

**IN THE COURT OF APPEALS OF IOWA**

No. 7-964 / 07-0735  
Filed January 30, 2008

**FARMERS CASUALTY  
INSURANCE COMPANY,**  
Plaintiff-Appellee,

**vs.**

**DIANE BIRKBY d/b/a CORNER CUP,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Fremont County, Gordon C. Abel,  
Judge.

Defendant appeals the district court's grant of summary judgment to  
plaintiff in a declaratory judgment action to determine the actual cash value of  
insured property. **AFFIRMED.**

Jon H. Johnson and Seth E. Baldwin of Johnson Law, P.L.C., Sidney, for  
appellant.

Jason D. Walke of Gunderson, Sharp & Walke, L.L.P., Des Moines, for  
appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

**HUITINK, P.J.**

The defendant, Diane Birkby, appeals the district court's grant of summary judgment to the plaintiff, Farmers Casualty Insurance Company (FCIC), in FCIC's declaratory judgment action to determine the actual cash value of insured property. We affirm.

**I. Backgrounds Facts and Prior Proceedings**

In October 2005 Birkby purchased a commercial building on the downtown square of Sidney for \$25,000. The building had once been a bank, but was eventually converted to an office space. Birkby bought the building to start a new business, the "Corner Cup" coffee shop. Two months later, on December 6, the building was severely damaged by a fire. The fire "gutted" the inside of the brick building, but its structural integrity remained sound.

Birkby had insured the building with FCIC. The policy covered the building on an "actual cash value" basis with a coverage limit of \$80,000. This same policy also covered the personal property in the building on a "replacement cost" basis with a coverage limit of \$10,000. The phrase "actual cash value" was not defined in the policy. Birkby interpreted the phrase to be the cost of rebuilding the building, less any reasonable depreciation on the old building. Birkby hired an appraiser to calculate the value of the building using this "cost approach" method. Her appraiser valued the building at \$135,300 and the land underneath the building at \$3700.<sup>1</sup> Her appraiser also used a traditional analysis of comparable sales and their relationship to the current property to determine that

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<sup>1</sup> This cost approach consisted of the estimated cost to rebuild the building (\$246,000), less the depreciated value of the building (\$110,700).

the market value for the entire property (land and building) was only \$29,800. Because the appraiser had determined, under the cost approach, that her building was worth \$135,300, Birkby demanded that FCIC pay her the \$80,000 limit on her policy.

FCIC did not agree with Birkby's interpretation of the phrase "actual cash value." FCIC equated actual cash value with the market value of the property. FCIC hired its own appraiser to determine the market value of the property and eventually paid Birkby \$26,140 for the damage to the building.<sup>2</sup>

Birkby was not satisfied with this result, so FCIC filed a petition for declaratory judgment requesting that the court declare the meaning of the phrase "actual cash value" and determine the actual cash value of the property in question as of the date of the fire. Both parties filed motions for summary judgment with corresponding statements of undisputed facts.

The district court granted FCIC's motion for summary judgment, finding FCIC had satisfied its obligation under the insurance policy by paying Birkby \$26,140 for the damage to the building. In doing so, the court concluded the actual cash value of the building was the market value of the building prior to the fire. Birkby now appeals.

## **II. Standard of Review**

We review a ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate only when

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<sup>2</sup> FCIC arrived at this figure by subtracting the assessed value of the land (\$3660) from the \$29,800 market value determined by Birkby's appraiser. FCIC also paid Birkby \$10,000 for lost personal property, \$4000 for lost business income, and \$10,260 for debris removal expenses. All of these payments were based on policy limits separate from the \$80,000 limit on the building.

there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006).

### III. Merits

There are no material fact issues in this case. The primary issue is how to calculate the “actual cash value” of the damaged building. This phrase is not defined in the policy, but both parties agree our supreme court’s decision in *Britven v. Occidental Ins. Co.*, 234 Iowa 682, 13 N.W.2d 791 (1944), addresses how to determine the actual cash value of an insured building destroyed by fire. On appeal, Birkby contends the district court impliedly overruled and improperly applied *Occidental* when it determined the actual cash value of her building was equivalent to its market value. We disagree.

*Occidental* involved a dispute between an insurance company and the insured over the value of a fire-damaged commercial building. 234 Iowa at 683, 13 N.W.2d at 792. The insurance policy covering the building limited the insured’s coverage to eighty percent of the actual cash value of the building prior to the fire. *Id.* The parties could not agree on the actual cash value of the building, so the matter was tried to a jury. *Id.* At the close of evidence, the court instructed the jury that the phrase “actual cash value” meant market value, and the jury returned a verdict unfavorable to the insured. *Id.* The insured appealed, arguing, in pertinent part, that the market value instruction was erroneous and the court erred in refusing to admit evidence on the replacement cost of the building prior to the time of the fire. *Id.*

Our supreme court reversed the court's decision, noting the district court incorrectly assumed the phrase "actual cash value" was synonymous with market value. *Id.* at 685, 13 N.W.2d at 793. The court stated there was no "hard and fast rule" to determine actual cash value in all cases, but outlined a general procedure to assist in the calculation. *Id.* at 685-87, 13 N.W.2d at 793-94.

The first question is whether there is a regular market for the property, a market where the property is bought and sold in the ordinary course of dealing. *See id.* at 685-86, 13 N.W.2d at 793. The next question is whether the property has a market value that is "fairly indicative of its real value." *Id.* If it is possible to determine the property's market value, then the market value "is *usually* taken to be its 'actual cash value' at the time of the loss." *Id.* at 685, 13 N.W.2d at 793 (emphasis added).

However, if there is no recognized market value that is fairly indicative of the property's real value, the actual cash value must be determined without resorting to the market value. *Id.* at 686, 13 N.W.2d at 793; *cf. Schiltz v. Cullen-Schiltz & Assocs., Inc.*, 228 N.W.2d 10, 18 (Iowa 1975) (noting a partially-built sewage disposal facility has little or no market value). The fact finder should therefore consider all facts and circumstances that tend to prove the actual value of the property. *Occidental*, 234 Iowa at 686, 13 N.W.2d at 794. These facts and circumstances may include "the size and dimensions of the building, the kind and quality of materials of which it is constructed, its age, the amount of wear and tear to which it has been subjected, its state of repair and all other pertinent matters." *Id.*

The *Occidental* court noted there was testimony and supporting authority that “a building apart from the ground on which it stands usually has little if any market value,” but also pointed out that neither party produced any evidence of a market for the building separate from the land it rested upon. *Id.* at 688, 13 N.W.2d at 794-95. Based on the information before it, the court stated that market value was “*generally* not the test in determining values of buildings in connection with fire losses” because a building “has little or no market value apart from the ground on which it stands.” *Id.* at 686, 13 N.W.2d at 793 (emphasis added).

Based on this holding, Birkby argues that Iowa law “mandates” the use of other evidence such as original cost and replacement cost when determining the actual cash value of a commercial building for insurance claims. We disagree.

*Occidental* does not mandate that the court use evidence beyond the market value of the property to determine the actual cash value of the property. *Occidental* only states that market value is “generally” not the test to determine values of buildings. *Id.* As noted above, the testimony presented in *Occidental* did not convince the supreme court that the building, on its own, could be fairly valued apart from the land. Conversely, in this case we find there was sufficient evidence to establish (1) the building could be valued apart from the land, (2) there was a market for the property, and (3) the market value of the property was recognizable and fairly indicative of its true value.

There was ample evidence to prove that a building could be valued separate from the underlying land. Birkby’s appraiser valued the underlying land

at \$3700, and the Fremont County Assessor assessed the land at \$3660.<sup>3</sup> Birkby's appraiser also stated that, so long as sufficient market data is available, the best indicator of value for a piece of property such as the building in question was the market data/comparable sales approach. Both appraisers found sufficient market information to perform a market data evaluation. This data revealed that this particular property had been bought and sold on two other occasions within the previous five and one-half years.<sup>4</sup> Also, two other commercial buildings located one-half block from the subject property had been sold within the previous three years. Based on this market data, the appraisers concluded the pre-fire market value of the property ranged between \$25,000 and \$29,800. A local real estate broker also performed a "market analysis" of the property. She found the value of the property, pre-fire, was \$25,000.

In light of this evidence, we find the court properly applied the factors set forth in *Occidental* to conclude the actual cash value of the building was \$26,140. Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court's decision to grant summary judgment in favor of FCIC.

**AFFIRMED.**

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<sup>3</sup> The assessor also valued the "improvements" on the property at \$19,610 twelve months before the fire. Shortly after the fire, the property was reassessed; the value of the land remained at \$3660 while the value of the improvements fell to \$5000.

<sup>4</sup> The property was purchased in January 2000 for \$10,500 and then sold again in February 2003 for \$22,500. The Birkbys then purchased this property in October 2005 for \$25,000.