IN THE COURT OF APPEALS OF IOWA

No. 2-087 / 91-869

DALE L. WEBB and **RICKEY L. WEBB,**

Plaintiffs-Appellants,

vs.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the Iowa District Court for Warren County, Thomas S. Bown, Judge.

Appellants appeal judgment denying recovery under their homeowners policy for a fire loss. **REVERSED AND REMANDED.**

Robert M. Benton of Stuyvesant & Benton, Carlisle, for appellants.

Nancy C. Coon, West Des Moines, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ., but decided en banc.

SACKETT, J..

The defendant-appellee American Family Mutual Insurance Company wrote a homeowners policy on a house plaintiffs-appellants Dale L. Webb and Rickey L. Webb owned in rural Hartford, Iowa. Dale and Rickey were named insureds under the policy. Plaintiffs brought this action to recover under the policy. The case was tried to a jury and it found Dale had intended to defraud the company and had concealed information in making claim for the personal property destroyed in the fire. The trial court denied the claim of plaintiff Rickey for insurance on the house, and the claim of plaintiff Dale for insurance on the house and the personal property. Plaintiffs appeal contending (1) the issue of Dale's misrepresentations should not have been submitted to the jury, and (2) the claim of Rickey should not have been barred by the actions of Dale.

Dale and Rickey were married and during their marriage acquired title to the insured house. Dale and Rickey's marriage was dissolved on September 15, 1989. The dissolution decree gave Dale sixty days to purchase Rickey's interest in the house for the sum of $50,000. If Dale did not purchase the property from Rickey then the property was to be sold and the equity divided between Dale and Rickey.

On September 21, 1989, Dale and Rickey purchased the homeowners policy from the defendant. The policy they purchased provided, among other things, fire insurance on the house in a maximum amount of $104,800 and fire insurance on personal property in a maximum amount of $52,400. On November 16, 1989, the house was destroyed by fire. Dale was residing in the house at the time of the fire and Rickey lived elsewhere.

After the fire, the plaintiffs filed a sworn proof of loss with the defendant. Plaintiffs claimed a $55,000 loss for household contents. The proof of loss stated the contents of the home were Dale's property. Defendant rejected the proof of loss and asked for a detailed list of the damaged contents. Dale resubmitted a new proof of loss with a detailed list of personal property he claimed was lost in the fire. The defendant denied the claim in its entirety. The defendant took the position Dale caused the loss, did not make efforts to protect the property from further damage, and misrepresented the extent of the personal property lost in the fire.

After this suit was filed, plaintiffs filed an application to adjudicate law points. Plaintiffs sought a ruling that Rickey was an innocent insured and consequently she had a right to recover under the policy, even if the defendant established Dale caused the fire or misrepresented the extent of his loss. The trial court determined Rickey did not have the right to recover under the policy if Dale were responsible for the fire or misrepresented his loss.

The case went to trial. Two special interrogatories were submitted to the jury. As to the first interrogatory, the jury found the defendant did not prove the fire was deliberately set, caused, or procured by Dale. As to the second interrogatory, the jury found the policy was void because Dale, with an intent to defraud, concealed material facts and circumstances as to the extent of the personal property destroyed in the fire.

I.

Plaintiffs' first claim is there is not substantial evidence to support the jury's finding Dale intended to defraud, or conceal a material fact or circumstance as to the extent of the personal property destroyed. Plaintiffs contend the defendant failed on this issue because it did not introduce evidence to dispute Dale's contention he lost personal property valued at more than the amount of coverage provided for under the policy. Plaintiffs contend, therefore, defendant has failed to prove it was prejudiced by Dale's action.

Dale claimed he lost personal property valued at $88,530.64 on the form he filed. He submitted a list of personal property lost. The list showed values but was not totaled. At trial there was evidence that Dale did not have some of the items on the list. Neither party has made an effort to set out for us the value of personal property not disputed and the value of personal property disputed.

We have attempted to do this from the record. We find the itemized list in the record to total $82,946.68 and, of that amount, we find there was evidence Dale did not have $1,716.94 in value of the property. What Dale says is "my claim was well over the policy coverage so it makes no difference that I overstated the value of the personal property." We recognize the difficulty any homeowner would have in attempting to inventory personal property after a fire destroys his or her house. The question is whether the submission of the personal property inventory was evidence of fraud where the value of the challenged items is only two percent of the amount claimed and the personal property insurance coverage is nearly $31,000 less than the personal property inventory submitted to the insurer.

First, we do not find that insurers expect perfect lists of personal property destroyed in a fire or that any insured could actually prepare one. Minor discrepancies in inventorying your life accumulation of personal property if destroyed by fire should not be considered fraud. This is particularly true with a homeowner who generally does not inventory his or her property, unlike a store owner generally does inventory his or her personal property.

Secondly, without considering the challenged items, the inventoried property was in excess of the amount of personal property coverage of the homeowners policy. For a misrepresentation to void the policy it should be material. <u>See</u> <u>Dempsey v. Auto Owners Ins. Co.</u>, 717 F.2d 556, 560 (8th Cir. 1983). (Fact one insured misrepresented his presence on the night of a fire claimed by the insured to be arson did not void the policy.) While an insurer should not necessarily have to show it was prejudiced by the claimed fraud, the insurer should at least be required to show the claimed fraud was material. <u>See</u> <u>American Diver's Supply & Manufacturing Corp. v. Boltz</u>, 482 F.2d 795, 797-98 (10th Cir. 1973). We agree with plaintiffs, this is not substantial evidence of fraud. We reverse the decision for the defendant. Having so decided, we find it unnecessary to address Rickey's claim Dale's conduct should not bar her recovery.

We reverse the trial court's decision denying plaintiffs' recovery for the November 16, 1989, fire under their homeowners policy with defendant. We remand to the trial court to determine the damage to the residence and to enter judgment for damage to the residence in an amount not to exceed $104,800. The trial court shall further enter judgment in favor of plaintiff Dale and against defendant for $52,400 for personal property destroyed in the fire.

Costs on appeal are taxed to defendant.

REVERSED AND REMANDED.

All judges concur except Habhab and Donielson, JJ., who dissent.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the district court. In doing so, I recognize and would hold that insurers should not expect perfect lists of personal inventory by their insured. As the majority points out, minor discrepancies in inventorying your life accumulation of personal property if destroyed by fire should not be considered fraud, and I agree. Home owners do not generally inventory their personal property.

I.

The question under this heading is whether those discrepancies submitted by Dale exceeded what has been termed by the majority as *minor discrepancies*. The trial court felt substantial evidence existed to submit this question to the jury. I agree.

It is not for us nor was it for the trial judge to determine whether Dale's conduct rose to the level of intentional fraud. Rather, that question was left for the determination of the fact finder. The fact finder in this instance was the jury, and it found the policy void because Dale had, with the intent to defraud, concealed material facts and circumstances as to the extent of the personal property destroyed. It was for the trial court and is now for us to determine whether substantial evidence existed to submit that issue to the jury.

The majority contends there was not substantial evidence to support a jury finding that Dale intended to defraud, or conceal a material fact or circumstance as to the extent of the personal property destroyed. It is here that I disagree with the majority. I find there was substantial evidence to submit to the jury that question of whether Dale misrepresented the extent of his personal property loss.

Pam Walker, Dale's former girlfriend, testified that certain items of personal property which Dale listed on the American Family inventory form were not at the home when she lived there just a few weeks before the fire. Dale claimed a roll top desk on the inventory form. Rickey testified that she took the roll top desk when she moved out in October 1989. On the inventory form, Dale claimed he lost a 200-piece tool set. Andy Briggs, from American Family, testified that every inch of the debris was sifted, and only one box wrench, two crescent wrenches, a few screw drivers and a drill bit were found. There are other discrepancies.

A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986)(citation omitted). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978)(citation omitted); Iowa R. App. P. 14(f)(2). The movant is considered to have admitted the truth of all evidence offered by the nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757(citation omitted). If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984)(citation omitted). The trial court is vested with considerable discretion in determining whether evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989)(citation omitted).

I believe, on this issue, that reasonable minds can differ as to whether Dale in fact did misrepresent the extent of his loss. The jury has spoken on this issue, and I would affirm.

II.

Plaintiff Rickey also claims Dale's conduct should not bar her recovery. Defendant contends Dale's conduct should bar Rickey's recovery.

In Vance v. Pekin Ins. Co., 457 N.W.2d 589, 592 (Iowa 1990), the Iowa Supreme Court held that it would follow the "new rule," also known as the "best reasoned rule," in deciding whether an innocent co-insured is barred from recovery when another insured acts in a manner which voids the insurance policy. Under the new rule, recovery by the innocent co-insured depends on a contract analysis of the insurance policy provisions. The Problem of the Innocent Co-insured Spouse: Three Theories on Recovery, 17 Val. U.L. Rev. 849, 867-68 (1983) [hereinafter Innocent Co-insured Spouse]. When interpreting an insurance policy, if the policy language is ambiguous, the court construes that language against the insurer. Voeltz, 431 N.W.2d at 785.

Following the precedent of Vance, we should apply the new rule contract analysis in this case to determine whether Rickey may recover from American Family, despite Dale's misrepresentations.

The pertinent language of the Webbs' American Family insurance policy states as follows:

> DEFINITIONS
> 1. You and your refer to the **person or people shown as the named insured in the declarations.**
>
> 2. Insured
> a. Insured means you and your relatives if residents of your household.
>
> GENERAL CONDITIONS
> 2. Concealment or Fraud. This entire policy is void if, before or after a loss, **any insured** has:
> a. intentionally concealed or misrepresented any material fact or circumstance;
> b. engaged in fraudulent conduct; or
> c. made false statements;
> relating to this insurance.

(Emphasis added.)

The policy is written in the names of "Dale L. and Rickey L. Webb." Based on the insureds named in the declarations and the definitions listed in the policy, it is clear that Rickey is a named insured under this policy.

As emphasized in the policy excerpts above, the American Family policy contains the language "any insured" under the general conditions section. This is significant. "Any insured" is very clear and unambiguous in its meaning. In fact, as stated in Vance it is the recommended wording for insurance policies:

> Perhaps the best solution to the entire problem is to revise the policy language. If the insurance companies intend the fraudulent acts of one spouse to void the policy as to both, the policy should be redrafted to reflect this position. **The desired result could be obtained by substituting the term "the" insured in the fraud provision with "a," "any" or "an" insured.** Drafting the policy to expressly deny recovery not only serves the interests of the insurance companies but also advances the public good by discouraging fraud.

(Emphasis added.) Vance, 457 N.W.2d at 593 (citing Innocent Co-insured Spouse, 17 Val. U.L. Rev. at 872).

The American Family policy actually incorporates the better language suggested in Vance. Further, "[t]he test for ambiguity is whether a reasonable person would read more than one meaning into the word." Id. (citation omitted). The meaning of the word "any" is clear, and a reasonable person would not read more than one meaning into the word. I do not interpret the Concealment/Fraud provision in the American Family policy to be ambiguous. Therefore, the provision should be enforced as clearly stated in the policy.

The fact that Dale and Rickey were not married at the time of the loss is not significant. They are named as the insureds. As the supreme court stated in Vance:

> We likewise conclude the exclusion here clearly and unequivocally says that a loss caused by an intentional act of an insured party bars coverage. Donald Vance was clearly an insured so his arson bars recovery by any insured under the policy and that includes Susan Vance. We think a reasonable person in Susan's position would read the policy that way. . . . Our answer does not depend upon how the insured property is held or upon whether the coinsureds are married. Rather we apply a contract analysis to determine the meaning of the exclusion. (Emphasis added.)

Id. at 593.

As recognized by the court in Vance, "although the results are undeniably harsh for [the innocent coinsured,] the clear meaning of the [policy] must govern here." Id. (quoting Woodhouse v. Farmers Union Mut. Ins. Co., 785 P.2d 192, 194 (Mont. 1990)). It is clear from the language of the American Family insurance policy that the entire policy is void if any insured has intentionally misrepresented any material fact or made false statements relating to the insurance.

Dale Webb was an insured under the American Family policy. The jury concluded that the entire policy was void because Dale, with intent to defraud, concealed a material fact or circumstance as to the extent of the personal property destroyed. Applying the clear language of the policy, the entire policy is void and recovery by any insured is barred because of Dale's misrepresentations to American Family. Therefore, I conclude Rickey Webb's recovery is barred. I think a reasonable person would interpret the policy language the same way.

I would affirm the district court's action in overruling appellant's motion to withdraw the misrepresentation issue from the jury. In addition, I would affirm the district court's action of entering judgment in favor of American Family and denying recovery by Dale and Rickey Webb.

Donielson, J., joins this dissent.