STATE OF MICHIGAN

COURT OF APPEALS

THE CINCINNATI INSURANCE CO,

Plaintiff-Appellant,

v

V.K. VEMULAPALLI, a/k/a GENESEE TOWERS,

Defendant-Appellee.

UNPUBLISHED
December 6, 2002

No. 233235
Genesee Circuit Court
LC No. 99-065843-no

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff, The Cincinnati Insurance Company, appeals as of right the circuit court's order granting summary disposition to defendant V.K. Vemulapalli. We affirm in part, reverse in part, and remand.

I. Basic Facts And Procedural History

Vemulapalli owns Genesee Towers, a commercial building in Flint that was built in the 1960s and had an original fire alarm system installed in 1967. Cincinnati insures the building. On August 18, 1998, part of the plumbing system in the building ruptured, causing extensive water damage, especially to the first floor and lower level. Before the flood, the fire alarm system was functional, although it had certain defects. After the flood, the fire alarm system did not work.

The insurance contract between the parties covers the *replacement* cost of a "direct physical loss" up to $12 million. The standard contract language excludes the cost of making repairs or replacements required by the "enforcement" of an "ordinance or law" "[r]egulating the construction, use or repair of any property" or "[r]equiring the tearing down of any property, including the cost of removing its debris." Vemulapalli, however, purchased an endorsement that, among other things, allowed up to $100,000 in coverage for increased construction costs "caused by enforcement of building, zoning or land use, ordinance or law."

The parties could not agree on the cost of this particular loss, much less its origin. So, pursuant to a process outlined in the insurance contract, they chose appraisers to examine the loss.[1] The umpire, in his third written factual findings,[2] addressed the fire alarm system:

> Following lengthy testimony and references to reports and exhibits submitted by expert witnesses Kenneth Yoder and Jeffrey Zwirn it is readily apparent, and indeed both parties agreed, that based upon prior service records the main [fire alarm system] panel and likely other related circuitry was not entirely functional at various times prior to the date of loss and maintained a number of defects. While the pre-date of loss records of GS Edwards are not specific as to the precise nature and types of defects nor the cause thereof at that point, it had been recommended that the system be replaced. On the other hand, and based upon all reasonable inferences, the system was still operational up to the date of the occurrence.
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> Further, both parties agreed that upon their respective testing of the system after the date of loss it was not operational and was experiencing various defects as outlined in the reports of the respective expert witnesses. However, and given the lack of specificity in the previous service and repair orders it could not be determined if the disruption of the system post incident was in whole or in part due to pre-existing problems.
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> As to the precise cause of the deficiencies discovered post incident Petitioner [Vemulapalli] asserts that in addition to direct water damage to a portion of the circuitry below the main panel that atmospheric moisture and humidity invaded the control panel thereby adversely affecting its component parts. Thus, Petitioner asserted that despite pre-existing defects additional damage to his system occurred as a direct result of the loss incident. Respondent [Cincinnati] maintained that per its inspections there was no evidence of water or moisture damage to the control panel and no indication that shorting of wiring or blown fuses had occurred. Additionally, Respondent noted that any circuitry below the main panel was protected by sheathing and sealed whereby water could not affect wiring therein. In essence, Respondent was of the position that there had been no loss of functions due to water damage and that the system failure was on the basis of pre-existing defects and the extreme age of this 30 year old system whereby replacement parts for necessary repairs could not be obtained.
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> Given the above circumstances no reliable conclusions could be made as to the cause of failure, but subsequent to such proofs testimony was received from Mr. William Wolverton whose company, Golden Circle Eco Systems, was in the

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[1] Evidently, one of the parties, presumably Vemulapalli, filed suit in the circuit court, but the circuit court dismissed the action to allow the parties to use the appraisal process. The record in the present case tells us nothing about that first action.

[2] The umpire dealt with other aspects of the loss the flooding caused, such as damage to security cameras, elevators, and the climate control system, but they are not involved in this appeal.

process of moving into Genesee Towers as a tenant at the time of the loss. In that regard Mr. Wolverton had occasion to be present in the building approximately 3 days after the water break occurred and conducted a personal inspection of the affected areas.

Mr. Wolverton advised that upon entering the first floor mechanical room on that occasion, where the break had occurred and where the fire alarm control panel was situated, he observed not only large amounts of standing water, but also, that the ceilings and walls therein were still extremely wet whereby it appeared they had been sprayed with a fire hose.

While this spray effect did not directly appear on the fire alarm system panel, as the broken line was not in close proximity thereto, nevertheless there was noted to be standing water on the floor below the control panel which in combination with the heat produced by several items of mechanical equipment therein resulted in vaporization and condensation appearing inside the control panel door, described by Mr. Wolverton as a spray, mist, dampness and wetness.

Moreover, when Mr. Wolverton was present at a later date during an inspection by GS Edwards he represented that comment was made that moisture appeared to have penetrated the panel itself, likely resulting in shorting of at least a portion of its circuitry.

On that basis it is determined that a sufficient factual basis exists to conclude that the non-functional status of the fire alarm system was caused by moisture resulting from the subject occurred and therefore is related to the loss incident.

As to the replacement cost of this system, only Petitioner has submitted estimates, ranging from $628,000 to $686,000. Accordingly, replacement cost is awarded in the amount of the *average of such figures in the sum of $657,000*.

Actual cash value of this admittedly antiquated and aged system, taking into account its virtually fully depreciated status, is determined to be $32,850.

Finally on this subject and consistent with the reports and estimates submitted by various fire alarm installation contractors, *Petitioner's claim for costs to comply with applicable laws and ordinance standards is included in the replacement cost award of $657,000*.[3]

The same portion of the insurance contract that permitted the appraisal process also reserved Cincinnati's right to deny a claim. As a result, despite having gone through the appraisal process, Cincinnati then filed a declaratory judgment action against Vemulapalli in the circuit court.

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[3] Emphasis added.

In the circuit court, both parties moved for summary disposition. Cincinnati did not identify the grounds under MCR 2.116(C) that it claimed justified summary disposition in its favor in its motion, though it later stated that it brought the motion under MCR 2.116(C)(8) and (10). Cincinnati argued that courts are the only bodies entitled to interpret coverage under an insurance contract. Although not stating so explicitly, Cincinnati apparently contended that the umpire exceeded his authority because he interpreted the insurance contract to permit coverage – when Cincinnati contended that none was available in this case – and then determined that Vemulapalli was entitled to more than $657,000 for the loss.

Vemulapalli moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the loss resulted from the plumbing failure, that the umpire had decided that case against Cincinnati, and that Cincinnati had violated its statutory duty to pay the umpire's award. Vemulapalli contended that only limited review of the umpire's decision is permitted, such as for bad faith, fraud, misconduct, or manifest mistake. In Vemulapalli's view, the umpire did not make a manifest mistake in this case because coverage was permitted under the contract.

At the beginning of the first hearing on the motions for summary disposition, the circuit court asked Cincinnati's attorney to explain his interpretation of the ordinance and law exclusion. Cincinnati's attorney, Charles Filipiak, said that he interpreted the contract to allow Vemulapalli to repair and replace the building as necessary, but that Cincinnati was not required to pay for "things to be updated or . . . to meet that code . . . because of a mandate of a particular ordinance . . . ." The circuit court asked Filipiak whether he was arguing that "there is some ordinance provision here that was enacted subsequent to this construction [of Genesee Towers] or this coverage that . . . the [umpire's] award" included. Filipiak responded that there "is no new amendment," but that the fire alarm system itself was obsolete and would have to be replaced. The circuit court then pressed Filipiak to explain whether, if this fire alarm system could be repaired, it would meet the code in place. Filipiak responded:

> I think it would . . . if it was restored to its functionability [sic]. I understand that because of its obsolescence and the fact that much of it didn't work much of the time, that that was a difficult thing to do. However, if it could be [repaired] it would have met – it would have met the existing code, to my understanding.

As Filipiak explained it, the fire alarm system was obsolete because of its "deterioration," not because of its technology.

Vemulapalli's attorney, Jerald Van Hellemont, pointed out to the circuit court that Cincinnati had never identified what ordinance or law had triggered the exclusion. Van Hellemont argued that replacement cost coverage is designed to cover just this sort of situation because, over time, the replacement cost of an item often exceeds its actual cash value. The fire alarm system's relatively low actual cash value, Van Hellemont noted, did not mean that, the system had a low cash value when it was originally installed. From Vemulapalli's perspective, there was nothing unusual about why the fire alarm system would cost significantly more to replace than its current actual cash value.

The circuit court announced its ruling from the bench, considering the motions as if they had been brought under MCR 2.116(C)(8):

> And I have examined the plaintiff's complaint. The complaint alleges that there was a policy exclusion that, because of that policy exclusion, the appraisers exceeded their authority in making their award and, therefore, the plaintiff is entitled to declaratory judgment that would set aside the appraisers' award and reduce that award to the policy limitation of $100,000.
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> This complaint for declaratory judgment alleges a cause of action. Because for the purpose of evaluating a (8) motion, the Court must take the facts as they are established in the complaint.
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> On the other side, the defendant has denied the allegations of the plaintiff. The defendant asserts that the appraisers acted in accordance with the policy provision, that the plaintiff has failed to pay the appraisal award which was rendered in accordance with the terms of the policy and Michigan law. And so the defendant sets up a defense and entitlement to coverage under the terms of the policy and confirmation of the appraiser's award.
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> In short, the plaintiff has alleged a cause of action, the defendant has alleged a defense, and, therefore, the motions for summary disposition are denied.

The circuit court explained that it had not considered the motions under MCR 2.116(C)(10) because Van Hellemont had not argued the motion on that basis at the hearing for Vemulapalli and because Cincinnati did not mention that ground in its motion.

The circuit court's decision not to grant either motion for summary disposition prompted Cincinnati to bring a new motion for summary disposition under MCR 2.116(C)(10). Vemulapalli filed a response and brief to Cincinnati's new motion. In that response, Vemulapalli argued that the circuit court should deny Cincinnati's motion for summary disposition and grant him summary disposition instead. In general, both parties relied on their previous arguments to support their positions.

At the hearing on the second motions for summary disposition, the circuit court gave a brief statement of the facts of the case, the parties' arguments, and the rules governing contract interpretation. Turning to the exclusion, the circuit court said that a "classic" example of when this exclusion would apply would be if there was "the enactment of an ordinance or a law that imposes an obligation that didn't exist prior to the loss." However, the circuit court noted, in this case

> the fire alarm system was necessitated by the code prior to this loss. The fire alarm system was in the building. And this was not something that was mandated by a code or a law that is adding something different with regard to what is required in the building code. There has always been a requirement for a fire alarm system.

The circuit court then compared the language in the ordinance or law exclusion to the language in the ordinance or law endorsement, concluding that the conflicting language created an ambiguity. Continuing, the circuit court said:

> I find that the umpire did not make a mistake. The umpire determined as a matter of fact that, while there were some defects in the system, that it was operable, it was a functioning system at the time of the loss, and that the fire alarm system was made inoperable by the water damage. It was the water damage that occasioned the necessity of the replacement of the system. For that reason, it would be covered.
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> But, in addition, there is an ambiguity in this insurance contract that gives rise to the conclusion as a matter of law that this contract should be construed in favor of the insured and against the insurer. And in that context, likewise the Court concludes that there is a coverage here.
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> The parties have stipulated that this policy is a replacement cost policy. So I conclude that the defendant is entitled to summary disposition as there is no genuine issue of fact that exists here.

After addressing a number of other issues not germane to this appeal, the circuit court clarified at Cincinnati's request that the coverage limitation in the endorsement did not apply in this case. In conclusion, the circuit court said, "Suffice [it] to say that I find no instances of bad faith, fraud, misconduct or manifest mistake." As a result, the circuit court explained that it "conclude[d] that the appraiser's determination was appropriate under the terms of the policy."

For reasons not clear from the record, two weeks later the circuit court held an additional hearing regarding summary disposition. The parties reasserted many of their previous arguments. This time, however, Cincinnati emphasized its evolving argument that the umpire had erroneously engaged in the legal task of interpreting the insurance contract, rather than the factual task of assessing the loss. Cincinnati also maintained that the fire alarm system was not functional before the plumbing problem, and that because Vemulapalli claimed that the system was functional, there was a disputed issue of material fact that made summary disposition inappropriate. As Cincinnati's lawyer, Filipiak, put it, if the "facts pan[ned] out" there might not be "any coverage whatsoever under the policy . . . ." Filipiak claimed that he had recently learned from Jeffrey Zwirn, an alarm expert he had consulted, that "there were a lot of things that were concealed in regards to the condition of this system that should have been brought up that were not during the course of this hearing" during the appraisal process. Filipiak added that the expert "suggests that the misconduct was significant and certainly had an effect upon the appraisal process and the findings of the umpire."

The circuit court asked Filipiak whether that factual determination was the umpire's[4] responsibility. Filipiak responded that the umpire's job was "[t]o find whether damage occurred, to find out whether replace – what the costs were," but the insurance contract had to be interpreted and applied before the appraiser could get to that stage. The circuit court, however, noted Vemulapalli's argument that Cincinnati had waived this issue because, for the items on which the umpire had reached conclusions favorable to Cincinnati, Cincinnati was not claiming

[4] The circuit court and the parties used the terms appraiser and umpire interchangeably. In fact, apparently, the parties and circuit court were referring to the umpire during this hearing even though they referred to him as the appraiser.

that the umpire had exceeded his authority by interpreting and applying the insurance contract. Filipiak denied that Cincinnati had waived the issue, but conceded that the umpire may have acted in just the same way in dealing with fire alarm system as he did when deciding losses favorably to Cincinnati. Filipiak, however, said that the correct step to take would be to return the case to the umpire for additional factual findings to clarify whether the umpire engaged in contract interpretation.

Filipiak added that Zwirn also believed that, in 1996, Flint had adopted an ordinance that incorporated the code or regulations developed by the National Fire Protection Association. Contrary to his earlier arguments on behalf of Cincinnati, Filipiak contended that Vemulapalli was upgrading his fire alarm system because of this Flint ordinance. Filipiak asserted that "[i]f that system had to be replaced before 1998 . . . [Cincinnati] owe[s] nothing," explaining that the umpire had only found that the water from the plumbing problem had caused additional damage to the system, and had not addressed whether there had been "concealment" of the existing problems with the fire alarm system.

When Van Hellemont had a chance to respond on behalf of Vemulapalli, he reminded the circuit court that it was considering a motion under MCR 2.116(C)(10), and

> most of what Mr. Filipiak has told you about the system in 1997 and about the problems with it not working and the fact that it was non-functional are simply not supported by anything in the record. This affidavit that he produced from Jeffrey Swern [sic], it doesn't say that. It doesn't say anything about there being substantial problems with it [the fire alarm system].
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> And I can tell you that in 1998 that someone pulled the alarm and evacuated the whole building, but you have no right to rely on that because that's not before you.

Van Hellemont emphasized for the circuit court that Zwirn had "participated in the entire appraisal process," as the umpire had mentioned in his third findings, and that Zwirn was claiming that there was some sort of misrepresentation for the first time more than a year after the appraisal process.[5] Van Hellemont also noted that, despite Zwirn's suggestion that Flint had adopted some standards regarding fire prevention, there was no way to know that was true because he did not represent the city. Van Hellemont insisted that the umpire had found as a matter of fact that the moisture build-up in the fire alarm system resulted from the water pipe that burst, and that moisture is what made the system nonfunctional. Accordingly, it was clear that the fire alarm system's need for replacement was "related to the loss incident."

The circuit court did not announce its ruling from the bench at this third hearing. Cincinnati took advantage of this delay to continue to file motions and supplements related to summary disposition. Vemulapalli also submitted an affidavit from his expert, who reaffirmed his opinion that the alarm system was functional before the flood, and from the umpire, who claimed that he did not consider whether the system would have complied with an ordinance

[5] In fact, contrary to Filipiak's8 assertion, we see nothing in Zwirn's affidavit that refers to misconduct, concealment, or any similar wrongdoing in the appraisal process.

before the damage. In an order entered approximately thirteen months after the third hearing, the circuit court indicated that it was granting Vemulapalli's motion for summary disposition for the reasons it stated on the record at the second hearing. Cincinnati now raises the same arguments it made in the circuit court.

II. Standard Of Review

Whether the circuit court erred in granting summary disposition to Vemulapalli is subject to review de novo.[6] This standard of review is also appropriate to the extent that we must interpret and apply the insurance contract.[7] However, the appraisal process used in this case is akin to a common-law agreement to arbitrate and, therefore, can be reviewed only for "bad faith, fraud, misconduct or manifest mistake."[8]

III. Ordinance Or Law Exclusion

Cincinnati argues that its liability is only required to pay up to $100,000 for replacing the fire alarm system under the ordinance or law endorsement. To get to that conclusion, however, the ordinance or law exclusion would have to apply. The exclusion states:

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> a. **Ordinance or Law**
>
> The enforcement of any ordinance or law:
>
> (1) Regulating the construction, use or repair of any property; or
>
> (2) Requiring the tearing down of any property, including the cost of removing its debris.[9]

The unambiguous language in this exclusion, which we must give effect,[10] requires the "enforcement of any ordinance or law" to cause, at least in part, "loss or damage" for this exclusion to apply.

Cincinnati says that "there is no dispute that the City of Flint required a fire alarm system to be present in the building" at issue in this case, and that the "ordinance regulates the repair of the property and mandates the reinstallation of the system in compliance with City Code." Yet, Cincinnati has *never* identified, much less quoted, *any* ordinance or law that, because it was

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[6] See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[7] See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[8] See *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992).

[9] Emphasis in the original.

[10] See *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

being enforced, caused any portion of the damage to the fire alarm system in the building, whether that loss occurred before, after, or concurrently with the plumbing failure in this case. Cincinnati certainly has not cited any ordinance or law being enforced that fit in the specific category of ordinances and laws identified in the exclusion, which "[r]egulat[e] the construction, use or repair of any property," or "[r]equir[e] the tearing down of any property, including the cost of removing its debris."

For instance, Cincinnati has not cited a specific Flint City ordinance that required Vemulapalli to modernize or replace the fire alarm system because of its age, design, or functionality. Rather, Cincinnati essentially asks us to assume that this mystery ordinance exists or assume that, because those sorts of ordinances are common, Flint has such an ordinance. At best, Zwirn, who evidently works primarily in New York and Florida, alleged that he believed that Flint had adopted an unspecified ordinance incorporating national standards. Even assuming that some sort ordinance exists, we have no way to determine whether the "enforcement" of the ordinance "caused directly or indirectly" the loss in this case. In other words, Cincinnati has not demonstrated that the City was enforcing its ordinance, which required Vemulapalli to modernize or replace the fire system as opposed to the flood caused by the plumbing failure. As far as we know, as Filipiak conceded at the first hearing on the motions for summary disposition, the fire alarm system would have still met any applicable ordinance or law had the system been operational after the water pipe burst.

There is one reference in the umpire's third findings to Vemulapalli's request that Cincinnati's payment be sufficient for the replacement fire alarm system "to comply with applicable laws and ordinance standards . . . ." This reference still fails to give us any meaningful information about any ordinance or law. This reference also does not suggest that any applicable laws or ordinances were being "enforced" and so "caused" this loss "directly or indirectly." In fact, though the umpire acknowledged that the record did not permit him to determine what specifically caused the system failure, the possibilities included only operational or mechanical deficiencies, not changes made because of any ordinance or law. As far as we can tell, Vemulapalli's request was an acknowledgment that the fire alarm system could not be replaced with an identical system because its age made the same system unavailable. Therefore, Vemulapalli wanted to be able to install a replacement system that would meet the ordinances and laws in effect. The exclusion does state that "loss or damage [caused by enforcement of an ordinance or law] is excluded regardless of any other cause or event that contributes concurrently or *in any sequence to the loss*."[11] However, the fair inference to be drawn from the umpire's findings is that the water damage caused a *complete* loss. Accordingly, even if the repair or replacement will give Vemulapalli a better fire alarm system than was in place before the occurrence, it would be impossible for that repair or replacement, even assuming that it was pursuant to the "enforcement" of an ordinance or law, to have "caused" part of the loss in this case.

Cincinnati also cites case law from foreign jurisdictions for the proposition that ordinance or law exclusions are generally enforceable. We have no quarrel with a general proposition that the parties to an insurance contract are free to exclude from the contract's coverage losses caused

[11] Emphasis added.

by the enforcement of an ordinance or law. In short, the problem in this case is that Cincinnati has failed to prove that the "enforcement" of an ordinance or law "directly or indirectly" "caused" the loss as the insurance contract plainly required. In fact, in failing to identify for us the Flint ordinance on which it is relying, Cincinnati has abandoned this argument.[12] Because the exclusion does not apply, the endorsement modifying the exclusion, and the circuit court's interpretation of the conflict between the two,[13] is irrelevant to the disposition of this case. Accordingly, the $12 million policy limit governs this loss.

IV. Additional Evidence

Cincinnati argues that the circuit court erred when it assumed that the fire alarm system had complied with whatever relevant ordinance Flint had in place, noting that the umpire and appraisers had not considered any such ordinance during the appraisal process. Cincinnati claims that the circuit court should have agreed to hear additional evidence concerning whether an ordinance or law required the fire alarm system to be replaced even before the flood in order to decide the motion. Cincinnati's argument is unpersuasive.

Cincinnati had an obligation to provide documentary evidence to demonstrate that a dispute of material fact existed at the time the circuit was deciding the motion for summary disposition.[14] In all the years this case was pending in the appraisal process and the circuit court, Cincinnati never provided, quoted, or specifically identified, a Flint ordinance that applied to a fire alarm system in Genesee Towers at all. Further, without identifying this ordinance, Cincinnati makes a completely unsupported leap in logic by suggesting that there was additional evidence that would have demonstrated that the hypothetical ordinance arguably required Vemulapalli to replace or alter the fire alarm system before the water pipe burst. If there were witnesses that Cincinnati believes could have provided the circuit court with evidence demonstrating that an ordinance required the fire alarm system to be repaired or replaced even before the loss in this case, Cincinnati should have cited the ordinance, documented that additional evidence, and submitted it to the circuit court before it decided the motion. Thus, the circuit court did not err in granting summary disposition. Additionally, Cincinnati has again failed to cite any authority to support its position.[15] Accordingly, we would not reverse the trial court on the basis of this issue even if it erred.

V. Rebuttal Witness

Cincinnati contends that the umpire erred because, although its appraiser testified, it was not allowed to present a rebuttal witness to Wolverton, whose testimony the umpire found decisive in this case. However, according to Vemulapalli, the umpire did not prohibit Cincinnati

[12] See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Balogh v City of Flat Rock*, 152 Mich App 517, 519-520; 394 NW2d 1 (1985).

[13] Technically, the circuit court's observation was correct, even if its reasoning was unusual. The language in the exclusion and the endorsement conflict, but that is because the endorsement is intended to modify the exclusion.

[14] See *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

[15] See *Mitcham*, *supra* at 203.

from providing additional testimony after Wolverton testified. Rather, Cincinnati chose not to offer this testimony until after it saw the umpire's findings.

Cincinnati cites case law that suggests that an umpire's award may be overturned if the appraisal proceeding was so "grossly unfair" it constituted misconduct.[16] However, we see nothing grossly unfair in the appraisal process. The real point Cincinnati makes is that the evidence presented to the umpire was conflicting, and that it had hoped to tip the balance in its favor by presenting additional testimony, although it does not indicate how it would have assailed Wolverton's testimony. Cincinnati had a full opportunity to present its expert and dispute Vemulapalli's evidence. To delve any deeper into the appraisal process to weigh the evidence and examine any potential alternative outcomes is the sort of detailed scrutiny that our limited review does not permit.[17]

VI. Estimated Replacement Cost

Finally, Cincinnati argues that the umpire erred in accepting the two appraisers' estimates of replacement cost, averaging the two figures, and deciding that Vemulapalli is entitled to $657,000 even before he makes the repairs. Cincinnati is partly correct. We are not concerned with the method the umpire used to determine the amount of the loss. "The amount of loss . . ., as determined by the appraisers, is conclusive."[18] However, the insurance contract provides that Cincinnati "will not pay on a replacement cost basis for any loss or damage" "until the loss or damage is actually repaired or replaced." This relates to the limitation that Cincinnati will only pay the replacement costs of the amount the insured "actually spend[s] that is necessary to repair or replace the loss or damages property." This provision is clear and must be enforced.[19]

We affirm the trial court's determination that fire alarm system was a covered loss and the law or ordinance exclusion did not apply, meriting summary disposition. We reverse the trial court's order granting summary disposition to the extent that it required Cincinnati to pay Vemulapalli any replacement cost in excess of the actual cash value that Vemulapalli had yet to incur. We remand this case to the circuit court to enter judgment in favor of Vemulapalli for $32,850 (the fire system's actual cash value) *and* any actual replacement costs in excess of that amount. The circuit court may, if necessary, hold an evidentiary hearing to determine the proper

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[16] See *Emmons, supra* at 466-467.

[17] See *id*. at 466.

[18] See *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 488; 476 NW2d 467 (1991).

[19] See *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 183; 490 NW2d 864 (1988) ("[T]he insureds must . . . actually repair, rebuild, or replace at the same or another site before the insurer becomes liable to pay *the difference between actual cash value and replacement cost*" pursuant to the terms of the insurance contract.) (emphasis added); see also *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 360; 581 NW2d 781 (1998) (acknowledging possible merit in the insurer's argument that, since *Smith*, there is no room to debate whether an actual repair or replacement clause is enforceable).

amount of the judgment and may order Cincinnati to pay Vemulapalli for the actual replacement costs as he incurs the costs. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad