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IN THE COURT OF APPEALS OF IOWA

No. 2-482 / 91-1612

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellant/Cross-Appellee,

vs.

STATE OF IOWA,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Plaintiff insurer appeals and the State cross-appeals a district court decision awarding plaintiff damages on its subrogation claim against the State. **AFFIRMED.**

John D. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport, for appellant.

Bonnie J. Campbell, Attorney General, and Greg Knoploh, Assistant Attorney General, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

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SCHLEGEL, J.

During April 1986, an incomplete combustion problem occurred at the University of Iowa power plant in Iowa City. The plant is an electric generating facility owned and operated by the State of Iowa. Due to the incomplete combustion, a caustic mixture of sulfur-based acids and oils was emitted from the plant. This emission caused damage to acrylic skylights in the roof of the Old Capital Center, a shopping mall located near the plant. Some pitting or "crazing" appeared on the outside surface of the skylights.

At that time, Old Capital Center was insured by United States Fidelity and Guaranty (USF&G). The insurance policy provided coverage for loss, destruction or damage of the insured premises, including "replacement cost coverage. It also provided that USF&G would not assume liability under the replacement coverage endorsement if the damage was not repaired, rebuilt or replaced.

The owners of Old Capital Center made a claim for the replacement value of the acrylic skylights to USF&G pursuant to their insurance contract. Swanson Gentleman, Inc., the firm which had originally installed the skylights, bid $153,437 to replace them. This amount represented $88,893 for materials and $65,544 for labor.

The skylights have a useful life of between thirty to forty years. About fourteen percent of that useful life had passed before the injury. The cost of materials,

$88,893, reduced by fourteen percent is $76,448. USF&G and the owners of the mall agreed to settle for $77,448. The insured's $1,000 deductible was deducted and the owners of the mall received a check for $76,448.

A petition was filed against the State on October 28, 1988, by USF&G; Old Capitol Center Partners, the insured; and Heitman Financial Services, Ltd., the successor to the insured. The claims of Old Capitol and Heitman were dismissed because they had failed to file claims with the State appeal board, as required by Iowa Code chapter 25A. However, USF&G had filed a claim pursuant to chapter 25A, and its claim was denied.

In its suit, USF&G alleged it was entitled to be reimbursed for the payment it made to Old Capital Center for the damages to the skylights. The State made a motion to dismiss USF&G's claim on the ground that USF&G was not the real party in interest. The district court denied the motion and the case proceeded to a bench trial.

The State admitted fault. The State also admitted causation, except as to the damages associated with the gaskets which held the skylights in place. The issues presented to the trial court included damages, whether USF&G was the real party in interest, and whether USF&G's payment was voluntary such that it was not entitled to recover.

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On September 12, 1991, the district court awarded USF&G $20,000. The court based the award upon Old Capital Center's diminution in market value. USF&G appeals, claiming the district court erred in applying the diminution in market value approach. The State cross-appeals, claiming the district court erred in finding USF&G was a real party in interest and in finding that USF&G's payment was not voluntarily made.

I. This case was tried to the court as an action at law and our review is only on errors assigned. See Iowa R. App. P. 4. As such, we review the record to determine if there is substantial evidence to support the decision of the trial court. Recruiter, Inc. v. Brenco Automation Center, Inc., 354 N.W.2d 245, 246 (Iowa App. 1984). If that quantum of evidence exists, we are bound thereby. Id. However, we are not precluded from inquiring whether the trial court applied erroneous rules of law which materially affect the decision. Davis v. Hansen, 224 N.W.2d 4, 5 (Iowa 1974).

II. We will address the cross-appeal issues first. The State contends that USF&G was not the real party in interest. Under Iowa Rule of Civil Procedure 2, every action must be prosecuted in the name of the real party in interest.

This rule has special application where an insurer becomes subrogated to an insured after paying a loss.

Wayne County Mut. Ins. Co. v. Grove, 318 N.W.2d 192, 193 (Iowa 1982). When the insurance payment covers the entire loss, the insurer becomes the real party in interest and may bring an action. United Security Ins. Co. v. Johnson, 278 N.W.2d 29, 30 (Iowa 1979). Where the insurance covers only a portion of the loss, the right of action remains in the insured for the entire loss. Id.

The rule is a shield, not a sword; it merely holds that a person should be called but once to defend a suit. Wayne County, 318 N.W.2d at 193. Thus, even where there is some question whether the loss suffered by the insured exceeded the amount paid by the insurer, where there is no realistic possibility of further suit on the claim, the insurer may proceed in its own name. Id.

We determine USF&G was the real party in interest here. USF&G paid the full amount the parties had agreed upon in settlement. Because the owners of the mall failed to file a claim pursuant to chapter 25A, there was no realistic possibility of further suit on the claim. We therefore affirm the district court's conclusion that USF&G was the real party in interest.

III. The State also contends USF&G was not entitled to a judgment because it voluntarily paid the mall owners' claim. The insurance policy stated:

> In the event of loss or damage to property which is not repaired, rebuilt or replaced, there shall be no liability assumed under this Replacement Coverage Endorsement.

The State points out that at the time of trial, the skylights had not been replaced. It argues that under the terms of the policy, USF&G was therefore not required to pay anything to the mall owners.

It is well settled that where one pays the debt of another as a pure volunteer, no occasion arises for the application of the doctrine of subrogation. Miller & Chaney Bank v. Collis, 211 Iowa 859, 863, 234 N.W. 550, 552 (1931). Where a question arises as to whether an insurer's payment was voluntary, we may look to the insurance policy to determine if the insured's loss was covered. See Aetna Casualty & Surety Co. v. Jewett Lumber Co., 209 N.W.2d 48, 48-49 (Iowa 1973).

We determine USF&G's payment to the mall owners was not voluntary. There is no question but that the damage to the skylights was a type of damage covered by the insurance policy. We find no requirement under the policy that the insured immediately repair or replace any property damage. The evidence showed the injury to the skylights reduced their useful life by ten percent. Thus, the mall owners will be required to replace the skylights about four years sooner than they had planned. The payment from USF&G will allow them to replace the skylights at this earlier date.

IV. USF&G argues on appeal that the award of damages was insufficient. It claims the measure of damages should be the reasonable cost of repair or replacement, not the diminution in value of the mall.

The general rule in Iowa for repairs or for replacement is the fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage. State v. Urbanek, 177 N.W.2d 14, 16 (Iowa 1970). Where repairs may render the damaged property more valuable than it was before the injury, the defendant is not required to bear the full expenditure of the repairs, but is only liable for the difference in the market price of the property before and after the injury. Id.

The evidence in this case showed the only damage to the skylights, other than aesthetic, was that the useful life of the skylights was reduced by ten percent. Thus, if the skylights were replaced now, the mall would be more valuable than it was before the injury. Therefore, the State should only be liable for the diminution in value of the property. This is the measure of damages used by the district court. We affirm the award of damages.

We have affirmed the district court on the appeal and the cross-appeal. Costs of this appeal are assessed one-half to each party.

AFFIRMED.