

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MOHAMMED ELKOUR and ZMC-3, INC.,

UNPUBLISHED  
May 27, 1997

Plaintiffs/Counter-Defendants/  
Appellees,

v

No. 187542  
Wayne Circuit Court  
LC No. 93-333917-NI

NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Defendant/Counter-Plaintiff/  
Appellant.

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Before: Jansen, P.J., and Saad and M.D. Schwartz\*, JJ.

PER CURIAM.

Defendant/counter-plaintiff Nationwide Mutual Insurance Company appeals as of right from a jury verdict awarding plaintiffs/counter-defendants \$90,000, and finding no cause of action regarding defendant's counter complaint in this insurance contract dispute. We reverse and remand for a new trial.

This action arises out of an alleged theft that occurred in August 1993 at Mohammed Elkour's clothing store called ZMC-3, Inc. As a result of the loss, Elkour filed a claim with defendant, his insurance company. After an investigation, defendant denied plaintiffs' claim for insurance proceeds to cover merchandise allegedly stolen from the business. Plaintiffs then filed a breach of contract claim, and defendant filed a counter claim for breach of contract and fraud against plaintiffs for allegedly filing a fraudulent insurance claim.

I

Defendant first argues that the trial court failed to instruct the jury regarding plaintiffs' burden of proof and that it impermissibly increased defendant's burden of proof. Where, as here, a party fails to

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

object to jury instructions, appellate review is precluded absent manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). In this case, we find that the trial court's jury instructions were erroneous and, because the error pertained to a basic and controlling issue in the case (the parties' burdens of proof), failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 532, 537; 470 NW2d 678 (1991); *Mina v General Star Indemnity Co*, 218 Mich App 678, 680-681; 555 NW2d 1 (1996).

The trial court instructed the jury that defendant, as the counter-plaintiff, had to prove by clear and convincing evidence that plaintiffs defrauded it. The trial court also failed to instruct the jury regarding plaintiffs' burden of proof in their breach of contract action. Additionally, the trial court instructed the jury that its verdict would be for defendant if it proved each of the elements of fraud by clear and convincing evidence, and against plaintiff only if it found that defendant had sustained its burden of proof that the burglary did not occur and that plaintiff knowingly made a false claim for damages. These instructions were erroneous.

In *Mina*, this Court recently reconsidered the proper burden of proof to be applied in fraud cases. Although noting the inconsistencies stated in previous opinions (whether requiring clear and convincing evidence or proof by a preponderance of the evidence), this Court ultimately concluded that the trial court properly instructed the jury that the defendant had to prove its defense of fraud and false swearing by a preponderance of the evidence. *Id.*, p 685. This Court reached this decision by concluding that the earliest Supreme Court cases, which had not been overruled or modified, required a jury instruction stating that fraud must be proved by a preponderance of the evidence. See *id.*, pp 681-682. Accordingly, we are required to follow *Mina* pursuant to Administrative Order 1996-4, and hold that the trial court erred in instructing the jury that defendant was required to prove its claim of fraud by clear and convincing evidence.

Further, the trial court failed to instruct the jury regarding plaintiffs' burden of proving their breach of contract claim. Under these circumstances, where the trial court instructed the jury on an improper burden of proof with respect to defendant's claim of fraud and where the trial court did not delineate any burden of proof with respect to plaintiffs' claim of breach of contract, we find that reversal is required. A party's burden of proving its claim is a basic and controlling issue in the case. Because the instructions did not correctly apprise the jury of the burdens of proof, the instructions denied defendant a fair trial. Accordingly, failure to reverse would be inconsistent with substantial justice, and defendant is entitled to a new trial on this basis.

## II

Next, defendant contends that the following comment made by plaintiffs' counsel in closing argument was so prejudicial that it denied defendant a fair trial:

MR. ZAYID [Plaintiff's Counsel]: Ladies and gentlemen, finally, I submit to you this. That we should not act in haste to prejudge as the insurance company did. They had their mind set that Mr. Elkour did this, and they were not directed or interested in

looking at any other person that may have done this. We almost fell into the trap again last week in the United States over here in the bombing of Oklahoma.

MS. SHOOP [Defendant's Counsel]: Your Honor-

THE COURT: Mr. Zayid.

MR. ZAYID: Your Honor, I'm using it as an example.

THE COURT: That is an inflammatory example. Do not use it.

MR. ZAYID: Your Honor - ladies and gentlemen, please don't use the haste of the insurance company to be served as a basis in this case. And I ask you to return a verdict of \$119,000. Thank you.

Counsel's reference to the Oklahoma City bombing, which had occurred eight days previously, was highly improper and inflammatory. Although this error may not require reversal in and of itself, combined with the erroneous jury instructions, we find that defendant was denied a fair trial. Further, the trial court did not instruct the jury to disregard the remark. This issue will not recur during the new trial because of the timing, but we caution counsel to not make such unnecessary remarks upon retrial.

### III

Lastly, defendant argues that the trial court erred in allowing plaintiffs to cross-examine a police officer about who directed him to serve a subpoena on a witness, Milos Todosov, and that plaintiffs' reference during closing argument regarding the officer's testimony was error. We disagree. The record does not support defendant's contention in this regard because the trial court sustained defendant's objection with respect to the cross-examination of the officer, and it admonished plaintiffs' counsel to proceed along a different line of questioning. Plaintiff's reference to the police officer during closing argument did not deny defendant a fair trial.

Reversed and remanded for a new trial. Jurisdiction is not retained. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen

/s/ Michael D. Schwartz