IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00121 COA

INDUSTRIAL INSURANCE COMPANY OF HAWAII, INC.

APPELLANT

v.

ELIAS DABIT D/B/A OXFORD STREET

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

CHARLES E. ROSS

JOHN D. PRICE

ATTORNEY FOR APPELLEE:

MINOR F. BUCHANAN

NATURE OF THE CASE: INSURANCE

TRIAL COURT DISPOSITION: DIRECTED VERDICT FOR PLAINTIFF FOR $49,287.85

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

In this case, Elias Dabit held an insurance policy issued by Industrial Insurance Company of Hawaii

(Industrial), which covered a retail clothing store in Madison County. Dabit sustained a loss of merchandise due to water damage and filed a claim. Industrial denied the claim under a provision that voided the policy in the event of fraud or material misrepresentation. Dabit filed suit in the Madison County Circuit Court and was awarded $49,287.85 pursuant to a directed verdict granted in his favor. Industrial appeals to this Court, arguing that the trial court erred in excluding testimony and photos offered by Industrial's appraiser; the trial court erred in excluding the testimony of two of Dabit's former store managers; the trial court erred in limiting Industrial's cross-examination of Dabit; and the trial court erred in granting a directed verdict because issues of material fact existed that could only be resolved by the jury.

After a careful review of the record, we determine that material issues of fact do exist as to Industrial's liability under the policy. Accordingly, we reverse the decision of the lower court and remand this case for a new trial.

FACTS

Elias Dabit wholly owned or had a partnership interest in approximately forty-five retail clothing stores nationwide. He secured an "actual cash value" insurance policy from Industrial on about twenty of those stores. One store covered by that policy was Oxford Street, a sole proprietorship located in Madison County.

Oxford Street was situated on the ground floor of Northpark Mall, and the water lines servicing the mall ran through the ceiling of the store's back room storage area. One morning, the Oxford Street manager noticed a leak in the storeroom and had mall maintenance quickly place buckets beneath the leak. Later that same day, the water pipes burst, pouring as much as four inches of water into the storeroom and damaging much of the store's merchandise. The manager notified the proper mall personnel and within an hour, the water flow was stopped.

Dabit was in Texas, not scheduled to return immediately; therefore, the manager called Industrial's local agent, Bill Barham. Barham came out to briefly inspect the damage and informed the manager that someone would be by the next day to take an inventory of all of the damaged merchandise. Barham contacted Richard Booker, an independent insurance adjustor, to go to Oxford Street and take such an inventory.

Booker and one of his employees went to Oxford Street the next day and examined the merchandise. Booker separated the damaged from the undamaged items, taking note of the prices and style numbers on the damaged items. He stated that most of the merchandise had price tags, style numbers, and manufacturers' identification. After about four hours, Booker quit taking inventory because he needed Dabit present to answer questions, there was not enough space to dry out the wet merchandise, and he was running a high fever.

On Booker's suggestion, Industrial hired M. F. Bank, a salvage company from New Orleans, to assist in the valuation of the damaged goods. M. F. Bank sent Paul Dusang to Jackson to take a second, complete inventory of the merchandise to determine which items were actually damaged and which items were not. Dusang and Booker met with Dabit at one of his other Jackson-area stores. Dusang inventoried the merchandise and included a list of "damaged" and "questionably damaged" items. Undamaged items were not listed on Dusang's inventory. He noted the retail price of all of the items

that had price tags on them, but he did not place a cash value on any of the merchandise. After he finished, Dusang gave Dabit a copy of the inventory and asked him to fill in the wholesale costs and actual cash values of the goods just prior to the damage. Dabit supplied these values and returned the completed form to Booker, along with invoices that were purportedly the basis for the amounts listed. According to Dabit's calculation, he had sustained a loss of $63,867.68 in merchandise, to which he added $1,200 for labor, $500 for storage, and $400 for carpet cleaning, bringing the total claim to $65,967.68.

Both Booker and Hilton Harvison, manager of M. F. Bank, attempted to correlate the cost values listed by Dabit with the invoices, but were unsuccessful. They later met with Dabit and asked him to match the values to the invoices in their presence, but he could not do it either. Booker suggested that Dabit take the inventory and invoices home and properly document the basis for the values he was claiming. A few days later, Dabit resubmitted the inventory with substantially fewer invoices and a much smaller claim of loss. The number of invoices relied on by Dabit dropped from 129 to 54, and the amount of the loss dropped from $65,967.68 to $51,787.85. His explanation for this change was that he could not find invoices for all of the damaged merchandise, and in the interest of cooperation and expedience he only claimed those items for which he had an invoice. However, Harvison was still unable to reconcile the invoices with Dabit's claimed cost figures. Therefore, Harvison sent Dabit a "Proof of Loss" form, which he completed and returned, still claiming a $51,787.85 loss.

Industrial requested that the merchandise be made available for Harvison to inspect and appraise. Dabit consented and provided access to the independent storage facility where the merchandise was being kept. Harvison and Booker went to the facility and inspected the goods. Due to the lack of style numbers, they were unable to match the goods to the inventory previously submitted by Dabit. As a result, Harvison and Booker simply took an inventory and appraisal of the merchandise that was there. Harvison counted 600 items, when Dabit had only listed 450 items in his prior claim. Moreover, Harvison testified that he found many items that had been altered, items with dry cleaning tags on them, clothing that was shopworn and out of style, and clothing that was not water damaged at all. Dabit claims that when he went to the storage unit, he discovered that the goods inspected by Harvison and Booker were not all of the goods that had been damaged at Oxford Street. According to Dabit, many of the women's garments had been stolen or somehow lost, and there had been an intervening hailstorm which caused damage to the roof of the storage building, further damaging the goods. Harvison, however, testified that Dabit led him to believe that all of the goods in the third inventory were damaged as a result of the Northpark incident.

Industrial denied Dabit's entire claim due to willful misrepresentation. Dabit filed suit and was granted a directed verdict at the end of all the evidence. The trial court awarded Dabit $51,787.85, less the $2,500 policy deductible.

TESTIMONY OF INDUSTRIAL'S APPRAISER

Hilton Harvison testified on behalf of Industrial; however, the majority of his testimony, including photographs, was held to be inadmissible by the lower court at trial. Harvison's testimony revolved around the third inventory taken by him along with Richard Booker. The substance of this proffered testimony was that much of the clothing was not damaged at all or had damage inconsistent with water damage, that there were items that had been professionally dry cleaned or laundered, and some

items had already been altered. In addition, the volume of merchandise had significantly decreased since the previous inventory taken by Paul Dusang. Dabit explained that once the merchandise was moved to the independent storage facility, he did not have any control over it. He said that he did not even have a key. Dabit claimed that at some point, a hailstorm damaged the storage facility and caused further damage to the merchandise. Also, Dabit testified that the reduction in the volume of merchandise must have been due to an apparent robbery where almost all of the men's clothing and some of the women's clothing had been stolen.

As a result of this testimony, the lower court determined that the clothing inventoried by Harvison and Booker was not the same clothing that was damaged at Oxford Street. Therefore, upon objection at trial, the lower court ruled that Harvison's testimony was irrelevant. The lower court reasoned that the purpose of the litigation was for the jury to determine the extent and value of merchandise which sustained water damage at Dabit's Oxford Street store, and that Harvison's testimony concerned merchandise other than that damaged at Oxford Street. Therefore, his testimony could not aid the jury in its fact-finding obligations and should be excluded.

"The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990) (citing *Hentz v. State*, 542 So. 2d 914, 917 (Miss. 1989)). While it may be true that Harvison's testimony was irrelevant in the sense that it could not have helped the jury determine the value of the loss sustained by Dabit, it was, in fact, relevant to Industrial's defense. Industrial asserted that, in accordance with a policy provision, the entire policy was void because Dabit made material misrepresentations with regards to his claim. In support of this assertion, Harvison's testimony was to be evidence of the following facts: (1) prior to the third inventory, Dabit claimed that the merchandise in the storage facility was the same merchandise that was damaged at Oxford Street; (2) the merchandise inventoried by Harvison included items that had markings inconsistent with water damage, items that were not damaged at all, items that had sweat stains, items that had dry cleaning tags on them, and items that had been altered; and (3) the amount of merchandise being claimed by Dabit varied from one inventory to another. Therefore, according to Industrial, Dabit's claim was fraudulently based on merchandise that was not damaged as a result of the flooding at Oxford Street. We conclude that the lower court abused its discretion, and Harvison's testimony should have been presented to the jury.

TESTIMONY OF FORMER MANAGERS

Industrial intended to call two of Dabit's former store managers, Muhammed Jamalia and Amir Zakaria, as witnesses against him. However, Dabit filed a motion *in limine* to exclude their testimony. The lower court granted Dabit's motion, thus prohibiting Jamalia and Zakaria from testifying. Consequently, Industrial made a proffer of the deposition testimony of these witnesses. A review of their depositions reveals that both Jamalia and Zakaria were prepared to testify about prior incidents in which Dabit submitted fraudulent insurance claims. Specifically, the men related instances where Dabit sustained legitimate water damage to store merchandise, but increased the value of the insurance claim by adding or substituting outside merchandise.

The lower court determined that there was no proof of fraud or misrepresentation offered by Industrial; therefore, any testimony about prior acts of insurance fraud was ruled irrelevant.

However, Industrial's evidence shows that each time the merchandise was moved from one location to another, the volume changed substantially. In fact, Paul Dusang testified that Dabit's Oxford Street storeroom, where the damage occurred, was not large enough to even hold the amount of clothing presented to him at the time of the second inventory. Further, Industrial put on evidence that just after the merchandise was damaged, most of the items had price tags, style numbers, and manufacturers' identification; yet, when the second inventory was taken these tags had disappeared. There was also evidence that the "actual value" claimed by Dabit on several items exceeded his wholesale cost.

In light of this evidence, we believe that the testimony of Jamalia and Zakaria is relevant. Dabit makes the argument that under Rule 404(b) of the Mississippi Rules of Evidence, their testimony should be excluded because it is evidence of past acts used to show Dabit's bad character and that he acted in conformity therewith. Industrial argues, that this evidence fits into the exceptions of Rule 404(b). Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.*

M.R.E. 404(b) (emphasis supplied). Specifically, Industrial contends that the evidence of the formers managers is relevant and probative of a general *plan* to commit insurance fraud by adding extra merchandise to a claim and disguising it by removing price tags, and style numbers in order to render it impossible to identify the value of the merchandise. We find merit in this argument and hold that the testimony of Dabit's former managers, Jamalia and Zakaria, was relevant and admissible under Rule 404(b). We do not attempt to conduct the requisite balancing test of probative value versus prejudicial impact required under Rule 403 of the Mississippi Rules of Evidence, since we are unable to assess the context in which the issue may arise at retrial.

INVOICES USED IN MULTIPLE CLAIMS

Industrial next argues that it tried to put on evidence that some of the invoices that Dabit used in his present claim had been used by Dabit in prior insurance claims. Our review of the record reveals that Industrial's attorney asked Dabit on cross-examination if he had ever used any of these invoices in any other insurance claims. An objection was made, which the lower court sustained. Mississippi jurisprudence permits wide latitude in cross-examination. *Wallace v. Jones*, 572 So. 2d 371, 373 (Miss. 1990); *State Highway Comm'n v. Havard*, 508 So. 2d 1099, 1102 (Miss. 1987). Certainly, it appears to this Court that, had certain of the invoices offered to support this claim been used to support earlier insurance claims, this could result in a reasonable inference that the information in support of Dabit's claim was not legitimate. That would appear to be a proper subject of inquiry, and Industrial was not required to be able to disprove the truth of Dabit's answer, should he have denied such an occurrence, in order to ask the question. If he answered affirmatively, this would have supported the defense asserted by Industrial. If he had answered negatively and Industrial had available evidence to dispute his testimony, the evidence would have been admissible both on the central issue of the legitimacy of the claim and, collaterally for its tendency to impeach Dabit's

credibility as a witness. If he answered negatively and Industrial was unable to disprove the denial, then the matter would have been at an end. In all events, questioning along these lines appears a legitimate point of inquiry on cross-examination.

CORRELATION OF THE INVOICES BY DABIT

Industrial attempted to show that Dabit's invoices did not match the inventory by having Dabit try to correlate at trial. Dabit's attorney objected and Dabit stated that it would take him hours to go through all of those documents. The lower court sustained the objection and let the documents speak for themselves.

"An elemental requirement in the production of evidence is that it shall be intelligible to the triers of the facts . . . . Moreover, the production must be in such a state of preparation as to expedite the trial and prevent trespasses upon the time of courts and juries." *Bridges v. City of Biloxi*, 250 Miss. 717, 723, 168 So. 2d 40, 42 (1964). The lower court concluded that it would be a waste of the court's time to have Dabit physically go through the invoices at trial, and the jury could wade through them if it deemed it necessary. Here again, Industrial has not provided us with any proof or case law which shows error on the part of the lower court. Therefore, we find that there was no abuse of discretion.

This Court would suggest, however, the possibility of a brief reopening of discovery prior to retrial to permit Industrial to depose Dabit and, in a setting not designed to be so wasteful of so many individuals' time, permit an inquiry into Dabit's ability to correlate the inventory to the supporting invoices, so that the material can be properly organized for a more expeditious presentation of the relevant information to the jury.

DIRECTED VERDICT

Lastly, Industrial argues that the lower court improperly granted a directed verdict in favor of Dabit. "The decision to grant a directed verdict is one of law." *Fox v. Smith*, 594 So. 2d 596, 603 (Miss. 1992). The Mississippi Supreme Court has clearly stated the standard of review when a directed verdict has been granted at the end of all the evidence. The Court stated that Rule 50 of the Mississippi Rules of Civil Procedure requires:

> [T]he trial court to take a case from the jury and grant a directed verdict if any verdict other than the one directed would be erroneous as a matter of law. The comment to the Rule instructs the trial court to look "solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, *could* support a verdict for that party, the case should not be taken from the jury."

Kussman v. V & G Welding Supply Inc., 585 So. 2d 700, 702 (citing *Hall v. Mississippi Chem. Express, Inc*. 528 So.2d 796, 798 (Miss. 1988) (emphasis supplied)).

Initially, it must be observed that the burden of proof as to the amount of damages recoverable under the policy was upon Dabit. His burden in this case was two-fold: (a) to establish by a preponderance of the evidence what items of inventory were actually damaged from water leaks at the Northpark

Mall storage facility, and (b) the actual cash value of those items at the time of the casualty loss. There was a substantial question as to whether, and to what extent, Dabit established his right of recovery by a preponderance of the evidence. That question should have been resolved by the jury and not the trial court.

Additionally, the record evidence in favor of Industrial indicates that just after the damage occurred, at the time of the first inventory, a large majority of the merchandise had price tags, style numbers, and manufacturers' identification tags. A week to ten days later, the merchandise was moved to a new location where a second inventory was taken. At this time, Booker testified that everything that he had previously separated had been jumbled, that the volume of the merchandise had grown tremendously, and that most of the merchandise no longer had price tags, style numbers, or any manufacturers' identification. Dusang, who took the second inventory, also testified that he evaluated the storage space at Oxford Street and that there was enough room for about 250 suits, yet at the time of the second inventory there were 600 to 700 suits that were allegedly damaged at Oxford Street. Several months later, a third inventory was taken at an independent storage facility. The volume of merchandise had drastically decreased, and Booker asserted that many of the items had damage that was inconsistent with water damage. Likewise, most of the clothing was old and used as evidenced by sweat stains, laundry tags, and alterations. There is further evidence that the invoices submitted by Dabit were insufficient due to the lack of style numbers. Booker, Harvison, and Dusang, all of whom have experience in the clothing industry, attested that it is highly unusual for invoices not to have style numbers on them, and that it is virtually impossible to determine the value of a piece of clothing without a style number. In addition, many of Dabit's "invoices" were nothing more than transfer slips written up by his employees when a garment had been transferred from one of Dabit's stores to another.

It appears that the trial court, in granting a directed verdict, simply disregarded the policy provision voiding any coverage in the event of a fraudulent claim. Dabit offered explanations for the discrepancies in the items being claimed at various times, and the trial court apparently found these explanations credible. Nevertheless, it remains the case that the jury could, on competent evidence, have seen the matter differently and could have reasonably inferred that Dabit knowingly attempted to add items to the insurance claim that were not, in fact, damaged as a result of the Northpark incident. Under the clear terms of the policy, such acts would void any right of recovery and would not require the jury to weed out those items fraudulently claimed and still permit recovery on those determined to be legitimate. Such a contractual provision defeating any recovery has been enforced in other jurisdictions, and we see no basis to deny its application in this instance. *See Frontier Exploration, Inc. v. American Nat'l Fire Ins. Co.,* 849 P.2d 887, 892-94 (Colo. Ct. App. 1992); *Wendel v. State Farm Fire & Casualty Co.,* 435 So. 2d 284, 285 (Fla. Dist. Ct. App. 1983); *Georgia Farm Bureau Mut. Ins. Co. v. Richardson,* 457 S.E.2d 181, 184 (Ga. Ct. App. 1995).

Considering this evidence, we determine that a reasonable, fair-minded jury could have found merit in Industrial's affirmative defense of willful misrepresentation on the part of Dabit, thus voiding the policy and absolving Industrial of any liability, or could have reached a different conclusion than the trial court as to exactly what portion of Dabit's claim was sustained by a preponderance of the evidence. Therefore, the lower court prematurely and erroneously took this case from the jury. Accordingly, we reverse.

THE JUDGMENT OF THE MADISON COUNTY CIRCUIT COURT IS HEREBY REVERSED AND REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO THE APPELLEE.

FRAISER, C.J. , THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., NOT PARTICIPATING.