STATE OF MICHIGAN

COURT OF APPEALS

RICHARD DAVIS,

Plaintiff-Appellee,

v

AUTO CLUB GROUP INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
July 7, 1998

No. 198597
Wayne Circuit Court
LC No. 95-502837 CK

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from an order granting plaintiff's motion for directed verdict and partial judgment on his claim for insurance benefits after his home was damaged by a fire. We reverse.

Defendant first argues that the trial court erred by granting plaintiff's motion for a directed verdict on the basis that defendant failed to establish a prima facie case of fraud by arson. We agree. Viewing the evidence in the light most favorable to defendant, a reasonable juror could have found that plaintiff or someone acting at his direction set this fire. See *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). To establish an affirmative defense of fraud by arson, an insurer must show by a preponderance of the evidence that the insured set the fire or caused it to be set. *Johnson v Auto-Owners Ins Group*, 202 Mich App 525, 527-528; 509 NW2d 538 (1993). An insurer may prove arson through circumstantial evidence. *Id.* at 527. In this case, defendant presented evidence showing that the fire was intentionally set with the aid of gasoline and possibly an incendiary device, such as a glass bottle with a wick in it. The police officers who discovered the fire testified that all of the doors and windows to the house were closed and locked. Further, only plaintiff and his girlfriend had keys to the house. Viewing this evidence in a light most favorable to defendant, defendant established that the fire was caused by an incendiary device placed in a rear bedroom of a home which was locked and secured at the time of the fire and that only plaintiff and his girlfriend could have had access to the locked house to initiate the fire. This circumstantial evidence could permit a reasonable juror to believe that plaintiff set the fire or caused the fire to be set by someone else. Therefore, the trial court improperly granted plaintiff's motion for a directed verdict on this issue. See *Meagher, supra* at 708.

Defendant also argues that the trial court erred by granting a partial judgment to plaintiff on the basis that defendant waived its right to contest the amount of damages. Because the issue may arise on remand, we address its proper resolution. We agree with defendant. The trial court abused its discretion by ruling that defendant waived its defense to damages by failing to list damages in the pretrial statement as an issue to be litigated at trial. Pretrial orders may include provisions regarding the simplification of the issues for trial or stipulations as to facts or the admissibility of documents or other evidence. MCR 2.401(C)(1)(a),(d). However, nothing in the court rules indicates that the failure to include an issue in such a pretrial statement constitutes an automatic waiver of that issue. See MCR 2.401(C). In fact, a previous version of this rule specifically stated that an issue would not be waived unless the waiver was expressly made and recorded in the pretrial order. MCR 2.401(C)(3) (deleted by the 1991 amendments); see also *Kengel v Palco*, 90 Mich App 338, 343; 282 NW2d 312 (1979); *Butler v Raupp*, 65 Mich App 20, 24; 236 NW2d 748 (1975). We conclude that the 1991 amendments to this rule were not intended to alter the existing law preventing waivers that were not expressly made. Given the severity of the prejudice to defendant and the lack of prejudice to plaintiff, such a waiver should not have been imposed in the absence of clear authority. See, generally, MCR 1.105. Defendant should have been granted the right to amend the pretrial order pursuant to MCR 2.401(B)(2)(c)(iii), and plaintiff should have been required to present proof of damages without regard to the trial court's ruling on plaintiff's motion for a directed verdict on defendant's affirmative defense of fraud by arson.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot