STATE OF MICHIGAN

COURT OF APPEALS

JEAN ZULCOSKY,

Plaintiff-Appellant,

v

FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
January 17, 1997

No. 191688
Wayne Circuit Court
LC No. 91-100595-CK

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Plaintiff appeals by right a judgment entered pursuant to a jury verdict in favor of defendant. We affirm.

The facts of this case are, briefly, as follows. Plaintiff applied for benefits under a life insurance policy procured by her son, Mark Zulcosky. Defendant contested the policy, arguing that Mark misrepresented his driving record. Plaintiff then brought suit to enforce the policy. The trial court granted defendant's motion for summary disposition, but this Court reversed and remanded the case on the ground that "a disputed question of fact existed regarding whether it [defendant] would have refused to issue the policy had it known the truth about Mark's driving record." *Zulcosky v Farm Bureau Life Ins Co of Michigan*, 206 Mich App 95, 100; 520 NW2d 366 (1994). At trial, the jury found that defendant would not have issued the policy if it had known about Mark Zulcosky's driving record. The trial court denied plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

On appeal, plaintiff first argues that the trial court erred in denying her motion for judgment notwithstanding the verdict because no reasonable jury could have found by clear and convincing

---

* Circuit judge, sitting on the Court of Appeals by assignment.

evidence that defendant would not have issued Mark Zulcosky the insurance policy if it had known about his driving record. We disagree.

In reviewing a motion for judgment notwithstanding the verdict, this Court views the evidence in a light most favorable to the nonmoving party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Id*.

A misrepresentation must be material in order for an insurer to rescind an insurance contract. MCL 500.2218(1); MSA 24.12218(1); *Zulcosky*, *supra* at 97. A misrepresentation is deemed to be material if "knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract." MCL 500.2218(1); MSA 24.12218(1). Finally, the insurer has the burden of proving materiality by clear and convincing evidence. *Zulcosky*, *supra*; *Howard v Golden State Mut Life Ins Co*, 60 Mich App 469, 477; 231 NW2d 655 (1975), overruled in part on another ground *In re Certified Question*, 413 Mich 57, 70; 318 NW2d 456 (1982).

Viewing the evidence in a light most favorable to defendant, we conclude that there was sufficient evidence to support the jury's verdict. Mark Zulcosky's driving record indicated that he had received a total of ten points within the preceding three years. According to defendant's written guidelines, Mark could have received insurance, but he would have paid an increased premium. However, several of defendant's employees testified at trial about an unwritten policy regarding multiple drinking and driving violations that would have resulted in denial of the application altogether.

Elaine Wells, Director of Life Operations, testified that defendant had a policy whereby individuals with two or more drinking violations within the preceding five years would automatically be denied insurance, and that this policy was in effect at the time of Mark Zulcosky's application. Daniel Determann, the underwriter who processed Mark's application, testified that if there were two or more drinking and driving violations within the preceding five years, it was up to the individual underwriter. Finally, Terrance Kuhns, defendant's manager of life and new business, also testified about an unwritten policy for dealing with multiple drinking and driving violations. Based on this evidence, reasonable minds could differ about whether defendant would have issued the insurance policy if it had known about Mark Zulcosky's driving record. The trial court did not err in denying plaintiff's motion for judgment notwithstanding the verdict.

Plaintiff argues in the alternative that the trial court erred in denying her motion for a new trial. We note that this issue was not set forth in the statement of questions presented, as required by MCR 7.212(C)(5). Nevertheless, we will briefly review the issue. We conclude that, although there was some evidence to support the conclusion that defendant would not have denied Mark Zulcosky's application had it known about his driving record, the jury's finding on the materiality issue was not against the great weight of the evidence.

A new trial may be granted only where the verdict is against the great or overwhelming weight of the evidence. MCR 2.611(A)(1)(e). In reviewing a trial court's decision whether to grant a new trial, this Court must determine whether that decision was an abuse of discretion. *Severn, supra*. "This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence." *Id*.

As stated previously, Mark Zulcosky's driving record was such that, under defendant's written guidelines, he could have obtained coverage but would have been assessed a higher premium. In addition, the evidence indicated that the guidelines defined the risk against which defendant was prepared to insure, that they were important to the company, and that they were intended to be comprehensive. However, there was also considerable evidence supporting defendant's claim that it had an unwritten policy that would have resulted in the automatic denial of Mark Zulcosky's application, and that this policy was in force at the time. Therefore, we conclude that the jury's verdict was not against the great weight of the evidence. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Plaintiff next argues that the trial court's instruction on the materiality element constituted error requiring reversal. Specifically, plaintiff asserts that the trial court should have given her proposed instruction, which she claims was mandated by this Court's prior decision in this case, *Zulcosky, supra*. We disagree.

Where the standard jury instructions do not properly cover an area, the trial court must give requested special instructions if they properly inform the jury of the applicable law. *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713; 550 NW2d 797 (1996). The trial court has discretion in determining whether a requested special instruction is applicable and accurately states the law. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). Moreover, jury instructions are reviewed in their entirety, and should not be extracted piecemeal. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990). "Reversal is not required if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id*.

Our review of the jury instructions in this case lead us to conclude that no error requiring reversal occurred. The trial court instructed the jury that defendant had to show that it would not have entered into a contract if it had known about Mark Zulcosky's driving record. This instruction, on the whole, correctly apprised the jury of defendant's burden under the statute as well as this Court's decision in *Zulcosky* and other relevant caselaw, which was to prove by clear and convincing evidence that it would not have issued the policy of insurance had it known about the misrepresentation. See MCL 500.2218(1); MSA 24.2218(1); *Zulcosky, supra* at 99-100. The instructions, when reviewed in their entirety, accurately and fairly presented the applicable law to the jury. *Wiegerink, supra*.

Since the instructions given by the trial court were sufficient to apprise the jury of the applicable law, we likewise find no error in the trial court's refusal to give plaintiff's proposed instruction. Despite

plaintiff's claim to the contrary, this Court in *Zulcosky*, *supra*, did not suggest a particular definition of materiality to be integrated into the trial court's instructions. Moreover, we are not persuaded that plaintiff's distinction between the indefinite articles "a" and "any" has any practical effect. The trial court did not abuse its discretion.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber