

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

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JASON CARDINAL and MELANEY  
CARDINAL,

UNPUBLISHED  
May 24, 2011

Plaintiffs-Appellees,

v

No. 293805  
Wexford Circuit Court  
LC No. 07-020649-CK

FARMERS MUTUAL INSURANCE CO,

Defendant-Appellant.

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Before: HOEKSTRA, P.J., and MURRAY and M.J. KELLY, JJ.

PER CURIAM.

In this first-party homeowners' insurance case, defendant appeals as of right the judgment entered in favor of plaintiffs following a jury trial. The jury, by special verdict, found defendant liable for policy benefits including additional living expense, damage to personal and real property, and cost of cleanup. We affirm.

**I. FACTS AND PROCEDURAL HISTORY**

This case arises out of the claim plaintiffs submitted on their homeowners' insurance policy issued by defendant after a fire destroyed their home in Cadillac on February 19, 2007. Defendant has maintained throughout the entirety of these proceedings that plaintiffs committed arson and then made material misrepresentations to obtain insurance proceeds. Plaintiffs categorically deny this charge.

According to plaintiffs, around 5:30 a.m. on the morning of the fire, plaintiff Melaney Cardinal informed her husband, plaintiff Jason Cardinal, that she noticed the smell of smoke as she was getting ready for work. When Mr. Cardinal subsequently observed flames coming from the garage, plaintiffs evacuated the house with their young son and set out for the home of Mr. Cardinal's parents four blocks away to call 911. While en route, plaintiffs came upon a police officer, who informed plaintiffs that help was on the way. Cadillac firefighters arrived on the scene around 6:02 a.m., and although they subdued the fire, the damage rendered the house a "total loss." After the fire, Cadillac fire marshal Mark Mongar investigated the scene and concluded that the fire originated in a joist channel in the basement below the northeast corner of the kitchen above the hot water heater. Mongar's incident report indicated that the cause of the fire was undetermined. Plaintiffs subsequently submitted a claim to defendant, who initially

compiled inventory estimates and paid plaintiffs monthly living expenses until the insurance adjuster's investigation revealed the fire was intentionally set.

With their insurance claim formally denied, plaintiffs filed a complaint on October 29, 2007, seeking damages and interest for breach of contract and a violation of MCL 500.2006 (requiring statutory interest for late insurance payments). Defendant answered and asserted as affirmative defenses, *inter alia*, arson, insurance fraud, and plaintiffs' failure to provide appropriate documentation. A contentious discovery period followed culminating with several court rulings compelling plaintiffs' cooperation, deeming a number of defendant's requests for admissions as admitted, and ordering sanctions.

Almost two years after plaintiffs initiated suit, defendant filed three motions for summary disposition under MCR 2.116(C)(10). Defendant argued that plaintiffs' claims should be dismissed due to (1) arson, (2) fraud and false swearing, and (3) as a discovery sanction for plaintiffs' "lies" under oath and concealment of relevant documents.

Defendant based the arson claim in large part on the affidavits of two "experts": electrical engineer Kenneth DeBack, who concluded that no electrical problems caused the fire, and fire investigator Mark Strange, who, based on DeBack's findings, concluded that the fire was intentionally set. Mongar testified in his deposition that after seeing the evidence upon which Strange based his opinion, he agreed the fire was intentionally set.

Additionally, defendant claimed that plaintiffs' numerous financial problems combined with their false answers about their finances and events related to the fire revealed their motive for committing arson and showed false swearing. In this regard, defendant pointed to: plaintiffs' inconsistent answers regarding their deficient car loan and mortgage payments – which resulted in the initiation of foreclosure and repossession proceedings after the fire – as well as plaintiffs' inconsistent testimony concerning their finances; plaintiffs' attendance and disciplinary problems at work about which they testified inconsistently; plaintiffs' alleged tax fraud; plaintiffs' numerous ATM withdrawals made at casinos in the months before the fire; plaintiffs' inconsistent testimony concerning where they kept their financial documents – all of which were destroyed in the fire except their homeowners insurance policy; the fact that plaintiffs fled their burning home in their leased Toyota (as opposed to the vehicle they owned); and the fact that phone records indicated that plaintiffs used their cellular phone after the fire despite their claim that the phone was destroyed in the fire.

Finally, defendant noted that a forensic examination of plaintiffs' insurance policy revealed that a fire did not cause soot marks on the policy, but instead revealed that someone applied the soot marks manually to make the policy appear charred in the house fire.

Plaintiffs countered that defendant failed to create any genuine issue of material fact and dismissal was inappropriate where: plaintiffs denied committing arson in their depositions; Mongar's investigation revealed that the cause of the fire was undetermined; no evidence of arson existed; and defendant failed to show the materiality of any alleged false statement. Additionally, plaintiffs contended that dismissal as a discovery sanction was inappropriate since plaintiffs did not intentionally fail to comply with court orders regarding defendant's discovery requests.

As for the motion based on arson, the court ruled that genuine issues of material fact existed in light of plaintiffs' denials of committing arson and because credibility determinations are inappropriate at the summary disposition stage. The court also denied defendant's motion based on fraud and false statement because a genuine issue of material fact existed on the issue of materiality. Orders were issued reflecting these rulings on October 6, 2008. Regarding dismissal as a discovery sanction, the court reserved its ruling pending a more detailed explanation of plaintiffs' failure to provide discovery as well as plaintiffs' compliance with additional discovery orders. On defendant's subsequent motion for reconsideration, the court ruled that even though it deemed several matters admitted since the motion, those issues did not render summary disposition appropriate where genuine issues of material fact still existed. Thus although the court denied defendant's motion, the court ordered plaintiff to provide additional discovery and to pay outstanding sanctions.

At the ensuing trial, the parties presented conflicting evidence concerning the cause of the fire. As at the summary disposition stage, plaintiffs denied setting the fire and explained how they discovered the fire while Strange testified that the fire was intentionally set.<sup>1</sup> Despite these conflicting positions, it was undisputed – per the deemed admissions – that the cause of the fire was unrelated to weather, to wires near the area where the fire started, or to electrical problems. Additionally, the jury was presented with plaintiffs' deemed admissions concerning their financial difficulties in the months leading to the fire.<sup>2</sup>

After the close of proofs, the jury concluded that plaintiffs did not set fire to their home, make material misrepresentations to or fail to cooperate with defendant, and, accordingly, awarded damages for living expenses, damage to personal and real property, and clean-up costs. After denying defendant's subsequent motions for judgment notwithstanding the verdict (JNOV) and for a new trial, the court entered judgment of \$166,204.10 plus interest on the jury's adjusted verdict in addition to case evaluation sanctions and taxable costs plus interest. The following appeal ensued.

## II. ANALYSIS

### A. SUMMARY DISPOSITION

Defendant's first assignment of error on appeal is the court's denial of its motions for summary disposition. The Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the

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<sup>1</sup> Mongar agreed with Strange's assessment based on the information upon which Strange relied.

<sup>2</sup> The admission included: plaintiffs' deficient mortgage, auto lease and auto purchase payments; the negligible amount of money in plaintiffs' checking and savings accounts just prior to the fire; Mr. Cardinal's reduced compensation at work; and plaintiffs' gambling losses and casino ATM withdrawals in the months preceding the fire.

moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

## 1. ARSON

Defendant's initial challenge concerns its arson claim. To establish the affirmative defense of arson, an insured must prove by a preponderance of the evidence that a plaintiff set the fire or caused the fire to be set. *Johnson v Auto-Owners Ins Group*, 202 Mich App 525, 527-528; 509 NW2d 538 (1993). Circumstantial evidence is sufficient to prove an arson claim. *Id.*

Defendant claims that when its experts' conclusions (that the fire was intentionally set) are considered in conjunction with evidence that plaintiffs had a financial motive to burn their home and that only plaintiffs had the opportunity to burn their home, it is impossible to conclude that a genuine issue of material fact exists on this issue. Based on these facts, alone, it is certainly reasonable to infer that plaintiffs' burned their home. Indeed, motive and opportunity are relevant factors to consider in determining an insurance arson defense. *Id.* at 527.

Nevertheless, motive and opportunity are not dispositive, *id.*, and defendant's motion must be considered in light of the other evidence. Most notably on this score, plaintiffs testified at length regarding their discovery of the fire and categorically denied burning or conspiring to burn their home. Additionally, Mr. Mongar's investigation report concluded the cause of the fire was undetermined. If plaintiffs' version of events is believed and defendant's experts are disbelieved, defendant's arson defense crumbles.

Defendant urges this Court to reverse the trial court's ruling in light of *Crossley v Allstate Ins Co*, 139 Mich App 464, 469; 362 NW2d 760 (1984), *George v Travelers Indemnity Co*, 81 Mich App 106, 112; 265 NW2d 59 (1978), and *Fenton v Auto-Owners Ins Co*, 63 Mich App 445, 450; 234 NW2d 559 (1975); however, each of those cases was decided by a jury. And while defendant argues that plaintiffs have presented no evidence contradicting its expert testimony, that argument neglects that a jury would not be required to believe defendant's experts, and that it is not for a trial court to accord weight to expert testimony. *People v Weddell*, 485 Mich 942, 948; 774 NW2d 509 (2009); *In re Skoog Estate*, 373 Mich 27, 29; 127 NW2d 888 (1964).

Simply put, because the evidence at this stage of the proceedings revolved around a credibility contest, summary disposition was not appropriate. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988). Indeed, it is well-settled that where the truth of the moving party's material factual assertion depends on credibility,

there exists a genuine issue to be decided at a trial by the trier of fact and a motion for summary judgment cannot be granted. *Moreover, summary judgment is especially suspect where motive and intent are at issue, or where the credibility of a witness or deponent is crucial.* [*Id.* (citations omitted) (emphasis supplied).]

The trial court did not err in denying defendant's motion on this ground.<sup>3</sup>

## 2. FALSE SWEARING

Next, defendant claims summary disposition was appropriate because plaintiffs violated the terms of their insurance policy by making material misrepresentations about how they found their insurance policy after the fire, and about their finances and phone records.<sup>4</sup>

To void a policy because the insured has willfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the material misrepresentation with the intention that the insurer would act upon it. [*Mina v General Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997).]<sup>5</sup>

A fact is material "if it is reasonably relevant to the insurer's investigation of a claim." *Id.*

Defendant's first claim of material misrepresentation suffers from the same deficiency as defendant's arson claim: namely, that the conflicting testimony of Mr. Cardinal and defendant's expert required a credibility determination for its resolution. *Metropolitan Life Ins Co*, 167 Mich App at 121. Specifically, Mr. Cardinal testified that he discovered his fire insurance policy in his home after the fire. In contrast, Dr. Buc's forensic examination revealed that the document did not show exposure to heat or fire damage as Mr. Cardinal claimed, but instead showed that someone "most likely" intentionally placed soot on the document to make it appear charred. This presents a classic genuine issue of material fact rendering summary disposition inappropriate.

Defendant frames its second claim concerning plaintiffs' misrepresentation of their finances wholly within the context of their receipt of foreclosure and deficiency notices. It too fails, however, since this argument rests upon a mischaracterization of the record. On this score, while Mrs. Cardinal claimed she did not believe the house was in foreclosure, she made this claim only after explaining that she had in fact received foreclosure notices in the mail but had

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<sup>3</sup> For this same reason, the court did not err in declining – as a discovery sanction – to deem admitted that the fire was intentionally set.

<sup>4</sup> The insurance policy indicates that any willful concealment or misrepresentation of a material fact or any fraud or false swearing voids the policy.

<sup>5</sup> While defendant alleges plaintiffs violated the sections of the insurance contract pertaining to both material representations and false statements, defendant's analysis is predicated wholly on the *Mina* framework for evaluating the misrepresentation of a material fact. Our analysis will proceed accordingly.

not read them. This does not bespeak that a false statement was knowingly made. Similarly, while Mr. Cardinal asserted that he received no deficiency notices in the mail, he admitted to receiving a phone call from the bank alerting him to a deficiency and acknowledged that he was over \$1,000 behind in mortgage payments. In light of this, it is clear Mr. Cardinal did not intend to mislead defendant. Quite simply, the record provides no basis to prove a material misrepresentation on this matter.

Finally, we reject defendant's third contention that plaintiffs' testimony that their phone burned in the fire constituted a material misrepresentation in light of the phone records contradicting their claim. Indeed, it is certainly a stretch to say that plaintiffs' testimony concerning their phone was material to defendant's arson claim, let alone that plaintiffs had the requisite intent to mislead defendant. Moreover, on this latter point, defendant has pointed to no specific evidence revealing the requisite intent, which in any event constitutes a question best left to a trier of fact. *Id.* at 121. The trial court did not err in denying defendant's motion on this ground.

## B. DIRECTED VERDICT AND JNOV

Mirroring its arguments attacking the court's summary disposition ruling, defendant contends that it was entitled to a directed verdict and to judgment notwithstanding the verdict (JNOV). This Court reviews de novo a trial court's decision on both a motion for directed verdict and a motion for JNOV. *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). When reviewing the trial court's decision on a motion for a directed verdict, we must view the evidence presented up to the point of the motion and all legitimate inferences from the evidence in the light most favorable to the nonmoving party to determine whether a fact question existed. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427-428; 711 NW2d 421 (2006). "Similarly, the trial court should grant a JNOV motion only if, reviewing the evidence and all legitimate inferences in favor of the nonmoving party, the evidence fails to establish a claim as a matter of law." *Foreman*, 266 Mich App at 135 (quotation marks and citation omitted). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

As we concluded was the case with regard to the motions for summary disposition, questions of material fact remained at the time of the motion for directed verdict. Indeed – as defendant concedes – the evidence presented at trial was essentially the same as the evidence presented in support of the motion for summary disposition and did not resolve the outstanding questions of fact. A directed verdict was therefore not appropriate. *Smith*, 269 Mich App at 427-428. Similarly, resolving all credibility issues in plaintiffs' favor – as we are required to do when evaluating a motion for JNOV – the evidence could not establish defendant's case as a matter of law. The trial court did not err.

## C. EVIDENTIARY ERROR

### 1. MOTION IN LIMINE

Defendant's first claim of evidentiary error involves a portion of the trial court's pretrial ruling granting plaintiffs' motion in limine with respect to certain employment and financial records. Specifically, defendant claims the trial court erred in excluding on relevancy grounds evidence that: plaintiffs' jobs were at risk due to disciplinary problems; Mr. Cardinal took vacation days to visit casinos; foreclosure proceedings commenced on plaintiffs' home within a month after the fire; and Mr. Cardinal filed a "fraudulent" 2003 tax return. This Court reviews a trial court's pretrial ruling on a motion in limine and decision to admit evidence for an abuse of discretion, but reviews preliminary questions of law pertaining to that decision de novo. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004); *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). Admission of evidence that is inadmissible as a matter of law constitutes an abuse of discretion. *Barnett*, 478 Mich at 159. A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Evidence is relevant if it has a tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. MRE 401; *Waknin v Chamberlien*, 467 Mich 329, 333; 653 NW2d 176 (2002). Generally, relevant evidence is admissible, MRE 402, unless its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or is cumulative, MRE 403; *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 272; 730 NW2d 523 (2006).

With respect to Mr. Cardinal's 2003 tax return, we fail to see how the court abused its discretion where the court expressly permitted defendant to question Mr. Cardinal with respect to his motives for improperly claiming deductions on that tax return. *Johnson*, 202 Mich App at 527 (motive and opportunity are relevant factors to an insurer's arson defense). However, we agree with defendant that whether plaintiffs' jobs were at risk and whether foreclosure proceedings had commenced would tend to make it more likely that plaintiffs had a motive to burn their house for insurance proceeds. Notwithstanding, the jury was well aware of plaintiffs' poor financial situation, and therefore the potential existence of a motive to commit arson. Specifically, the jury heard evidence of plaintiffs' mortgage default, Mr. Cardinal's reduced compensation at work, and plaintiffs' gambling losses and casino ATM withdrawals. Thus, any error in this respect was harmless.<sup>6</sup> *City of Ann Arbor v McCleary*, 228 Mich App 674, 683; 579 NW2d 460 (1998).

## 2. EVIDENCE OF FINANCIAL HISTORY

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<sup>6</sup> Additionally, we note that defendant makes no challenge to the court's exclusion of Mr. Cardinal's employment records under MRE 403 and 404(b). Thus, this alternative ground is sufficient for us to affirm the court's ruling with respect to this issue. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

On the issue of financial records, defendant further maintains that the court erroneously prohibited questioning and the presentation of certain exhibits. Although defendant has abandoned this issue for failure to cite any relevant authority, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), we note that defendants' record citations reveal that the court did in fact permit defense counsel to question Mrs. Cardinal regarding her finances and casino visits. Moreover – by defense counsel's own admission – the excluded evidence either consisted of detailed exhibits elaborating on plaintiffs' admissions (already provided to the jury) or was “probably not” necessary. Therefore, MRE 403 precluded admission of this evidence as unnecessarily cumulative. Defendant's argument is meritless.

### 3. HEARSAY INCIDENT REPORT

Defendant claims the court erred in admitting a fire report authored by firefighter Jeff Holly (indicating that no human factors contributed to the fire) under two hearsay exceptions: MRE 803(6) (business records exception) and MRE 803(8) (public records exception). Hearsay is inadmissible as a matter of law unless falling under an established hearsay exception. MRE 802; *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992).

We agree with defendant that Holly's incident report was not admissible under MRE 803(8) since it consisted primarily of Holly's opinion rather than the acts of the fire department. See *Bradbury v Ford Motor Co*, 419 Mich 550, 553-554; 358 NW2d 550 (1984) (MRE 803(8) “rejects the introduction in private civil actions of factual findings resulting from an investigation made in accordance with authority granted by law”); *People v Shipp*, 175 Mich App 332, 340; 437 NW2d 385 (1989) (conclusions and opinions in investigated reports are not admissible under MRE 803(8)(B)). To be sure, on this very point Mongar was clear that portions of Holly's report did not comport with his *opinion* as to the origin of the fire.

Notwithstanding, defendant has not shown that MRE 803(6) was inapplicable. Indeed, contrary to defendant's argument, the foundational requirements of MRE 803(6) did not require the presentation of Holly at trial or even someone else who could interpret the contents of the report. *People v Safiedine*, 152 Mich App 208, 217; 394 NW2d 22 (1986). Also, there is no indication the report was prepared in anticipation of litigation, and Mongar explained that the report was part of the fire department's standard recording procedure carried on during the normal course of business. Thus, the trustworthiness of this report is not in question as defendant claims. *People v McDaniel*, 469 Mich 409, 414; 670 NW2d 659 (2003) (investigation reports prepared in anticipation of litigation indicate a lack of trustworthiness). And as defendant has failed to cite any authority in support of its argument on this point, further treatment of this issue is unnecessary. *Mudge*, 458 Mich at 105.

Regardless, even if there were error in the admission of Holly's report (which defendant also alleged contained plaintiffs' claims that they did not set the fire), such was harmless and caused no prejudice where Mongar testified, consistent with his own report, that the cause of the fire was undetermined and where plaintiffs both testified that they did not start the fire. *Merrow*,

458 Mich at 634. For this same reason, defendant's attacks to the admission of this report under MRE 701 and 702 also must fail.<sup>7</sup>

#### D. MOTION FOR NEW TRIAL

Defendant next argues that the court erred in denying its motion for a new trial in light of misconduct on the part of plaintiffs' counsel. Defendant premises its argument on MCR 2.611(A)(1)(b) and (e), which permit a new trial if a party's substantial rights were materially affected due to the misconduct of the prevailing party or errors of law. For the reasons set forth below, we find a new trial was not in order.

We review a trial court's decision to grant or deny a motion for new trial under MCR 2.116 for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). Whether the misconduct of the prevailing party warrants a new trial is subject to the following inquiry:

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

#### 1. ELECTRICAL CAUSES

During the cross-examination of Mr. Strange, plaintiff's counsel inquired into the thoroughness of Mr. DeBack's investigation of the electrical wires. Defendant asserts that plaintiffs' deemed admission that the fire was not electrical precluded this line of questioning. However, as the trial court ruled, this questioning properly attacked the foundation of Mr. Strange's conclusion that the fire was intentionally set and did not undermine the admission at issue. Furthermore, contrary to defendant's claim, the closing argument of plaintiff's counsel on this point (i.e., that Mr. DeBack "just eyeballed [the wires]") was entirely proper as it undercut

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<sup>7</sup> Defendant failed to lodge an objection on these grounds below, and therefore must demonstrate prejudice to warrant reversal of this unpreserved issue. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

the credibility of Mr. Strange's opinion. In other words, an argument that Strange based his conclusions on an incomplete investigation properly called into question the credibility of his expert opinion as opposed to contradicting a deemed admission. A witness's credibility is always a material issue. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). Furthermore – contrary to defendant's argument – plaintiffs' counsel made *no* suggestion in his argument that the fire was electrical in nature. We find no error here.

## 2. PLAINTIFFS' LATE MORTGAGE PAYMENTS

Plaintiffs' trial testimony that they were unconcerned about their late mortgage payments because they would eventually "catch up" even though they were "always behind" was not inconsistent with plaintiffs' admissions as defendant argues<sup>8</sup>. On the contrary, the admissions read to the jury indicate that plaintiffs in fact remitted a mortgage payment in the month prior to the fire. Even if there were error in the admission of plaintiffs' unchallenged testimony, however, such was harmless given that the mortgage references were brief and comprised but a small fraction of plaintiffs' overall testimony concerning their poor financial situation prior to the fire (e.g., evidence was presented of plaintiffs' gambling habits, credit card debt, late car payments, 401(k) loans, and outstanding student loan debt).

## 3. CROSS OF MONGAR

Next, defendant asserts that prejudice resulted from the statement of plaintiffs' counsel during the cross examination of Mr. Mongar that many house fires go unexplained. This is an incomplete characterization of the record, however, as the challenged statement was made in answer to the court's request to make an offer of proof as to why questioning Mongar about fire protection week was relevant. And even if this were improper, the court instructed the jury that the attorneys' statements were not evidence. Instructions are presumed to cure most errors, and jurors are presumed to follow instructions. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

## 4. UNDISCLOSED PHONE RECEIPT

On cross examination, Mrs. Cardinal revealed that her attorney had a copy of a receipt proving that her mother-in-law replaced her cell phone after the fire. We agree with defendant that withholding this information until trial was improper. MCR 2.302(B)(1). However, no harm resulted from this error where the trial court subsequently granted defendant's motion in limine precluding any reference to the receipt and Mrs. Cardinal's mother-in-law testified that she did, in fact, replace the cell phone after the fire.

## 5. CLOSING ARGUMENT

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<sup>8</sup> Although defendant argues broadly that plaintiffs' testimony pertained to their bills, the only citations to the record defendant provides (in his statement of facts section) pertain to late mortgage payments.

Defendant makes three allegations of prejudice resulting from the closing argument of plaintiff's counsel. First, defendant asserts that plaintiffs' counsel argued – without evidentiary support – that plaintiffs could not have started the fire since there was insulation on the sill plate where the fire started. Notably, the reference to insulation was based on a picture admitted into evidence. It was from this evidence that plaintiff's counsel offered a hypothesis as to how the fire started based on Mr. Strange's conclusion that the fire was intentionally set. This hypothesis was a reasonable inference based on the record, and was therefore proper. *In re Miller*, 182 Mich App 70, 77; 451 NW2d 576 (1990) (counsel may draw reasonable inferences from the record evidence). Regardless, as before, any potential error was cured by the appropriate jury instruction.

Second, defendant challenges the argument of plaintiffs' counsel concerning Mr. Mongar's investigation report. To the extent this argument pertained to the conclusion of the report, i.e., that the cause of the fire was undetermined, we find no error since Mongar testified consistently that this was the report's conclusion. Nevertheless, counsel's argument was improper to the extent he claimed that Mongar's failure to re-open the report or contact the authorities was proof that Mongar did not believe the cause of the fire was arson. Indeed, no evidence was adduced explaining the procedure involved to amend an investigation report.<sup>9</sup> Nevertheless, defendant cannot show prejudice where Mongar admitted that he believed that if wires were eliminated as an ignition source, "it would have to be a humanly caused fire." This unpreserved error was harmless.

Finally, we agree with defendant's third claim that the arguments that an "insurance company can hire an expert to say almost anything," and "any one of you could get caught by an insurance company investigating a fire loss claim the same way" were improper and had no place in closing argument. *Rogers v Detroit*, 457 Mich 125, 149; 579 NW2d 840 (1998), overruled on other grounds *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000) (arguments designed to elicit juror sympathy and appeal to juror's self-interest are improper). The court's relevant instruction on this matter cured any possible resultant prejudice, however. *Rogers*, 457 Mich at 149, citing *Jakubiec v Hasty*, 337 Mich 205; 59 NW2d 385 (1953). Thus, this error – which defendant raises for the first time on appeal – is not a basis for reversal.

#### E. REMITTITUR

Without a single citation to statute, court rule, or case law, defendant urges this Court to reverse the trial court's denial of its request for remittitur. Although our review of this matter is for an abuse of discretion, *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008), we deem defendant's failure to even provide a perfunctory citation as having abandoned this issue, *Mudge*, 458 Mich at 105. Before moving on, however, we note our

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<sup>9</sup> Contrary to defendant's mischaracterization of the record on appeal, the record does not reveal that the trial court prevented Mongar from testifying at trial that the reason police did not pursue an investigation was due to lack of resources. Notwithstanding, plaintiff's argument was improper for the reasons noted, *supra*.

agreement with the trial court that the proofs concerning additional living expenses fell “reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation . . . .” *Silberstein*, 278 Mich App at 462. Moreover, defendant did not present the clean-up invoice from the city of Cadillac (upon which defendant relies to challenge the clean-up award) until *after* trial. Since there is no indication that defendant could not have discovered and presented this receipt with reasonable diligence, review of such evidence at this juncture would be improper, particularly where the jury’s award fell squarely within the bounds of the record evidence. See MCR 2.612(C)(1)(b); *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000).

#### F. CASE EVALUATION SANCTIONS

As its last assignment of error, defendant claims case evaluation sanctions were inappropriate since the case evaluation award was impossible to interpret and awarded damages to a nonparty. This Court reviews *de novo* a trial court’s decision regarding a motion for case evaluation sanctions under MCR 2.403(O). *Ivezaj v Auto Club*, 275 Mich App 349, 356; 737 NW2d 807 (2007). Under that rule, a defendant that has rejected an evaluation *must* pay the plaintiff’s actual costs if the plaintiff accepted the evaluation and the jury verdict is not more than ten percent below the evaluation after adjusting for assessable costs, interest, and future damages. MCR 2.403(O)(1), (2), and (3).

Here, the case evaluation panel awarded plaintiffs \$60,000 and indicated that the amount “does not include money owing to [the] mortgage holder.” This award is not impossible to interpret as defendant claims. On the contrary, as the trial court explained, this award ensured that plaintiffs received an award independent of any lien the mortgagor could claim for damages and clean-up costs to the real property that was destroyed. By its very terms, the evaluation awarded no amount to a third party and pertained *only* to the parties involved in this action. Consequently, because the jury verdict in this case, even after including necessary adjustments, was well above the evaluation, case evaluation sanctions were mandated.

#### III. CONCLUSION

For the foregoing reasons, we conclude that each of defendant’s arguments for reversal lacks merit, and affirm the trial court’s judgment in favor of plaintiffs.

Plaintiffs may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Joel P. Hoekstra  
/s/ Christopher M. Murray  
/s/ Michael J. Kelly