STATE OF MICHIGAN

COURT OF APPEALS

DAN HUDKINS,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 19, 2002

No. 222848
Wayne Circuit Court
LC Nos. 96-690458-CK;
97-734613-CZ

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from the August 2, 1999, judgment in the amount of $228,305.40, entered on the jury verdict in favor of plaintiff in this breach of contract action. We affirm in part and vacate in part.

On appeal, defendant first contends that it was denied a fair trial by plaintiff's counsel's conduct during trial. Specifically, defendant challenges plaintiff's counsel's comments during closing argument, as well as questioning of defense witnesses during cross-examination. In *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), our Supreme Court provided the following framework for appellate courts when considering a claim that an attorney's misconduct denied the opposing party of a fair trial.

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error, and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Id*. (footnotes omitted).]

Further, this Court observed in *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999):

> "An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." [*Id.*, quoting *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).]

We have reviewed the challenged statements made by plaintiff's counsel during closing argument, and conclude that they were not so egregious to the extent that reversal is warranted. We recognize that it is improper for a party to appeal to the sympathy of the jury during closing argument. *Rogers v Detroit*, 457 Mich 125, 147; 579 NW2d 840 (1998), overruled on other grounds *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). Further, it is improper for a party to emphasize the corporate nature of an adverse party, and depict that party as callous and insensitive, *Reetz, supra* at 110-111; *Fellows v Superior Products Co*, 201 Mich App 155, 163-164; 506 NW2d 534 (1993), or suggest that the jury send a message to the corporate defendant with its verdict. *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 65; 454 NW2d 188 (1990); *Duke v American Olean Tile Co*, 155 Mich App 555, 562; 400 NW2d 677 (1986).

Thus, to the extent that defendant argues that plaintiff's counsel's initial comments during closing argument were improper, we are inclined to agree. However, in our opinion, any error was harmless, given that the trial court instructed the jury on more than one occasion that the comments of the attorneys were not evidence. *Reetz, supra* at 105; *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Additionally, the trial court, in its final instructions to the jury, explained that the jury's verdict "must be solely to compensate the plaintiff for his damages, and not to punish the defendant." Consequently, plaintiff's counsel's comments do not require reversal where the jury was instructed that the attorneys' comments were not evidence, and that its verdict should not be used to punish defendant. *Szymanski v Brown*, 221 Mich App 423, 429; 562 NW2d 212 (1997); see also *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996) (declining to reverse for improper comment where curative instruction would not have been futile).

Moreover, it is noteworthy that plaintiff's attorney's comments in rebuttal were directly responsive to defendant's attorney's assaultive comments concerning plaintiff's credibility during closing argument. Specifically, during closing argument, defendant's attorney referred to plaintiff as an arsonist, repeatedly accused him of lying to defendant about his insurance claim, discussed his financial and emotional motives for burning down his own home, and accused him of lying to the federal government concerning his tax returns. "Statements made by counsel in closing argument may not be error if given in response to arguments made by opposing counsel." *Wheeler v Grand Trunk W R Co*, 161 Mich App 759, 765; 411 NW2d 853 (1987); *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 636; 329 NW2d 760 (1982).

Likewise, we are not of the opinion that plaintiff's counsel's questioning of defense witnesses far exceeded permissible bounds to the extent that reversal of the verdict is required. In support of its argument that plaintiff's attorney's conduct warrants reversal, defendant points

to this Court's decision in *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999). In *Badalamenti*, the Court concluded that the plaintiff's lead counsel's behavior during trial was "truly egregious" and "far excee[ed] permissible bounds." *Id.* at 289. The Court further opined that the plaintiff's lead counsel "completely tainted the proceedings" by repeatedly and without basis in fact accusing the witnesses of engaging in conspiracy and collusion, and fabricating evidence. *Id.* at 290. The attorney in *Badalamenti* also repeatedly belittled the witnesses and suggested that they suppressed and destroyed evidence. *Id.* at 291. The plaintiff's attorney in *Badalamenti* also accused one of the defendants of abandoning the plaintiff to engage in a sexual tryst with a nurse, emphasized the defendant's corporate power, and improperly appealed to the jurors' self-interest as taxpayers. *Id.* Comparing the plaintiff's attorney's conduct with the "egregious" conduct of the attorneys in other cases where the Court found reversal warranted, the *Badalamenti* Court also noted the trial court's failure to properly restrain the attorney from behaving in such a manner. *Id.* at 293.

> In short, it appears that plaintiff's lead trial counsel here did just what [other courts that have ordered reversal of a jury verdict] condemned: he sought to divert the jurors' attention from the merits of the case and to inflame the passions of the jury. That strategy paid off handsomely here in the form of a large verdict for plaintiff. The cumulative effect of the improper innuendo, remarks and arguments by plaintiff's lead trial counsel was so harmful and so highly prejudicial that we are unable to conclude that the verdict in this case was not affected. [*Id.* at 292.]

The *Badalamenti* Court went on to note that "[t]he objectionable remarks of plaintiff's lead counsel were so pervasive that the trial court's instruction to the jury that statements of counsel are not evidence could not have cured the resulting prejudice in this case." *Id.* at 292, n 6.

Although defendant attempts to analogize plaintiff's attorney's conduct in the instant case with that of the plaintiff's attorney in *Badalamenti, supra*, we are not persuaded that reversal is warranted here. A review of the record as a whole demonstrates that this was a hotly contested trial, where defendant's good faith in investigating plaintiff's claim was a central and disputed issue. Although we recognize that an attorney is not permitted to "belittle a witness or to make unsubstantiated conclusions that the witness is lying," *Wayne Co Bd of Rd Comm'rs v GLS Leasco*, 394 Mich 126, 134; 229 NW2d 797 (1975); *Powell v St John Hosp*, 241 Mich App 64, 80; 614 NW2d 666 (2000), we do not believe that plaintiff's counsel did so in the present case.

First, with regard to plaintiff's counsel's questioning of Charles Johnson concerning the explanation for defendant's failure to produce William Schwartz as a deposition or trial witness because it knew Schwartz was a liar, although these comments were potentially inflammatory, these accusations did have a reasonable basis in the evidence. Specifically, plaintiff introduced a complaint filed in Oakland Circuit Court indicating that Schwartz gave false testimony in another case. Thus, we are of the view that these comments are distinguishable from the attorney's comments in *Badalamenti, supra* and *GLS Leasco, supra*, where the attorney's questions were nothing more than "unjustified, direct attacks on the integrity and honesty" of the witnesses. *Id*. at 134.

Additionally, given that one of the central issues relevant to plaintiff's breach of contract claim was whether defendant fairly and adequately investigated the cause and origin of the fire, we are not persuaded that plaintiff's counsel's inquiries of Gary Kraft and Michael McGuire were examples of "a studied purpose to prejudice the jury and divert the jurors' attentions from the merits of the case." *Kern v St Luke's Hosp Ass'n of Saginaw*, 404 Mich 339, 354; 273 NW2d 75 (1978); see also *Watkins, supra* at 339 (where counsel comments on facts relevant to a material issue at trial, reversal is not warranted on the basis of attorney misconduct). Rather, evidence at trial revealed that Kraft's investigation and examination of the fire scene was less than thorough, and that he concluded that the fire was caused by arson before ruling out other potential accidental causes of the fire. Further, McGuire conceded at trial that his examination of the fire scene was predicated on Kraft's determination of the cause and origin of the fire.

Likewise, to the extent defendant challenges plaintiff's insinuations that Kraft and McGuire may have tailored their findings to facilitate and support defendant's accusation that the fire was incendiary, in contrast with *Badalamenti, supra* at 292, n 6, these questions were not so pervasive that the trial court's multiple instructions to the jury that the comments of counsel were not evidence could not have successfully cured any prejudice.

Although plaintiff's counsel's conduct during trial may have been less than exemplary at times, it is worthy of note that defendant's counsel's conduct was likewise inappropriate at various times throughout these proceedings. Further, after reviewing the record as a whole, we are not left with the impression that plaintiff's counsel, through comments during closing argument, and questions of defense witnesses, undertook a studied attempt to deflect the jury's attention from the core issues of the case. The present case is thus distinguishable from other cases where our courts have concluded that reversal is warranted. *Reetz, supra*; *GLS Leasco, supra*; *Kern, supra*; *Badalamenti, supra*.

Defendant next argues that it was denied a fair trial as a result of judicial bias. Following the testimony of Johnson and Kraft, defendant moved for a mistrial on the basis of MCR 2.003, arguing that the trial court impermissibly exhibited partiality to plaintiff when questioning these witnesses. Ruling from the bench, the trial court denied the motion for the following reasons:

> I think the rules provide for the court to ask some questions to clarify issues. And I think that there certainly are a number of them needed [sic] to be clarified in this matter, certainly to find out what the issues were about in this case, I think that's why I asked some questions.
>
> And so the motion is denied.

By virtue of its argument on appeal, defendant implicates MCR 2.003(B), which provides in pertinent part:

> A judge is disqualified when the judge cannot impartially hear a case, including . . . .
>
> (1) The judge is personally biased or prejudiced for or against a party or attorney.

As our Supreme Court explained in *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996), MCR 2.003(B)(1) requires a showing of "*actual* bias." (Emphasis supplied.) Along with making a showing of actual bias, a party seeking disqualification pursuant to MCR 2.003(B)(1) must demonstrate that the court is "personally" biased against a party or attorney. *Cain, supra* at 495.

> Simply stated, a showing of "personal" bias must usually be met before disqualification is proper. This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. [*Id.* at 495-496.]

Moreover, opinions formed by a judge on the basis of facts introduced during the proceedings will not amount to a basis for disqualification unless they demonstrate a "deep-seated favoritism that would make fair judgment impossible." *Id.* at 496, quoting *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). Likewise, judicial remarks during the course of proceedings that are critical, disapproving, or even hostile to counsel or the parties will not ordinarily support a finding of judicial partiality. *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Benevolent and Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998); see also *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 728-729; 591 NW2d 676 (1998).

After a review of the whole record, we conclude that defendant has not demonstrated actual and personal bias on the part of the trial court. Quite simply, there is no record support for defendant's assertion that the trial court exhibited partiality for plaintiff. As primary support for its assertion that the trial court displayed bias, defendant points to two instances where the trial court questioned defense witnesses during the course of their trial testimony. However, as plaintiff points out in his brief on appeal, a trial court may use its discretion to question witnesses "to produce fuller and more exact testimony." *Murchie v Standard Oil Co*, 355 Mich 550, 559; 94 NW2d 799 (1959). Moreover, MRE 614(b) specifically provides that "[t]he court may interrogate witnesses, whether called by itself or a party." "[T]he principle limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Where the trial court's questions are aimed at clarifying testimony and gaining an understanding of the issues, no error occurs. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 24; 436 NW2d 70 (1989). However, the trial court must make an effort to avoid questions that are intimidating, argumentative, prejudicial, unfair, or partial. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992).

In the instant case, it appears that the trial court asked questions of the witnesses in an attempt to clarify disputed issues at trial. For example, the exchange with Johnson followed testimony concerning whether defendant was disputing plaintiff's claims with regard to personal property present in the home when it burned. Similarly, the trial court's questions of Kraft followed his testimony in which he explained why he did not investigate other potential sources of the fire. Even accepting defendant's assertion that trial court's questions of Kraft appear argumentative, prejudicial or impartial, we are satisfied that any error was cured when the trial court instructed the jury in the following manner during its final instructions:

> Now I have not meant to indicate any opinion as to any facts by my rulings, conducts, or remarks, during the trial. But if you think I have, you should disregard it, because you are the sole judges of facts.

Likewise, during its preliminary instructions to the jury, the trial court also instructed the jurors that they should not conclude from its rulings that it had an opinion on the case, or that it favored one side or the other. Curative instructions informing the jurors that they are to disregard any expressed opinion of the trial court can render any error arising from improper questioning harmless. *Murchie, supra* at 559; *Davis, supra* at 52; *Cole v DAIIE*, 137 Mich App 603, 610; 357 NW2d 898 (1984). Although the trial court's remarks during its questioning of Kraft could be perceived as adverse to defendant, disapproving or critical remarks by the court toward a party or attorney will not ordinarily support a claim of judicial bias. *Schellenberg, supra* at 39. Given the paucity of record evidence supporting defendant's contention that the trial court was personally biased against it, we are unable to conclude that defendant has overcome the heavy presumption of judicial impartiality. *Cain, supra* at 497.

Defendant next contends that the trial court erred in allowing the jury to hear evidence relating to plaintiff's claim of intentional infliction of emotional distress. This Court reviews for an abuse of discretion a trial court's decision concerning the admission or exclusion of evidence. *Barrett v Kirkland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). "An abuse of discretion exists 'only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.'" *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 454; 633 NW2d 418 (2001), quoting *Berryman v Kmart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992). A trial court's decision on a close evidentiary question ordinarily does not amount to an abuse of discretion. *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 707, n 49; 630 NW2d 356 (2001).

Plaintiff first initiated the actions giving rise to this appeal in 1996, alleging, as relevant to this appeal, that defendant breached the terms of the insurance policy by failing to act reasonably and in good faith in investigating and paying plaintiff's claim. After plaintiff filed a separate complaint alleging intentional infliction of emotional distress, defendant moved for partial summary disposition, arguing that the intentional tort claim could not be supported by an insurer's failure to pay an insurance claim. The trial court heard argument on defendant's motion on April 26, 1999. Although the trial court initially concluded that the claim should be dismissed, after plaintiff's counsel further argued the issue, the trial court denied the motion for summary disposition, and, on plaintiff's attorney's suggestion, decided to bifurcate the trial to allow the jury to hear evidence regarding defendant's investigation of plaintiff's insurance claim. The trial court further concluded that he would revisit the issue regarding the viability of plaintiff's tort claim if there was sufficient evidence adduced at trial to support the claim of intentional infliction of emotional distress.

The jury returned a verdict on May 5, 1999, finding that defendant breached its duty of good faith to plaintiff. Plaintiff's counsel then moved the court to allow plaintiff to present additional proofs to support its claim of intentional infliction of emotional distress. Defendant objected, arguing that there was no evidence that defendant's conduct in investigating plaintiff's

claim was outrageous.[1] Agreeing with defendant that the record evidence did not indicate that defendant's conduct was outrageous, the trial court declined to allow plaintiff to present additional evidence relevant to the intentional tort claim. After defendant later raised the issue of the propriety of admitting this evidence in its motion for JNOV and new trial, the trial court denied the motion, concluding that any error in the admission of the evidence was harmless, given that the jury was not instructed on the claim of intentional infliction of emotional distress.

The thrust of defendant's claim on appeal is that the trial court erred in admitting any evidence relevant to the claim of intentional infliction of emotional distress where Michigan courts have ruled that such a claim is not viable in cases where an insurer did not pay an insured's claim. To the extent that defendant maintains that the tort of intentional infliction of emotional distress was not actionable under the present facts, it finds support for its argument in recent cases of this Court.[2] For example, in *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 864 (1994), this Court held that the "[f]ailure to pay a contractual obligation does not amount to outrageous conduct, even it is it wilful or in bad faith." Further, the *Taylor* Court recognized that the tort of "bad-faith refusal to pay an insurance claim" does not exist in Michigan. *Id.* at 657.

Other panels of this Court have reached a similar conclusion. *Burnside v State Farm Fire & Casualty Co*, 208 Mich App 422, 432; 528 NW2d 749 (1995) (M.J. Talbot, J., concurring) ("when there is a mere breach of contract, whether in good faith or not, there is no independent tortious action . . . ."); *Runions v Auto-Owners Ins Co*, 197 Mich App 105, 110; 495 NW2d 166 (1992) (The mere failure to pay an insurance claim will not sustain a claim of intentional infliction of emotional distress); *Lawrence v Will Darrah & Associates, PC*, 194 Mich App 635, 638; 487 NW2d 820 (1992) rev'd on other grounds 445 Mich 1 (1994) ("[a] mere failure to pay a contractual obligation does not amount to outrageous conduct for purposes of the tort of intentional infliction of emotional distress. Even a wilful or bad-faith failure to pay the contractual obligation does not amount to outrageous conduct"). Consequently, to the extent that the trial court allowed the jury to consider evidence pertaining to plaintiff's tort claim, it appears initially that it may have erred.[3]

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[1] The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996).

[2] It is worthy of note that our Supreme Court has yet to formally recognize or adopt this tort in Michigan jurisprudence. See *Smith v Calvary Christian Church*, 462 Mich 679, 690; 614 NW2d 590 (2000) (Weaver, C.J., concurring) (recognizing that our Supreme Court has not formally adopted the tort of intentional infliction of emotional distress); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 611; 374 NW2d 905 (1985) (Given the plaintiff's failure to offer proofs to make out a prima facie case of intentional infliction of emotional distress, our Supreme Court declined to address the viability of adopting it in Michigan).

[3] Contrary to defendant's assertion on appeal, the jury was not instructed regarding the tort of intentional infliction of emotional distress. However, the trial court did instruct the jury regarding plaintiff's theory of the case, that defendant breached the insurance contract by falsely accusing him of arson and fraud.

Defendant argues that reversal is warranted because evidence supporting plaintiff's theory that his claim was not properly and thoroughly investigated, and that defendant erroneously accused him of arson, was relevant only to the tort of intentional infliction of emotional distress. We disagree that this evidence was improperly admitted because any issue of bad faith was only relevant to plaintiff's tort claim. Indeed, it is a well-settled precept of contract law that every contract imposes on each party to the agreement a duty of good faith in the performance and enforcement of the contract. *Stark v Budwarker, Inc*, 25 Mich App 305, 313, n 7; 181 NW2d 298 (1970); *Flynn v Korneffel*, 451 Mich 186, 213, n 8; 547 NW2d 249 (1996) (Levin, J., dissenting); 2 Restatement Contracts, 2d, § 205, p 99 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement"); see also 2 Corbin Contracts, § 5.27, p 529; 13 Williston, Contracts, (4th ed) § 38.15, p 437.

Moreover, in the insurance context in particular, our Supreme Court has explained that an "implied covenant of good faith and fair dealing . . . arises from the contract between the insurer and the insured." *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 116; 393 NW2d 479 (1986) (Williams, C.J.); see also *Quarters v Michigan Physicians Mut Liability Co*, 154 Mich App 593, 598; 399 NW2d 46 (1986) ("The obligation of an insurer to protect in good faith its insured arises out of contract."). On the basis of the foregoing principles, we are unable to conclude that the trial court did not have any justification or excuse to allow evidence pertaining to defendant's bad faith refusal to pay plaintiff's claim.[4] Consequently, we disagree with defendant that the trial court abused its discretion in admitting this evidence.[5]

In a related argument, defendant argues that the trial court erred in admitting a copy of a complaint defendant filed in an unrelated case in Oakland Circuit Court against its former attorney, in which it alleged that William Schwartz, the claims investigator in plaintiff's case, gave erroneous and false deposition testimony. Before trial, defendant moved to exclude this evidence, arguing that it was not relevant to an issue in dispute. Without articulating in substantial detail its reasoning, the trial court concurred with plaintiff that the evidence was relevant to defendant's credibility, and admitted the evidence.

The thrust of defendant's argument on appeal is that such evidence was irrelevant, and that the trial court did not properly consider whether the prejudicial effect of the evidence outweighed its probative value.[6] In response, plaintiff argues that the complaint was admissible

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[4] The issue whether defendant asserted the defense of arson in good faith was also relevant to the issue whether plaintiff was entitled to the replacement cost of the dwelling if the jury rejected this defense. See *Michigan Basic Property Ins Ass'n*, 441 Mich 181, 190; 490 NW2d 864 (1992), superseded by statute as stated in *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 359-360; 581 NW2d 781 (1998).

[5] "This Court may affirm a decision of a trial court for reasons different than those relied on by the trial court." *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 82; 592 NW2d 112 (1999).

[6] Defendant confines its argument on appeal to its challenge regarding the trial court's failure to engage in a MRE 403 balancing analysis. In other words, defendant does not assert that this document was inadmissible hearsay, nor does it assert that the document was improperly admitted to impeach an individual that was not present to testify at trial. Rather, defendant's argument is confined to whether the trial court erred in admitting this evidence on the basis of

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because it was relevant to whether defendant properly investigated plaintiff's insurance claim. Plaintiff further contends that the trial court properly weighed the probative value of the evidence against its prejudicial effect before admitting it.

As a panel of this Court recently explained in *Tobin, supra* at 637:

> Only relevant evidence is admissible. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999), quoting *Yates v Keane*, 184 Mich App 80, 82; 457 NW2d 693 (1990) Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403.

As contemplated by MRE 403, "unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence." *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997); see also *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 201; 555 NW2d 733 (1996). Further, only when the probative value of the evidence is *substantially outweighed* by the danger of unfair prejudice should evidence be excluded. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, mod 450 Mich 1212 (1995). Thus, the purpose underlying MRE 403 "'is limited to excluding matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect . . . .'" *Mills, supra* at 75, quoting *United States v McRae*, 593 F2d 700, 707 (CA 5, 1979).

In our opinion, the trial court did not abuse its discretion in admitting the October 1997 complaint into evidence. Evidence at trial demonstrated that Schwartz was the lead investigator in plaintiff's insurance claim, and that it was he who decided to deny the claim on the ground that the fire was incendiary. Whether defendant's decision to accuse plaintiff with arson followed a good-faith investigation was a vigorously contested issue at trial. Consequently, to the extent that the evidence tended to establish that Schwartz, the decisionmaker in plaintiff's insurance claim had questionable credibility, the evidence was indeed relevant. Likewise, we are not persuaded that the probative value of this evidence was substantially outweighed by any prejudicial effect, given that the evidence was of more than marginal relevance, and was not introduced merely for its prejudicial effect, but to bolster plaintiff's theory that defendant's allegation that he burned his own home did not follow a thorough and fair investigation. We acknowledge that reasonable minds might differ regarding whether this evidence should have been admitted. However, our courts have clearly held that a trial court's decision on a close evidentiary decision does not amount to an abuse of discretion. *Hilgendorf, supra* at 707, n 49.

Likewise, to the extent that defendant argues that the trial court erred in precluding defendant from introducing evidence regarding the specific price for which plaintiff sold the

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(…continued)

MRE 402, and whether the trial court should have excluded the evidence under MRE 403.

property after defendant paid the remaining balance on plaintiff's land contract, we are not persuaded that the trial court abused its discretion in this regard.

Defendant argues that this evidence should have been admitted because it is relevant to plaintiff's financial motive to engage in arson. In *Smith v Michigan Basic Property Ins Ass'n*, 441 Mich 181, 193; 490 NW2d 864 (1992), superseded by statute on other grounds as stated in *Salesin v State Farm Fire & Casualty Co*, 229 Mich App 346, 359-360; 581 NW2d 781 (1998), our Supreme Court recognized that under certain circumstances, evidence of an individual's financial motive to commit arson may be introduced at trial. However, the *Smith* Court also went on to explain that "'evidence of a defendant's financial condition, because it ordinarily has limited probative value and usually goes to a collateral issue, will often distract rather than aid the jury.'" *Id.*, quoting *People v Henderson*, 408 Mich 56; 289 NW2d 376 (1980). See also *People v Brown*, 239 Mich App 735, 749; 610 NW2d 234 (2000); *People v Jensen*, 162 Mich App 171, 179; 412 NW2d 681 (1987).

We are not persuaded that the trial court abused its discretion in excluding this evidence, given its potential to distract the jury from the central issues at trial. Further, we note that the trial court afforded defendant wide latitude in the admission of evidence concerning plaintiff's financial motive to engage in arson. For instance, during defendant's cross-examination of plaintiff, defense counsel was permitted to question plaintiff at length about his income in the months leading up to the fire, as well as his outstanding debts and monthly obligations. Defendant also presented additional evidence that plaintiff misrepresented the amount of his income during the investigation of his insurance claim, and that his monthly obligations, such as his car payment, mortgage and child support, exceeded his monthly income.[7] Defendant also elicited testimony from plaintiff that his business was slow in the months leading to the fire, and that he was behind in his child support and electric bills. Further, Johnson testified that under the terms of the insurance policy defendant was required to pay off the balance of plaintiff's land contract, regardless of plaintiff's involvement in the fire. Johnson went on to observe that if the land contract was paid off, plaintiff would have remaining property value following the fire, and this fact tended to establish that plaintiff had a financial motive to burn his home. Under the circumstances, we are not persuaded that the trial court's decision to exclude evidence concerning the price plaintiff sold the property for after the fire, and after his land contract was paid, should be disturbed on appeal.

Finally, defendant argues that the award of consequential damages to plaintiff must be vacated because there is nothing in the terms of the insurance contract that entitled plaintiff to such damages. In his brief on appeal, plaintiff expressly concedes that the award of $70,000 in consequential damages should be vacated. Given the parties' agreement on this issue, we need not address this moot issue. *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). Accordingly, we affirm the trial court's August 8, 1999, judgment, with the exception of the portion awarding plaintiff $70,000 in consequential damages, which, given plaintiff's concession, is vacated.

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[7] Defendant admitted copies of plaintiff's 1993, 1994 and 1995 tax returns at trial, as well as a copy of plaintiff's credit report.

Affirmed in part, vacated in part.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper