STATE OF MICHIGAN

COURT OF APPEALS

STELLA NIMO,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
June 2, 1998

No. 196895
Wayne Circuit Court
LC No. 94-435430 CK

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Defendant insurer appeals as of right from the circuit court's judgment on a jury verdict requiring defendant to compensate plaintiff, its insured, for losses stemming from a burglary of plaintiff's printing business. We reverse and remand for a new trial.

Plaintiff had operated a successful printing concern from her home, then expanded into a new location on Woodward Avenue in Detroit, renovating the premises and installing security devices. Then, according to plaintiff's evidence, shortly after completing the move, the business was burglarized, resulting in major losses of equipment and supplies. Defendant denied plaintiff's insurance claims, alleging that plaintiff staged the burglary in order to collect on her policy. Plaintiff initiated this cause of action in response.

At trial, over a defense objection, the circuit court allowed plaintiff's counsel to ask a police officer who had been dispatched to the scene if plaintiff had been prosecuted for staging the burglary. The officer replied that he knew of no criminal investigation or prosecution, and indicated that he himself had not been sufficiently suspicious of the circumstances to suggest that such an investigation take place. Plaintiff's counsel then stressed the lack of a police investigation in closing arguments. Defendant argues on appeal that the trial court abused its discretion in allowing plaintiff's counsel to present the lack of a criminal prosecution as evidence that plaintiff had not engaged in insurance fraud. We agree.

A review of how the various courts have treated the question brings to light a common law rule that evidence that an insured was acquitted, or never prosecuted, for insurance fraud is

not admissible to prove the honesty of an insurance claim in a suit against the insurer. See, e.g., *Kelly's Auto Parts, No 1, Inc, v Boughton*, 809 F2d 1247, 1251-1253 (CA 6, 1987); *American Home Assurance Co v Sunshine Supermarket, Inc*, 753 F2d 321, 325 (CA 3, 1985); *Galbraith v Hartford Fire Ins Co*, 464 F2d 225, 227 (CA 3, 1972); *Rabon v Great Southwest Fire Ins Co*, 818 F2d 306, 309 (CA 4, 1987); *Weathers v American Family Mutual Ins Co*, 793 F Supp 1002, 1015 (D Kan, 1992); *Krueger v State Farm Fire & Casualty Co*, 510 NW2d 204, 210-211 (Minn App, 1993); *Dawson v Miller*, 594 So 2d 970, 972 (La App, 1992). We are aware of no published decision holding otherwise. The courts that have addressed this issue have consistently recognized the highly prejudicial nature of such evidence, because it goes to the principal issue before the jury. *Krueger, supra*. Additionally, evidence of the lack of a criminal prosecution or conviction has very little probative value in a related civil inquiry, because the former requires proof beyond a reasonable doubt, while the latter is decided upon a mere preponderance of the evidence. *Dawson, supra*. Further, a prosecutor's decision not to bring criminal charges may take into account many additional factors that do not come to bear in civil actions. *Rabon, supra*.

In *Cook v Auto Club Ins Ass'n (On Remand)*, 217 Mich App 414, 417-419; 552 NW2d 661 (1996), this Court took account of the authorities and reasoning above and declared it an abuse of discretion to allow evidence that an insured was acquitted or not prosecuted to prove the insured's honesty in filing an insurance claim. That reasoning, and conclusion, compels reversal in the instant case, whose facts are nearly indistinguishable from those of *Cook*.

Plaintiff argues that because *Cook* was decided after the trial court disposed of the instant controversy the rule in *Cook* should not be applied.[1] However, because this Court's ruling in *Cook* neither disturbed precedent nor decided a question whose resolution was not clearly foreshadowed in existing law, the question of retroactive application of an appellate decision does not arise. See *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982), citing *Chevron Oil Co v Huson*, 404 US 97, 106; 92 S Ct 349; 30 L Ed 2d 296 (1971). Instead, *Cook* simply applied an established common law principle to one more factual setting, as we do here. See *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 711; 499 NW2d 453 (1993), rev'd on other grounds, 445 Mich 502; 519 NW2d 441 (1994).

Because we reverse and remand for a new trial for the reasons discussed above, we need not reach defendant's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.

[1] We acknowledge that if the trial court had had the benefit of this Court's clear pronouncement in *Cook, supra*, the court surely would not have permitted the line of questioning or argument at issue here.