mandated by statute[1] and utilized in the instant case "is a substitute for the judicial determination of disputes over the amount of

---

[1] MCL 500.2833(1)(m) requires that every fire insurance policy issued or delivered in Michigan contain the following provision:

> That if the insured and insurer fail to agree on the actual cash value or amount of the loss, either party may make a written demand that the amount of the loss or the actual cash value be set by appraisal. If either makes a written demand for appraisal, each party shall select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days after receipt of the written demand. The 2 appraisers shall then select a competent, impartial umpire. If the 2 appraisers are unable to agree upon an umpire within 15 days, the insured or insurer may ask a judge of the circuit court for the county in which the loss occurred or in which the property is located to select an umpire. The appraisers shall then set the amount of the loss and actual cash value as to each item. If the appraisers submit a written report of an agreement to the insurer, the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within

losses to be paid by insurers." *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 399; 605 NW2d 685 (1999). It is "'a simple and inexpensive method for the prompt adjustment and settlement of claims'" and effectively constitutes arbitration. *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991), quoting *Thermo-Plastics R & D, Inc v Gen Accident Fire & Life Assurance Corp, Ltd*, 42 Mich App 418, 422; 202 NW2d 703 (1972). This Court has previously rejected the notion that an order or judgment entered following arbitration or settlement constitutes a "verdict" within the meaning of MCR 2.403(O). In *Saint George Greek Orthodox Church of Southgate, Mich v Laupmanis Assoc, PC*, 204 Mich App 278, 282-284; 514 NW2d 516 (1994), this Court held that mediation sanctions were not awardable under a previous version of MCR 2.403 when the claim was resolved through arbitration and the court merely entered an order confirming the arbitration award.[2] In *Smith v Elenges*, 156 Mich App 260, 263-264; 401 NW2d 342 (1986), this Court held that a consent judgment was not a "verdict" as that term was used in WCCR 403.15, an early predecessor of MCR 2.403(O). See also *Jerico Constr, Inc*, 257 Mich App at 30-31. Similarly, in *Jerico Constr, Inc*, this Court held that a stipulated order of dismissal entered on the basis of a settlement agreement did not constitute a "verdict" under MCR 2.403(O)(2). *Id*. at 31.

In this case, the parties participated in case evaluation, which resulted in an award in plaintiff's favor in the amount of $11,000. Plaintiff accepted the award, and defendant rejected it. Thereafter, the parties agreed to resolve their dispute regarding the value of plaintiff's loss by participating in the appraisal process set forth in the insurance policy, resulting in an appraisal award of $20,877 in plaintiff's favor. Plaintiff then filed a motion for entry of judgment, which the trial court partially granted and entered judgment in plaintiff's favor. As previously

> a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any 2 of these 3 shall set the amount of the loss. Each appraiser shall be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire shall be paid equally by the insured and the insurer.

[2] The previous version of MCR 2.403(O)(1) at issue in *Saint George Greek Orthodox Church of Southgate, Mich*, 204 Mich App at 281-282, stated:

> If a party has rejected an evaluation and the action *proceeds to trial*, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. [Emphasis added.]

This Court reasoned that the arbitration did not satisfy the "proceeds to trial" language and that merely confirming the arbitration award did not constitute a "verdict" because that interpretation ignored the requirement that the action proceed to trial. *Id*. at 283. The current version of MCR 2.403(O)(1) at issue in this case uses the phrase "proceeds to verdict" rather than "proceeds to trial." This Court in *Saint George Greek Orthodox Church of Southgate, Mich* also reasoned, however, that "MCR 2.403 was designed to expedite and simplify the final settlement of cases to avoid a trial[,]" and that the parties were attempting to effectuate that purpose by working "within the framework of arbitration and the arbitration award." *Id*. at 384. Cf. *Cusumano*, 264 Mich App at 238 (holding that case evaluation sanctions were awardable following arbitration when the arbitration agreement provided that such sanctions shall apply).

discussed, the appraisal process was effectively an arbitration, and an order or judgment entered pursuant to an arbitration or settlement is not a "verdict" within the meaning of MCR 2.403(O)(2)(c). See *Jerico Constr, Inc*, 257 Mich App at 31; *Saint George Greek Orthodox Church of Southgate, Mich*, 204 Mich App at 282-284; *Auto-Owners Ins Co*, 190 Mich App at 486. The trial court's order granting plaintiff's motion for entry of judgment merely confirmed the appraisal award and did not constitute a "verdict" under MCR 2.403(O)(2)(c). Accordingly, the trial court properly denied plaintiff's request for case evaluation sanctions.

Plaintiff next argues that the trial court erred by denying its request for debris removal expenses. "Judicial review of an appraisal award is limited to instances of 'bad faith, fraud, misconduct, or manifest mistake.'" *Angott v Chubb Group Ins*, 270 Mich App 465, 473; 717 NW2d 341 (2006), quoting *Auto-Owners Ins Co*, 190 Mich App at 486. Further, "[t]he question of what constitutes a waiver is a question of law" that we review de novo. *Angott*, 270 Mich App at 469-470 (quotation marks and citation omitted).

Issues involving an insurance policy's coverage are generally for the court to determine, and "[t]he appraisal process cannot legally settle coverage issues[.]" *Auto-Owners Ins Co*, 190 Mich App at 486-487. "Where the parties cannot agree on coverage, a court is to determine coverage in a declaratory action before an appraisal of the damage to the property." *Id*. at 487. In *Angott*, 270 Mich App at 473-474, this Court held that the defendant insurer waived its coverage-based challenge and was bound by the appraisal award absent bad faith, fraud, misconduct, or manifest mistake where the parties stipulated to submit the plaintiff's claim for appraisal without first seeking court intervention to determine coverage issues.

Here, plaintiff erroneously characterizes its argument regarding debris removal expenses as a coverage issue and contends that the trial court, rather than the appraisal panel, should have determined the issue. To the contrary, defendant did not assert that debris removal expenses were not covered under the policy. Rather, it appears that the case proceeded through the appraisal process without plaintiff having raised the issue of debris removal expenses. In a letter accompanying the appraisal award, appraiser Richard Guider stated that "no allowance was made for debris removal, as no evidence ha[d] been presented that the insured incurred any debris removal expense." Thus, the appraisal panel would have addressed debris removal expenses if plaintiff submitted evidence showing that it had incurred debris removal costs. While plaintiff contends that it did not incur such costs until after the appraisal proceedings, it is noteworthy that the appraisal award was issued on September 17, 2010, and the fire occurred on May 27, 2007. By submitting its case for appraisal and proceeding through the appraisal process without raising the issue of debris removal expenses, plaintiff waived its claim for such expenses. See *Angott*, 270 Mich App at 473-474; see also *id*. at 470 ("Waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and

conduct of the party against whom it is claimed.")

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio