STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1033

Diane Saarela,
Appellant,

vs.

Minnesota FAIR Plan,
Respondent.

Filed April 28, 2009
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-CV-06-8852

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Harten, Judge.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellant-insured Diane Saarela challenges the denial of her motion for judgment as a matter of law (JMOL) or a new trial after the district court concluded that

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

respondent-insurer Minnesota FAIR Plan was not liable for her claim because a jury found that appellant had increased the hazard. Because the jury's verdict has reasonable support in the facts and is not contrary to law and because the district court did not abuse its discretion in denying appellant's motion, we affirm.

FACTS

In January 1998, appellant purchased a house in Minneapolis. The house met all code requirements. Appellant applied for and received homeowner's insurance from respondent, a non-profit organization. *See* Minn. Stat. § 65A.31 (2008).

Between January 2000 and December 2004, appellant received over 80 property code citations. In May 2003 and in March 2004, she refinanced the house with an increased mortgage and used part of the proceeds to pay credit card debt.

On 15 March 2004, a housing inspector and police examined the house. They found clutter, unsanitary conditions, open electrical boxes, an illegal apartment, paper and clothing piled next to the furnace, trash and bags inside the fireplace, a garage roof near collapse, and an unsafe stairwell. Appellant was issued two letters of intent to condemn. One required correction of the most hazardous conditions by 28 March 2004; the other required correction of less hazardous conditions by 1 May 2004.

On 12 April 2004, the housing inspector and police again examined the house and found that little had been done. The inspector explained to appellant that she had to comply with the letters. On 16 April 2004, a "Do Not Occupy" notice was posted on appellant's house with an order to vacate the property by 1 May 2004. On 3 May 2004, the housing inspector found that the condition of the house had not improved sufficiently

for it to be safe to be occupied. The police ordered that the house be vacated and boarded up.

On 16 May 2004, appellant's house was set on fire. A city fire investigator determined that the fire had been set in two places. Two days later, an investigator retained by respondent also determined that the fire was set in two places and that an ignitable liquid was used. He concluded that the fire was the result of arson. On 10 June 2004, appellant's house was again set on fire. A police officer found a gasoline-soaked carpet on the second floor and a gasoline-soaked blanket spread on the stairs to the third floor. The city investigator smelled gasoline and concluded that this fire also resulted from arson. Respondent's investigator came to the same conclusion.

The mortgagee filed a payoff demand statement with respondent. Respondent paid the policy limit, $156,000. Appellant also filed claims for fire damages with respondent. Respondent notified her that, as permitted by Minn. Stat. § 65A.01, subd. 3, it would take her examination under oath (EUO) concerning her fire damage claims. Following the EUO, respondent denied appellant's claims on the grounds that: (1) the fires were set by her or at her direction; (2) she increased the risk of hazard; (3) she concealed and misrepresented material facts relating to the insurance; and (4) she was not using the house as a residence at the time of the loss.

Appellant challenged the denial through respondent's internal appeal process; respondent's Governing Board upheld the denial. Appellant then challenged the denial with the Minnesota Department of Commerce (DOC), which also upheld respondent's denial of appellant's claims.

Appellant then brought this action against respondent, which alleged counterclaims in its answer. A hearing was held on the parties' cross-motions for summary judgment and resulted in the dismissal of some of their claims. A jury trial was held on the remaining claims; the jury found that appellant increased the risk of hazard. Appellant moved for JMOL or a new trial. The district court denied her motion and concluded that, because appellant increased the risk of hazard, respondent is not liable for the fire damage.

Appellant challenges the denial of her motion, arguing that she is entitled to JMOL because the jury verdict is contrary to law and, in the alternative, the district court abused its discretion in denying her motion for a new trial.

D E C I S I O N

1. JMOL

"JMOL is appropriate when a jury verdict has no reasonable support in fact or is contrary to law." *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007). This court reviews de novo a decision on a motion for JMOL. *Id.*

Appellant argues that she is entitled to JMOL because her policy did not list "increase in hazard" as an exclusion. But the Minnesota Standard Fire Insurance Policy statute provides that:

> Any policy or contract . . . which includes . . . coverage against the peril of fire and coverage against other perils may be issued without incorporating the exact language of the Minnesota standard fire insurance policy, provided: Such policy or contract shall, with respect to the peril of fire, afford the insured all the rights and benefits of the Minnesota standard fire insurance policy and such additional benefits as the policy provides; . . . such policy or contract is complete as to its terms of coverage; and, the

> commissioner is satisfied that such policy or contract complies with the provisions hereof.

Minn. Stat. § 65A.01, subd. 1 (2008). The Minnesota standard fire insurance policy, Minn. Stat. § 65A.01, subd. 3 (2008), includes this provision: "Unless otherwise provided in writing added hereto this company [the insurer] shall not be liable for loss occurring: (a) while the hazard is increased by any means within the control or knowledge of the insured."

Appellant argues that an "additional benefit" provided to insureds by her policy is the elimination of the standard policy's exclusion of insurer liability when the insured has increased the hazard. But nothing in appellant's policy supports the inference that respondent provided this "additional benefit" to its insureds. Moreover, appellant's policy does exclude coverage for losses caused by "neglect of the 'insured' to use all reasonable means to save and preserve property at and after the time of a loss" and for losses "arising out of any act committed . . . [b]y or at the direction of an 'insured' . . . [w]ith the intent to cause a loss." Construing appellant's policy *not* to provide the standard exclusion for losses occurring while the hazard is increased by a means within the insured's knowledge or control would implicitly, if not explicitly, conflict with these exclusions: e.g., an insured would be both permitted to increase the hazard to the property and required to use all reasonable means to save and preserve the property.

Appellant relies on *Krueger v. State Farm Fire and Cas. Co.*, 510 N.W.2d 204, 209 (Minn. App. 1993) (holding that, "when an insurer has issued a fire insurance policy providing more coverage than the statutory minimum [i.e., Minn. Stat. § 65A.01, subd.

3], the insurance contract between the parties determines the extent of the insured's coverage."). But the policy at issue in *Krueger* provided that "property loss caused by vandalism and malicious mischief is not covered by the insurance if the house had been vacant for more than 30 consecutive days immediately before the loss." *Id*. at 207. Minn. Stat. § 65A.01, subd. 3, provides that loss caused by fire is not covered if incurred "while the described premises, whether intended for occupancy by owner or tenant, are vacant or unoccupied beyond a period of 60 consecutive days." The damage in *Krueger* occurred from an incendiary fire set when the house had been vacant for about 180 days, or six months. *Id.* at 207. Because the insured claimed that he had never received a copy of the policy, the district court disregarded the policy and granted the insurer's motion for a directed verdict of no liability based on the 60-day statutory exclusion. *Id*. at 208. *Krueger* reversed the directed verdict because "it was error to direct a verdict without considering whether the [insurer's] policy afforded greater coverage than the minimum coverage required by [Minn. Stat. § 65A.01, subd. 3]" and remanded for a determination of coverage under the insured's policy. *Id*. at 209, 212.[1]

[1] The decision on remand was again appealed, and the Eighth Circuit discussed this court's opinion, noting that one basis for it was "that the Standard Fire Policy exclusion applies when the policy is silent." *Farm Bureau Mutual Ins. Co. v. Wilcox*, 500 F.3d 823, 825-26 (8th Cir. 2007) (discussing *Krueger v. State Farm Fire and Cas. Co.*, No. C0-94-557 (Minn. App. 16 Aug. 1994), *review denied* (Minn. 27 Oct. 1994)).

Here, there is no basis to conclude that appellant's policy afforded greater coverage by permitting insureds to increase the hazard because it did not explicitly exclude liability when the hazard was increased.[2]

2. New Trial

This court will not disturb the denial of a motion for a new trial absent an abuse of the district court's discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). But if the decision on a motion for a new trial was not an exercise of discretion but rather based on the presence or absence of an error of law, the decision is reviewed de novo. *Id.* "On appeal from a denial of a motion for a new trial, the verdict must stand unless it is manifestly and palpably contrary to the evidence, viewed in the light most favorable to the verdict." *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992), *review denied* (Minn. 29 Apr. 1992).

Because appellant argued that increased hazard was not an issue, neither her proposed jury instructions nor her proposed special verdict forms referred to increased hazard. She now argues that she is entitled to a new trial because respondent did not prove, and the jury did not decide, if the loss occurred while the hazard was increased by a means within appellant's control or knowledge or if appellant increased the hazard after the policy was issued. Specifically, she asserts that respondent cannot prove these points because respondent did not inspect the property before issuing the policy. But appellant

[2] The fact that appellant's policy permits cancellation of the policy if an act or omission of the insured "materially increases the risk originally accepted" is irrelevant to her argument. An insurer's explicit right to cancel a policy if the insured has increased the risk accepted does not remove the insurer's implicit right to exclude coverage if the insured has increased the risk accepted.

testified that, at the time of purchase, "there was an inspector that came to the house and everything at that point in time was up to code." When appellant applied for insurance, she said the property had no "unrepaired damage." Respondent provided evidence that, at the time of the fire damage, (1) the building had been condemned; (2) appellant had been repeatedly notified of many code violations; (3) these violations had not been corrected to an extent sufficient to lift the condemnation; and (4) the building had been ordered vacated, thus increasing its risk as a fire hazard. Particularly viewed in the light most favorable to the verdict, evidence supports the jury's finding that appellant increased the risk of hazard.

Appellant also argues that respondent did not prove and the jury did not decide if the increased hazard caused the loss. But "where the risk is in fact increased, it is immaterial that the loss was not caused by it." *Quam v. General Accident Ins. Co.*, 411 N.W.2d 270, 273 (Minn. App. 1987) (upholding jury instruction that "the insured's 'increase of hazard' may defeat recovery although the increased hazard did not cause the actual loss").

The district court did not abuse its discretion in denying appellant's motion for a new trial.

Affirmed.