

STATE OF MICHIGAN
COURT OF APPEALS

RICKY HICKS and ROXANNE HICKS,
Plaintiffs-Appellees,

UNPUBLISHED
January 24, 2012

and

BRIAN GOODSSELL,
Plaintiff,

v

AUTO CLUB GROUP INSURANCE
COMPANY,
Defendant-Appellant.

No. 295391
Manistee Circuit Court
LC No. 08-013074-CK

ON REMAND

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case returns to us on remand after our Supreme Court upheld the trial court's determination that plaintiff Roxanne Hicks was an innocent coinsured, for the reasons stated in Judge Krause's dissenting opinion. *Hicks v Auto Club Group Ins Co*, 490 Mich 888; 804 NW2d 117 (2011). The Court instructed us to consider the issues raised by defendant but not addressed in our original opinion. *Id.* Those issues are (1) whether the trial court correctly calculated the insurance proceeds due under the applicable property insurance policy, and (2) whether Roxanne is entitled to the full amount of those proceeds (as opposed to one-half of the proceeds). In addition, defendant argues in a supplemental brief that even if Roxanne is an innocent coinsured, plaintiff Ricky Hicks's fraud precludes Roxanne from receiving any policy proceeds. Having considered these issues, we conclude that Roxanne is entitled to the full amount of the insurance proceeds, but that the trial court erred in calculating those proceeds. Accordingly, we vacate the trial court's damages award and remand with instructions to recalculate the award.

The undisputed facts on remand are that a fire destroyed plaintiffs Roxanne and Ricky Hicks's home, that defendant was the insurance carrier on the home, and that the policy limit on the home was \$193,000. Plaintiffs do not challenge the trial court's finding that Ricky

fraudulently overstated the nature and value of the contents of the home when submitting the insurance claim. The trial court found, and our Supreme Court determined, that Roxanne did not participate in the fraud.

Defendant first argues that the fraud provision in the applicable insurance policy precludes innocent coinsureds from recovering under the policy. We disagree. The interpretation and application of the fraud provision presents a legal issue, which we review de novo. See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). In this case, the legal issue is controlled by *Williams v Auto Club Group Ins Co*, 224 Mich App 313; 569 NW2d 403 (1997). In *Williams*, this Court determined that MCL 500.2833(2) requires insurance carriers to provide coverage to innocent coinsureds, notwithstanding any policy exclusions for intentional acts or fraud by an insured. *Id.* at 316, 320. Defendant asks us to declare a conflict with *Williams* and to instead apply the *Williams* dissent. We decline to declare a conflict. We follow the *Williams* majority opinion and conclude that Ricky Hicks's fraud does not bar Roxanne from receiving insurance proceeds under the policy.

Defendant argues in the alternative that Roxanne is entitled to only one-half of the available insurance proceeds. Again, we disagree. The insurance policy at issue states that defendant will not pay more than "the insurable interest an insured person has in the covered property at the time of loss." As the trial court correctly found, Roxanne is the only party with an insurable interest in the real property. The other party with an insurable interest in the property was Brian Goodsell, and he apparently disclaimed his interest. Defendant contends that this Court should deem Ricky and Roxanne to be tenants by the entireties for the real property on the ground that Ricky provided financial consideration for the property and sustained a loss by the destruction of the property. However, defendant presents no facts of record to indicate that Ricky and Roxanne actually owned the property as tenants by the entireties. Rather, the record demonstrates that Ricky's name was not on the contract for the purchase of the property. Given the lack of factual support for defendant's argument and the undisputed fact that Ricky was not a party to the land contract, we conclude that Roxanne retained all of the insurable interest in the real property. Roxanne is thus entitled to all of the recoverable insurance proceeds under the policy.

Defendant next presents several challenges to the trial court's calculation of the amount insurance proceeds. To the extent the calculation of proceeds requires interpretation of the applicable policy, we review the trial court's decision de novo. *Archambo*, 466 Mich 402, 408. We review the underlying factual findings for clear error. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

The trial court initially stated on the record that it would award Roxanne \$182,534, which the court calculated as the \$231,600 replacement cost of the home, less \$46,000 for the amount defendant paid to the land contract holder, less \$1,476 for temporary electricity payments made by defendant, and less \$1,590 for temporary plumbing payments. A few months later, but still before the trial court entered judgment, the parties stipulated to allow the court reporter to correct the transcript of testimony concerning the replacement cost of the home. The testimony in the corrected transcript indicated that the replacement cost was \$226,327 (not 226 to 327, as originally transcribed). The court stated on the record that the replacement cost must include foundation work, which the court stated would be a minimum of \$3,900. The court then stated

that the total replacement cost of the dwelling was \$230,227. It appears, however, that the trial court ultimately calculated the judgment using the \$231,600 replacement cost figure. The signed judgment is in the amount of \$182,534, which is the same as the amount the court initially stated on the record.¹

To determine whether the judgment amount is correct, we must determine whether the applicable policy requires the proceeds to be calculated on the basis of the actual cash value of the house, or on the policy limits, or on the replacement value of the house. Defendant contends that the proceeds are limited to the actual cash value and relies on the following policy provision: “We will not pay more than the Actual Cash Value of the damaged property until the repair or replacement is completed with equivalent construction and for equivalent use.”

Here, the burned house was not rebuilt. Nonetheless, defendant’s contention that the proceeds are limited to the actual cash value is directly contrary to MCL 500.2827 and to this Court’s holding in *Cortez v Fire Ins Exch*, 196 Mich App 666; 493 NW2d 505 (1992). MCL 500.2826 generally allows insurers to make the receipt of proceeds contingent upon the actual repair or replacement of the damaged property. However, MCL 500.2827(3) requires insurers to pay proceeds regardless of whether the property is rebuilt, if “the amount of loss or damage to the insured property . . . exceeds the amount of liability covered by the contracts.” MCL 500.2827(3). In *Cortez*, this Court applied § 2827(3) to hold that when the replacement cost exceeds the policy limits, an insurer cannot withhold replacement cost proceeds even if the insured did not repair or replace the insured property. 196 Mich App at 669-670.

Defendant argues that *Cortez* was wrongly decided. We disagree and find that *Cortez* is controlling precedent for this case. Here, as in *Cortez*, the replacement cost of the property exceeds the policy limits. Accordingly, the policy provision that purports to limit the proceeds to the actual cash value in this case is inapplicable.

Having determined that the proceeds are not limited to the actual cash value of the house, we must decide whether the policy requires that the proceeds be calculated according to the policy limits or the replacement cost. The policy is clear on this issue:

[P]ayments will not exceed the smallest of the following amounts:

- (a) the cost to repair or replace the damaged part of the Dwelling or Additional Structures with equivalent construction and for equivalent use on the same premises; or

¹ Plaintiffs contend that the defendant proposed, and the trial court adopted, a figure calculated from an escalation clause in the policy. Although the transcripts are not clear on this point, it appears to us that the trial court based its calculation on the replacement cost.

(b) the amount actually and necessarily spent to repair or replace the damaged Dwelling or Additional Structures with equivalent construction and for equivalent use;

(c) the Limits of Liability of this policy for the Dwelling or Additional Structures.

According to the policy, proceed payments will be the lesser of replacement cost or policy limits. When an insurance policy is clear and unambiguous, we must enforce the policy according to its valid terms. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

Here, the record demonstrates that the policy limit of \$193,000 is less than the \$226,327 replacement cost. Consequently, we conclude that the trial court erred by calculating the insurance proceeds based upon the replacement cost. The policy requires that the calculation begin with the policy limits.

To summarize: plaintiff Roxanne Hicks is an innocent coinsured and is entitled to the full policy proceeds. The trial court must calculate those proceeds starting from the policy limit and then deduct setoffs as appropriate.

Affirmed in part, judgment amount vacated, and remanded for recalculation of the judgment. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause