STATE OF MICHIGAN

COURT OF APPEALS

DAVID DALE KHOURY,

Plaintiff-Appellee,

v

NORTHERN MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 23, 2001

No. 219604
Gogebic Circuit Court
LC No. 97-000207-CK

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This case arises from a claim on a homeowners insurance policy covering plaintiff's house and its contents, which were destroyed by fire in November 1996. The trial court granted partial summary disposition in favor of plaintiff, ruling that § 2827 of the Insurance Code, MCL 500.2827; MSA 24.12827, applied and, consequently, that the insurance policy entitled plaintiff to the replacement cost of the structure regardless of whether plaintiff rebuilt it. A trial followed and the jury found plaintiff entitled to recover personal property benefits under the policy. Thereafter, the trial court awarded plaintiff mediation sanctions. Defendant appeals as of right. We affirm.

Plaintiff owned a house in Ironwood, Michigan, and insured that house and its contents through an insurance policy issued by defendant. In November 1996, fire destroyed the house. After the fire, defendant issued a $16,000 check to the mortgagee, representing defendant's determination of the structure's actual cash value. Plaintiff countered that he was entitled to $43,050 for the loss, including the $41,000 policy limit on the house and $2,050 for debris removal. The parties agreed that to repair or replace the structure would have exceeded the policy limits and that plaintiff did neither. Plaintiff further sought recovery of $28,474 for the contents of the house.

Both parties moved for partial summary disposition on the basis of the terms of the insurance policy and the alleged applicable governing statute. At issue in this appeal is which of two sections of the Insurance Code[1] applied to the policy in question. Plaintiff argued that

[1] MCL 500.100 *et seq.*; MSA 24.1100 *et seq.*

§ 2827 governed, and thus he was entitled to replacement cost whether or not he rebuilt the structure. In contrast, defendant argued that § 2826, MCL 500.2826; MSA 24.12826, governed, and thus there could be no liability beyond the actual cash value of the structure unless the property were actually repaired, rebuilt, or replaced. Relying on *Cortez v Fire Ins Exchange*, 196 Mich App 666; 493 NW2d 505 (1992), the trial court determined that § 2827 applied and that the policy required payment of the replacement value whether or not the structure was replaced. The issues of plaintiff's personal property damages and the defendant's fraud and false swearing defenses regarding the nature, amount, and value of the items claimed were tried to a jury. After deliberations, the jury concluded that plaintiff had not defrauded the insurer and that plaintiff suffered personal property losses of $4,668.

On the basis of the trial court's ruling that plaintiff was entitled to the remaining replacement cost of the structure, totaling $25,000 (the $41,000 policy limit minus the $16,000 previously paid to the mortgagee), and the stipulated $900 for debris removal, and the jury verdict of $4,668 for personal property losses, damages totaled $30,568. In addition, the trial court awarded plaintiff mediation sanctions. Added together, the final judgment in favor of plaintiff was $50,971.05, inclusive of costs and interest.

Defendant first argues on appeal that the trial court erred in ruling that plaintiff was not required to repair or replace the damaged structure before recovering replacement costs. Defendant claims that the insurance policy clearly does not permit an award of replacement costs for a fire-damaged structure unless the structure is actually repaired or replaced, and that this policy is allowed by the Legislature. In support of this claim, defendant relies on provisions of the insurance contract, § 2826 of the Insurance Code, and *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181; 490 NW2d 864 (1992). In contrast, plaintiff contends that § 2827, as opposed to § 2826, is applicable and that actual replacement is not required. Relying on *Cortez, supra*, plaintiff claims that he is entitled to recover the policy limit.

We review a trial court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). Likewise, the interpretation of contractual language is reviewed de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). "Any ambiguities in insurance contracts are liberally construed in favor of the insured and against the insurer, who drafted the contract." *Id.* at 261-262. Questions of law, such as statutory interpretation, also are reviewed de novo. *Crown Technology Park v D&N Bank, FSB*, 242 Mich App 538, 546; 619 NW2d 66 (2000). In construing a statute, the primary goal is to discern and give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

We must determine if the trial court erred in granting summary disposition on the basis of the conclusion that § 2827 of the Insurance Code, rather than § 2826, governed the situation. Section 2827 does not require that the structure be rebuilt if the amount of loss or damage exceeds the amount of liability covered by the contract. Section 2827 provides:

> (1) An insurer may issue a fire policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual cash value of the lost or damaged insured property at the time of the

> loss or damage, and the amount actually necessary to repair, rebuild, or replace the lost or damaged insured property to a condition and appearance similar to that which existed at the time of the loss or damage based on the use of conventional materials and construction methods which are currently available without extraordinary expense. The insurer's liability shall not exceed the amount of liability covered by the contract of insurance.
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> (2) The contract of insurance established pursuant to subsection (1) shall not preclude an insured from selecting a cash settlement based on the actual cash value of the lost or damaged insured property at the time of the loss or damage, but not to exceed the amount of liability covered by the contract.
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> (3) The contract of insurance established pursuant to subsection (1) may provide that there shall be no liability on the part of the insurer to pay an amount in excess of the actual cash value of the lost or damaged insured property at the time of the loss or damage, unless the lost or damaged property is actually repaired, rebuilt, or replaced at the same or another contiguous site. *However, this subsection shall not apply if the amount of loss or damage to the insured property under the standards of subsection (1) exceeds the amount of liability covered by the contracts.* [Emphasis supplied.]

Section 2826 also authorizes the issuance of a certain type of fire insurance policy:

> An insurer may issue a fire insurance policy, insuring property, by which the insurer agrees to reimburse and indemnify the insured for the difference between the actual value of the insured property at the time any loss or damages occurs, and the amount actually expended to repair, rebuild, or replace with new materials of like size, kind, and quality, but not to exceed the amount of liability covered by the fire policy. A fire policy issued pursuant to this section may provide that there shall be no liability by the insurer to pay the amount specified in the policy unless the property damaged is actually repaired, rebuilt, or replaced at the same or another site.

Unlike § 2827, § 2826 contains no language limiting its application when the amount of loss or damage to the insured property exceeds the amount of liability covered by the contract. Clearly, as defendant argues, § 2826 requires that the structure be rebuilt upon that stated requirement in the insurance contract.

On the basis of the insurance contract language and the statutory language of § 2826 and § 2827, we conclude that the trial court was correct in determining that § 2827 applies in the present case. The applicable provision of the insurance policy specifically provides that plaintiff could receive, among other things, the replacement cost for the loss of the structure:

> **Loss settlement --** . . .[W]e will settle losses according to the Replacement Cost Terms. If the Replacement Cost Terms do not apply, we will settle losses according to the Actual Cash Value Terms.

a. **Replacement Cost Terms** -- These apply only to buildings . . . [.]

* * *

When the cost to repair or replace exceeds the lesser of $2,500 or five percent of the limit on the damaged building, we do not pay for more than the actual cash value of the loss until repair or replacement is completed.

You may make a claim for actual cash value of the loss before repairs are made. A claim for an additional amount payable under these terms must be made within 180 days after the loss.

(1) If the limit on the damaged building is less than 80 percent of its replacement cost at the time of loss, we pay the larger of the following:

a) the actual cash value at the time of the loss; or

b) that part of the replacement cost of the damaged part which our limit on the building bears to 80 percent of the full current replacement cost of the building. [Emphasis removed.]

(2) If the limit on the damaged building is at least 80 percent of its replacement cost at the time of loss, we pay the smallest of the following:

a) the limit that applies to the building;

b) the cost to repair or replace the damage on the same premises using materials of like kind and quality, to the extent practical; or

c) the amount spent to repair or replace the damage.

Here, the parties agree that subsection (1) of the insurance policy is applicable. However, the parties disagree regarding which of two sections of the Insurance Code applies. Which of the statutory provisions at issue applies to the contract depends on the type of materials used to rebuild the structure. The insurance policy does not define replacement as requiring "new materials of like size, kind, and quality," as § 2826 provides. Rather, the contractual language requiring use of "materials of like kind and quality, to the extent practical," albeit found in subsection (2) of the replacement cost section of the insurance policy, which is not directly implicated by the facts here, is more similar to the language used in § 2827, which speaks of the use of "conventional materials and construction methods which are currently available without extraordinary expense." Because we find the contractual language to be ambiguous, yet more

consistent with the application of § 2827,[2] and because we find the factual situation similar to the *Cortez* case, the *Cortez* case is controlling.[3]

As the *Cortez* Court explained, "[§] 2827, unlike § 2826, contains a subsection limiting an insurer's ability to withhold replacement-cost benefits until repairs have been made where the amount of the loss or damage to the insured property exceeds the amount of liability covered by contract." *Id.* at 669-670. Here, there is no disagreement that the replacement cost of the property exceeds the $41,000 contract liability. Therefore, pursuant to § 2827(3), defendant had no authority to withhold plaintiff's replacement-cost benefits on the basis that he had not actually repaired or replaced the property. *Cortez, supra* at 670. Accordingly, the trial court properly granted partial summary disposition in favor of plaintiff. *Id.*

Defendant next argues that the trial court abused its discretion in making certain evidentiary rulings. Defendant claims error in the trial court's foreclosing questioning about the circumstances of the fire and plaintiff's whereabouts near the time of the fire, about plaintiff's financial condition, about the actual cash value of the damaged structure, and about the mortgage amounts then owing. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *Morinelli, supra* at 265.

Upon review of the record, we conclude that the trial court's evidentiary rulings were not an abuse of discretion. First, as the trial court indicated, plaintiff's location at the time of the fire was irrelevant to the issues at trial because defendant never alleged that plaintiff set the fire or arranged an arson. Moreover, we cannot say that the trial court abused its discretion when also concluding that, even if relevant, the probative value was outweighed by the danger of unfair prejudice. MRE 403. Further, the trial court correctly permitted the insurer to explore plaintiff's financial status up to the date plaintiff made his final proof of claim because defendant alleged that plaintiff had committed false swearing in making such claims. See *Mina v General Star Indemnity Co*, 218 Mich App 678, 688; 555 NW2d 1 (1996), rev'd in part on other grounds, 455 Mich 866 (1997) (where the defenses were that the plaintiff committed or procured arson, only evidence of the plaintiff's financial condition at the time of the fire was relevant). Finally, defendant agreed that the cash value of the structure and its mortgage were irrelevant to the issues at trial, and thus has waived appellate review of these issues. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998).

Next, defendant argues that the trial court erred in permitting plaintiff's counsel to cross-examine and ask leading questions of plaintiff, thereby impeaching plaintiff or refreshing plaintiff's testimony. Defendant also claims that the trial court erred in allowing plaintiff and his ex-wife to testify about the value of a piano on the basis of out-of-court statements allegedly made to them by non-witnesses. Further, defendant claims that the trial court improperly allowed plaintiff's counsel to lead a witness, plaintiff's ex-wife, although plaintiff did not announce her

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[2] Moreover, to the extent that the contractual language is ambiguous with regard to the definition of replacement cost, it is to be construed against the drafter. *Marinelli, supra*.

[3] Although defendant relies on *Smith, supra*, that case did not involve § 2827. *Smith, supra* at 187, n 6.

as a witness under the adverse witness statute. We review these evidentiary claims for an abuse of discretion. *Lukity, supra*; *Morinelli, supra*; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 416; 516 NW2d 502 (1994).

With respect to defendant's claim of the refreshing or impeaching of plaintiff's testimony by a prior statement without the proper foundation, we find no abuse of discretion. Generally, a witness' prior consistent statement is inadmissible as substantive evidence. *Brown v Pointer*, 390 Mich 346, 351; 212 NW2d 201 (1973). However, the trial court allowed the testimony to prove plaintiff's state of mind, which was under attack in the case. Where defendant defended the action with allegations of plaintiff's false swearing, the trial court's ruling permitted plaintiff to demonstrate the basis for his belief of the stated value of his goods and that he had consistently used the same valuation since near the time of loss. This evidence relates to plaintiff's state of mind about the value of the goods and his intent to cite their value. MRE 803(3). The trial court's ruling was not an abuse of discretion.

Nor do we find an abuse of discretion with regard to defendant's hearsay claim about what people in the music industry told plaintiff about the value of the piano. Although the trial court agreed that the information was hearsay, it determined that the defense of false swearing required proof of intent and state of mind and on that issue plaintiff's testimony that he arrived at a value on the basis of talking to others was properly considered by the jury under the state of mind exception to the hearsay rule. The trial court limited the jury's use of the evidence of the statements of others to the consideration of the false swearing issue alone and not as a basis for valuing the piano. We agree with the trial court's analysis and instruction, and thus find no abuse of discretion. Because defendant did not address in its brief this same allegation of error with regard to defendant's ex-wife, that claim is abandoned on appeal. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").

We need not review defendant's claim about the allegedly improper cross-examination of plaintiff's ex-wife because defendant failed to preserve this issue by timely objection. See MRE 103(a)(1); *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Defendant has not established outcome-determinative plain error. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

Defendant also argues that the trial court erred in refusing to give defendant's requested jury instructions on the issues of fraud and false swearing and misrepresentation. Defendant claims that the instructions were in error because they mandated that the jury find defendant relied on false statement or misrepresentations and because "materiality" was not defined. This Court reviews jury instructions in their entirety. *Cox v Flint Bd of Hospital Managers (On Remand)*, 243 Mich App 72, 83; 620 NW2d 859 (2000). "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Cox, supra*.

Upon review of the instructions given to the jury, we conclude that defendant's arguments are without merit. Viewed in their entirety, the instructions were substantially similar to those requested by defendant, and when read in context, they do not convey that the jury may not find

false swearing unless it was proven that plaintiff intended the insurer to rely on the statement, as defendant suggests. Rather, the instructions fairly and accurately conveyed that the jury must find that plaintiff acted with the intent that the insurer would act to plaintiff's benefit. Further, the trial court adequately defined "material" as "significant to the issue." See *Goff v Bil-Mar Foods, Inc (After Remand)*, 454 Mich 507, 514 n 5; 563 NW2d 214 (1997) (noting definitions of material), overruled in part on other grounds 462 Mich 691 (2000).

Finally, defendant argues that the trial court erred in determining that plaintiff was entitled to mediation sanctions where it included in the calculation amounts due and owing to a non-party mortgagee. MCR 2.403(O) governs whether mediation sanctions are appropriate. We review the trial court's decision to award mediation sanctions de novo. *Marketos v American Employers Ins Co*, 240 Mich App 684, 698; 612 NW2d 848 (2000).

Here, the trial court's refusal to set off the amount of the jury verdict by the amount of the outstanding mortgage balance, which would have precluded the award of mediation sanctions to plaintiff, was proper. The plain language of MCR 2.403(O) requires the trial court to award mediation sanctions if the jury verdict, adjusted only as set forth in that rule, is not more favorable to the rejecting party than the mediation evaluation. *Id.* at 700. MCR 2.403(O) provides no setoff under the given circumstances, and thus the trial court properly awarded mediation sanctions on the basis of the jury verdict unaltered by any setoff for the amount of the outstanding mortgage balance.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra