

STATE OF MICHIGAN
COURT OF APPEALS

CLIFTON STERLING,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

June 15, 2004

No. 245556

Genesee Circuit Court

LC No. 97-061853-CK

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the order granting plaintiff's motion for summary disposition in this insurance dispute. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant insured a rental property owned by plaintiff at 1312 Minnesota in Flint. The policy limit was \$35,000. A fire occurred in the dwelling on February 3, 1997. Defendant determined that the repair cost exceeded the value of the home, and paid plaintiff \$18,900, the actual cash value of the dwelling, less statutory costs.

Plaintiff repaired the home, but also purchased another rental property for \$35,000, and requested that defendant pay the difference between the replacement cost and the actual cash value already paid. Defendant denied the claim because the dwelling had been repaired. Plaintiff brought this action for breach of contract. The trial court granted summary disposition to plaintiff, based on defendant's citation to the wrong policy section in its denial of the claim. This Court reversed and remanded for consideration of plaintiff's claim under section 2(f) of the policy. *Sterling v Auto-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued 5/21/02 (May 21, 2002, Docket No. 230919). On remand, the trial court again granted summary disposition to plaintiff.

We review the grant or denial of a motion for summary disposition de novo. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). The construction and interpretation of an insurance contract is a question of law that is also reviewed de novo. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

An insurance contract must be enforced in accordance with its terms. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). A court must not hold an

insurance company liable for a risk it did not assume. Where there is no ambiguity, an insurance policy must be enforced as written. *Id.*

The loss settlement provision of the policy provides in relevant part:

2. Under Dwelling and Other Structures Coverages:

(a) How a loss to the dwelling or other structure will be settled will depend on how the amount of insurance relates to the full replacement cost. In determining full replacement cost, do not include the cost of excavations, underground pipes, wiring and drains, foundations or other supports below the surface of the ground and inside foundation walls.

(b) If, at the time of the loss, the amount of insurance for the dwelling or other structure in this policy is 80% or more of the full replacement cost, we will pay the full cost to repair or replace the damaged part of the dwelling or other structure, without deduction for depreciation.

(c) If, at the time of loss the amount of insurance for the dwelling or other structure in this policy is less than 80% of the full replacement cost, we will pay the larger of the following amounts:

(i) the actual cash value of the damaged part of the dwelling or other structure; or

(ii) the amount of the loss multiplied by the ratio of the amount of insurance on the dwelling or other structure to 80% of its full replacement cost.

(d) But, we will pay under (b) or (c) no more than the smallest of the following:

(1) the limit of liability in this policy for the dwelling or other structure;

(2) the cost to replace the damaged dwelling or other structure with equivalent construction for equivalent use on the same premises; or

(3) the amount actually spent for necessary repair or replacement of the damaged dwelling or other structure.

* * *

(f) You may disregard these replacement cost loss settlement provisions and make a claim on an actual cash value basis. If you do, you may make further claim within 180 days after the loss for any additional cost you incur in replacing the damaged property.

In his deposition, plaintiff stated that although he had no records, he believed that he repaired the subject property for approximately \$22,000, or roughly \$3,000 more than was paid

under the policy. Under policy provision 2(d)(3), that would be the limit of his recovery. Section 2(f) allows him to disregard that provision, but only to make a claim on an actual cash value basis. While plaintiff asserts that this allows him to claim the cost of a replacement house up to the policy limit, 2(f) contains no support for that conclusion. Plaintiff was paid the actual cash value of the house, which is what is provided for by section 2(f).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray