

STATE OF MICHIGAN
IN THE SUPREME COURT OF THE STATE OF MICHIGAN

Michigan Supreme Court No. 146452

Court Of Appeals Case No. 306361

Wayne County Circuit Court No. 07-726774-Cz

ACORN INVESTMENT CO.

Plaintiff/ Appellant

vs.

**MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION
AN UNINCORPORATED ASSOCIATION**

Defendant/ Appellee

*146452
reply*

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**PLAINTIFF/APPELLANT'S REPLY BRIEF TO DEFENDANT/APPELLEE'S
RESPONSE TO PLAINTIFF/APPELLANT'S REQUEST FOR LEAVE TO APPEAL TO
THE MICHIGAN SUPREME COURT**

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**PLAINTIFF/APPELLANT’S REPLY BRIEF TO DEFENDANT/APPELLEE’S
RESPONSE TO PLAINTIFF/APPELLANT’S REQUEST FOR LEAVE TO APPEAL TO
THE MICHIGAN SUPREME COURT**

In reply to the Defendant/Appellee Michigan Basic Property Insurance Association’s (hereinafter referred to as “the Association”) response to Plaintiff/Appellant Acorn Investment Co.’s (hereinafter referred to as “Acorn”) Application For Leave to Appeal to the Michigan Supreme Court, Acorn responds as follows:

Acorn is asking leave of this Court to appeal the ruling of the Court of Appeals, (hereinafter referred to as the “Acorn Court”), on two grounds:

- I. Acorn is entitled to case evaluation sanctions under MCR 2.403(O)(2)(c) because it obtained a “verdict”
- II. Acorn did not waive its claim for debris removal expenses.

I. Acorn Is Entitled To Case Evaluation Costs Under MCR 2.403(O)(2)(C) Because It Obtained A “Verdict”

ANALYSIS

A. Introduction:

The Association wrongfully denied Acorn’s fire claim on the basis of a defense that was summarily rejected after case evaluation under MCR 2.116(C)(10). The Association then rejected a case evaluation (\$11,000) that was barely half of the actual loss determined by appraisal panel (\$20,877) but according the arguments presented by the Association and the ruling of the Acorn Court it will not be required to compensate the insured, Acorn, **for the true legal costs of holding its insurer, the Association, to its contractual obligations.**

The Acorn Court agreed that the Association would not be required to pay for the true costs necessitated by its rejection of the case evaluation by finding that there was no verdict obtained under MCR 2.403(O)(2)(c) because the issue of damages from the fire was decided by an appraisal panel instead of a trial court or a jury. The Acorn Court stated: "The trial court's order granting plaintiff's motion for entry of judgment merely confirmed the appraisal award and did not constitute a "verdict" under MCR 2.403(O)(2)(c)" However, this finding is contrary to the purpose behind MCR 2.403, which is to encourage settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation. *Broadway Coney Island, Inc v Commercial Union Ins Cos*, 217 Mich App 109, 114; 550 NW2d 838 (1996).

B. Acorn Is Being Penalized For Agreeing To An Alternative Dispute Resolution Method

The Association nowhere in its responsive brief discusses the issue of interaction of the Michigan Court rules to this controversy which Acorn analyzed in its main brief. This is that if a court determines that an insured has coverage by a motion for summary disposition, MCR 2.116(C)(10), after case evaluation but before trial, leaving only the issue of damages to be determined, by using an Alternative Dispute Resolution (ADR), appraisal, per MCR 2.410, by stipulation of the parties, instead of judicial determination of damages, there is a "verdict" under MCR 2.403(O)(2)(c) which entitles Acorn to case evaluation costs which under the mandatory language of the rule the rejecting party "must" pay.

The Association apparently concludes that this argument is not relevant. However, MCR 2.410, Alternative Dispute Resolution (ADR), is based on the recommendations of the Michigan Supreme Court Dispute Resolution Task Force in 1999, to:

- . Provide more dispute resolution choices for litigants
- . Establish a more "user-friendly" court system
- . Promote early resolution of disputes
- . Increase the involvement of parties in the process of resolving their disputes
- . Increase parties' satisfaction and compliance with the results of dispute resolution
- . Assist parties in developing a wider range of outcomes than are available through adjudication
- . Provide access to processes that are less formal and intimidating than the traditional adjudicatory process
- . Increase the court's ability to resolve cases within given resources
- . Decrease the cost to parties of resolving disputes
- . Ensure consistency and quality of alternative dispute resolution services in the state's trial courts, and to the extent possible, with the federal and state court appellate mediation programs
- . Seek and promote an integrated dispute resolution system in the courts. (See

Report to the Michigan Supreme Court, Dispute Resolution Task Force, January, 1999, Page 1)

This Court clearly explained that there were many more choices to litigants than just a bench or jury trial in civil matters.

Acorn accepted the encouragement of the Supreme Court and the Task force and in the instant case moved for the implementation of the Appraisal Clause and thereby chose the alternative method of appraisal instead of a bench or jury trial to determine the monetary verdict. Any costs for the protracted litigation after the Association's refusal to accept the case evaluation award including but not limited to: filing, arguing and winning the numerous motions listed in the statement of facts in

Acorn's main brief, obtaining summary disposition under MCR 2.116(C)(10) regarding the issue of coverage; the appraisal costs; and the Motion for Entry of Judgment. These costs were necessitated by the Association's rejection of the case evaluation award. Of course, the Association did not improve its position which is the only way it can avoid responsibility for costs under the terms of MCR 2.403. In essence, Acorn is being penalized for using ADR. Acorn suggests that such a disposition would be contrary to the policies established by this Court and such a result was not the intention of this Court in approving new court rule, MCR 2.410, Alternative Dispute Resolution, in the year 2000 for the reasons cited above.

C. A "Verdict" Must Represent A Finding Of The Amount That The Prevailing Party Should Be Awarded

For purposes of awarding sanctions under MCR 2.403(O), a "verdict" must represent a finding of the amount that the prevailing party should be awarded. *Marketos v. Am. Empls. Ins. Co.*, 465 Mich. 407, 414 (2001) A statutory award under the appraisal statute MCL 500.2833(1)(m) is an act which is certainly the equivalent to a judicial determination of damages. As stated in *Union Lake Associates, Inc v Commerce & Industry*, 89 Mich App 151; 280 NW2d 469 (1979):

The statutory appraisal procedure has been called "a substitute for judicial determination of a dispute concerning the amount of loss", and "a simple and inexpensive method for the prompt adjustment and settlement of claims". *Thermo-Plastics, supra*, at 422, *Davis, supra*, at 231.

Certainly the trial court concluded that the appraisal process was sufficiently authoritative so as to grant Acorn's Motion for Entry of Judgment based upon that award.

In so doing the entry of a judgment became a “verdict” as described by MCR 2.403 (O)(2)(c).

The Michigan Supreme Court over 162 years ago in *Vanderhoof vs. Dean*, 1 Mich 463 (1850) said the following:

“The award of the arbitrators may be likened to a verdict of a jury. In the one case we have the judgment of three persons selected by the parties; in the other, the judgment of twelve persons selected in the manner provided by law. **The judgment in the one case is called an award--in the other a verdict; in both cases, however, the county court have the authority, unless upon good cause shown, to render its judgment.**” Emphasis added.

The appraisal process has also been described as a common law arbitration. *Davis v National American Ins. Co.*, 78 Mich App 225; 259 NW2d 433 (1977). This process, of course, is limited to a determination of damages.

The Association admits on page 8 of its response that: “[a] final order dismissing the case or **rendering judgment** in the awarded amount would have been required, for purposes of removing the matter from the Court’s docket.” Emphasis added.

Thus, the plain language of the monetary judgment entered by the trial court on December 3, 2010 as a result of a ruling on Acorn’s dispositive motion of November 16, 2010 for entry of judgment on the appraisal award and for assessment of UTPA interest, made the order a “verdict” under the current version of MCR 2.403(O)(2)(c).

D. There Was No Settlement Between The Parties

By definition, a settlement agreement is a compromise of a disputed claim. *Hoffman v Burkhammer*, 373 Mich 187, 195; 128 NW2d 503 (1964). The Association on page 8 attempts to convince this Court that there was a “settlement” between the parties after

case evaluation because it did not object to the entry of a judgment for the amount of \$20,877 awarded by the appraisal panel. However, the Association did not agree to the appraisal award and could not object to the final award because two out of the three members of the panel, the umpire and Acorn's representative agreed to the umpire's statement of damages per the policy requirements. See Exhibit 6 of Acorn's main brief.

E. Acorn Received Summary Disposition Pursuant to MCR 2.116 (C) (10)

The Association on Page 8 of its response stated that: "The Plaintiff did not seek summary disposition. They are apparently referring to *Johnson v State Farm Mutual Auto Ins Co*, 183 Mich. App. 752, 767-769; 455 N.W.2d 420 (1990), where the Appeals Court addressed the issue whether mediation sanctions (now case evaluation costs) may be imposed when a case is summarily decided on a motion after mediation but before the commencement of trial. The Court found that the Court Rule, MCR 2.403(O)(2)(c), intended to include those cases which disposed of summarily by motion following mediation but prior to the commencement of trial.

The Association is in error. Acorn received summary disposition under MCR 2.116(C)(10). That rule provides that Acorn is entitled to a judgment if, except for the amount of damages, there is no genuine issue to any material fact. The Lower Court ruled that Acorn had insurance coverage in a summary disposition motion under MCR 2.116(C)(10). See Exhibit No.2 in Acorn's main brief. The only issue left was one of damages, which instead of a jury deciding, Acorn moved to have resolved by the Appraisal procedure afforded by the insurance contract and the enabling statute, MCL 500.2833(1)(m). The panel then under court supervision and an order relating to the determination of values rendered an award for. *actual cash value or amount of the loss.*

Thus, there were two judgments entered in this case by motion relevant to case evaluation sanctions: The summary disposition judgment which determined that Acorn had insurance coverage; and the decision *i.e.* judgment by the appraisal panel that was used to determine the monetary damages which was then made a judgment pursuant to the order of the court upon Acorn's motion for Entry of Judgment. That is, it became a verdict. These verdicts must be read together for the purposes of MCR 2.403(O).

II. **Acorn Did Not Waive Its Claim For Debris Removal Expenses**

A. **Findings of the Acorn Court**

The Acorn Court found the following regarding debris removal expenses:

"By submitting its case for appraisal and proceeding through the appraisal process without raising the issue of debris removal expenses, plaintiff waived its claim for such expenses. See *Angott*, 270 Mich App at 473-474; see also *id.* at 470 ("Waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed.")". Slip opinion pages 4-5

The Association in its reply added no new arguments to the findings of the Acorn Court cited above. Acorn would refer the Court to its analysis in its main brief as to why the Trial Court should have decided the issue of incidental coverage and amount for debris removal, but would add the following reply to the Association's response:

B. The Statutory Appraisal Agreement Limits The Scope Of The Appraisal Proceedings To A Determination Of Actual Cash Value and Loss Not The Question Of Debris Removal

The Association cites *Union Lake Assocs. v. Commerce & Indus. Ins. Co.*, 89 Mich. App. 151 (1979) to support its position on debris removal. However, this case

supports Acorn's argument that it is entitled to debris removal expense because there was no specific agreement for the Appraisal Panel to determine debris removal expense.

The Court of Appeals in *Union Lake*, *id* on page 157-158 said the following:

The Michigan Supreme Court has held that a submission to appraisal under MCL 500.2832; MSA 24.12832 constitutes a common law arbitration agreement. It is a well-settled arbitration principle that the scope of the agreement between the parties dictates the issues to be addressed by the arbitrators. Likewise, the arbitration award must not exceed the authority granted the arbitrators, who derive their power solely from the parties' agreement. The statutory appraisal agreement here at issue limits the scope of the appraisal proceedings to a determination of the amount of actual cash value and loss suffered by the policyholder. Plaintiff and defendant further specifically agreed, pursuant to plaintiff's policy, to submit the question of plaintiff's rental loss to the appraisers and umpire. The appraisal panel was thus authorized to determine "the amount of actual case value and loss of rentals." (Citations and Footnotes omitted)

In the instant case Acorn and the Association only agreed to submit to the panel under MCL 500.2833(1)(m) the *actual cash value* of the loss.

The order stated in the second paragraph:

"IT IS FURTHER ORDERED that the parties and the Appraisal Panel are limited to a determination of the actual cash value that is consistent with the Court's prior Order in *Limine* and only evidence of replacement cost less depreciation may be considered by the Panel in rendering its Award." (See Acorn's exhibit No.3 and No. 5 in its main brief.)

The incidental coverage for debris removal cited in Acorn's main brief was not specifically agreed to be submitted to the appraisal panel. The appraisal panel thus was not authorized to determine the amount of the actual cost of debris removal.

Therefore, according to Michigan law the Trial Court could decide the issue of debris removal and the amount.

CONCLUSION

For the reasons cited above and in Acorn's main brief, Acorn respectfully asks this Court to grant Leave To Appeal the erroneous published decision of the Acorn Court of Appeals panel; and to reverse the Court of Appeals and Trial Court and award Acorn case evaluation costs and award debris removal costs or in the alternative to remand the matter with instructions as requested above.

2/4/2013



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