

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN BASIC PROPERTY INSURANCE
ASSOCIATION,

UNPUBLISHED
November 19, 1999

Plaintiff-Counterdefendant-
Appellee/Cross-Appellant,

v

No. 204949
Oakland Circuit Court
LC No. 94-486298 CK

J.T. HAIR DESIGNS and JANELLA QUINN,

Defendants-Counterplaintiffs-
Appellants/Cross-Appellees.

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

Following separate bench trials, the trial court entered judgments of no cause of action on plaintiff's complaint for declaratory judgment and on defendants' counterclaim for breach of the parties' insurance contract. Defendants appeal and plaintiff cross-appeals from the judgments. We affirm the court's entry of a judgment in plaintiff's favor on defendants' counterclaim seeking payment under the insurance contract. We find it unnecessary to address the merits of plaintiff's cross-appeal.

A fire damaged defendant's business, J.T. Hair Designs. Defendant filed a claim under its standard fire insurance policy with plaintiff, Michigan Basic Property Insurance Association. Plaintiff regarded the fire as incendiary, began investigating, and eventually denied the claim on the grounds that defendant failed to cooperate with the investigation and furnished material misrepresentations concerning the claim.

Plaintiff's complaint for declaratory relief alleged that defendant failed to cooperate in various ways, including that one of defendant's owners did not submit to an examination under oath, as required under the policy, and that defendant made material misrepresentations, including regarding the availability of tax returns. Plaintiff also claimed that defendant exaggerated its proof of loss. Defendant filed a counterclaim for breach of contract based on plaintiff's failure to satisfy its claim. Plaintiff defended the claim on the basis that defendants intentionally concealed or misrepresented facts or committed fraud or false swearing.

Defendants first argue that the trial court improperly applied a preponderance of the evidence standard, rather than a clear and convincing evidence standard, to the question whether plaintiff had established its affirmative defense of fraud or false swearing. We review questions of law de novo. *Dye v St John Hospital and Medical Ctr*, 230 Mich App 661, 665; 584 NW2d 747 (1998).

The standard of proof issue was addressed by a panel of this Court in *Mina v General Star Indemnity Co*, 218 Mich App 678; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). In *Mina*, *supra*, the insurer denied the insured's claim for fire insurance coverage on the basis of fraud, false swearing and arson. 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. 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; 200NW 457 (1924), held that the burden of proof for fraud cases was clear and convincing evidence. *Id.* at 681. After noting and discussing the confusion in Michigan law regarding the issue, this Court upheld the giving of the jury instruction, concluding that the trial court properly followed *Campbell*, *supra*:

. . . unless and until the Supreme Court offers us additional guidance on this issue, we cannot find that the trial court erred in relying on *Campbell*, *supra*. In *Campbell*, the Supreme Court addressed the identical issue that is presented in the present case. The Supreme Court has never overruled *Campbell*. Accordingly, the trial court properly followed *Campbell* and instructed the jury that defendant had to prove its defense of fraud and false swearing by a preponderance of the evidence. [*Mina*, *supra*, at 685.]

Defendant relies on *Hi-Way Motor Co v Int'l Harvester*, 398 Mich 330, 336; 247 NW2d 813 (1976), in which the Court stated that "fraud will not be presumed but must be proven by clear satisfactory and convincing evidence," and *Flynn v Korneffel*, 451 Mich 186; 547 NW2d 249 (1996), a more recent case stating the same proposition. These cases are distinguishable. In both *Campbell* and *Mina* the insurer asserted the defense of fraud and false swearing to preclude the insured from recovery under the insurance policies. *Hi-Way Motor Co* and *Flynn*, in contrast, were tort actions. The cases defendants cite are also distinguishable because they do not involve an assertion of fraud or false swearing as an affirmative defense. *Mina*, *supra*, is controlling under MCR 7.215(H)(1).

Defendants next argue that the trial court erred in finding, even by a preponderance of the evidence, that defendants committed fraud or false swearing. This Court will not set aside the trial court's findings of fact unless clearly erroneous. MCR 2.613(C); *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 636; 583 NW2d 215 (1998). Regard must be given "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Port Huron*, *supra* at 636.

To void an insurance policy on the basis of misrepresentation of a material fact, the insurer must show that (1) the misrepresentation was material; (2) it was false; (3) the insured knew that it was false at the time it was made or made it recklessly, without any knowledge of its truth; and (4) the insured

made the material misrepresentation with the intention that the insurer would act upon it. *Mina, supra* at 686. Reliance or prejudice is not an element of the defense. *Foreman v Badger Mutual Ins Co*, 169 Mich App 772, 776; 426 NW2d 808 (1988); *Rayis, supra* at 392.

Defendants contend that their misrepresentations regarding the business' tax returns did not materially affect the ability of plaintiff to establish its defense. A misrepresentation is material if it is "reasonably relevant to the insurer's investigation of a claim." *Mina, supra* at 686; see also *Dadurian v Underwriters at Lloyd's, London*, 787 F2d 756, 759-760 (CA 1, 1986). The trial court did not err in concluding that the requested tax information was relevant to plaintiff's investigation into the incendiary nature of the fire. See *Mina v General Star Indemnity Co*, 455 Mich 866; 568 NW2d 80 (1997) (noting that "there was no manifest injustice in instructing the jury that the facts relating to the plaintiff's financial condition were material."); see also *Meyers v State Farm Fire & Casualty Co*, 801 F Supp 709, 716 (ND Ga, 1992) (noting that "it is merely a matter of common sense that where an insurer alleges arson as a defense to a claim for fire loss, the financial status and potential financial gain to the insured—as the suspected arsonist—are circumstances material to that defense."). Further, the tax information was reasonably relevant to plaintiff's investigation into the accuracy of defendants' claim, in that the documents sought might have contained inventory information. Additionally, defendants' assertions that the tax returns existed but had been destroyed in the fire resulted in plaintiff's expenditure of time and resources in attempting to procure copies of these documents. Accordingly, the court did not err in concluding that the misrepresentations were material, i.e., "reasonably relevant to the insurer's investigation of a claim." *Mina, supra*, at 686.

In light of our determination that the trial court did not err in determining that plaintiff had established its affirmative defense of fraud or false swearing by a preponderance of the evidence, we need not address the issues raised by plaintiff's cross-appeal.¹

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Helene N. White

¹ Plaintiff argues in its cross-appeal that (1) the trial court reversibly erred in holding that it was required to establish that it had suffered prejudice as a result of defendants' failure to cooperate in the investigation of the insurance claim in order to prevail on its complaint for declaratory action, and (2) the trial court's finding that it had not demonstrated material prejudice was clearly erroneous.