

STATE OF MICHIGAN
COURT OF APPEALS

UTICA MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v

HASTINGS MUTUAL INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED

August 25, 2009

No. 281441

Calhoun Circuit Court

LC No. 06-004525-CZ

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

In this insurance dispute, defendant Hastings Mutual Insurance company appeals as of right from the trial court's order denying its motion for summary disposition and granting plaintiff Utica Mutual Insurance Company's cross-motion for summary disposition. We affirm as modified herein and remand for entry of an amended judgment to reflect a \$1,000 reduction in plaintiff's award attributable to the policy deductible.

I. Background

This case involves insured residential property in Marshall, Michigan, which was destroyed by fire. The property was insured by defendant under a policy issued to the titleholder, Jerry Clifton. Michael and Heidi Robinson lived in the farmhouse on the property. In 2004, the Robinsons and Jerry and Anita Clifton¹ executed a land contract with the Robinsons for \$50,000 to secure a \$50,000 line of credit for the Robinsons. The Robinsons made the line of credit payments, which under the land contract were considered payments on the contract. When the Robinsons' farmowners insurance policy was cancelled, Clifton obtained insurance through defendant via an authorized independent agent, Buckenberger Insurance Associates. Clifton was the named insured, but the Robinsons paid the insurance premiums.

In 2005, a fire destroyed the farmhouse resulting in a complete loss. Defendant determined that Clifton, as a land contract vendor, was only entitled to receive his remaining

¹ The singular term "Clifton" is used to refer to Jerry Clifton only.

interest under the land contract, not the policy limits. It also informed Clifton that the contents of the farmhouse were not covered under the policy. Plaintiff, Buckenberger's errors and omissions carrier, determined that Buckenberger was negligent in failing to insure that the policy contained this coverage. Subsequently, plaintiff, Buckenberger, the Cliftons, and the Robinsons entered into a settlement agreement, under which the Cliftons and the Robinsons agreed to subrogate and assign to plaintiff their rights under defendant's insurance policy. Plaintiff thereafter brought this action seeking certain coverages under the policy.

II. Standards of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted under MCR 2.116(C)(10) when

[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley, supra* at 278. When deciding the motion, the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* All reasonable inferences are to be drawn in favor of the nonmovant. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2).

The interpretation of clear contractual language is an issue of law that is reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003). Insurance contracts are construed in accordance with the principles of contract construction. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007). The primary goal in the interpretation of a contract is to honor the intent of the parties. *Klapp, supra* at 473. An insurance contract should be read as a whole and meaning given to all terms. *Berkeypile v Westfield Ins Co*, 280 Mich App 172, 197; 760 NW2d 624 (2008). Clear contractual language is enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).

III. The Claim

Defendant first argues that no claim was made that would give plaintiff a basis for seeking proceeds under the policy because, although a claim was made, Clifton did not submit a claim on his behalf. Rather, he only assisted the Robinsons in trying to obtain insurance proceeds.² The question is whether the claim that was made was sufficient for Clifton to pursue

² Thus, defendant argues that plaintiff's action is an illusory subrogation/indemnification action to recoup settlement monies it paid to the Robinsons for Buckenberger's negligence. However,
(continued...)

his coverage rights, thereby permitting plaintiff to seek them as his subrogee/assignee.³ The policy only requires notice of loss, which defendant acknowledges it received. Clifton's reasons for seeking to recover the insurance proceeds are not relevant. There is nothing in the policy that specifies how Clifton must allocate the proceeds. Thus, the policy requirements for making a claim were met and Clifton had a right to have his coverage rights determined. Therefore, plaintiff is entitled to pursue Clifton's rights under the policy. The trial court did not err in denying defendant's motion with respect to this issue.

IV. Residential Coverage

Defendant argues that Clifton was not entitled to the policy limits for residential coverage because, as a land contract vendor, his coverage rights under the policy are limited to his interest in the property, which was the outstanding value of the land contract, \$50,000.⁴ The parties agree that the pertinent question is whether a land contract can limit a vendor's interest, thereby precluding recovery of the full insurance proceeds, and that *Wilson v Fireman's Ins Co of Newark, New Jersey*, 403 Mich 339; 269 NW2d 170 (1978), supplies the answer. However, their interpretations of *Wilson* differ.

In *Wilson*, the plaintiffs, who purchased a house on land contract from the Yorks, were required under the contract to obtain insurance for the seller's benefit. The contract provided that the vendors could obtain insurance if the vendees failed to do so and add the premium amount to the balance owed. The plaintiffs did not obtain insurance and the Yorks' policy continued to cover the property. *Id.* at 341. Subsequently, a fire destroyed the house and its contents. The defendant insurer paid Mrs. York (Mr. York having died) the amount due on the land contract. The plaintiffs brought suit against the defendant and Mrs. York claiming a right to payment under the insurance contract. *Id.* The policy provided, in part, that the Yorks were insured "to the extent of the actual cash value of the property at the time of loss * * * nor in any event for more than the interest of the insured." *Id.*

The trial court entered a judgment for the plaintiffs, holding that a land contract vendor's interest in the property could not limit his right to full coverage under an insurance contract. *Id.* The trial court in that case stated:

(...continued)

plaintiff's subjective reasons for pursuing this action are not relevant. Clifton legally assigned and subrogated his rights under defendant's policy to plaintiff. Therefore, plaintiff is entitled to pursue whatever rights Clifton had under the policy.

³ Defendant raises two other issues that do not require analysis. The parties do not dispute that, as Clifton's subrogee or assignee, plaintiff's rights are limited to those that Clifton had under the insurance policy. The parties also do not dispute that defendant cannot be held liable for any negligence on the part of Buckenberger because, as an independent agent, Buckenberger was an agent of Clifton, not defendant, when he acted to secure coverage for Clifton.

⁴ Shortly after the land contract was executed, the Cliftons quitclaimed the property to themselves and Heidi Robinson as joint tenants. Thus, the Cliftons' 50 percent interest was subject to the land contract.

“The insurance company may not withhold payment of the full amount of the policy, merely because the land contract vendor's insurable interest in the property did not equal the amount of the policy benefits. The insurance company was required to pay the full benefits to the vendors who then hold the remaining amount in a constructive trust for the benefit of the vendee. Since this is an equitable action, it is unnecessary at this time to require payment to the vendor, but this court will order payment of the balance owed to be paid to the vendee. . . .” [Id. at 341 n 1.]

On appeal, this Court reversed, holding that an insurer's liability was limited, in part, due to the policy's language regarding the insured's interest. *Id.* On appeal to our Supreme Court, despite the fact that the vendees had brought suit, the Court framed the issue before it as follows: “We are asked to decide whether an insurer is liable to an insured land contract vendor for the full amount under a fire insurance policy or is only liable to the extent of the vendor's interest remaining under the land contract.” *Id.* at 340. The Supreme Court stated, “The trial court found that the insurer was liable for the full amount, and we agree.” *Id.*

Because no Michigan case had dealt with the issue presented, the Supreme Court in *Wilson* looked to other jurisdictions in reaching its decision. It first reviewed *State Mut Fire Ins Co v Updegraff*, 21 Pa 513 (1853), in which the Pennsylvania Supreme Court “considered this question and rejected the insurance company's claim that its liability under a policy insuring a land contract vendor was limited to the value of his beneficial interest.” *Wilson, supra* at 342. The *Wilson* Court quoted *Updegraff* as follows:

“An insurance upon a house, effected by the vendor, is prima facie an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter and not upon the former, rests upon the underwriters.” [Id., quoting *Updegraff, supra* at 520.]

The *Updegraff* Court reasoned that where the premium was paid on the entire property, the insurer's risk was no different whether the insured was a land contract vendor or vendee. *Id.*

The *Wilson* Court also looked to *Dubin Paper Co v Ins Co of North America*, 361 Pa 68 (1949), which was in accord with *Updegraff*. It noted, “In *Dubin*, the Court arrived at that result even though the insurance policy contained standard language similar to that in the instant case, including the phrase “nor in any event for more than the interest of the insured.” *Wilson, supra* at 343 (internal quotations omitted).

Lastly, the Court cited *Northwestern Mut Ins Co v Jackson Vibrators, Inc*, 402 F2d 37 (CA 6, 1968), which reached a similar result on somewhat different facts.

In that case, the buyer and seller entered into a land contract, similar to the one in the instant case. The seller, Jackson Vibrators, which had an insurance policy on the property, added the buyers' names to the policy, and charged them for the premiums. The buyers later assigned their interest under the land contract to third parties, who agreed to pay the premium. The new buyers were not added

to the policy. When the building was destroyed by fire, the insurer sought a judgment declaring that its liability was limited to the seller's security interest, since the buyers were not parties to the insurance contract and were unknown to the company.

The Court of Appeals upheld the trial court's ruling that the company was obligated to pay the seller the entire proceeds under the contract, and the seller was obligated to apply the proceeds according to the terms of the land contract, for the benefit of the buyers. [*Wilson, supra*, 403 Mich at 343.]

The two significant factual differences between the cases were that in *Wilson*, the vendees brought suit and the insurance proceeds first went to them, while in *Northwestern*, the vendor brought suit and the insurance proceeds first went to him. In this regard, the instant case is similar to *Northwestern*. However, these differences did not affect the *Wilson* Court's ultimate holding, only the specific relief it granted.

In *Wilson, supra* at 344, the Court concluded:

As in *Updegraff*, there is no evidence in this record to indicate that the insurance premium was less than the usual rate for such a house, and it cannot be said that the risk to the insurer was increased by this transaction. We agree with the trial court that, based on the contract between the buyers and seller, and the fact that the buyers paid the insurance premiums, they are entitled to the proceeds, less the amount of the sellers' interest.

Therefore, *Wilson* establishes that a vendee, who is not a named insured, may recover under a vendor's policy in accordance with the land contract's terms. It also establishes that a land contract vendor's interest cannot limit the vendor's right to the full policy limits, despite language in the insurance policy to the contrary.

Defendant argues that *Wilson* supports its position because the Court held that the vendees were entitled to the full amount of insurance proceeds "less the seller's interest," which is what it paid Clifton. We disagree. Defendant fails to recognize that the specific relief granted in *Wilson* was determined by the terms of the land contract. The land contract stated:

"[I]n case of loss the insurance, unless by mutual agreement used to repair or rebuild, shall be paid to seller and be endorsed on this contract to the extent of the amount unpaid thereon, and the balance, if any, shall belong to and be paid to buyer." [*Id.* at 343.]

Thus, pursuant to the land contract, the insurance proceeds first went to the vendor to the extent of the remaining debt on the land contract and the remainder to the buyer. Because the vendees brought suit, their relief was limited to the portion of the insurance proceeds they were owed under the land contract. The defendant had already paid Mrs. York, the vendor, her interest under the land contract. Had the defendant acted properly, it would have paid Mrs. York the policy limit, and Mrs. York would have been obligated to distribute the proceeds in accordance with the land contract.

The rules of law announced in *Wilson* continue to be good law, although not often cited in Michigan. See *Singer v American States Ins*, 245 Mich App 370, 380; 631 NW2d 34 (2001) (amount for which defendant insurer is liable does not depend on any amount still owed under the land contract, but rather on the contract parties' interest in the property)⁵; *Miller v Van Kampen*, 154 Mich App 165, 167; 397 NW2d 253 (1986) (“[w]hether insurance proceeds are payable to the vendor or the vendee depends upon the contracts entered into by the parties”). It is noteworthy that other jurisdictions follow *Wilson*.⁶ See *King v Dunlap*, 945 SW2d 736 (Tenn App, 1996) (defendant vendor entitled to full recovery from defendant insurer despite land contract)⁷; *Musselman v Mountain West Farm Bureau Mut Ins Co*, 251 Mont 262; 824 P2d 271 (1992) (terms of policy did not limit vendors to the unpaid balance of the land contract).

Based on *Wilson*, defendant's attempt to limit Clifton's right to full coverage under the policy is contrary to law and thus, cannot be enforced. *Rory*, *supra* at 461. It is undisputed that the insurance policy covers the residence and that the premiums were based on it, not the secured debt. Thus, there was no increased risk as a result of the land contract. Accordingly, we agree with the trial court that Clifton was entitled to the policy limit for the residential coverage, which was \$166,000. Defendant does not contest that if Clifton was entitled to the policy limits, then so is plaintiff. Accordingly, the trial court did not err in granting summary disposition to plaintiff on this issue and denying defendant's cross-motion for summary disposition.

V. Debris Removal Coverage

The policy provides in part that defendant will “pay to remove the debris of covered property after an insured loss.” Defendant argues that the trial court erred in finding that it was liable for debris removal coverage under the policy for several reasons. First, defendant points to the fact that plaintiff paid the Robinsons for debris removal, not Clifton. This fact is immaterial. The only issue is whether plaintiff, as Clifton's subrogee, is entitled to debris removal coverage. Second, defendant repeats its argument that Clifton never made a claim, which we have already addressed and rejected in section III, *supra*.

⁵ In *Singer*, at the time of the insured event, the vendee had quitclaimed her interest to the vendor, the plaintiff. *Id.* at 379. Thus, it appears that any terms in the land contract governing the distribution of insurance proceeds were irrelevant. The *Singer* Court remanded the case for a determination of the plaintiff's proof of loss. *Id.* at 381-382.

⁶ This Court is not bound by cases from foreign jurisdictions, but they may be used as persuasive authority. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

⁷ In *King*, the plaintiff vendee brought suit against the vendor and the insurer before monies were paid out on the insurance policy. *Id.* at 737. The land contract provided that the vendor had a right to receive any insurance proceeds and apply them to the unpaid balance on the contract. *Id.* at 738. There was no provision for the distribution of excess monies. The court held that equity required that the plaintiff receive the monies. *Id.* at 744. Thus, contrary to defendant's assertion, the case follows the rules set forth in *Wilson*.

Third, defendant argues that Clifton was not entitled to the coverage under the plain language of the policy. We disagree. Debris removal is incidental to property coverage, which is subject to the terms of the applicable property coverages. Coverage A states in part, “We cover your residence(s) on the insured premises shown in the Declarations.” The parties do not dispute that the farmhouse was a residence on insured premises. The policy defines “your” as referring “to the person or persons named in the Declarations” It is undisputed that Clifton is the only named insured in the Declarations section. “Residence” is defined as “a one to four family house, a town house, a row house, or a one or two family mobile home.”

Defendant contends that the farmhouse was not Clifton’s residence because he did not live there. However, this argument fails to give effect to the policy’s definition of residence. An insurance policy is enforced in accordance with its terms. If a term is defined in the policy, that definition controls. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). Although the term “residence” connotes habitation in the structure, the policy definition only requires that the farmhouse be Clifton’s house. The farmhouse qualifies as Clifton’s residence, i.e., house, because he is a titleholder to the property. Because the land contract price has not been paid in full, Clifton retains legal title. *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 614; 677 NW2d 829 (2004). Ownership is all the policy requires. Compare to *Heniser v Frankenmuth Mut Ins*, 449 Mich 155; 534 NW2d 502 (1995) (coverage for a loss to the “residence premises” unambiguously required the insured to “reside” in the dwelling where “residence premises” was defined as the family dwelling or another building where the insured resided). Therefore, the trial court did not err in finding that plaintiff, as Clifton’s subrogee, was entitled to debris removal coverage based on Clifton’s rights.

VI. Penalty Interest

Defendant argues that the trial court erred in ordering it to pay plaintiff 12 percent interest pursuant to MCL 500.2006(4) because the claim was reasonably in dispute. We disagree.

MCL 500.2006(4) states:

If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. The interest shall be paid in addition to and at the time of payment of the loss. If the loss exceeds the limits of insurance coverage available, interest shall be payable based upon the limits of insurance coverage rather than the amount of the loss. If payment is offered by the insurer but is rejected by the claimant, and the claimant does not subsequently recover an amount in excess of the amount offered, interest is not due. Interest paid pursuant to this section shall be offset by any award of interest that is payable by the insurer pursuant to the award.

In *Yaldo v North Pointe Ins Co*, 457 Mich 348 n 4, 578 NW2d 274 (1998) our Supreme Court determined that the “not reasonably in dispute” requirement of the penalty interest provision applies only to third-party tort claimants, not the insured. In *Arco Industries Corp v American Motorists Ins Co*, 233 Mich App 143, 148-149; 594 NW2d 74 (1998), this Court determined that this holding was non-binding dicta, because the real issue before the Court in *Yaldo* was the applicability of a different interest provision. The *Arco* decision was subsequently followed in many cases. See *Angott v Chubb Group Ins*, 270 Mich App 465, 479-480; 717 NW2d 341 (2006), and cases cited therein.

Recently, however, a seven-judge special conflict panel of this Court held that *Arco* erroneously held that “the *Yaldo* Court’s discussion of MCL 500.2006(4) was dictum, and therefore not binding.” *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 562-563; 741 NW2d 549 (2007) (“*Griswold II*”). It also concluded that the plain language of the statute supported the *Yaldo* Court’s decision. *Id.* at 565-566. Thus, currently, when an insured is entitled to benefits under the insured’s policy, and the insurer fails to pay the benefits on a timely basis, the insured is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute. *Id.* at 566.

Defendant argues that *Griswold II* does not apply to this case because it was decided after the trial court’s oral decision, albeit before its written order, and it should be given prospective application only. As this Court noted in *Paul v Wayne Co Dep’t of Pub Service*, 271 Mich App 617, 620-621; 722 NW2d 922 (2006):

Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [Citations and internal quotations omitted.]

Here, there are no exigent circumstances that would require *Griswold II* be given only prospective application. *Griswold II* did not overrule clear and uncontradicted case law. Although earlier cases had decided the penalty-interest issue differently, those decisions were not clear and uncontradicted in light of our Supreme Court’s decision in *Yaldo, supra*, which had also rejected the “reasonable dispute” standard. We conclude that *Griswold II* did not clearly establish a new principle of law and should be given full retroactive effect, and applies to this case.

Accordingly, the trial court did not err awarding plaintiff penalty interest under MCL 500.2006(4).

VII. Deductible

Finally, defendant argues that if this Court concludes that plaintiff is entitled to any recovery, plaintiff is required to pay the policy's \$1,000 deductible. The trial court agreed and intended for the deductible to be reflected in the judgment amount, but the adjustment was never made. Plaintiff concedes that the deductible applies. The policy provides that if defendant is liable to pay for a loss, it will "pay the amount of the loss in excess of the deductible." Thus, rather than ordering plaintiff to pay the deductible amount, we remand for entry of an amended judgment to reflect a reduction of \$1,000 attributable to the deductible.

Affirmed as modified and remanded for entry of an amended judgment in accordance with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher