STATE OF MICHIGAN

COURT OF APPEALS

THELMA WINTERBOTTOM,

Plaintiff-Appellee,

v

TRANSAMERICA INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 183566
Oakland Circuit Court
LC No. 92-430085 CK

Before: Doctoroff, P.J., and Kelly and Young, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment in favor of plaintiff entered pursuant to a jury verdict. We affirm in part, reverse in part, and remand for further proceedings.

The facts of this case are briefly as follows. On June 11, 1991, a fire destroyed plaintiff's residence. Plaintiff initiated this action after defendant denied her claim for insurance proceeds on the grounds of arson and misrepresentation. Defendant rejected plaintiff's August 1992 offer of judgment in the amount of $60,000, and both parties later rejected a December 1992 mediation award of $35,000 in favor of plaintiff. Following trial, the jury found that, although the fire at plaintiff's residence was an intentional arson-fire, plaintiff did not herself set or procure the fire. The jury also found that plaintiff did not commit fraud, false swearing, or misrepresentation regarding her involvement in the setting of the fire. The trial court entered judgment accordingly, and awarded plaintiff the replacement cost of the dwelling and its contents, as well as offer of judgment costs and attorney fees.

Defendant first argues that the trial court erred by refusing to admit the statement of personal property inventory that plaintiff submitted to defendant along with her insurance claim and sworn statement in proof of loss. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Defendant asserts that the inventory statement was relevant and admissible to show that plaintiff committed fraud or false swearing in connection with her insurance claim. This was an affirmative

defense, proof of which would have relieved defendant of its obligations under the insurance policy. See MCL 500.2833(c); MSA 24.12833(c). Because the $77,980.20 worth of personal property listed on the inventory statement was more than three times the appraised replacement cost of that property, and more than five times the appraised actual cost, we agree with defendant that the inventory statement would have been relevant to prove that plaintiff committed fraud, false swearing, and misrepresentation regarding the actual amount of the loss. MRE 401. Nevertheless, while defendant sought to admit the inventory statement on the basis that the discrepancies between it and the statutory appraisal tended to establish plaintiff's alleged false swearing, this defense was simply not part of defendant's theory of the case at trial or the subject of any issue submitted to the jury for determination.

A review of defendant's opening and closing statements, as well as the unobjected-to jury instructions and verdict form, leads us to conclude that the only issue presented to the jury for its determination regarding fraud was whether plaintiff committed fraud, false swearing and/or misrepresentation *concerning the cause and origin of the fire*. For example, the pertinent question on the verdict form read as follows: "Do you find that Transamerica Insurance Company provided by clear and convincing evidence that Thelma Winterbottom committed fraud, false swearing and/or misrepresentation *regarding her involvement in the setting of the fire*?" (Emphasis added).[1] In fact, while defendant elicited on cross-examination testimony indicating that plaintiff included several items on the inventory that were never found, defendant never mentioned these discrepancies in its closing argument. Moreover, defense counsel used the unadmitted inventory statement to impeach plaintiff's honesty in completing the inventory statement and in making her claim. Thus, in light of the defense posture at trial, we cannot say that the trial court's decision refusing to admit the inventory statement on the ground of relevancy was an abuse of discretion. *Price*, *supra*.

Defendant's next evidentiary issue is that the trial court erred when it excluded, on hearsay grounds, identification testimony by two witnesses, Mary Jones and her daughter Kim Lassen, both of whom saw a man in a phone booth outside plaintiff's residence at the time of the fire. We disagree.

With respect to Jones' proffered testimony, we note that defendant failed to preserve this issue for appeal because it did not take exception to the trial court's ruling by making an offer of proof. MRE 103(a)(2). Accordingly, we decline to review it. *In re Green Charitable Trust*, 172 Mich App 298, 329; 431 NW2d 492 (1988). With respect to Lassen, we agree with the trial court that her proposed identification was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

Defendant maintains that Lassen's testimony was admissible under MRE 801(d)(1), which provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person." However, Lassen testified that she did not immediately recognize the man in the phone booth. Rather, she learned the man's identity several days later when she described his appearance to some of her family members. Since Lassen's identification was based not on her own perception, but on other hearsay statements made to her by third-party declarants that

were not subject to a hearsay exception, MRE 801(d)(1)(C) is inapplicable. Accordingly, the trial court did not abuse its discretion in excluding Lassen's proffered testimony.

Defendant next argues that the trial court erred by refusing to allow defendant to read into the record the depositions of two witnesses, Diana Smith and Melvin McPherson, who did not appear at trial to testify, although the witnesses were, at one point, subpoenaed to appear at an earlier scheduled trial date. We disagree. MRE 804(b)(5) provides that testimony given as a witness in a deposition is not hearsay if the declarant is unavailable to testify at the time that the testimony is offered. MRE 804(a)(5) defines "unavailability as a witness" to include situations where the declarant is "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

Trial in this case commenced on December 6, 1994. The record indicates that defendant's last attempt to contact either Smith or McPherson was by way of a letter dated July 21, 1994, almost six months prior to trial. The trial court found that no reasonable effort to obtain the witnesses' presence had been undertaken. Based on these facts, we cannot say that the trial court abused its discretion in denying defendant's request to read Smith and McPhersons' depositions into the record.

Next, defendant argues that the trial court erred when it awarded plaintiff the full amount of the replacement costs contained in the statutory appraisal. We agree. MCL 500.2826; MSA 24.12826, provides:

> An insurer may issue a fire insurance policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between actual value of the insured property at the time any loss or damage occurs, as the amount actually extended to repair, rebuild or replace with the materials of like size, kind and quality, but not to exceed the amount of liability covered by the fire policy. *A fire policy issued pursuant to this section may provide that there should be no liability by the insurer to pay the amount specified in the policy unless the property damage is actually repaired, rebuilt or replaced at the same or another site.* [Emphasis added.]

The insurance policy in this case contained the actual repair obligation provision contemplated by MCL 500.2826; MSA 24.12826. However, the trial court awarded plaintiff the full replacement cost of the dwelling and contents on the ground that defendant's refusal to honor the claim prevented plaintiff from actually repairing or replacing her property.

Defendant maintains that under the plain language of the statute as well as the Supreme Court's decision in *Smith v Michigan Basic Ins*, 441 Mich 181; 490 NW2d 864 (1991), plaintiff is required to actually have repaired, rebuilt or replaced her home and personal property before defendant becomes liable for replacement costs. Plaintiff, on the other hand, urges us to follow the reasoning of *Pollock v Fire Ins Exchange*, 167 Mich App 415; 423 NW2d 234 (1988), and *McCahill v Commercial Ins Co*, 179 Mich App 761; 446 NW2d 579 (1989). In those cases, this Court found that the insurers'

bad faith in processing the plaintiffs' claims excused them from performance of the condition precedent (repair or replacement of the damage). *Pollock*, *supra*; *McCahill*, *supra*. The Michigan Supreme Court, however, distinguished *Pollock* and *McCahill* in *Smith*, *supra*. In *Smith*, the Court held that, where an insurer asserts in good faith a defense of arson or fraud, the insured is not automatically entitled to payment of replacement cost following a jury's rejection of those defenses. *Id*. at 190.

We believe that *Smith* is controlling here because there was no showing that defendant's arson and fraud defenses were not asserted in good faith. See *Id*. In any event, *Pollock*, *supra* (insurer did not argue any good faith defenses), and *McCahill*, *supra* (insurer engaged in extreme and outrageous conduct), are clearly distinguishable on their facts. Our conclusion is supported by the jury's finding that the fire which destroyed plaintiff's residence was, in fact, intentionally set, albeit not by plaintiff. The trial court erred in awarding plaintiff replacement costs without requiring actual repair, rebuilding or replacement as required by the insurance policy and the statute.

Defendant also argues that the trial court erred in refusing to reduce the judgment by one-half because the statutory appraisal on which it was based represented the interests of both plaintiff and her ex-husband, Gary Winterbottom, who were coinsureds under the policy and who were married at the time of both the loss and the appraisal. Defendant argues that because Winterbottom failed to contest the denial of his claim within the one-year period of limitation contained in MCL 500.2833; MSA 24.1283, plaintiff is only entitled to one-half of the insurance proceeds.

We reject defendant's argument for three reasons. First, the authorities on which defendant relies, *Ramon v Farm Bureau Ins Co*, 184 Mich App 54; 457 NW2d 90 (1990), and *Lewis v Homeowners Ins Co*, 172 Mich App 443; 432 NW2d 334 (1988), are inapplicable here. Each of those cases involved an innocent coinsured spouse, holding property as a tenant by the entirety, attempting to recover insurance proceeds of more than one-half the amount of property damage caused by the wrongful acts of the other coinsured spouse. *Ramon*, *supra*; *Lewis*, *supra*. Defendant has cited no authority for the proposition that Gary Winterbottom's failure to timely file suit should preclude plaintiff in the instant case from recovering the full amount of the insurance proceeds. Indeed, the logic of *Ramon* and *Lewis* suggests that, when no implicated insured is involved, the full contractual payment should be made.

Second, defendant relies on no contractual provision of the insurance policy in support of its claim. The third reason for rejecting defendant's contention is that the record does not establish defendant's claim that the statutory appraisal in fact represented more than plaintiff's interest alone.[2] In the absence of legal authority or contractual or factual bases to the contrary, we conclude that the trial court did not err in refusing to limit plaintiff's recovery to one-half of the statutory appraisal.

Defendant next argues that the trial court erred by not reducing plaintiff's recovery by the amount of the unpaid mortgage balance. The trial court determined that defendant waived any right to set-off by failing to raise it in a timely manner. Unfortunately, defendant has failed even to address the basis of the trial court's decision, much less explain why the decision was erroneous. Therefore, we

decline to address this claim. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Finally, defendant argues that the trial court erred in awarding plaintiff offer of judgment sanctions. We agree with defendant that the trial court erred in applying MCR 2.405, relating to offer of judgment sanctions, instead of MCR 2.403, which provides for mediation sanctions. MCR 2.405(E) provides:

> In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.[3]

Because the mediation rejection in this case occurred later in time, the provisions of MCR 2.405 do not apply. *Freysinger v Taylor Supply Co*, 197 Mich App 349, 354; 494 NW2d 870 (1992). The trial court erred in requiring defendants to pay plaintiff's costs under the offer of judgment rule. Accordingly, we vacate the trial court's award of actual costs under MCR 2.405, and remand this matter to the trial court for a redetermination of plaintiff's entitlement to actual costs under MCR 2.403. In light of our disposition of this issue, we need not reach defendant's contention that the trial court's award of attorney fees under MCR 2.405 was unreasonable and excessive.

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

/s/ Martin M. Doctoroff
/s/ Robert P. Young, Jr.

I concur in results only.

/s/ Michael J. Kelly

[1] The trial court also gave the following unobjected-to instruction to the jury:

> The Transamerica policy provides as follows, quote:
>
> > "This policy is void as to you and any other insured if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss."
>
> End of quote.

> Transamerica also contends that plaintiff violated these provisions of the policy by concealing or misrepresenting material facts and circumstances *concerning the cause and origin of the fire*. In order for Transamerica to prevail on this defense, it must establish the following elements by clear and convincing evidence:
>
> That Thelma Winterbottom concealed or misrepresented material information *concerning the cause and origin of the fire*.
>
> If you find that Transamerica has proved that either Thelma Winterbottom committed fraud or false swearing *in connection with the cause and origin of the fire*, then the insurance policy is void, and your verdict shall be in favor of Transamerica.
>
> If you find that Transamerica has failed to prove that Thelma Winterbottom committed fraud or false swearing *as to the cause or origin of the fire*, then your verdict shall be in favor of the plaintiff on the fraud and false swearing defense. [Emphasis added.]

[2] We note defendant's claim that Gary Winterbottom will be entitled to forty percent of the insurance proceeds under the parties' divorce judgment. However, defendant never presented evidence of this claim to the trial court. Because our review is limited to the record developed by the trial court, we decline to consider it. *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994).

[3] We note that MCR 2.405 has since been amended. The amended version became effective on July 1, 1997. See 454 Mich liii-liv.