STATE OF MICHIGAN

COURT OF APPEALS

KUMAR VEMULAPALLI and SASIKALA VEMULAPALLI,

Plaintiffs-Appellees,

v

LAKE STATES MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
November 14, 1997

No. 194284
Genesee Circuit Court
LC No. 94-026733-CK

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered pursuant to a jury verdict finding coverage for a commercial fire loss suffered by plaintiffs. We affirm.

On August 23, 1993, at approximately 3:10 a.m., the Bateman Building, which was owned by plaintiffs and insured by defendant, caught fire. The City of Flint Fire Department determined that the fire was intentionally set through the use of a gasoline accelerant and twenty-one gasoline-filled beer bottles located throughout the first floor of the building.

Plaintiffs filed a timely claim against the insurance policy issued by defendant. Three proof of loss forms were sent to plaintiffs, one for the fire loss, one for the business interruption claim, and one for the valuable documents claim. Defendant rejected plaintiffs' business interruption claim for failing to state the actual cash value of the loss, and failing to provide adequate documentation. On December 23, 1993, defendant denied the remainder of plaintiffs' claim alleging that plaintiff Kumar Vemulapalli[1] or someone in privity with him had intentionally set fire to the building.

Plaintiff filed the present action alleging breach of contract, Unfair Trade Practices Act, and bad faith. Defendant moved for partial summary disposition regarding the Unfair Trade Practices Act and bad faith claims. The trial court granted summary disposition regarding the Unfair Trade Practices Act, but denied defendant's motion regarding the bad faith claim. The matter proceeded to trial, whereupon

a jury found for plaintiff for the breach of contract claim in the amount of $159,100. The jury found for defendant on the bad faith count. Defendant moved for a new trial, which was denied.

Defendant first contends that because the proof of loss forms submitted by plaintiff were inadequate the trial court erred in denying its motion for a directed verdict. This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When evaluating a motion for directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor. *Id*. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Id.*

The policy of insurance issued by defendant required the submission of a statement of loss within sixty days from the time a request was made. Defendant received a proof of loss form for plaintiff's "Business Income and Extra Expense" claim within the allotted time period which listed the actual value of the property as "Not Applicable," the whole loss and damage being, "Undetermined At This Time," less the amount of the deductible as, "Applied to Building," and the amount claimed as, "Undetermined at this Time." The remainder of the form was completely filled in by plaintiff. Defendant claims that this submission was insufficient to constitute a proof of loss, and therefore, the claim should have been precluded as a matter of law.

The purpose of provisions in an insurance contract requiring the insured to give prompt notice is to allow the insurer to make a timely investigation in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. *Dellar v Frankenmuth Mutual*, 173 Mich App 138, 145-146; 433 NW2d 380 (1988). The purpose of filing a proof of loss within sixty days is to allow the insurer to determine with certitude that the insured demands payment under the policy, the amount of the claim, and the question of its liability. *Id.*

Clearly, the filing of the statement of loss indicated to defendant that payment was being demanded and put defendant on notice in order to investigate the claim. Plaintiff had promptly contacted defendant about the fire. The day after the loss, defendant retained a cause and origin inspector to investigate the loss and conducted a tape-recorded interview with plaintiff. Plaintiff also submitted to an examination under oath and supplied additional information both personally and through his retained public adjuster. Moreover, all the questions which pertained to defendant's potential liability for the loss were answered. We find that the above facts demonstrate that plaintiff substantially complied with defendant's proof of loss requirement, and thus, the purpose behind the proof of loss requirement was satisfied.[2] Therefore, looking at the evidence in a light most favorable to plaintiff, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next contends that it was entitled to a new trial because the trial court erred in denying its motion for summary disposition pursuant to plaintiff's claim of defendant's bad faith, and therefore, it was prejudiced because improper evidence was admitted before the jury which caused it to award plaintiff damages in excess of what he was entitled. This Court will not reverse a trial court's

grant or denial of a new trial absent an abuse of discretion. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 40; 550 NW2d 809 (1996).

Our Supreme Court has defined a claim of bad faith as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986). Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. *Id*. at 136-137. Additionally, if the insurer is motivated by selfish purpose or by a desire to protect its own interest at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent. *Id*. at 137. Damages for mental distress are not recoverable in a breach of contract action absent allegation and proof of tortious conduct existing independently of the breach of contract. *Isagholian v Transamerica Ins Co*, 208 Mich App 9, 17; 527 NW2d 13 (1994).

In its motion for partial summary disposition, defendant separated plaintiff's count for bad faith into two separate issues. The first issue was that defendant's actions in denying plaintiff's claim were done in good faith after reasonable investigation. Defendant also argued that the emotional distress or exemplary damages are inappropriate because they are not available for breach of contract actions in which separate tortious conduct is not alleged.

We believe that a genuine issue of material fact existed regarding whether defendant's conduct constituted arbitrary, reckless, indifferent, or intentional disregard of plaintiff's interests. See *Commercial Union*, *supra* at 136. However, because plaintiff failed to allege any tortious action which was separate from the manner in which defendant adjusted plaintiff's claim, the trial court erred in failing to dismiss plaintiff's claim for emotional distress damages arising out of defendant's bad faith. *Isagholian*, *supra* at 9. However, in order for a new trial to be appropriate, defendant must have suffered prejudice as a result of the trial court's error. MCR 2.613(A). Upon review of the record, we find that the limited scope of testimony regarding plaintiff's emotional damages did not prejudice defendant. The jury awarded plaintiff damages totaling $159,100, which constituted compensation for half of the value of the building, as well as for business interruption.[3] Because the award was in accord with the proofs presented, there was no prejudice which affected defendant's case. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial because defendant was not prejudiced by the admission of proofs regarding damages for emotional distress.

Defendant's final argument is that the trial court erred in denying its motion for a new trial because the jury award was against the great weight of the evidence. The trial court's function on a motion for new trial is to determine whether the overwhelming weight of the evidence favors the losing party. *Arrington v Detroit Osteopathic Hosp*, 196 Mich App 544, 564; 493 NW2d 492 (1992). The appellate court is to determine whether the trial court abused its discretion in making such a finding. *Id.* A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court. *Id.* at 560. A trial court's determination that a verdict is against the great weight of the evidence will be given somewhat less deference to insure that the trial court did not invade the province of the jury. *Id.* In either situation, the reviewing court must engage in an in-depth analysis of the record on appeal. *Id.*

Although the evidence is irrefutable that the fire was intentionally set, no evidence was introduced which directly linked plaintiff with its origin. Additionally, plaintiff presented testimony refuting defendant's allegations of his alleged motive and financial need. Moreover, plaintiff presented competent testimony that he was at home when the fire was started. Giving substantial deference to the trial court, we find that the testimony refuting defendant's evidence of plaintiff's motive, opportunity, and intent to burn his own building, coupled with the evidence of defendant's substandard and inadequate investigation, demonstrates that the great weight of the evidence does not require a new trial. Rather, the jury verdict was in accord with the evidence on the record.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] Sasikala Vemulapalli's claim against defendant was settled because defendant determined that she was an innocent co-insured. Because the present appeal only pertains to defendant's allegations regarding Kumar Vemulapalli's claims, he will be addressed as plaintiff in this opinion.

[2] See, *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 128; 290 NW2d 408 (1980) (substantial, not strict compliance is required for the notice provisions under the no-fault act when determining whether notice was given within the one-year statutory limitation period). See also, *Bituminous Casualty Corp v Vacuum Tanks, Inc*, 75 F3d 1048, 1056, n 7 (CA 5, 1996) (applying Texas law); *Wells Fargo Bus Credit v American Bank of Commer*, 780 F2d 871, 874 (CA 10, 1985) (applying New Mexico law); *Fidelity S&L Ass'n v Aetna Life & Cas Co*, 647 F2d 933, 938 (CA 9, 1981) (applying California law); *Fishel v Yorktowne Mutual Ins Co*, 254 Pa Super 136; 385 A2d 562, 564 (Pa Super, 1988); *St Paul Fire & Marine Ins Co v Metropolitan Urology Clinic, PA*, 537 NW2d 297, 300 (Minn Ct of Appeals, 1995); *Walker v American Bankers Ins Group*, 108 Nev 533, 536; 836 P2d 59 (1992); *Antao & Chuang v St Paul Fire & Marine Ins Co*, 225 AD2d 316, 317; 639 NYS2d 322 (1996).

[3] The other half of the claim had been previously paid to Sasikala Vemulapalli pursuant to a settlement between the parties.