STATE OF MICHIGAN

COURT OF APPEALS

BRITTANY SMITH,

Plaintiff-Appellee,

v

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
March 5, 2009

No. 281034
Wayne Circuit Court
LC No. 05-518126-CK

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant, Farm Bureau Insurance Company, appeals as of right the trial court's Jury Verdict and Judgment in favor of plaintiff in this homeowner's insurance coverage trial. We affirm in part, reverse in part, and remand the case for an evidentiary hearing to determine the interest of the mortgagor.

Plaintiff's home was insured by defendant at the time that it was destroyed in a fire, and defendant denied coverage based on an alleged fraudulent statement made by plaintiff in her claim. Defendant argues that the trial court should have granted it judgment notwithstanding the verdict because reasonable minds could not differ regarding plaintiff's making of a fraudulent statement. We disagree.

A trial court's denial of a motion for judgment notwithstanding the verdict is subject to de novo review. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). This Court may only reverse a trial court's denial of a motion for judgment notwithstanding the verdict if the evidence, viewed in the light most favorable to plaintiff, fails to establish a claim as a matter of law. *Id.*

The insurance contract in this case permits defendant to void coverage if the insurer "intentionally conceal[s] any material fact or circumstance."

> To void a policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. [*Mina v General Star Indemnity Co*, 218 Mich App

678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).]

Defendant argues that the sworn statements in proof of loss submitted by plaintiff represents a misrepresentation of material fact that allows defendant to void the insurance coverage. It is not disputed that the inventory accompanying the sworn statements in loss included items that did not belong to plaintiff. The element of falseness, therefore, was satisfied. A misrepresentation is only material if it concerns a subject relevant to the insurer's investigation. *Id*. at 685. In the instant case, the value of the property claimed by plaintiff would be relevant to the investigation, and it would, therefore, be material. Culley Robinson, the public adjustor who inventoried the lost property on plaintiff's behalf, testified that the items in question amounted to approximately $900 to $1,000, thereby increasing the amount requested by plaintiff to $47,951.81. Because this figure was below the $98,000 limit of the policy for personal property, the representation is material. In order to satisfy the fourth element, however, and prevail on the defense of false swearing, defendant must prove that the statement was made "with intent to defraud." *Id*. at 686.

"In ruling on a motion for JNOV, 'the court must give a concise statement of the reasons for the ruling, either in a signed order or opinion filed in the action, or on the record.'" *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 283; 602 NW2d 854 (1999), quoting MCR 2.610(B)(3). Additionally, the trial court stated on the record that the intent to defraud was not present because plaintiff admitted during her examination under oath, prior to the submission of the revised sworn statement, that some of the things listed on the form were not her own possessions. The trial court went on to note that defendant failed to take this opportunity to go through the list of items and ask her which ones belonged to her.

Viewed in the light most favorable to plaintiff, the evidence at trial regarding the value of the home supports this finding of the trial court and the jury's determination that plaintiff did not offer the sworn statement in loss with the intent to defraud. Because plaintiff admitted to the discrepancies both at her examination under oath and at trial, a reasonable juror could infer that she entered the sworn statement without the intent to defraud. Additionally, the $900 to $1,000 difference in the amount claimed and the amount lost by plaintiff is negligible enough that a reasonable juror could conclude that the revised statement was not submitted with the requisite intent to deceive.

Next, defendant argues that the evidence produced at trial regarding the value of the home does not support the jury verdict of $147,000, which was reduced to $140,000 by the trial court due to policy limits, and that the trial court committed error requiring reversal when it denied defendant's motion for remittitur. We agree.

This Court reviews a trial court's denial of remittitur for an abuse of discretion. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). A jury verdict should not be disturbed if it "falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation . . . ." *Id.*

Plaintiff argues, citing *Cortez v Fire Ins Exchange*, 196 Mich App 666, 669; 493 NW2d 505 (1992), that she is entitled to the replacement cost of the property even though she did not begin or complete repair or replacement of the property after its destruction. The *Cortez* Court

held, citing MCL 500.2827, that an insurer is required to pay the replacement value to an insured without evidence of actual replacement when the replacement cost exceeds the policy limits, and the contract includes replacement to a condition "similar" to its prior state. *Id.* In the instant case, however, the insurance contract covers replacement "using new material of like kind and quality." Therefore, MCL 500.2826 applies instead of MCL 500.2827, which permits an insurer to pay only the actual cash value of the property unless actual repair or replacement of the property has been completed. Therefore, because plaintiff has not repaired or replaced the lost property, she is only entitled to receive its actual cash value.

While the sworn statement and revised statement both list an actual cash value for the property of $208,276.84, Robinson testified at trial that this figure represented the total of the costs to repair the home, including contractor profit. Therefore, this figure cannot be used to represent the actual cash value of the property.[1] And, as defendant correctly argues, the only evidence offered to prove the actual cash value of the home was the testimony of Mark Amos, who stated that it had a value of $110,000 at the time he sold it to plaintiff.[2] Hence, there was no evidence in the record to support a jury verdict in excess of $110,000 regarding the value of the home, as Robinson only testified to the replacement cost and what the policy limits for real property were under the contract. Therefore, the $147,000 award by the jury does not fall "reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation," *Silberstein*, *supra* at 462, and cannot be upheld by this Court. Accordingly, we remand this case to the trial court for a remitter of the verdict reflecting the actual cash value of the home to be $110,000. Moreover, because of our holding, the trial court's decision to reduce this award by $7,000 to reflect the limits of the insurance policy must be set aside because the new award for the real property loss is not above the policy limit.

Finally, defendant argues that the award to plaintiff for loss of dwelling should be reduced by the amount of the mortgage owed Chase at the time of loss, an additional insured on the insurance policy. We agree that Chase, as an additional insured, is entitled to a portion of the insurance proceeds, but find that the amount of its interest must be determined based on the time of payment of proceeds.

"Generally, the rights of insured parties are fixed at the time of the loss." *Kass v Wolf*, 212 Mich App 600, 605; 538 NW2d 77 (1995). Defendant argues that the holding in *Kass* requires that the jury verdict should be reduced by the approximately $60,000 owed on the mortgage at the time of the loss of property. We disagree with defendant's interpretation of *Kass*. *Kass* dealt with an instance where the mortgage debt had increased after the date of loss, and the plaintiff sought to recover that additional amount from the insurance company. The instant case deals with a situation where the mortgage debt has likely decreased, as a result of the foreclosure and forced sale of the property, and defendant seeks to reduce the award to plaintiff by the full amount owed at the time of loss. Following this argument, a mortgagor would be penalized for making payments on a mortgage after the date of loss in order to keep his finances

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[1] Plaintiff's counsel also admitted that Robinson's testimony reflected a replacement cost.

[2] This fact was also admitted and argued by plaintiff's counsel during closing argument.

in good standing. Additionally, it would result in insurers paying less than the overall award that plaintiff is owed because they could withhold the mortgage balance at the time of loss from the proceeds to be paid to an insured, and then be required to pay less than that amount to the mortgage company.

The mortgage clause requires that defendant distribute the insurance proceeds between plaintiff and Chase "as interests may appear." Therefore, defendant is required to determine the interest remaining due to Chase at the time of the award of proceeds and distribute the jury verdict according.

We, therefore, remand this case to the trial court for an evidentiary hearing to determine to what extent the foreclosure and auction of the property satisfied the balance owed on the mortgage at the time of loss, with Chase entitled to a portion of plaintiff's verdict equal to any remaining balance.

Affirmed in part, reversed in part, and remanded for an evidentiary hearing consistent with this opinion. No costs, neither party prevailing in full.

We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray