STATE OF MICHIGAN

COURT OF APPEALS

EDMOND F. CLEARY and DONNA CLEARY,

Plaintiffs-Appellants,

v

BUCKEYE STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 19, 2000

No. 216831
Cass Circuit Court
LC No. 97-000068-NZ

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, judgment was entered in favor of defendant on plaintiffs' breach of contract claim for the recovery of insurance proceeds under a fire policy. The jury determined that plaintiffs were not entitled to insurance proceeds because of their involvement in setting the fire to their cottage property, and because of their fraud or misrepresentation in concealing material facts regarding the loss or claim for proceeds. Plaintiffs appeal as of right. We affirm.

Plaintiffs raise two issues on appeal. First, plaintiffs claim that the trial court erred in refusing to rule on the question of the admissibility of the last page of plaintiffs' mediation brief outside the presence of the jury. Defendant wished to admit the evidence to demonstrate that, although plaintiffs had listed $14,000 in personal property loss, they were requesting the full policy limits of $30,800, as recently as the mediation hearing. The trial court eventually ruled that the document was inadmissible, but did not do so until after reference had been made before the jury to a "court-ordered document" in which plaintiffs were asking for $30,800.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997) This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Reversal of close discretionary evidentiary questions is not warranted merely because reviewing appellate judges would have ruled differently. *Lopez v General Motors Corp*, 224 Mich App 618, 634; 569 NW2d 861 (1997)

MCR 2.403(J)(4) provides that statements made by an attorney during a mediation hearing and the briefs or summaries are not admissible in any court or evidentiary proceeding. Thus, the trial court correctly ruled that the document was inadmissible. Further, we are satisfied that any error arising from the brief reference to this document in the jury's presence before it was ruled inadmissible was harmless. MCR 2.613(A).

The jury was not informed that plaintiffs had requested $30,800 at a mediation hearing; only that, on May 18, 1998, they had requested $30,800 as reimbursement for the contents of their cottage. This information, however, was already before the jury. Defendant's claims manager had testified that plaintiffs had "at all times" made a claim for the policy limits for the contents. The claims manager agreed that plaintiffs had submitted a form showing $14,000 for replacement of contents, but continued to claim the policy limit of $30,800. In light of this evidence, it is highly improbable that the reference to plaintiffs' continued request for the policy limits had any effect on the outcome of the trial. Thus, reversal is not warranted. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996).

Next, plaintiffs contend that the trial court erred in allowing Michigan State Police Lieutenant James A. Shinsky to testify about his investigation of plaintiffs. We disagree.

Plaintiffs moved the court to limit Shinsky's testimony to his observations at the scene of the fire and his cause and origin investigation, and to exclude any conversations he may have had with plaintiffs. In his deposition, Shinsky had stated that there was an on-going criminal investigation and, therefore, he would not answer certain questions concerning the investigation, but would only give his opinion about the cause of the fire. The court ruled, outside the presence of the jury, that Shinsky could testify regarding the results of his investigation, but could not express a personal opinion as to who committed the suspected arson. The court instructed plaintiffs to object if they believed Shinsky's testimony went beyond the scope of his deposition. During Shinsky's testimony, plaintiffs lodged two objections.

First, they objected to defendant's question inquiring what Shinsky was "looking for" when he interviewed plaintiffs after his investigation. Defense counsel explained that he was merely asking what Shinsky wanted to find out. The court overruled the objection. Plaintiffs objected a second time to defendant's question inquiring whether Shinsky attempted to verify plaintiffs' statements about the time frame of events on the night of the fire. Defense counsel noted that the evidence had already come in through other witnesses. Again, the court overruled the objection.

We conclude that Shinsky's testimony did not overstep the court's ruling, which was that he could not give his personal opinion that plaintiffs had committed the arson. Further, a review of Shinsky's deposition reveals that he did not testify at trial to anything of substance that was not covered in his deposition. Thus, plaintiffs were not prejudiced in that regard. In particular, Shinsky testified at his deposition that he had interviewed plaintiffs, obtained a written statement from them, and found conflicts in some of their statements. He testified extensively about his interview with the Clearys. Moreover, evidence of Mr. Cleary's presence at the cottage during the early morning hours, shortly before the fire, was already before the jury, prior to Shinsky's testimony. Telephone records also placed Mr. Cleary at the cottage as late as 1:45 a.m., Michigan time. Thus, Shinsky's testimony about

the discrepancy in the time frames was merely cumulative. Accordingly, the trial court did not abuse its discretion in overruling plaintiffs' objections. *Sawyer, supra* at 5.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh