

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

NAIL MAROKI and YASSER MARROGI,

Defendants-Appellants.

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UNPUBLISHED

September 24, 2002

No. 230051

Oakland Circuit Court

LC No. 99-015865-CK

Before: O’Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, the trial court entered a declaratory judgment in favor of plaintiff. Defendants appeal as of right from the judgment. We affirm.

Defendants, who are brothers, obtained an insurance policy from plaintiff, Allstate Insurance Company, on defendant Yasser’s leased vehicle. Defendant Nail signed the application and Yasser was not listed as a driver on the policy. Later, defendants were involved in an automobile accident. As a result, the vehicle was a total loss and defendants sustained injuries. Defendants filed a personal injury protection claim under the insurance policy for medical expenses and for uninsured motorist benefits. After paying off the vehicle, plaintiff received the title and discovered that Yasser, not Nail, was the lessee of the insured vehicle. Plaintiff conducted an investigation and determined that defendants were not properly insured. Plaintiff filed a complaint for declaratory relief, alleging fraud in the application of insurance and material misrepresentations/fraud in pursuing the claim. The trial court conducted a jury trial and the jury found, among other things, that Nail had no insurable interest in the vehicle, that Nail intentionally made a material misrepresentation when he applied for the insurance, and that defendants intentionally concealed or misrepresented material facts when making a claim under the policy. Thereafter, the trial court declared the insurance policy and all claims for benefits under the policy void and entered a judgment against defendants.

On appeal, defendants argue that the trial court improperly instructed the jury concerning plaintiff’s burden of proof on the fraud claim, and that this error prejudiced defendants. The trial court instructed the jury that plaintiff had to prove fraud by a preponderance of the evidence, rather than by clear and convincing evidence. Because whether the trial court’s instruction on the burden of proof was proper presents a question of law, our review is de novo. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 694-695; 630 NW2d 356 (2001).

In *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997), this Court addressed the standard of proof issue. In *Mina*, *supra* at 680, the insurer denied the insured's claim for fire insurance coverage on the basis of fraud, false swearing, and arson. Thereafter, the insured brought suit against the insurer for payment under the policy and the insurer raised fraud, false swearing and arson as affirmative defenses to preclude recovery. *Id.* The trial court, relying on the Supreme Court's decision in *Campbell v Great Lakes Ins Co*, 228 Mich 636, 638; 200 NW 457 (1924), which also involved an insurer alleging fraud and false swearing as an affirmative defense, instructed the jury that the insurer must prove its fraud and false swearing defense by a preponderance of the evidence. *Mina*, *supra* at 681. On appeal, the insured argued that the trial court erroneously instructed the jury because the more recent Michigan case law held that the burden of proof in fraud cases was by clear and convincing evidence. *Id.* After analyzing the apparent confusion in Michigan law regarding the proper standard of proof, this Court upheld the jury instruction requiring that the plaintiff prove by fraud by a preponderance of the evidence, concluding that it was not improper for the trial court to rely on *Campbell*, *supra*. *Mina*, *supra* at 685. In so deciding, this Court stated:

[U]nless and until the Supreme Court offers us additional guidance on this issue, we cannot find that the trial court erred in relying on *Campbell* . . . . In *Campbell*, the Supreme Court addressed the identical issue that is presented in the present case. The Supreme Court has never overruled *Campbell*. Accordingly, the trial court properly followed *Campbell* and instructed the jury that defendant had to prove its defense of fraud and false swearing by a preponderance of the evidence. [*Id.*]

See also *Hawkeye Casualty Co v Holcomb*, 302 Mich 591, 604; 5 NW2d 477 (1942) ("The burden was upon plaintiff, who claimed fraud on the part of defendants in obtaining the issuance of such policy, to prove such fraud by a preponderance of the evidence.")

Defendants rely on *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330; 247 NW2d 813 (1976), and *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996), to support their argument that plaintiff must prove its claim by clear and convincing evidence. As defendants point out, in *Hi-Way*, *supra* at 336, the Court stated that "fraud will not be presumed but must be proven by clear, satisfactory and convincing evidence." Similarly, in *Foodland*, *supra*, this Court stated that "[i]t is generally held that fraud must be proved by 'clear and convincing' evidence, rather than by the preponderance of the evidence." However, these cases are distinguishable from *Campbell* and *Mina*. In both *Campbell* and *Mina*, the insurer asserted the defense of fraud and false swearing to bar the insured from recovery under the insurance policy, but *Hi-Way Motor Co* and *Foodland* were tort actions. The present case is a declaratory action where plaintiff-insurer asserted fraud to preclude the insured from recovery under the policy, and although this is an original action, rather than a defense, it remains more similar to *Campbell* and *Mina*. In other words, although procedurally different, *Campbell*, *Mina*, and the present case concern the preclusion of an insured's recovery from an insurance policy on the basis of fraud. The *Mina* Court explained:

Unfortunately, in the *Hi-Way Motor* opinion, the Supreme Court did not overrule its previous cases holding that fraud had to be proved by a preponderance of the evidence. In fact, the opinion made no mention of them.

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[W]e are unable to say with any degree of certainty exactly what standard of proof courts should apply in fraud cases. The Supreme Court has alternately required fraud to be established by a preponderance of the evidence and by clear and convincing proof, with little consistency and no detailed analysis. While the most recent Supreme Court pronouncements regarding the question have stated that fraud must be proved by clear and convincing evidence, we think it unlikely that the Supreme Court would overrule a significant body of case law without at least mentioning that it was doing so. [*Mina, supra* at 684-685.]

Pursuant to MCR 7.215(I)(1), we are bound by *Mina*. Therefore, the trial court's instruction was not improper.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Richard Allen Griffin  
/s/ Joel P. Hoekstra