STATE OF MICHIGAN

COURT OF APPEALS

ERNEST BANASZAK and
JOHNNIE BANASZAK,

Plaintiffs-Appellees,

and

KURT M. ARMSTRONG, as Personal Representative of the Estates of ROBERT W. RAINEY, JR. and AMBER A. RAINEY, Deceased,

Intervening Plaintiff-Appellee,

v

JOHN T. LONG, RICHARD FOSTER, and HARDT-ELLIOTT AGENCY, d/b/a HARDT INSURANCE,

Defendants,

and

MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 184873
Van Buren Circuit Court
LC No. 93-38-726-CK-B

Before: Reilly, P.J., and MacKenzie and B. K. Zahra*, JJ.

PER CURIAM.

Defendant insurer appeals as of right from a judgment in favor of plaintiffs Ernest and Johnnie Banaszak, entered following a jury trial. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On November 29, 1992, an apartment building owned by plaintiffs was destroyed by fire. Two children died as a result of the blaze. Plaintiff Ernest Banaszak had applied and paid for homeowners' coverage with defendant on November 9, 1992, and shortly after received a copy of the policy. On January 25, 1993, defendant, plaintiffs' homeowners' insurer, canceled coverage effective November 9, 1992 on the ground that Banaszak misrepresented the condition of the property when he applied for the insurance. Specifically, defendant contended that Banaszak fraudulently or innocently denied that the building had unrepaired damage and stated that the building had only four units. This lawsuit followed.

The jury found that plaintiffs were entitled to coverage under the policy. The parties stipulated that this finding entitled plaintiffs to coverage for replacement of the dwelling; additionally, the finding triggered coverage with regard to wrongful death actions brought by intervening plaintiff. The jury also awarded plaintiffs damages for loss of rent, personal property, and other structures.

On appeal, defendant first argues that the trial judge abused his discretion in refusing to allow defendant to cross-examine Banaszak concerning marijuana use at the apartment building. We conclude that the court properly excluded the evidence. Even assuming that the pleadings were sufficient to set forth marijuana use as a basis for canceling the policy, the court correctly noted that the evidence of use either related "to a time period that predated the application or there is no clear indication this was continuing at the time of the application." Because there was no clear evidence of ongoing marijuana use, the court did not abuse its discretion in refusing to allow the cross-examination.

Defendant next argues that the court erred in denying defendant's motion for directed verdict on its claim that the policy was void from the inception because Banaszak's application for insurance did not reveal the presence of unrepaired damage in the apartment building. We disagree. Viewing the evidence in a light most favorable to plaintiff as the nonmoving party, reasonable persons could honestly reach different conclusions as to whether Banaszak misrepresented the condition of the building. *Rickrode v Wistinghausen*, 128 Mich App 240, 244; 340 NW2d 83 (1983). Banaszak testified that insurance agent John Long filled out the application for insurance. Banaszak did not recall Long asking about unrepaired damage or defining the term. According to Banaszak, he had repair work to do on the building, but he did not consider that to be "damage." When he applied for coverage, the property was structurally in the same condition and in need of the same type of repair work as in the past, when defendant had previously insured the property; defendant had never before indicated that the needed repairs rendered the property uninsurable.

In order to prevail on a claim of innocent misrepresentation, defendant had to establish, among other items, that Banaszak made a false representation, and that defendant would not have entered into the parties' insurance contract if Banaszak had not made the false representation. SJI2d 128.04. A reasonable juror could conclude that Banaszak did not make a false representation with respect to unrepaired damage in light of his knowledge that defendant had previously insured his property in roughly the same condition it was in on November 9, 1992, and in deference to Long's expertise and judgment in indicating on the application that there was no unrepaired damage. Under these circumstances, the trial court did not err in denying defendant's motion for directed verdict.

Defendant next argues that the trial court erred in allowing intervening plaintiff's counsel to cross-examine Marie Means, defendant's underwriting supervisor, concerning the existence of "potential claims for personal injuries" as a result of the fire. Assuming that this issue is properly preserved, we find no abuse of discretion. The issue of a witness's pecuniary interest in the outcome of a case goes directly to the witness's bias and as such is relevant to the question of credibility. *US Fire Ins Co v Citizens Ins Co of America*, 156 Mich 588, 592; 402 NW2d 11 (1986). Thus, the trial court properly allowed intervening plaintiff to cross-examine Means regarding the size of the personal injury claims and the extent of the insurance limits to cover those claims. Further, the court prevented the possible prejudicial effect of this evidence from substantially outweighing its probative value, MRE 403, by barring any mention that the personal injuries at issue were the deaths of two children. Reversal is not required on this ground.

Defendant next argues that the trial court erred in instructing the jury. According to defendant, the jury should have been told that the inspector who informed defendant that plaintiffs' property had more than four units and unrepaired damages was not an employee of defendant, so that defendant "has no liability for any actions or omission relating to that inspection report." We conclude that the court properly refused to give defendant's special instruction because it was not relevant to any issue being tried. The issue before the jury was whether defendant could avoid its obligations under its policy because Banaszak had committed fraud in obtaining the policy; the dispute was *not* whether defendant could avoid its contractual obligations based on the inspection report. We find no abuse of discretion. See *Niemi v Upper Peninsula Orthopedic Associates Ltd*, 173 Mich App 326, 329; 433 NW2d 363 (1988).

Defendant next argues that the trial court improperly denied its motion for directed verdict because plaintiffs presented no evidence regarding their damages. We reject this claim. Damages based merely upon speculation or conjecture are not recoverable. *Hoffman v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). However, damages are not speculative simply because they are not demonstrated with mathematical precision, and the certainty requirement regarding damages is relaxed where the fact of damage has been established and the only question that remains is their extent. *Id.* Here, the fact of damage was established; there was no question that Banaszak lived in the building, that all his personal effects were located there, and that the fire totally destroyed the building. Banaszak described the methodical process he used to calculate the value of his lost personal property. Further, there was evidence that Banaszak intended to keep renting three units, and that he was deprived of that income for twenty-six months. Those lost rents were clearly within the contemplation of the parties where the policy specifically provided for loss of use up to $20,000. We therefore conclude that the trial court properly denied defendant's motion for directed verdict.

Finally, defendant contends that the trial court erred in denying its motion for summary disposition regarding the number of units in the building. This argument is also without merit. While there was no question that the building – a converted house -- previously contained six units, there was a dispute whether it contained six or four units at the time Banaszak applied for the homeowners' policy. Banaszak testified that he knew that he could have a maximum of four units to qualify for homeowners' coverage rather than more costly commercial coverage. Based on Long's advice, therefore, he

removed some kitchens and electric meters and consolidated the rooms into four units. Construing the evidence in favor of plaintiff as the nonmoving party, *Skinner v Square D Co,* 445 Mich 153, 161-162; 516 NW2d 475 (1994), the trial court properly denied defendant's motion.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra