

STATE OF MICHIGAN
COURT OF APPEALS

MILDRED SIBERT,

Plaintiff-Appellant,

v

STATE FARM FIRE & CASUALTY COMPANY,

Defendant-Appellee.

UNPUBLISHED

February 19, 1999

No. 201121

Oakland Circuit Court

LC No. 93-464462 CK

Before: Talbot, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action. We affirm.

After defendant denied plaintiff's claim for the alleged theft-related loss of personal property, plaintiff brought a breach of contract action against defendant on the homeowner's insurance policy defendant had issued to plaintiff. At the jury trial held in this case, defendant's theory of defense was, first, that no theft occurred and, second, that plaintiff had committed fraud in connection with her claim. The jury found that plaintiff had not sustained a loss due to the theft of personal property.

On appeal, plaintiff first raises several grounds for her contention that the trial court abused its discretion in denying her motion for a new trial. We review a trial court's grant or denial of a new trial for an abuse of discretion. *Settington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

Specifically, plaintiff argues that the trial court erred in admitting evidence that plaintiff had previously submitted three other loss claims involving thefts of personal property to another insurer within a couple of years of her instant claim. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 528; 564 NW2d 532 (1997). Evidence of other acts is admissible if (1) the evidence is offered for a proper, non-character purpose; (2) the evidence is relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. See, generally, *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In this case, the evidence of prior claims was not admitted to establish plaintiff's bad character, but rather

was admitted for the purposes of showing (1) plaintiff's plan or scheme to defraud defendant and (2) a fraudulent misrepresentation on her insurance application. MRE 404(b). These purposes were relevant to defendant's defense. MRE 401. In addition, the jury was given a cautionary instruction that it could not use this evidence as evidence of plaintiff's bad character. MRE 403. Thus, after reviewing the record, we conclude that the trial court did not abuse its discretion in admitting this evidence. *Phinney, supra*. We further conclude that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on this ground. *Settingington, supra*.

Next, plaintiff argues that the verdict was against the great weight of the evidence because the jury committed misconduct. However, we reject plaintiff's conclusory and unsupported allegation that the fact that the jury deliberated only one hour, without more, demonstrates jury misconduct or a failure to deliberate. Plaintiff also argues that the verdict was against the great weight of the evidence because defendant did not prove by clear and convincing evidence plaintiff committed a fraud. However, the verdict form reveals that the jury never reached the issue of fraud. Rather, the jury found that plaintiff had not sustained a loss due to the theft of personal property. It would appear that plaintiff would have the burden of establishing that she sustained a loss due to theft in order to establish a breach of contract. However, even assuming the jury's finding involved determining whether plaintiff had committed fraud and the burden of doing so was on defendant, on this record we find no abuse of discretion in the trial court's determination that the verdict was not against the great weight of the evidence. *Phinney, supra*.

Finally, plaintiff relies on the "interest of justice" exception in the offer-of-judgment rule, MCR 2.405(D)(3), to argue that the trial court erred in awarding attorney fees as part of the actual costs awarded to defendant under this rule in this case. Specifically, plaintiff contends that her refusal of defendant's offer of judgment was reasonable. However, the rule is that a reasonable refusal of an offer, without more, is insufficient to justify the denial of attorney fees under MCR 2.405. *Luidens v 63rd Dist Court*, 219 Mich App 24, 33; 555 NW2d 709 (1996). Plaintiff also contends that attorney fees should not have been awarded because she will suffer catastrophic damages as a result of the loss of her stolen property and the attorney fees owed to her own lawyers. *Lamson v Martin (After Remand)*, 216 Mich App 452, 463; 549 NW2d 878 (1996). However, the jury specifically found that plaintiff had not sustained a loss due to the theft of personal property. In summary, we conclude that the trial court did not abuse its discretion in awarding attorney fees to defendant under MCR 2.405.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Michael R. Smolenski