

STATE OF MICHIGAN
COURT OF APPEALS

PIONEER STATE MUTUAL INSURANCE
COMPANY,

Plaintiff/Counter-Defendant-
Appellant,

V

DONALD RIFE,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED
November 26, 2002

No. 232157
Tuscola Circuit Court
LC No. 98-016991-CZ

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment entered for defendant following a jury trial. Plaintiff refused to pay insurance benefits to defendant, its insured, for fire damage to his home and its contents because it accused defendant of intentionally setting the fire. Defendant denied setting the fire and counter sued for breach of contract. We reverse and remand for remittitur.

Plaintiff first claims the trial court erred in denying its motion for a new trial after the jury returned an excessive damages award. We agree. A trial court's decision to deny a new trial is reviewed for a clear abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

At trial, the parties stipulated that if the jury found in defendant's favor, its damages determination would be limited to the actual cash value of defendant's dwelling and its contents, rather than their replacement value. Accordingly, the trial court instructed the jury to determine the actual cash value of the dwelling and contents at the time of the loss. Nonetheless, the jury returned a verdict awarding the defendant an amount far in excess of what the evidence indicated the actual cash value to be.

"A new trial may be granted on the basis of an excessive verdict if the verdict was obtained by improper methods, was the result of sympathy or prejudice, or if it was clearly or grossly inadequate or excessive." *Craig v Oakwood Hospital*, 249 Mich App 534, 566; 643 NW2d 580 (2002) (Cooper, J, concurring). See also MCR 2.611(A)(1)(c) and (d); MCL 600.6098(2)(b)(iv) and (v). Because the jury verdict in this case was contrary to the jury instructions and unsupported by the evidence, it was clearly excessive. Therefore, the trial court

abused its discretion in denying plaintiff's motion for a new trial. Because we conclude the excessive verdict was the only error at trial, we remand for remittitur of the jury's award. See *Craig, supra* at 566.

Next, plaintiff asserts that the trial court erred in not striking a witness defendant failed to disclose until the first day of trial. A trial court's decision to permit an undisclosed witness to testify is reviewed on appeal for a clear abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000).

Accepting, without deciding, that the trial court erred in failing to strike the witness, plaintiff suffered no prejudice because defendant did not call the witness to testify at trial.

Finally, plaintiff argues the trial court erred in denying its motion for a new trial or mistrial after defense counsel elicited testimony barred by the trial court's motion in limine. We disagree. We review a trial court's decision to deny a motion for mistrial or a new trial for a clear abuse of discretion. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999).

Before trial began, the court ruled to omit all references to the fact that defendant had never been charged with or convicted of a crime in connection with this case, but left open the possibility of a later ruling that it would be admissible under the circumstances of the case. During cross-examination of several witnesses, defense counsel inquired whether any of them had information from which to conclude that defendant set the fire or that the fire was set with his knowledge or consent. Each denied that they did. In addition, defense counsel asked the investigating police officer what the status of his investigation was, and the officer indicated the investigation was open. The trial court denied plaintiff's motion for a new trial or mistrial based on this testimony, holding defendant had not violated the order in limine.

We reverse a decision to deny a motion for mistrial only where a miscarriage of justice would otherwise result. *Knight v Gulf & Western*, 196 Mich App 119, 132 n 5; 492 NW2d 761 (1992). Additionally, a new trial may be granted when a party's substantial rights have been materially affected due to irregularities in the proceedings of the court that denied the moving party a fair trial. MCR 2.611(A)(1)(a)(e); *Snell v UACC Midwest, Inc*, 194 Mich App 511, 516; 487 NW2d 772 (1992).

Evidence of acquittal or lack of prosecution is not admissible in an insured's suit against an insurer because the evidence is highly prejudicial since it goes to the principal issue before the jury. *Cook v Auto Club Ins Ass'n (On Remand)*, 217 Mich App 414, 417-419; 552 NW2d 661 (1996), citing *Kelly's Auto Parts, No. 1, Inc, v Boughton*, 809 F2d 1247, 1251-1253 (CA 6, 1987). Additionally, the evidence has little or no probative value because of the different burdens of proof involved in criminal and civil cases. *Cook, supra* at 418. Finally, a prosecutor's decision not to prosecute may incorporate considerations not relevant in a civil suit. *Id.*

In this case, the trial court did not abuse its discretion in denying plaintiff's motion with regard to defense counsel's questions relative to whether the witnesses had information indicating defendant played a role in the fire. Although the jury might have inferred from the witnesses' answers that defendant had not been charged or convicted in connection with the fire,

the jury most likely construed the question as an inquiry whether direct evidence of defendant's involvement existed.

Additionally, the trial court did not abuse its discretion in denying plaintiff's motion on the basis of defense counsel's question regarding the status of the police investigation. Read in context, defense counsel did not inquire about the investigation's status at the time of trial. Rather, defense counsel asked what actions the police officer took as part of his investigation – including surveying defendant's house and questioning defendant's neighbors – and inquired what the status of the investigation was while he took those actions. Therefore, defense counsel did not violate the trial court's order in limine, and the trial court did not abuse its discretion in denying plaintiff's motions for mistrial or a new trial.

Reversed and remanded for remittitur. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper