STATE OF MICHIGAN

COURT OF APPEALS

SHAWANA WILLIAMS,

Plaintiff/Cross-Defendant-Appellee,

v

AUTO CLUB GROUP INS. CO., a/k/a AAA MICHIGAN,

Defendant/Cross-Defendant-Appellant,

and

NEW FALLS CORPORATION,

Intervening-Defendant/Cross-Plaintiff.

UNPUBLISHED
August 23, 2011

No. 294511
Kent Circuit Court
LC No. 06-009905-CK

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant, Auto Club Group Ins. Co., a/k/a AAA Michigan, appeals as of right a judgment for plaintiff Shawana Williams in a suit arising from defendant's failure to compensate her for damages resulting from a fire in her home. Defendant argues that the trial court erred by denying its post-trial motions for set-off and remittitur. We affirm in part, and reverse in part.

I.

In 2003, plaintiff purchased a home in Grand Rapids, executed a mortgage and, in an adjustable rate note, promised to pay $84,455, plus interest, to her lender, Metro Center Mortgage, Inc. ("MCM, Inc."). The home was insured by defendant when a fire occurred at the home on May 25, 2005.

Donald Swartz, a claim representative for defendant, testified that plaintiff stayed at the Residence Inn from the night of the fire until June 6, 2005, resulting in additional costs of

approximately $3,000, which defendant paid before trial. Plaintiff thereafter moved to an apartment, which cost $757 per month, where she stayed for one year. At the same time as plaintiff was renting the apartment, plaintiff testified that she received bills from Homecomings Financial[1] and in turn sent $670 mortgage payments every month.

Defendant's loss claims specialist determined that $60,135.56 would restore the home to its original condition, but the actual cash value of the claim was $46,965.33. The restoration estimate was mailed to Homecomings Financial, which in turn sent a sworn statement and proof of loss to defendant. Thereafter, defendant paid a portion of the cash value ($7,064) to the City of Grand Rapids under MCL 500.2845,[2] and the remaining $39,901.33 to Homecomings Financial. Homecomings Financial then had 180 days to make the repairs to the home, which would require payment by defendant of the remaining $13,170.23 in the restoration estimate.[3] We note that a key issue before the trial court, and now on appeal, is whether defendant properly paid Homecomings Financial because the insurance policy provides that loss shall be payable to "any mortgagee named on the Declaration Certificate," but the only Declaration Certificate in the record identifies the "Mortgage Servicing Company/Mortgagee" as Household Bank FSB.

The mortgage was assigned by MCM, Inc. to New Falls Corporation (NFC) on April 12, 2007. NFC's account officer, Denise Harkless, subsequently learned that defendant had paid $39,901.33 to Homecomings Financial. Harkless testified that NFC did not receive that payment with the mortgage assignment. Harkless was unsure what happened to the payment, but she

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[1] It is unclear from the record what role Homecomings Financial played in the mortgage process. There was some testimony from an account officer of an assignee of the mortgage, New Falls Corporation, that Homecomings Financial could have been a servicing agent for MCM, Inc. There was other evidence that Homecomings Financial claimed that it was plaintiff's lender. However, according to a title search, as well as the plain language of the note and the mortgage, MCM, Inc. was the lender at the time of the fire and Homecomings Financial was not listed in these documents as a servicing agent.

[2] MCL 500.2845 provides, in relevant part:

> (1) If a claim is filed for a loss to insured real property due to fire or explosion and a final settlement is reached on the loss to the insured real property, an insurer shall withhold from payment 25% of the actual cash value of the insured real property at the time of the loss or 25% of the final settlement, whichever is less . . . At the time that 25% of the settlement or judgment is withheld, the insurer shall give notice of the withholding to the treasurer of the city, village, or township in which the insured real property is located, to the insured, and to any mortgagee having an existing lien or liens against the insured real property, if the mortgagee is named on the policy. In the case of a judgment, notice shall also be provided to the court in which judgment was entered.

[3] A section pertaining to property insurance in plaintiff's mortgage allows a lender to make a proof of loss and hold insurance proceeds for restoration and repair.

nevertheless testified that she credited plaintiff's payoff amount with $39,901.33 because, as she explained, it is NFC's policy to err on the side of the debtor. Harkless maintained that the payoff amount after this credit was $61,967.59.

Plaintiff filed a complaint against defendant alleging that defendant had failed to timely pay plaintiff's claim for coverage resulting from the fire. Defendant responded that the policy was void, maintaining that plaintiff intentionally set the fire to fraudulently collect insurance payments from defendant. NFC intervened as a named insured on the insurance policy. Among other claims unrelated to this appeal, NFC alleged that plaintiff had stopped making payments on the note and that plaintiff's default entitled NFC to acceleration of the amount of the security interest.

Following trial, a jury reached a verdict finding that plaintiff was not involved with arson and she did not engage in fraud, falsely swear, or make material misrepresentations to the insurance company. Thus, the jury found that plaintiff was entitled to $60,135.56 in damages for the structure, $60,000 in damages for personal contents, and $7,570 in damages for additional expenses. The jury found that plaintiff was liable to NFC for $21,000 on the security interest.

Defendant thereafter filed a motion for remittitur with respect to the jury's award for additional living expenses, which the trial court denied. Defendant also filed a motion for set-off from the $60,135.56 in damages for the structure, arguing that plaintiff already enjoyed the benefit of its $7,064 payment to the City of Grand Rapids and its $39,901.33 payment to Homecomings Financial in light of NFC's credit of that amount to the payoff amount. Plaintiff did not contest the $7,064 set-off, which the trial court granted, but the trial court denied the motion for set-off of $39,901.33. The trial court reasoned that the payment to Homecomings Financial "loomed" over the case, but "the proofs to this day are unclear . . . concerning whether the proper mortgagee was paid."

We consider first defendant's argument, with respect to the trial court's denial of the motion for set-off, that the judgment awarding $60,135.56 in damages to the structure will result in double recovery for plaintiff. We agree.

> Generally, under Michigan law, only one recovery is allowed for an injury. *Chicilo v Marshall*, 185 Mich App 68, 70; 460 NW2d 231 (1990); *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986). To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated. *Chicilo*, 185 Mich App at 70. Thus, where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award. *Great Northern Packaging*, 154 Mich App at 781. [*Grace*, 253 Mich App at 368-369.]

Even though NFC's attorney maintained in his closing argument that it was entitled to the full payoff amount without the credit, $101,868.94, the only evidence regarding the payoff amount that is properly before this Court is Harkless's testimony that plaintiff was in fact credited for the $39,901.33, reducing the payoff amount to $61,967.59. Because, according to the record evidence, plaintiff ultimately enjoyed the benefit of the $39,901.33 payment by defendant to

Homecomings Financial for damage to the structure, and because $60,135.56 equaled the cost to restore the home, we conclude that, having been awarded the full $60,135.56 for damage to the structure, plaintiff received a double recovery as to the $39,901.33 payment already credited to plaintiff. *Id.* We therefore reverse the trial court's order denying defendant's motion for set-off and remand for the trial court to set off $39,901.33 from the judgment. Given our holding here, we decline to address defendant's remaining arguments concerning the set off and payments allegedly due Homecomings Financial.

Defendant also argues on appeal that the $7,570 award for additional living expenses is not supported by the evidence and the trial court abused its discretion by denying its motion for remittitur. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). We disagree.

> The power of remittitur should be exercised with restraint. When deciding whether to grant a motion for remittitur, the trial court must examine all the evidence in the light most favorable to the nonmoving party to determine whether the evidence supported the jury's award. "If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, it should not be disturbed." [*Id.* (citations omitted).]

Plaintiff's insurance policy provides:

> If a loss caused by a Peril We Insure Against and not otherwise excluded in this Policy makes **your residence premises** untenable, **we** will pay the reasonable increase in living expenses necessary to maintain **your** normal standard of living while **you** and **your resident relatives** live elsewhere. **We** will pay for the shortest time needed to repair or replace the damaged property; or for **you** to permanently relocate.

Plaintiff defined additional expenses as, "Anything as far as when I'm out of the home. Shelter, clothing, anything as far as however long I'm out of the home while they are repairing the property." Swartz told plaintiff that additional expenses constituted "any money over . . . normal living expenses [she] would incur." For example:

> if [plaintiff] stayed in a hotel room for 30 days at a hundred dollars a day, [defendant] would pay $3,000, less what her normal expenses would be. If she had an electric bill, phone bill, a garbage bill, we would subtract that from the $3,000 because those—she would have paid those . . . anyway.

Defendant maintains on appeal that it paid for five months of rent before trial, so plaintiff could not have paid $7,570 in rent for the remaining seven months that she lived in the apartment. Seven months of rent, at a cost of $757 per month, would total $5,299. The jury was in the best position to determine the amount of rent plaintiff paid after the reimbursements by defendant ended. Although defendant claims on appeal that it made reimbursements for rent from May 25, 2005 (before plaintiff was even renting an apartment) to October 31, 2005, thus equaling five months of reimbursements, plaintiff testified at trial that defendant reimbursed her for three to four months' rent and Swartz could only testify that defendant reimbursed her for at

least three months' rent. The jury was free to reject this less than exact evidence regarding defendant's reimbursements and instead accept plaintiff's figure, $7,570, representing the amount of rent she paid after defendant stopped paying reimbursements. See *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001) ("Indeed, the plaintiff bears the burden of proving damages, and a jury is free to accept or reject such proofs."). Viewing the evidence in a light most favorable to plaintiff, the trial court did not abuse its discretion in denying defendant's motion for remittitur on this ground.

Defendant argues for the first time on appeal that plaintiff failed to establish that she lived in the apartment for the shortest time needed to repair or replace the damaged property, or for her to permanently relocate. We decline to address this portion of defendant's argument, *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993), because the facts necessary for its resolution have not been presented. *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006) ("[T]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented."). In any event, Swartz testified that defendant agreed to pay additional living expenses until the claim was resolved and, because of the instant litigation, plaintiff's claim was not resolved until well after her one-year stay in the apartment.

Defendant also maintains that, prior to the fire plaintiff incurred several hundred dollars in expenses each month for utilities and other costs. At trial, plaintiff specifically testified that she paid between $85 and $90 for electricity, between $90 and $100 for gas, $25 for water, between $70 and $80 for a home telephone, and between $120 and $170 for food. Plaintiff did not testify at trial regarding whether these expenses remained constant, increased, decreased, or were duplicated after the fire. The thrust of plaintiff's argument at trial was only that her living expenses increased because she paid both her mortgage payments ($670 per month) and her rent payments ($757 per month). Viewing the evidence in a light most favorable to plaintiff, it was not outside the range of principled outcomes for the trial court to conclude that the other utilities remained constant (either to maintain the fire-damaged home or to live at the apartment) and the only increase in living expenses was that claimed by plaintiff—rent.

We affirm the trial court's order denying defendant's motion for remittitur, but we reverse the trial court's order denying defendant's motion for set-off and remand for the trial court to set off $39,901.33 from the judgment for damages to the structure.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder