[Cite as *Vires v. Grange Mut. Cas. Co.*, 2011-Ohio-264.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLINTON COUNTY

MARY VIRES, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2010-06-009
	:	O P I N I O N
- vs -		1/24/2011
	:	
GRANGE MUTUAL CASUALTY CO.,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM CLINTON COUNTY COURT OF COMMON PLEAS
Case No. CVH-2007-0916

Pyper Alexander & Nordstrom, LLC, P. Christian Nordstrom, 7601 Paragon Road, Suite 301, Dayton, Ohio 45459, for plaintiffs-appellants

David T. Davidson, 127 N. Second Street, P.O. Box 567, Hamilton, Ohio 45011, for defendant-appellee

HENDRICKSON, J.

{¶1} Plaintiffs-appellants, Mary Vires and Rosalea Stamper, appeal a decision of the Clinton County Court of Common Pleas denying their motion for summary judgment and granting summary judgment in favor of defendant-appellee, Grange Mutual Casualty Company. For the reasons outlined below, we affirm the decision of the trial court.

{¶2} Appellants are the owners of real property located at 92 B Street in Cuba, Ohio ("the property"). On January 3, 2007, a fire occurred at the house located on the property, resulting in a total loss. The property was insured under a dwelling fire policy issued by Grange, which included a $190,000 limit of coverage for the dwelling.

{¶3} Grange's adjuster estimated the actual cash value of the property less deductible at $99,175.11. This figure was based on an estimated replacement cost of $140,237.69. Grange offered to pay for the replacement of the structure up to the policy limit of $190,000. If appellants elected not to rebuild, Grange agreed only to pay the actual cash value of $99,175.11. Appellants chose not to rebuild the destroyed structure.

{¶4} Appellants hired their own adjuster, who used the same computer program as that used by Grange's adjuster and estimated the replacement cost of the property at $190,649. Based on this figure, appellants demanded the full stated value of the dwelling coverage, $190,000. Grange refused to pay the full stated value unless appellants replaced the structure.

{¶5} Because it was undisputed that Grange owed appellants at least $99,175.11, the insurer tendered that amount to appellants. On December 19, 2007, appellants initiated this action against Grange. The complaint included claims for breach of contract, bad faith, unjust enrichment, and declaratory judgment.

{¶6} The parties filed cross motions for summary judgment. In a decision rendered on January 15, 2010, the trial court overruled appellants' motion and granted Grange's motion. Subsequently, the court issued an entry reflecting the parties' stipulation as to any remaining issues of fact and declaring the January 15, 2010 decision a final appealable order. This appeal followed.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT TO APPELLEE GRANGE MUTUAL CASUALTY COMPANY AND DENYING THE CROSS MOTION FOR SUMMARY JUDGMENT OF APPELLANTS MARY VIRES AND ROSALEA STAMPER."

{¶9} Appellants argue that the trial court erred in granting summary judgment to Grange on appellants' claims for breach of contract and declaratory judgment and in denying appellants' summary judgment motion on those claims. Appellants insist that R.C. 3929.25 required Grange to pay the full stated value of the policy in view of the fact that the fire resulted in a total loss and appellants did not repair or replace the structure. To the extent that the policy circumvented this requirement, appellants contend, it was unenforceable.

{¶10} In response to appellants' arguments, Grange asserts that it was required to pay only the actual cash value of the property until appellants actually rebuilt or replaced the destroyed structure. Because appellants elected not to rebuild or replace the structure, Grange maintains that it fully complied with the terms of the policy and its duties under R.C. 3929.25.

{¶11} We review a trial court's decision on a summary judgment motion de novo. *Burgess v. Tackas* (1998), 125 Ohio App.3d 294, 296. Summary judgment is proper where (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only come to a conclusion adverse to the party against whom the motion is made, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶12} The parties do not dispute that this matter entails the application of R.C. 3929.25, commonly referred to as Ohio's valued policy statute. The current version of

the statute provides in pertinent part:

{¶13} "A person, company, or association insuring any building or structure against loss or damage by fire or lightning shall have such building or structure examined by his or its agent, and a full description thereof made, and its insurable value fixed, by such agent. In the absence of any change increasing the risk without the consent of the insurers, and in the absence of intentional fraud on the part of the insured, in the case of total loss the whole amount mentioned in the policy or renewal, upon which the insurer received a premium, shall be paid. However, if the policy of insurance requires actual repair or replacement of the building or structure to be completed in order for the policyholder to be paid the cost of such repair or replacement, without deduction for depreciation or obsolescence, up to the limits of the policy, then the amount to be paid shall be as prescribed by the policy."

{¶14} The parties do not allege that the dwelling fire policy in the case at bar is ambiguous. Rather, the resolution of this case reduces to a single query involving the interpretation of R.C. 3929.25. That is, in cases involving a total loss where the insured elects not to rebuild or replace the destroyed property, is the insurer obligated to pay the full coverage limit under R.C. 3929.25 as amended in June 1992?

{¶15} Appellants argue that the present matter is controlled by the Ohio Supreme Court's holding in *McGlone v. Midwestern Grp.* (1991), 61 Ohio St.3d 113. In *McGlone*, the plaintiffs purchased a $35,000 fire insurance policy to cover a dwelling located on their property. The structure was destroyed by fire, at which time the insurance company submitted a payment of $23,585.87 to the plaintiffs. This amount represented the actual cash value of the dwelling less depreciation. After opting not to replace the structure, the plaintiffs filed an action against the insurance company to recover the difference between the amount paid and the policy limit. The trial court

granted summary judgment to the insurance company.

{¶16} On appeal, the Ohio Supreme Court upheld this court's reversal of the trial court's decision. Construing a prior version of R.C. 3929.25, the high court determined that an insured party who sustains a total loss to property covered by a fire insurance policy and does not replace the property is entitled to payment of the full face value of the policy. Consistent with the language of the statue, the court conditioned its holding on the absence of intentional fraud or any change which increased the risk without the consent of the insurer.

{¶17} Contrary to Grange's arguments on appeal, we are unable to distinguish the Ohio Supreme Court's decision in *McGlone* simply on the basis that *McGlone* involved the 1980 version of R.C. 3929.25. Although the wording of the third sentence of the statute was significantly altered in 1992, the substance of the sentence is not markedly distinct from the 1980 version. Even so, the timing of the amendment and the alterations imposed by the legislature support Grange's position that appellants were only entitled to the actual cash value of the destroyed structure in this case.

{¶18} For the sake of comparison, we shall reproduce the provisions at issue here. The third sentence of the 1980 version, the one contemplated by the *McGlone* court, read as follows:

{¶19} "If, however, the policy of insurance, by its express terms, permits the policyholder to recover the full cost of repair, or replacement, of the building or structure, without deduction for depreciation or obsolescence, up to the limits of the policy in the event that the building or structure is in fact repaired or replaced, the amount of recovery for any loss under such a policy of insurance shall be as prescribed by the policy."

{¶20} Following *McGlone*, the third sentence of R.C. 3929.25 was amended to read as follows:

{¶21} "However, if the policy of insurance requires actual repair or replacement of the building or structure to be completed in order for the policyholder to be paid the cost of such repair or replacement, without deduction for depreciation or obsolescence, up to the limits of the policy, then the amount to be paid shall be as prescribed by the policy."

{¶22} Admittedly, the language employed by the legislature in the amended version of R.C. 3929.25 does not expressly indicate an intent to supersede the high court's interpretation of the statute in the *McGlone* case. However, the timing of the redraft, read in conjunction with the *McGlone* dissent, suggests that the legislature did in fact amend the statute in response to *McGlone*. See Goldman, Property Insurance Law: 1991 – 1992 Developments (1993), 28 Tort & Ins. L.J. 392, 404.

{¶23} The high court's *McGlone* decision was released on July 1, 1991. At that time, the General Assembly was sitting in its 119th session. Less than one year after the *McGlone* decision was issued, the General Assembly amended R.C. 3929.25 while still sitting in its 119th session. Either the timing was fortuitous, or the *McGlone* decision prompted the legislature to address the statute during that session.

{¶24} Statements in the *McGlone* dissent further support the deduction that the legislature amended the statute in response to *McGlone*. Justice Wright opined that the majority misread R.C. 3929.25 and abrogated the legislative intent behind the 1980 amendment to the statute (which added the third sentence). He agreed that the second sentence required insurers to pay the face amount of the policy where a fire resulted in a total loss. Contrary to the majority opinion, however, Justice Wright viewed the third sentence as an exception to the second sentence. If the policy in question provided for a full recovery of the face amount when the insured structure was actually replaced, he opined, then the insured was entitled to the full face amount only where she actually

replaced the structure.

{¶25} While Justice Wright firmly believed his interpretation reflected the legislature's true intent in adding the third sentence to R.C. 3929.25 in 1980, he found the grammatical structure of the sentence to be lacking. The justice noted that the "if" clause which began the third sentence was not complemented by a "then" clause, but by a clause set off by a comma rather than the word "then." Nonetheless, Justice Wright insisted that his interpretation of R.C. 3929.25 reflected the natural meaning of the language and also furthered the legislative purposes of encouraging replacement of destroyed property and discouraging arson

{¶26} Following the release of *McGlone*, the General Assembly amended R.C. 3929.25 by enacting Am.Sub.S.B. No. 221, effective June 18, 1992. Of note, the third sentence was revised to implement the very "if-then" construction advocated by Justice Wright. Either this was a coincidence, or the General Assembly was indeed influenced by the justice's dissenting opinion in *McGlone*.

{¶27} In sum, we view the timing of the amendment, along with the fact that the statute was altered to incorporate the changes suggested by the *McGlone* dissent, as indicative of the legislature's endorsement of Justice Wright's interpretation of R.C. 3929.25. Consequently, the majority opinion in *McGlone* does not control this matter.

{¶28} We hold that the third sentence in the1992 version of R.C. 3929.25 operates as a limitation upon the obligation of the insurer to pay the full face value of the policy where there is a total loss but the insured elects not to repair or replace the destroyed structure. Such a construction of R.C. 3929.25 facilitates two reciprocal public policy considerations. First, the statute protects the insured by preventing insurance companies from over-insuring property, collecting inflated premiums, and then underpaying proceeds when the property is destroyed by fire. Second, the statute

protects insurance companies by preventing the insured from over-insuring property, failing to protect or maintain the property, and then collecting insurance proceeds on a dilapidated or ruined structure.

{¶29} As stated, appellants insured the property under a dwelling fire policy, which included a $190,000 limit of coverage *for the dwelling*. This amount appeared under the heading "Section I – Property Protection" on the policy declarations page and was designated as "Coverage A – Dwelling." Licensed agent Amy Adams, who wrote appellants' dwelling fire policy with Grange, offered further explanation. Adams testified in her deposition that the $190,000 figure represented a *replacement cost value* that was calculated using information provided by the county auditor's website. She confirmed that the policy limit and replacement cost for the dwelling were synonymous concepts.

{¶30} Notably, the preamble to Am.Sub.S.B. No. 221 stated that the 1992 amendment to the statute was intended "to permit a fire insurance policy to require actual replacement of a structure as a condition of the payment of the policy's replacement limit." Hence, it is sensible to conclude that the third sentence of R.C. 3929.25 authorized Grange to require actual replacement of the structure at 92 B Street as a condition of the payment of the full $190,000 value of the policy's replacement limit.

{¶31} In accordance with our interpretation of the current version of R.C. 3929.25, the loss settlement provisions in Grange's policy which limited appellants' recovery to actual cash value where they did not repair or replace the destroyed dwelling were enforceable. Because appellants chose not to rebuild the destroyed structure, they were not entitled to receive the full $190,000 face value of the policy. Therefore, Grange did not breach the contract in submitting to appellants a payment that reflected only the actual cash value of the destroyed property.

{¶32} There being no genuine issues of material fact, the trial court properly awarded summary judgment to Grange on appellants' breach of contract and declaratory judgment claims.

{¶33} Appellants' sole assignment of error is overruled.

{¶34} Judgment affirmed.

POWELL, P.J., concurs.

RINGLAND, J., concurs separately.

RINGLAND, J., concurring separately.

{¶35} I concur with the majority's analysis and resolution of appellant's single assignment of error as it relates to their interpretation of the legislative history leading to the passage of Am.Sub.S.B. No. 221 and the amended R.C. 3929.25. I write separately, however, to emphasize that based on its underlying facts, the Ohio Supreme Court's majority decision in *McGlone v. Midwestern Grp.* (1991), 61 Ohio St.3d 113, is inapplicable to the case at bar.

{¶36} Justice Brown, the swing vote concurring with the majority in *McGlone*, based his concurring opinion on the language found in paragraph 5(c) subsection (2) of the insurance policy at issue, which states the following:

{¶37} "If at the time of loss the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately prior to the loss, *we will pay the larger of the following amounts*, but not exceeding the limit of liability under this policy applying to the building:

{¶38} "(a) the actual case value of that part of the building damaged; or;

{¶39} "(b) that proportion of the cost to repair or replace, without deduction for

depreciation, of that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building." (Emphasis added.)

{¶40} The insurance policy provision at issue in this case, however, states:

{¶41} "In the event of a covered loss to these types of property, *we will pay the smallest of*:

{¶42} "(a) the actual cash value of the damaged property

{¶43} "(b) the cost to repair or replace the damaged property with the property of like kind and quality;

{¶44} "(c) the limit of liability as shown on the Declarations Page that applies to the damaged property." (Emphasis added.)

{¶45} When comparing the language of the insurance policy provision at issue in *McGlone* to the insurance policy provision at issue here, it is readily apparent that the policy now before this court is just the opposite to that at issue in *McGlone*. I have previously interpreted the third sentence found in the 1980 version of R.C. 3929.25 as modifying the second sentence which was in line with only three of the seven Ohio Supreme Court justices. See *McGlone v. Midwestern Grp.* (Aug. 21, 1989), Clermont C.P. No. 89-CV-0073. Had the *McGlone* court been presented with the insurance policy at issue here, it is certainly conceivable that Justice Brown's concurring opinion would have supported the *McGlone* dissent, thereby avoiding the need for the General Assembly to amend R.C. 3929.25 as it did in 1992.