STATE OF MICHIGAN

COURT OF APPEALS

JAMES SUTHERLAND and VIOLET SUTHERLAND,

Plaintiffs-Appellees/
Cross-Appellants,

v

FARM BUREAU MUTUAL INSURANCE COMPANY,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED
March 4, 1997

No. 184805
Gladwin Circuit Court
LC No. 92-11490 CK

Before: Young, P.J., and O'Connell and W.J. Nykamp,* JJ.

PER CURIAM.

In this breach of insurance contract action, defendant insurer appeals as of right the judgment on jury verdict entered in favor of plaintiffs. Plaintiffs cross-appeal, challenging a setoff in defendant's favor that the court allowed against the judgment. We reverse and remand for a new trial.

Plaintiffs entered into a homeowner's insurance contract with defendant. Plaintiffs' home was subsequently destroyed by fire under, arguably, suspicious circumstances. Defendant refused to pay plaintiffs' claim, asserting that plaintiffs had been involved in setting the fire and that plaintiffs had misrepresented the extent of their loss. Plaintiffs brought suit, alleging breach of contract, and the case proceeded to trial. The court granted plaintiffs' motion for directed verdict with respect to the defenses raised by defendant, concluding that they were supported by insufficient evidence, and refused to allow the jury to consider these defenses. The jury found in favor of plaintiffs, and defendant now appeals.

---

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

Defendant first argues that the trial court erred in granting a directed verdict in favor of plaintiffs with respect to certain defenses raised by defendant. The insurance contract in force between the parties provided as follows:

> Concealment or Fraud
>
> The entire policy will be void if, whether before or after a loss, an insured has:
>
> a. intentionally concealed or misrepresented any material fact or circumstance; or
>
> b. made false statements or engaged in fraudulent conduct;
>
> relating to this insurance.

As relevant to this appeal, defendant raised two defenses pertaining to misrepresentations allegedly made by plaintiffs. First, defendant argued that plaintiffs had been involved in setting the fire, and that this misrepresentation voided policy coverage. Second, defendant argued that plaintiffs had intentionally and materially misrepresented the extent of their loss, which also voided policy coverage. As noted above, the court found that defendant had supported these defenses with insufficient evidence and granted a directed verdict in favor of plaintiff on these issues.

Motions for directed verdict are addressed in MCR 2.515. A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995). When determining whether a directed verdict is warranted, "we examine the testimony and all legitimate inferences that may be drawn in a light most favorable to the [non-moving party]." See *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). The trial court's decision will not be disturbed absent a clear abuse of discretion. *Howard v Canteen Corp*, 192 Mich App 427, 431; 481 NW2d 718 (1992).

Our review of the record indicates that the court committed a clear abuse of discretion in granting a directed verdict with respect to both of these defenses. In the context of defendant's contention that plaintiffs had been involved in starting the fire that destroyed their home, the following evidence was presented: plaintiffs left their home on the day of the fire at approximately 5:30 p.m.; at approximately 6:30, plaintiffs returned to the home and picked up their dog; the two then sat in their vehicle near the home for approximately fifteen minutes; plaintiffs then drove around aimlessly, finally parking in a department store parking lot for another fifteen minutes; plaintiffs' expert witness later testified that the fire likely started at approximately 6:30; the doors of the home were locked when the fire was discovered; evidence was found indicating that gasoline was present at the site of the fire; and plaintiff husband initially denied any knowledge of the presence of gasoline in his home, but later recanted this testimony at trial. Considering this evidence in the light most favorable to the non-moving party, *Zander*, *supra*, we believe it an abuse of discretion for the court to determine that no reasonable

juror could conclude that plaintiffs had some involvement in the fire. Accordingly, we reverse the order granting a directed verdict with respect to this issue.

Similarly, we conclude that the court abused its discretion in concluding that no reasonable juror could have determined that plaintiffs intentionally submitted grossly inflated estimates of the value of their loss. As set forth in *Rayis v Shelby Mutual Ins Co*, 80 Mich App 387, 392-393, n 3; 264 NW2d 5 (1978), "[t]he mere fact that plaintiff's loss is determined to be less than his stated claim is not proof of fraud. In the usual case, the fact that plaintiff has overstated his loss creates a question of fact for the jury. The jury then determines whether plaintiff's over-valuation was made in good faith or with the intent to defraud the insurer." Here, plaintiffs initially represented to defendant insurer in their "Sworn Statement in Proof of Loss" that they estimated their total loss to be $123,000; at trial, they stipulated that their loss was approximately $53,000. We consider this discrepancy, when viewed in the light most favorable to the non-moving party, *Zander*, *supra*, easily sufficient to render the question of plaintiffs' intent a jury question, and conclude that to hold otherwise constituted an abuse of discretion. Therefore, we reverse the order granting a directed verdict on this issue, as well.

To address briefly the remaining issues on appeal, considering the jury instructions in their entirety, *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990), we do not believe, as defendant asserts, that the instruction unduly emphasized the criminality of arson and unfairly elevated the standard of proof. With respect to plaintiffs' cross-appeal concerning the setoff, because we are reversing the judgment, we find it unnecessary to address this issue.

Reversed and remanded for a new trial. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp