

STATE OF MICHIGAN
COURT OF APPEALS

TERRENCE MARTIN,

Plaintiff/Counter Defendant-
Appellee/Cross Appellant,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant/Counter Plaintiff-
Appellant/Cross Appellee.

UNPUBLISHED

April 22, 2008

No. 275261

Wayne Circuit Court

LC No. 04-414989-CK

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

PER CURIAM.

In this insurance coverage dispute, defendant, Farm Bureau General Insurance Company of Michigan, appeals by leave granted the trial court's order granting plaintiff, Terrence Martin, a new trial on his breach of contract claim. We reverse and remand for entry of judgment for defendant.

This lawsuit arises from an October 15, 2003, fire at plaintiff's home. The fire destroyed most of the personal property in the home and rendered the house uninhabitable. At the time of the fire, the property was insured under a homeowner's insurance policy issued by defendant. The policy insured the house and the personal property within against fire loss or damage. Defendant paid plaintiff \$5,000 in emergency living expenses, but thereafter denied plaintiff's claim for his personal and real property losses on the basis of arson, fraud, and false swearing.

Plaintiff sued to enforce the insurance contract. After a jury trial, in which the jury concluded that plaintiff did not commit arson but did make false statements related to his personal property losses, plaintiff moved for a new trial or judgment notwithstanding the verdict pursuant to MCR 2.611(A)(1)(e) and (g). Plaintiff argued that the jury's verdict was against the great weight of the evidence and that the trial court improperly instructed the jury, contrary to prevailing precedent. The trial court granted plaintiff a new trial on the basis that the insurance contract was divisible, and held that because plaintiff's misrepresentations pertained only to his personal property, it was a "harsh result" to deny plaintiff coverage for emergency living expenses and damaged realty. Defendant appeals and plaintiff cross appeals the trial court's ruling.

Defendant first argues that the trial court reversibly erred by granting a new trial. We agree. This Court reviews a trial court's decision to grant or deny a motion for a new trial under MCR 2.611 for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). An abuse of discretion occurs when a court chooses an outcome that is not within the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Also, issues of statutory interpretation and interpretation of contractual language, such as that used in an insurance policy, are issues of law that are reviewed de novo on appeal. *Woodard v Custer*, 476 Mich 545, 598; 719 NW2d 842 (2006); *Morinelli v Provident Life & Acc Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

MCR 2.611(A)(1) governs motions for new trials and provides that a new trial may be granted whenever the moving party's substantial rights were materially affected for any of the following reasons:

- (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
- (b) Misconduct of the jury or of the prevailing party.
- (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
- (d) A verdict clearly or grossly inadequate or excessive.
- (e) A verdict or decision against the great weight of the evidence or contrary to law.
- (f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.
- (g) Error of law occurring in the proceedings, or mistake of fact by the court.
- (h) A ground listed in MCR 2.612 warranting a new trial.

Plaintiff moved for a new trial on the basis of MCR 2.611(A)(1)(e) and (g), alleging that the verdict was against the great weight of the evidence, contrary to law and that an error of law occurred. However, in granting plaintiff's motion, the trial court did not explicitly ground its decision in MCR 2.611(A). Rather, the trial court opined that voiding the entire policy was a "very harsh" result, given that plaintiff's misrepresentations pertained only to the personal property present in the house during the fire. The trial court held that plaintiff made three separate claims, a claim for emergency living expenses, a personal property claim, and a realty claim, and because plaintiff's misrepresentations pertained only to the personal property, it was a "harsh result" to deny coverage for the emergency living expenses and damaged realty.

Arguably, the trial court granted the new trial based on a conclusion that an error of law occurred, specifically that the insurance policy was divisible. Because the trial court did not

decide that the policy was divisible before it instructed the jury, the jury was not instructed to consider whether plaintiff made misrepresentations about each of his claims, i.e., for personal property, realty, and emergency living expenses. However, no jury instruction error occurred. The trial court improperly interpreted the insurance policy, in contravention of its plain language.

The insurance policy provides, in relevant part:

The entire policy will be void if, whether before or after a loss, one or more persons insured under this policy have:

- a. intentionally concealed or misrepresented any material fact or circumstance;
- b. engaged in fraudulent conduct; or
- c. made false statements;

relating to this insurance or to a loss to which this insurance applies.

An insurance policy must be enforced in accordance with its terms. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). A court should not create ambiguity in an insurance policy where the terms of the contract are clear and precise. *Id.* Thus, the terms of an insurance policy must be enforced as written where there is no ambiguity. *Id.* Although insurance policies are construed in favor of the insured if an ambiguity is found, “this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefitting an insured.” *Id.*

Here, the insurance policy clearly states that the *entire* policy is void if the insured conceals or misrepresents material facts or circumstances, engages in fraudulent conduct or makes false statements relating to either the insurance or to a loss to which the insurance applies. The policy condition does not differentiate between coverages for personal property, realty, and emergency living expenses, and specifically voids the whole policy upon a finding of misrepresentation or fraud. Furthermore, the misrepresentation or fraud must only pertain to a *loss*, in order to nullify coverage. Thus, to void the policy, the insured is not required to lie about all of his or her losses; rather a lie related to a single loss operates to void the policy. See *Robinson v City of Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000) (“the” refers to a specific object, while “a” means “one” or “any”). The language of the policy is clear and precise and, therefore, the trial court erred by creating ambiguity in the policy where none is present. See *Henderson, supra* at 354. The plain language of the policy shows that it is not divisible. Accordingly, no error of law occurred and the trial court abused its discretion by granting plaintiff a new trial. The trial court’s decision was outside the range of principled outcomes. See *Maldonado, supra* at 388.

Plaintiff relies on *West v Farm Bureau Mut Ins Co of Michigan*, 402 Mich 67; 259 NW2d 556 (1977), to support his argument that the trier of fact must decide whether an insurance policy is divisible. In *West*, the insurance policy provided:

This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in any case of fraud or false swearing by the insured related thereto. [*Id.* at 68 n 3.]

In applying that provision, our Supreme Court stated:

Where an insurance policy provides that an insured's concealment, misrepresentation, fraud, or false swearing voids the policy, the insured must have actually intended to defraud the insurer. The effect of this rule is that a false claim regarding a small portion of the loss may not result in forfeiture of the entire coverage unless the insured is shown to be clearly culpable. [*Id.* at 69 (footnotes and citations omitted).]

The Supreme Court went on to conclude that whether the insured intended to defraud the insurer is a question for the jury. *Id.* at 70.

In this case, the question of whether plaintiff intended to defraud defendant went to the jury, and the jury concluded that plaintiff committed fraud and false swearing. Nevertheless, the trial court decided that even though plaintiff intended to defraud defendant with respect to the loss of his personal property, defendant could not preclude coverage for plaintiff's loss to his realty and for emergency housing expenses. However, under *West* an insurer may void an entire policy if the insured is "shown to be clearly culpable," in the concealment, misrepresentation, fraud, or false swearing. *West, supra* at 69. The jury found plaintiff "clearly culpable" of fraud, when it answered "yes" to the question "[d]id the Plaintiff commit fraud and false swearing regarding the claims submitted to Farm Bureau Insurance Company." Therefore, defendant was authorized to void the entire policy, and the trial court erred when it concluded that plaintiff's fraud voided only his personal property coverage.

Plaintiff also argues that MCL 500.2833 does not require or allow insurance policies to have a blanket provision voiding all coverage for any misrepresentation. MCL 500.2833 requires fire insurance policies to contain a provision stating "that the policy may be void on the basis of misrepresentation, fraud, or concealment." MCL 500.2833(1)(c). The statute does not restrict an insurer's ability to include a condition that the insurance policy is automatically void if the insured commits misrepresentation, fraud, or concealment. MCL 500.2833(1)(c). Indeed, the statute allows insurers to void policies, at their discretion, for misrepresentation, fraud, or concealment and requires only that a policy notify the insured of the condition. See MCL 500.2833(1)(c).

Plaintiff further claims that "[t]here is no need for MCL 500.2833(1)(c) if the language in former [MCL] 500.2832 is included," because former MCL 500.2832 renders MCL 500.2833(1)(c) surplusage. This argument is meritless. MCL 500.2833 requires fire insurance policies to provide, at minimum, the coverage in the standard fire insurance policy written into former MCL 500.2832. MCL 500.2833(2); MCL 500.2832 (repealed). One provision in former MCL 500.2832 stated that the entire policy was void upon misrepresentation, fraud, or false swearing by the insured. MCL 500.2832 (repealed). Nonetheless, MCL 500.2833(2) only requires fire insurance policies to provide the same coverage as the standard fire insurance policy

contained in former MCL 500.2832. It does not require insurers to write the policy conditions contained in the standard fire insurance policy into their fire insurance policies. Therefore, the policy conditions listed in MCL 500.2833 are not surplusage.

On cross-appeal, plaintiff argues that he was entitled to a new trial because the jury was improperly instructed. We disagree.

Plaintiff contends that the trial court improperly instructed the jury on the applicable burden of proof. He asserts that the standard of proof for fraud and false swearing is clear and convincing evidence, not preponderance of the evidence. Because plaintiff objected to the trial court's instruction on the burden of proof before the jury retired to deliberate, this alleged instructional error is preserved. See *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). Preserved instructional errors are reviewed de novo. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 8; 651 NW2d 356 (2002).

This Court addressed the standard of proof issue in *Mina v Gen Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). In *Mina*, the insurer denied the insured's claim for fire insurance coverage on the basis of fraud, false swearing, and arson. *Id.* at 680. The trial court instructed the jury that the insurer had the burden of proving its affirmative defense of fraud and false swearing by a preponderance of the evidence. *Id.* at 681. The plaintiff argued on appeal that the instruction was erroneous because Michigan case law more recent than the case relied on by the trial court, *Campbell v Great Lakes Ins Co*, 228 Mich 636; 200 NW 457 (1924), held that the burden of proof for fraud cases was clear and convincing evidence. *Mina, supra*.

Both *Mina, supra*, and *Campbell, supra*, involved insurers that asserted fraud and false swearing as affirmative defenses to deny coverage under insurance policies, and the Supreme Court and this Court held that insurers must prove fraud and false swearing by a preponderance of the evidence. The cases relied on by plaintiff, in support of his argument that clear and convincing evidence is the applicable standard, all involve tort claims of fraud. See *Flynn v Korneffel*, 451 Mich 186, 199, 201-202; 547 NW2d 249 (1996); *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 90; 443 NW2d 451 (1989). In such cases, a plaintiff must prove a claim by clear and convincing evidence. See e.g., *Flynn, supra* at 199, 201-202. In this case, which did not involve tortious fraud, the trial court properly instructed the jury that the applicable burden of proof for the affirmative defenses of fraud and false swearing is preponderance of the evidence. See *Mina, supra* at 681. No error occurred, and plaintiff is not entitled to a new trial on this ground.

Plaintiff next argues that the trial court improperly instructed the jury on a defense of fraud and false swearing. Because plaintiff did not preserve this allegation of error, appellate review is precluded absent manifest injustice. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 403; 628 NW2d 86 (2001). Manifest injustice results if the defect is of such a magnitude as to constitute plain error requiring a new trial or if it pertains to a basic and controlling issue. See *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; 660 NW2d 361 (2003), aff'd in part, rev'd in part on other grounds 471 Mich 540 (2004).

The trial court instructed the jury on the defense of fraud and false swearing as follows:

Now, Farm Bureau General Insurance Company of Michigan has the burden of proof on the following defenses. That the Plaintiff engaged in fraudulent conduct in that he made false statements relating to a loss to which he was insured, and to which his insurance policy applies.

Plaintiff relies on *West, supra*, and *Rayis v Shelby Mut Ins Co*, 80 Mich App 387, 393; 264 NW2d 5 (1978), in support of his argument that the correct jury instruction for a defense of fraud and false swearing is: 1) the insured made a misrepresentation, 2) the misrepresentation was material, 3) the insured either knew the misrepresentation was false at the time that it was made or made the misrepresentation recklessly without any knowledge of its truth, and 4) the insured made the misrepresentation with the intention of deceiving the insurer. In *West, supra* at 69, and *Rayis, supra*, the Supreme Court and a panel of this Court held that the elements of a fraud and false swearing defense were as argued by plaintiff above.

However, *West, supra*, and *Rayis, supra*, are distinguishable from the case at bar. In both *West* and *Rayis* the policies at issue were governed by former MCL 500.2832, and contained a provision stating:

This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

The policy in the case at bar is governed by MCL 500.2833, which requires fire insurance policies to contain a provision stating that the policy may be void on the basis of misrepresentation, fraud, or concealment. MCL 500.2833(c). The policy at issue contained the following fraud condition: “the entire policy is void if the insured conceals or misrepresents material facts or circumstances, engages in fraudulent conduct or makes false statements relating to either the insurance or to a loss to which the insurance applies.” Because the willful and material language is no longer present in the statute, and the policy language does not require the insured to have intentionally committed fraud or false swearing about material facts or circumstances, manifest injustice did not result by the absence of an instruction regarding intent and materiality. See MCR 2.516(B)(1) (the trial court is obligated to instruct the jury on the applicable law). The trial court needed only to instruct the jury to decide whether plaintiff concealed or misrepresented material facts or circumstances, or engaged in fraudulent conduct or made false statement, in accordance with the fraud provision.

We also note that the instruction proposed by plaintiff is the standard jury instruction for the tort of fraud. M Civ JI 128.01. In the notes on the use of M Civ JI 128.01, it states that the “instruction is intended to be used in a tort action for damages for fraud. It is not designed for use in other types of cases.” This is not a fraud tort case; rather, the term “fraud” is used as an example of when the policy may be void. An insurer does not have to prove fraud to void the policy. It may be voided upon an insured’s false statements relating to either the insurance or to a loss to which the insurance applies. MCL 500.2833(c). Therefore, requiring an insurer to prove fraud would raise the burden of proof beyond what is mandated in the policy and by

statute. Here, the trial court instructed the jury to decide whether defendant proved that plaintiff made false statements relating to a loss covered by the insurance policy. This instruction was in accord with the applicable law. Plain error did not occur, and plaintiff is not entitled to relief. See *Shinholster, supra* at 351.

In addition to his allegations of instructional error, plaintiff argues that his insurance policy should not be voided for misrepresentations about items that represented a small percentage of his claim. Unfortunately for plaintiff, the insurance policy does not differentiate between big and small lies. The policy clearly states that the entire policy is void if the insured conceals or misrepresents material facts or circumstances, engages in fraudulent conduct or makes false statements relating to either the insurance or to a loss to which the insurance applies. The jury found that plaintiff committed fraud and false swearing regarding the claims he submitted to defendant. An insurance policy must be enforced in accordance with its terms. *Henderson, supra* at 354. The insurance policy, therefore, is void.

Lastly, plaintiff argues that the trial court erred by denying his motion for judgment notwithstanding the verdict (JNOV). This Court reviews a trial court's decision with regard to a motion for JNOV de novo. *Morinelli, supra* at 260-261; *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn, in a light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

In this case, sufficient evidence was presented to create an issue for the jury. Plaintiff initially claimed that he had 700 CDs, a computer, a camcorder, a Playstation, several cameras, binoculars, and a large number of DVDs in the house during the fire. None of these items were present in the house when defendant conducted its first inspection, nor did plaintiff ever produce all of the allegedly damaged items. In addition, the evidence suggested that many of the items that plaintiff claimed were damaged or lost were not in the house during the fire. Plaintiff's statements to defendant were inconsistent and, at times, contradictory. His statements and trial testimony, therefore, created a question for the jury regarding whether plaintiff made false statements to defendant or simply accidentally overstated the contents of his home. Because the evidence is such that reasonable people could differ, the trial court properly sent the question to the jury and did not err by denying plaintiff's motion for JNOV. See *Severn, supra* at 412.

Reversed and remanded for entry of judgment for defendant. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Mark J. Cavanagh