

STATE OF MICHIGAN
COURT OF APPEALS

PROFESSIONAL TEAM, INC.,

Plaintiff-Appellee,

v

SAFECO INSURANCE COMPANY OF
AMERICA,

Defendant,

and

AMERICAN STATES INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

April 11, 2006

No. 259020

Wayne Circuit Court

LC No. 04-404770-CK

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant American States Insurance Company¹ appeals as of right from a judgment confirming an “appraisal” award in favor of plaintiff for \$89,213, plus interest. We affirm in part, reverse in part, and remand. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained a fire loss to its building, which was operated as a Howard Johnson’s motel. A commercial property insurance policy covered the loss. The policy included business income loss and extra expense coverage. The parties could not agree on the amount of damages sustained as business interruption loss, so plaintiff filed a civil action against defendant. Defendant requested that the matter be submitted to appraisal as required by the insurance

¹ Defendant Safeco Insurance Company was also originally a defendant-appellant to this appeal, but the parties subsequently stipulated to dismiss the appeal as to Safeco Insurance Company. As used in this opinion, the singular term “defendant” refers only to defendant American States Insurance Company.

policy. The parties subsequently stipulated to dismiss the action without prejudice and submit the damage dispute to appraisal.

Plaintiff and defendant each appointed an appraiser, and after they were unable to agree on an umpire, the court appointed one. On November 21, 2003, a document styled as an appraisal award was issued by the umpire in the amount of \$89,213, which plaintiff's appraiser signed.

Plaintiff then filed this action to enforce the award and for breach of contract. Plaintiff subsequently filed a motion to confirm the award, and defendant filed a motion to set it aside or reduce it to comport with a coinsurance clause in the policy. The trial court denied defendant's motion and granted plaintiff's motion in part. Over defendant's objection, the trial court entered a judgment in favor of plaintiff in the amount to \$89,213, plus statutory interest.

On appeal, defendant asserts that the trial court erred in refusing to set aside the award or conduct an evidentiary hearing because there was not a "full exchange of information" and a "good faith meeting" as part of the appraisal process.

The provision of the insurance policy concerning appraisal states:

1. Appraisal

If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that the selection be made by a judge of a court having jurisdiction. The appraisers will state separately the amount of Net Income and operating expense or amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we still retain the right to deny the claim.

This appraisal clause is a common-law² arbitration agreement. See *Manausa v St Paul Fire & Marine Ins Co*, 356 Mich 629, 633; 97 NW2d 708 (1959); *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992); *Auto-Owners Ins Co v Kwaiser*, 190 Mich App

² The policy does not include the necessary language for it to be deemed an agreement for statutory arbitration. See *Hetrick v David A Friedman, DPM, PC*, 237 Mich App 264, 268-269; 602 NW2d 603 (1999).

482, 486; 476 NW2d 467 (1991); *Davis v Nat'l American Ins Co*, 78 Mich App 225, 232; 259 NW2d 433 (1977).

“[J]udicial review of a common law arbitration award is limited to instances of bad faith, fraud, misconduct or manifest mistake, and will be upheld absent (1) fraud on the part of the arbitrator; (2) fraud or misconduct of the parties affecting the result; (3) gross unfairness in the conduct of the proceedings; (4) want of jurisdiction in the arbitrator; (5) violation of public policy; [or] (6) want to the entirety of the award.” *City of Ferndale v Florence Cement Co*, ___ Mich App ___, ___; ___ NW2d ___ (2006) (citations and internal quotation marks omitted).

As noted by the trial court, the provisions in the insurance policy concerning the appraisal process do not expressly require an exchange of information between appraisers or a meeting. In addition, defendant was aware long before the proposed appraisal award was issued by the umpire that the process being followed did not involve an exchange of information between, or meeting of, the appraisers. However, defendant failed to challenge the procedure until after the award was issued. A party may not adopt a “wait and see” approach and then complain for the first time after the ruling. See, e.g., *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99-100; 323 NW2d 1 (1982); *American Motorists Ins Co v Llanes*, 396 Mich 113, 114-115; 240 NW2d 203 (1976). The trial court did not err in refusing to set aside the appraisal award on the basis of the alleged unfairness in the procedure.

Defendant also argues that the trial court should have set aside the award or conducted an evidentiary hearing because there were manifest mistakes of law and fact in the umpire’s Summary of Findings that she issued after the award. This Court has indicated that relief may be granted where “the mistake or error relied on is clear and the correct result which should have been reached but for the mistake or error can be readily ascertained,” *E E Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 255; 230 NW2d 556 (1975) (citation and internal quotation marks omitted). Having reviewed the summary on which defendant relies, the alleged mistakes are not clear, and the correct result cannot be readily ascertained. Therefore, the trial court did not err in refusing to set aside the appraisal award on the basis of alleged mistakes.

Finally, defendant argues that the trial court erred in entering judgment in the amount of the award instead of reducing its liability for the amount of the loss in accordance with a coinsurance provision in the policy. The trial court reasoned that defendant was precluded from raising this issue because it failed to timely raise the issue before the umpire.

The scope of the arbitration is determined by the contract. *Gogebic Medical Care Facility v AFSCME Local 992, AFL-CIO*, 209 Mich App 693, 696-697; 531 NW2d 728 (1995). The policy provided an appraisal process to resolve disagreements concerning the amount of the loss: “If we and you disagree on the amount of Net Income and operating expense or the amount of loss, either may make written demand for an appraisal of the loss.” However, the amount of loss suffered by the insured is distinct from the question of the insurer’s liability for that loss. See *American Automobile Ins Co v Kevreson*, 131 Mich App 759, 763; 347 NW2d 1 (1984) (recognizing that the appraisal process pursuant to a standard fire insurance policy “does not resolve any question of liability of an insurer but merely resolved the amount of losses suffered by an insured”). See also *Kwaiser, supra* at 486-487, and cases cited therein. The coinsurance provision on which defendant relies is not merely a factor to be used in determining the amount

of the loss. If it were, then it properly may be said that it should have been raised during the appraisal process. Rather, the coinsurance provision is a limitation on defendant's obligation to pay the loss once determined. The policy does not indicate that the parties agreed that the task of applying that provision was to be included in the appraisal process. Accordingly, because application of the coinsurance provision was not a matter subject to the appraisal process, defendant was not obligated to raise the issue in that context.

We decline defendant's request to "reduce the award" to \$50,227 in accordance with defendant's appraiser's calculation and application of the coinsurance provision. Instead, we remand this case for a determination of defendant's liability in accordance with the coinsurance provision. On remand, plaintiff will have an opportunity to present its view concerning the proper calculation and application of the provision, and the trial court will be in the position to make the necessary findings to complete the calculation and make a proper determination.

We affirm the appraisal award, but reverse the judgment in favor of plaintiff and remand the case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra