STATE OF MICHIGAN

COURT OF APPEALS

EMC MORTGAGE CORPORATION,

Plaintiff/Counter-Defendant,

v

AMERICAN FELLOWSHIP MUTUAL INSURANCE COMPANY,

Defendant/Third-Party Plaintiff/Counter-Plaintiff-Appellee,

and

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Plaintiff,

and

CAREY SHAWN TORRICE,

Third-Party Defendant/Counter-Plaintiff-Appellant,

and

CAROL KOEPPEN,

Third-Party Defendant/Counter-Plaintiff,

and

MICHAEL PETER TORRICE,

Third-Party Defendant-Appellant,

and

UNPUBLISHED
November 20, 2012

No. 298518
Macomb Circuit Court
LC No. 2006-005409-CK

GUY HUBER,

Third-Party Defendant.

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Third-party defendants Carey Shawn Torrice ("Carey") and Michael Peter Torrice ("Michael) appeal by right the trial court's judgment, entered after a jury trial, awarding defendant American Fellowship Mutual Insurance Company ("American Fellowship") damages of $36,000, case evaluation sanctions of $18,000, taxable costs of $1,748.36, and interest of $6,002.77, for a total judgment of $61,751.13, and also awarding American Fellowship a judgment of no cause of action on Carey's counterclaim against it. We affirm.

This action arose from a fire at a home that Carey owned in Chesterfield Township. In December 2005, Carey had obtained a homeowner's insurance policy for the home from American Fellowship. Later that month, the home was destroyed by a fire. American Fellowship determined that the fire was intentionally set by someone who had access to the home. It also determined that the home was vacant when Carey applied for insurance coverage and remained vacant at the time of the fire, contrary to Carey's representations in the insurance application. American Fellowship made a partial payment of $36,000 under the policy to EMC Mortgage Corporation ("EMC"), which held a mortgage on the property and was named as an additional insured.

EMC later brought this action against American Fellowship and a previous insurer, Allstate Insurance Company, to recover the mortgage balance. American Fellowship filed a third-party complaint against Carey and Michael.[1] EMC later dismissed its claims against the two insurers. The case proceeded to trial only on American Fellowship's claims against the Torrices and a counterclaim by Carey against American Fellowship for breach of contract. The jury found that American Fellowship was entitled to rescind its policy, and it awarded American Fellowship damages of $36,000, the amount it had paid to EMC. The jury also found no cause of action with respect to Carey's counterclaim. The Torrices now appeal by right.

I. THIRD-PARTY DEFENDANTS' CHALLENGES TO AMERICAN FELLOWSHIP'S CLAIMS

The Torrices (third-party defendants) first argue that American Fellowship's claims for "arson" and unjust enrichment were legally insufficient to be considered by the jury. They alternatively argue that the jury's verdict on the unjust enrichment claim is against the great

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[1] Carey and Michael married after the date of the fire. In addition to Carey and Michael, American Fellowship named Carol Koeppen (Carey's mother) and Guy Huber (Carey's brother) as third-party defendants. The claims against Carol and Guy were resolved prior to trial.

weight of the evidence. Our review of the record discloses that the Torrices failed to raise these specific issues in an appropriate motion in the trial court. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). Accordingly, the issues are unpreserved, and our review is limited to plain error affecting the Torrices' substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Contrary to the Torrices' assertions, American Fellowship's complaint did not contain any claim for "arson." Rather, count VIII asserted a claim against Michael for fraud, which was factually based on allegations that he intentionally started the fired at Carey's house and then falsely represented that he did not know how the fire started to induce American Fellowship to pay insurance benefits to Carey. American Fellowship also brought a claim for civil conspiracy, alleging that Carey and Michael acted in concert to defraud American Fellowship. Although the trial court instructed the jury on "arson," that instruction was attendant to the fraud and civil conspiracy claims.

We find no merit to the Torrices' argument that the "arson" instruction was improper. Their argument is based on the erroneous assumption that Carey was the only person who was harmed by the alleged arson. American Fellowship also sustained economic harm from the fire because, as the insurer of the property, American Fellowship made payment to EMC. Furthermore, it was American Fellowship's theory that Michael intentionally set the fire as part of a conspiracy with Carey, the homeowner, to recover under the policy.

Further, American Fellowship had brought a separate, alternative claim against Michael for negligence, in which it alleged that Michael's negligent conduct was the cause of the fire. One of the principal issues at trial was whether the fire resulted from a negligent act, an intentional act, or an accident. Therefore, it was appropriate for the trial court to distinguish between an intentional, negligent, or accidental cause of the fire, and more specifically what constituted arson, to enable the jury to properly evaluate the fraud claim against Michael, which was based on allegations that Michael intentionally started the fire, as well as the civil conspiracy claim, which was based on allegations that Carey was complicit to Michael's intentional conduct.

The Torrices also argue that it was improper to submit the unjust enrichment claim to the jury because an express contract existed between Carey and American Fellowship. They further argue that the jury's verdict finding them liable on the unjust enrichment claim is against the great weight of the evidence.

Unjust enrichment consists of (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the defendant's retention of that benefit. *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 504; 739 NW2d 656 (2007). If unjust enrichment exists, the law will imply a contract in order to prevent the unjust result. *Id.* A contract may be implied under this theory only if there is no express contract. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992).

There was no plain error in allowing the jury to consider the unjust enrichment claim. First, American Fellowship successfully obtained rescission of the insurance policy, leaving no

express contract in place. Therefore, American Fellowship was entitled to pursue a claim for unjust enrichment to obtain return of the $36,000 that it paid to EMC on behalf of Carey.

Second, the evidence supports the jury's verdict that the Torrices were unjustly enriched. The mortgage balance on the mortgage on the property was reduced by $36,000 as a result of American Fellowship's payment to EMC. The evidence showed that Carey made material misrepresentations when she applied for the insurance coverage by misrepresenting that the house was occupied, resulting in issuance of a policy that otherwise would not have been issued. In addition, evidence was presented that an accelerant was detected in samples taken from the house and that the burn pattern was consistent with an arson fire, that there were no signs of a forced entry, and that Michael was the last person in the house. Given this evidence, the jury's determination that the fire was intentionally set by Michael is not against the great weight of the evidence. Third, even though Michael was not a property owner, the jury could properly find that both Carey and Michael benefitted from the payment by American Fellowship because the evidence showed that they had married and that both planned to begin building on the property to construct a "family compound."

For these reasons, we find no plain error with respect to the Torrices' arguments involving the "arson" and unjust enrichment claims.

II. JURY INSTRUCTIONS

The Torrices next argue that the trial court erred by failing to give their requested special instruction defining the terms "vacant" and "unoccupied" to the jury. The trial court instead instructed the jury that it was "to determine based on your own general knowledge and experience in the affairs of life, whether the property was vacant or unoccupied." This Court reviews de novo a trial court's decision not to give a requested jury instruction. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 679; 819 NW2d 28 (2011).

In the application for insurance, Carey represented that the home was occupied by a single family. She also signed a statement in which she affirmed that "the described premises is the only premises where the Named Insured or spouse maintains a residence other than business or farm properties." In addition, she acknowledged that she understood that no coverage would be afforded under the policy if the application contained any false statements, omissions, or material misrepresentations that would alter American Fellowship's evaluation of her application. American Fellowship's theory at trial was that the house was vacant and unoccupied when Carey completed the application for insurance, and that Carey therefore materially misrepresented the status of the house, entitling it to rescission of the policy.

At trial, the Torrices requested that the trial court instruct the jury on definitions of "vacant" and "unoccupied." American Fellowship objected because those terms were not defined in either the policy or the application that Carey had signed, and the case law on which the Torrices was relying involved cases in which insurance contracts contained definitions for those terms. We agree with American Fellowship that the trial court did not err by declining to give the Torrices' requested special instruction. The requested instruction was based on definitions of the terms "vacant" and "unoccupied" as used in other insurance policies. Here, American Fellowship was seeking to rescind the insurance policy based on misrepresentations in

Carey's application for insurance, and the terms "vacant" and "unoccupied" were not defined in the application. Because the application did not purport to define either "vacant" or "unoccupied," and thus the parties had not attempted to give these terms any special meaning, the trial court did not err by failing to provide a definition of those terms to the jury, or by instead instructing the jury that it could determine whether the property was vacant or unoccupied in accordance with its own general knowledge and experience in the affairs of life.

III. FRAUD AND MISREPRESENTATION

The Torrices next argue that the jury's verdict on American Fellowship's fraud or misrepresentation claim against Carey was against the great weight of the evidence, and thus the trial court erred in denying their motion for a new trial. We disagree.

In *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006), this Court stated:

> We review for an abuse of discretion a trial court's denial of a motion for a new trial. When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [Citations omitted.]

To establish a claim for actionable fraud, the plaintiff must prove the following elements:

> "(1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." [*Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011), quoting *Scott v Harper Recreation, Inc*, 444 Mich 441, 446 n 3; 506 NW2d 857 (1993).]

Fraud requires a misrepresentation about a past or present event. *Lawrence M Clarke, Inc*, 489 Mich at 284. A material misrepresentation in an application for insurance is one that affects the decision to issue a policy, or would result in a different policy. See *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 253-254; 632 NW2d 126 (2001).[2]

The trial court also instructed the jury on innocent misrepresentation, which

[2] Our Supreme Court recently held that an insurer can sue for fraud in an insurance application even if the basis for the fraud could have been easily discovered upon investigation by the insurer. *Titan Ins Co v Hyten*, 491 Mich 547, 571; 817 NW2d 562 (2012).

> is shown where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation. [*Forge v Smith,* 458 Mich 198, 211-212; 580 NW2d 876 (1998).]

The evidence showed that Carey applied for insurance approximately two weeks before the fire. Well before the application was submitted, most of the contents of the house had been removed. Testimony indicated that items were placed in storage containers in September or October 2005. Shortly thereafter, stakes were placed in the yard, indicating that there were plans for new construction. These events occurred before Carey applied for insurance coverage. In addition, testimony from officers who first responded to the fire indicated that Carey told them that the house was vacant at the time of the fire. Carey was interviewed by Detective Feld shortly after the fire and stated only that she sometimes slept on the couch in the house. Carey also told a neighbor that there were plans to turn the property into a "family compound." Utility records showed that the house was not being used as much as it had in the past. This evidence supports American Fellowship's claim that the house was vacant or unoccupied and was not being used as a residence at the time Carey completed the insurance application. Thus, the jury's determination that Carey intentionally misrepresented the condition or use of the property at the time she applied for insurance is not against the great weight of the evidence.

IV. CIVIL CONSPIRACY

The Torrices also challenge the jury's verdict and the trial court's jury instructions on American Fellowship's claim for civil conspiracy. American Fellowship alleged that Carey and Michael were liable for civil conspiracy because they conspired to have Carey fraudulently procure insurance coverage and have Michael intentionally set the fire to obtain insurance proceeds from American Fellowship. Because the Torrices did not challenge the weight of the evidence with respect to the conspiracy claim in their motion for a new trial, or object to the trial court's jury instructions on civil conspiracy, these issues are unpreserved, and our review is limited to plain error affecting the Torrices' substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp,* 245 Mich App 670, 700; 630 NW2d 356 (2001).

As explained in *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 507; 686 NW2d 770 (2004), overruled on other grounds in *Titan Ins Co,* 491 Mich at 556 n 4:

> A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. A claim of civil conspiracy must be based on an underlying actionable tort.

Contrary to the Torrices' argument that there was no underlying tort to support a conspiracy, the alleged conspiracy was based on Carey's tortious conduct of intentionally misrepresenting the status of the house to obtain insurance coverage and Michael's tortious conduct of intentionally starting the fire and fraudulently misrepresenting the circumstances of the fire afterward to induce American Fellowship to pay the insurance proceeds.

We also reject the Torrices' argument that there was no evidence that they engaged in "concerted action" to prove a civil conspiracy. Contrary to what the Torrices suggest, it was not necessary that both of them commit the same actionable tort. What is critical to a conspiracy is that the participants engage in conduct with the same unlawful or criminal goal through a concert of action. *Mable Cleary Trust,* 262 Mich App at 507. Given the evidence of the Torrices' relationship, the fact that both had access to the house and both participated in removing items from the house before the fire, that Michael was the last know person inside the house before the fire, and that both made representations concerning the status of the property and the circumstances surrounding the fire, the jury's finding of a concert of action to support a civil conspiracy is not against the great weight of the evidence.

The Torrices also challenge the trial court's instructions on the elements of civil conspiracy. The Torrices argue that the trial court's instructions did not adequately inform the jury that, to find a conspiracy, it had to find not only that the Torrices conspired to act in concert, but that they actually acted in concert. Viewed as a whole, the trial court's instructions required the jury to find that (1) the Torrices combined together, (2) by some concerted action, (3) to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. The instructions required the jury to find that the Torrices agreed to work together to achieve a criminal or unlawful act or purpose. Reviewed in their entirety, the instructions properly required the jury to find that there were improper acts actually committed by the Torrices to find a conspiracy.

V. ADMISSIBILITY OF MICHAEL TORRICE'S TESTIMONY

The Torrices next argue that the trial court erred by refusing to permit Michael to testify at trial because he had earlier invoked his Fifth Amendment right against self-incrimination to avoid giving testimony at his deposition. We review the trial court's evidentiary ruling for an abuse of discretion, but review any preliminary questions of law affecting admissibility de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

The Fifth Amendment allows an individual to decline to answer questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Huntington Nat'l Bank v Ristich,* 292 Mich App 376, 384; 808 NW2d 511 (2011). The privilege may be invoked even if criminal proceedings have not been instituted or planned. *Id.* However, the privilege may not be used to deprive a plaintiff of his constitutional right to his day in court. *Id.* Moreover, a party who invokes the privilege against self-incrimination in civil proceedings does so to the peril of his claim. *Allen v Mich Basic Prop Ins Co*, 249 Mich App 66, 74; 640 NW2d 903 (2001). Furthermore, the privilege does not forbid adverse inferences against a party in a civil action who refuses to testify in response to probative evidence offered against him. *Phillips v Deihm,* 213 Mich App 389, 400; 541 NW2d 566 (1995). Any penalty imposed in a civil action as a result of the refusal to testify based on the privilege against self-incrimination is no different than what would result from refusing to testify for reasons unrelated to the privilege. *Id*.

In this case, the trial court did not err in ruling that Michael would not be permitted to testify at trial given his previous assertion of his Fifth Amendment privilege to avoid offering testimony at his pretrial discovery deposition. See *In re Handley*, 2006 WL 305683, 2-3 (ED

Mich, 2006), *Traficant v Comm'r of Internal Revenue Serv*, 884 F2d 258, 265 (CA 6, 1989), and *United States v $60,000 in US Currency*, 763 F Supp 909, 913-914 (ED Mich, 1991). The Torrices argue that Michael should have been permitted to testify concerning matters for which he had not invoked the Fifth Amendment privilege. At his deposition, however, he answered questions regarding his name, his work, and his business, but then invoked the Fifth Amendment privilege to avoid answering questions about all substantive matters related to the fire and the insurance issues. The trial court properly refused to allow Michael to testify when he had only offered to testify at his deposition about matters that were not material to the issues in this case. The trial court's ruling barring Michael's trial testimony was consistent with the scope of the privilege asserted. *Traficant*, 884 F2d at 265. Further, because Michael had refused to answer questions during the discovery phase, and the matter was close to trial and case evaluation had already been completed, the trial court did not err by refusing to allow Michael to give his deposition later. The late offer would have prejudiced American Fellowship's trial preparations.

Accordingly, we reject this claim of error.

VI. COUNSEL'S CONDUCT

The Torrices next argue that improper conduct by American Fellowship's attorney denied them a fair trial. They contend that it was improper for counsel to question Carey about her work as an actress and as a private investigator and then use that testimony to argue that she was not a credible witness. We disagree.

First, we disagree with the Torrices' argument that American Fellowship's counsel's questions concerning Carey's training and experience as an actress and her work as a private investigator, were improper because they were irrelevant and unduly prejudicial. Under the rules of evidence, relevant evidence is admissible, while irrelevant evidence is not. MRE 402; *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991). Evidence is relevant if it tends to make the existence of a fact at issue more probable or less probable than it would be without the evidence. MRE 401; *McDonald*, 191 Mich App at 605. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995). A trial court has broad discretion to permit cross-examination concerning matters relevant to a witness's credibility. In *Estate of Barbara Johnson v Kowalski*, 296 Mich App 664; ___ NW2d ___ (Docket No. 297066, issued May 29, 2012), slip op at 9, lv pending, this Court stated:

> In trial, the credibility of a witness is almost always relevant. *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281, citing with approval, *United States v Abel*, 469 US 45; 105 S Ct 465; 83 L Ed 2d 450 (1984). The jury, as the finder of fact and judge of credibility "has historically been entitled to all evidence that might bear on the accuracy and truth of a witness' testimony." *Abel*, 469 US at 52. Moreover, inasmuch as the questions posed to [the witness] arose during cross examination, "[t]here is a general canon that on cross examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal*." *Wilson v Stilwill*, 411 Mich 587, 599; 309

BW2d [sic] 898 (1981), quoting 3A Wigmore, Evidence (Chadbourn Rev), § 944 p 778 (Court emphasis).

In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court summarized an appellate court's role in reviewing claims of misconduct by counsel:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.

In *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court stated:

> An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [Citations omitted.]

In this case, on direct examination, Carey introduced herself as a county commissioner, a licensed private investigator, and an actress. On cross-examination, American Fellowship's counsel pursued these subjects and questioned Carey about her training as an actress and about published reports that she had worked as a decoy at her private investigation agency to try to catch individuals who might cheat on their spouses. Carey admitted that she had received training as an actress to play different roles, but denied acting as a decoy. Although the Torrices argue that the questions about Carey's work and public appearances were not relevant, those subjects were first brought up by Carey. Further, Carey's training as an actress and her work as an undercover private investigator were relevant to her credibility. Even if the line of questioning could be considered only marginally relevant to Carey's credibility, there was nothing particularly prejudicial about the subject matters that could be considered unfairly prejudicial. Thus, counsel's conduct in pursuing this line of questioning was not improper, and the trial court did not abuse its discretion in permitting the cross-examination.

During closing arguments, counsel for American Fellowship stated:

> With regard to what she was doing in December when she was so distraught. Starting up a new business, she's the president of the business. Well,

> I'm the president of the business, I don't do the day to day stuff, I have other people to do stuff for me. Yeah, like torching down the house.
>
> I don't do the dangerous work in the investigations. That's what she said. And then she goes ahead and says -- I showed her what was marked as Exhibit 28 or 29, or 27, this is from your website. I had it wrong, first I thought it was the Eye Spy website. She corrected me, it's her website where they have the picture of her on the Maury Povich show. And also has a press release about her talking about how she for the past five years has been going to bars and has been misrepresenting to men in the bars how I'm not in favor of guys cheating on their wives. But, she said in her statement on her website, I go to the bars, I misrepresent, I come onto these people, and we try to catch them so we can go ahead and show their wives, their girlfriends, that they're cheaters. That's the type of person we're dealing with here. That's why this is a fraud case. But she says here, I don't do that. It's just in there like for whatever, advertising, puffing. Then you're just a liar. Okay. It doesn't matter, you can't believe anything this lady says.

First, these comments represent only a brief portion of American Fellowship's closing argument. Most of the argument was spent addressing the facts of the case and Carey's credibility based on her explanation of the events in question. The challenged comments were not a significant part of counsel's closing argument. More significantly, however, counsel's remarks do not reflect a studied purpose to inflame or prejudice the jury or to deflect the jury's attention from the issues. See *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 22; 684 NW2d 391 (2004). Moreover, the trial court instructed the jury that the statements by counsel were not evidence. The court's instruction was sufficient to cure any perceived prejudice. Accordingly, the Torrices were not denied a fair trial.

VII. REQUEST FOR RELIEF FROM JUDGMENT

The Torrices lastly argue that the trial court erred in denying their motion for relief from judgment, which was based on a claim that a witness committed a fraud upon the court. We review a trial court's decision whether to grant relief from a judgment under MCR 2.612(C)(1) for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

The Torrices' motion was based on transcripts of recorded telephone calls between a detective involved in the fire investigation and another individual who knew the Torrices. At trial, the detective denied discussing this case with the other individual, but the recorded telephone conversations revealed that the detective had mentioned his involvement in the investigation to the other individual and referred to the Torrices as people who were "shady," and even suggested that the individual file a police report to attempt to "scare" Michael to cooperate in helping the other individual recover some property that the individual had stored on the Torrices' property. The Torrices' argue that this latter evidence was relevant to show the detective's bias against them.

The Torrices' motion for relief was based on MCR 2.612(C)(1)(c), which permits a court to relieve a party from a judgment for "[f]raud (intrinsic or extrinsic), misrepresentation, or other

misconduct of an adverse party." In this case, however, there was no allegation or evidence of fraud by an adverse party. The Torrices' argued that the detective who investigated the fire provided false testimony at trial, but there was no evidence that American Fellowship was aware that the testimony he provided was false. Further, even if the post-trial evidence could have supported an argument that the detective was biased against the Torrices, the detective played only a minor role in the trial. Indeed, while he investigated the case, he did not pursue criminal charges. Moreover, the detective's testimony was largely cumulative of that provided by other witnesses. In addition, the new evidence would have only impeached the detective's credibility in general. It would not have shown that any of his trial testimony concerning the facts of his investigation was inaccurate or misleading. For these reasons, the trial court did not abuse its discretion in denying the Torrices' motion for relief from judgment.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck