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CITATIONS

1. Allstate Ins. Co. v. Boggs (1971), 27 Ohio St. 2d 216
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3. Fernando v. Auto Owners Mutual Ins. Co. (2002), 98 Ohio St. 3d 186, 205-206, 202-Ohio 7217
4. Ohio Revised Code Sections 3923.14 and 3911.06
5. Westgate Ford Truck Sales, Inc. v. Ford Motor Company (August 9, 2007), Court of Appeals, 8th District, Cuyahoga County
6. Spriggs v. Martin, 115 Ohio App. 529, 182 N.E. 2d 20 which cited Cross v. Ledford, 161 Ohio St. 460, 120 N.E. 2d 118

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GENERAL INTEREST.
THE INSURANCE COMPANY HAS TRIED TO USE THE INSURED'S LACK OF TOTAL
CANDOR TO DENY HIM COVERAGE UNDER HIS POLICY.

This case involves an unusual accident in which the insured was operating a front-end loader, which he had recently acquired, leveling ground on his property. The insured had been operating that piece of equipment and had just stopped on the top of a hill, when his friend stopped at his house to see him. The insured drove the front-end loader down the hill, and in doing so found himself without power or ability to control the unit. The front-end loader barely missed his friend but struck and substantially damaged his home. He immediately notified the insurance company and spoke with the insurance agent, and met with an estimator who came out and helped secure the property and then over several days did a complete inspection of the property. The insured had no problems with either the agent or the estimator.

It wasn't until the insurance investigator appeared on the scene several days later that the insured encountered problems. The insured had been recovering from chemotherapy, was weak and not well. After the investigator walked the insured up and down the hill three or four times, the investigator then decided to make a taped statement. After describing the accident again on tape the agent turned to other issues including the insured's business interest, his girlfriend, and also asked where he acquired the front-end loader. The Appellant testified that he was aggravated by the investigator who as much as called him a liar in relation to the questions about how the accident happened. But when he asked where he acquired the front-end loader the insured stated that he didn't remember but it was in southern Ohio someplace. The insured subsequently admitted several days later that the front-end loader came from a business in his hometown. He further testified that he did not want this investigator going there and interfering

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with his business relationship with the company that sold him the front-end loader because the insured believed would interfere with a future business relationship between himself and said company.

It is this last statement that the insurance company has classified as a "lie" and based upon the insured's failure to identify the direct source of where he acquired the front-end loader that they instituted an action to declare the insured's policy null and void by reason of the "lie".

It is this lack of candor by the insured as result of his frustration and aggravation with the insurance investigator and only this statement that his led to this trial. It is The Court's interpretation of this one statement as of this date that has denied the insured coverage under his policy. That is why this case is of public and great general interest.

The investigator admitted in trial that he did not rely on the insured's statement, that within two days of beginning his investigation he knew exactly where the front-end loader came from and that the information obtained in his investigation was not material to his investigation and that the insured's statements did not impede his investigation. Again, that is why this case is of public and great general interest.

Appellant herein believes that it is crucial that there be some standards and/or guidelines established which do not appear evident from the case law as it relates to this matter. The Appellants believe that there is no case law in this area because most of these claims are paid for by the insurer. The case as cited to the Common Pleas Court and to the Court of appeals by the Appellees, herein involved cases where the insured's did in fact intentionally cause damage to their properties, either by way of fire or other intentional act. There has been no such determination in our case; in fact, the jury concluded that the plaintiff did not prove that this was not an accident.

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The Appellant believes that in order for any misstatement to be material, that there needs to be some reliance on that statement by the insurance company, and/or that said statement inconvenience or delay the investigation in some manner; neither of which existed in this case. The inadvertent statement by the insured should not be sufficient to deny him coverage under his policy. This would be contrary to public policy and is therefore, of great public and general interest.

The decision of the Court of Appeals sets a precedent that would allow the insurance companies to utilize unscrupulous investigators in order to irritate and/or antagonize claimants. If they are less than fully cooperative and candid with the investigator that the insurance companies can deny coverage under their policy. This leads to a preposterous result, especially when the insurance company did not rely on any such statement and were not inconvenienced or delayed in their investigation. In the case at hand, the subsequent ensuing investigation produced no information that would result in a finding other than that the claimed accident was in fact an accident as is covered under the policy of the insured. Appellees at trial before a Jury were unaber to prove beyond a reasonable doubt as concluded by the Jury that it was not in fact an accident.

The insured's intent was not to impede the investigator, which he did not do, but was intended to protect his business interest. Failure to provide complete information to this investigator at that time should not be sufficient to deny him coverage under his policy.

The Court of Appeals also considered an issue of whether or not the insured improperly tore down his residence after the insurance company had surrendered the residence back to him. Of greater general significance is the fact that the insurance company offered the insured \$5,000.00 to clean up his property after the accident, and gave him no direction whatsoever as to

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what that meant. In the perceived authorization, the insured then removed the building from the premises. At that time the building was being held up by supporting braces and had a cracked foundation from front to back. The insured testified that as of the day of trial he still had not ever heard from the insurance company as to the extent of loss and/or findings and therefore tore the building down. Public policy would dictate that the insured follow his own conscience and proceed as he did, absent proper direction to the contrary.

Both of the foregoing issues we believe create great and significant general interest. The Appellant asks that the Supreme Court address the same and to establish future guidelines upon which the lower Court's may construe and interpret the insurance policy. If the insurance company does not rely upon the statements, and have not been inconvenienced or delayed in their investigation, by a statement in a sufficient way, then the statement of the insured cannot be used to deny coverage under the policy. Only in this manner is the Defendant protected from unscrupulous and hostile investigators who attempt to terminate coverage under a policy that the insured has paid substantial premiums for over the life of the policy. This Court must grant jurisdiction to hear this case and review the substantial issues of great public and general interest for the benefit of all policyholders to prevent unjust results and enrichment to the insurance companies.

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STATEMENT OF THE CASE AND FACTS

This case arises out of an accident in which the insured John Skeens was operating a front-end loader that he had recently purchased on his property in Piqua Miami County Ohio. On the day in question he was on a slight elevation when his friend came on his property and he rode the front-end loader down the hill to talk with him. On his way down the hill he encountered a situation he had never encountered before. As he started down the hill he encountered a total loss of control of the front-end loader and he had no steering or brakes. He barely missed his friend and in doing so struck his house and caused substantial damage to his home. The electrical power fell on the top of the front-end loader and he was almost electrocuted and he was thrown around in the cab of the front-end loader.

The insured reported the incident to his insurance agent who then sent an estimator out to the property and over a period of numerous days the investigator prepared his analysis of the damage to the property. Several days later an investigator was sent to the property to conduct an interview with the insured.

The insured was a ninth-grade dropout from school. He however had developed and operated several small businesses to support himself over the years. He was at that time of the interview recovering from chemotherapy and was weak and did his best to cooperate with the investigator. After several trips up and down the hill to explain over and over how the accident occurred, which statements were consistent throughout, the investigator asked to take a taped statement. After again describing the accident the insured was asked several questions that he was offended by which were not relater to the accident. One such question involved where he acquired the front-end loader. In the insured's attempt to protect his business interest he did not

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immediately disclose where he had acquired the front-end loader, but stated he would provide the information at a later date. He testified at the trial that he did not believe that was relevant to the accident. In fact he stated that he got the front-end loader in southern Ohio someplace. The investigator testified at trial that after taking the insured's statement that he talked with the neighbors the next day and he found out exactly where the front-end loader came from. He was therefore able to contact the company it was purchased from and learned that the unit was purchased "as is". Nothing useful to the Insurance Company came from this investigation, and only supported the insured's statement that the piece of equipment would lose power and total control when it lost its prime. There would be no brakes or steering.

As a result of the insured's statement that he did not know where the front-end loader came from he has been brandished as a "liar". It was this lie and only this lie that prevents the insured from coverage under his policy.

The insurance company however testified through its investigator that it did not rely on any of the insured's statements and having found out the information themselves within two days, the same did not impede their investigation. The insurer furthered acknowledged in testimony that nothing that they learned involving the front-end loader and/or its source in any way resulted in a finding that this was not an accident and the Jury in fact concluded that the insurance company did not prove beyond a reasonable doubt that this was not an accident.

The insured relied on the Common Pleas Court to apply the law to the Jury's finding of fact, and to go beyond the findings of the Jury to find that the law requires more than this incomplete statement. The Appellant believes that the Court should require that the statement of the insured relates to the risk of loss in order to justify termination of benefits under the policy. The Jury found the insurance company did not prove this was not an accident, however the Court

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found because of the admitted lie, the insured had violated his policy and therefore was not entitled coverage. The Court of Appeals in their finding found that the Nationwide investigator did uncover independently the truth of the facts concerning the purchase of the front-end loader, which turned out to be of no assistance to Nationwide. The Court of Appeals went astray however in their decision stating that false answers are material if they might have affected attitude and action of the insurer and they are equally material if they may be said to have calculated either to discourage, mislead, or deflect the company's investigation in an area that might seem to the company at that time, relevant or productive area to investigate. We do not argue with the Court of Appeals position in that matter, that every statement is so misleading that it warrants a termination of coverage under the terms of the policy. The insured didn't give the insurance company a specific location and indicated he would provide information at a later date. The insurance company's routine investigation had the information within two days and the information did not produce anything material in the investigation to deny the claim. The delay in securing the information had no bearing on the investigation whatsoever. This decision is contrary to public policy and is of great public interest and is of great general concern to all insured's.

The Insurance Company had no problem taking the ninth grade dropout's money but now expect that the insured appreciates an investigators investigating issues such as your income, your business interests, your girlfriends, any other sundry inquiries that might disclose information leading to the insurer's ability to determine a financial and/or other alterative motive for the accident. The Court of Appeals goes too far in stating that the statement of the insured in and of itself, at that moment, is sufficient to deny coverage under this policy as even though the

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information was not material to the Nationwide Insurance Company, and led to no material findings.

The Court further concluded that the "lie" was sufficient to result in recoverable fraud. Is every lack of full disclosure fraud? The Appellant herein believes the mere statement that he made and admitted to is not fraud, and of itself cannot be the basis for cancellation of his benefits under his policy and that there appears to be a lack of standard for the Court to investigate or pursue when the insurance company 1) fails to rely on it, 2) fails to act on it, and 3) fails to uncover any material evidence, that would lead the Jury or the insurance company to a finding that this was not an accident.

There are many cases finding that Insurance Policies are to be construed against the Insurance Companies and in favor of the policyholder.

The insurance company can only win by attacking the insured's personality. Does nothing justify the insured's defensive position against the offensive investigation? Does any incomplete statement void the policy? In this case, even with all this information the insurer has not been able to prove that this was not an accident.

There are other discrepancies in the insured's statement, which are due to recall or delayed memory. For example, the insured originally said he did not hit the brakes and originally he said he did. Since there were no brakes, it is not material how he remembers the issue over a year later.

What is important, and of great public interest is that the insurance company not decide this case, other than on its merits.

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ARGUMENTS

The insured, John Skeens, Appellant herein, clearly acknowledged within days after his taped statement that he did not totally provide all the information to the investigator during his taped statement. The investigator had just put the defendant through rigorous physical acts to reenact the accident then decided to take an oral statement. The Appellant was recovering from chemotherapy and was weak and frustrated by the investigator who had called him a liar challenging his description of the accident. Under extreme circumstances, the investigator asked the appellant to again explain the accident on the record. After he described the accident on the tape then the investigator started to pursue areas unrelated to the accident itself including the defendant's business interest, financial condition, relationships with his girlfriend, and where he acquired the front in loader. The defendant did not appreciate, nor did he understand, nor did the investigator explain to him the reason for the far-reaching questions, which went outside the scope of the investigation of the accident itself. These sundry issues did not relate to the risk and/or loss but questioned the insured's credibility, these issues may be relevant to Appellee's investigation however they were not relevant to the accident itself. The insured did not appreciate or understand these questions since the accident had nothing to do with his other business interests or relationships. The Court has had the benefit of the depositions in this matter and the court should note that the attorney for the plaintiff, in his deposition of the defendant, went to great lengths to explain to the defendant why he was making inquiries in areas not related to the accident. The investigator had not explained, in any regard, the reasons for his inquiry into the defendant's financial condition, the financial condition of his businesses, his cash holdings, his relationship with his girlfriend, where the equipment was purchased, and many other extraneous issues pursued at the scene. The defendant however still answered all questions

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propounded to him by the investigator except when asked about the source of the front-end loader. Mr. Skeens said he would attempt to secure the source of the equipment and provide it to him at a later date. The investigator testified that in talking to the neighbors and within two days established where the front-end loader came from. The testimony is clear that the defendant was forthright in providing all of the answers necessary to all of the inquiries of the plaintiff's counsel and investigator other than the immediate disclosure of the source of the piece of equipment. Right or wrong, the defendant indicated that the reason for not divulging information was not to impede the investigation into the accident but was to protect his business relationship with Piqua Materials.

The defendant did testify that he believed that he had just cause for refusing to answer that question because of the attitude of the investigator, who he believed that if he took the same attitude with Piqua Materials, it would interfere with insured's business relationship with Piqua Materials. That is exactly what happened as testified by insured.

The Court should also be aware that the defendant did not provide any information that led the investigator to conduct any additional investigation and/or to incur any additional expense in locating the source of the equipment and/or the condition of the sale of the equipment. In fact, the investigator said within two (2) days he knew exactly where the machine came from and was able to speak with Piqua Materials relative to the piece of equipment. More importantly, the investigator further testified on the last day of the trial that he did not accept or act on any of the defendant's statements and pursued his own investigation independent of anything that the defendant had told him. He also testified nothing material came from this information.

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The defendant would cite this Court to *Allstate Ins. Co. v. Boggs* (1971), 27 Ohio St. 2d 216, which states that a misrepresentation must be “fraudulently made and... material to the risk”. The questions of the investigator clearly did not relate to the risk, which was the damage done to the house as a result of the accident. It related only to the credibility of the insured as to whether this was an intentional action or an accident. The jury found in favor of the insured in that Nationwide did not prove that this was not an accident. If the misstatement is not material to the risk then, “it does not void the policy ab initio” *ibid*. The false statement, which was openly and quickly admitted to after the taped statement was made, was not material to the risk nor did it prejudice the plaintiff in their investigation. *Ibid*.

Nowhere can the plaintiffs state or show that they were prejudiced by the defendant’s actions. The Court should also look at the case of *Nicholas v. McCullough – Baker Ins. Serv. Inc.* (2007), 207 Ohio St. 1748, wherein the Court discussed the issue of breach of contract based upon whether or not the insurer is prejudiced by the actions of the insured. See also *Fernando v. Auto Owners Mutual Ins. Co.* (2002), 98 Ohio St. 3d 186, 205-206, 202-Ohio 7217. The plaintiff never argued that they were prejudiced in any way by Defendant’s actions. In fact the investigator stated he relied on nothing the appellant had to say and within two days obtained the information requested.

All misrepresentations do not render a policy void (*Allstate Ins. Co. v. Boggs Supra*). Where the plaintiff is not prejudiced by the statements of the defendant (*McCullough – Baker Ins. Supra*) and where the misstatement does not relate to the risk involved (*Allstate Ins. Co. v. Boggs Supra*) then the policy should not be declared void and defendant should be allowed to recover his loss.

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Even the Ohio Legislature has adopted Ohio Revised Code Sections 3923.14 and 3911.06 which both indicate that a false statement as it relates to an [application for] insurance does not, in fact, invalidate the policy unless it materially effects the risks assumed by the insured. We just previously argued that Appellant's statements had no bearing on the risk and the plaintiff was not prejudiced in any way by his statements. The plaintiff has shown no other misstatement by the defendant and, although they hammered on the alleged "lie", they were never able to establish a motive or explanation for the accident. It was concluded by the jury, that Nationwide did not prove that this was not an accident. The Appellant did not benefit by the misstatement nor was the plaintiff prejudiced by said statement and, as Plaintiff admitted at trial, it did not impede or interfere with the investigator in pursuit of his investigation of the claim. One misstatement in the overall bearing on the case did not constitute sufficient grounds to void the policy (see *Westgate Ford Truck Sales, Inc. v. Ford Motor Company*, Court of Appeals, 8th District, Cuyahoga County, decided August 9, 2007).

As to the fraud issue, Appellant directs the Court to *Spriggs v. Martin*, 115 Ohio App. 529, 182 N.E. 2d 20 which cited *Cross v. Ledford*, 161 Ohio St. 460, 120 N.E. 2d 118, which turned on the fact that in order to rescind the contract on the grounds of fraud, "the statement must be made; 1) with intent to mislead a party to rely thereon (here there was nothing to rely upon) and; 2) that such party relied on such representations". The intention of the statement made by the Appellant was to protect his business, not to mislead the plaintiff, and it was made clear from the testimony of the investigator, Kelleher, on the final day of trial that he did not accept any of the defendant's statements and did not rely on, nor did he act on them.

For the reasons discussed above, the case involves matters of public and great general interest and we need this Court to set forth guidelines which require that any misstatement of the insured

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be 1) relied upon and 2) be instrumental in the investigation of the risk and not necessarily in the truth and veracity of the insured. The Appellant requests that the Court accept jurisdiction in this case so the important issues presented herein will be reviewed on their merits. Further Appellant requests that guidelines as requested herein are established to protect innocent policyholders from scrupulous investigators and insurance companies.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this court accept jurisdiction in this case so that the important issues present will be reviewed on the merits for the benefit of the appellant and all policy holders everywhere.

Respectfully submitted,



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JOHN L. SKEENS

CERTIFICATE OF SERVICE

I hereby acknowledge that the foregoing Defendant's Brief was served upon Nicholas E. Subashi, Attorney for Plaintiff, The Oakwood Building, 2305 Far Hills Avenue, Dayton, Ohio 45419, Facsimile: 937-534-0505 this 17th day of August, 2007 via Ordinary U.S. Mail.



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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

NATIONWIDE MUTUAL
INSURANCE CO.

Plaintiff-Appellee

v.

JOHN L. SKEENS

Defendant-Appellant

Appellate Case No. 07-CA-29

Trial Court Case No. 06-370

(Civil Appeal from
Common Pleas Court)

.....
OPINION

Rendered on the 18th day of April, 2008.
.....

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BROGAN, J.

John L. Skeens appeals from the trial court's declaratory judgment that he is not entitled to coverage on a claim he made under a homeowner's insurance policy issued by appellee Nationwide Mutual Insurance Company.

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

Skeens' insurance claim resulted from his act of driving a front-end loader downhill into his house and causing substantial damage. After investigating the incident, Nationwide concluded that it was not an accident. Nationwide took the position that Skeens intentionally drove the front-end loader into his house and lied about the circumstances of the loss. For his part, Skeens insisted that the incident was an accident. He claimed it occurred when his brakes and steering failed while he was operating the front-end loader.

In response to Nationwide's declaratory judgment action, the trial court allowed a jury to resolve the factual disputes underlying Skeens' insurance claim. At the conclusion of the trial, the jury answered six interrogatories. First, it found that Skeens intentionally had concealed or misrepresented a material fact or circumstance in making his claim. Second, it found that he had committed fraud. Third, it found that he knowingly had made a false statement relating to his loss. Fourth it found that he had failed to use all reasonable means to preserve or protect his property from further damage. Fifth, it found that he did not fail to submit a signed and sworn proof-of-loss form within sixty days of Nationwide's request. Sixth, it found that Nationwide had failed to prove, by a preponderance of the evidence, that the incident was not an accident.

Based on the jury's response to the first three interrogatories alone, the trial court held that Skeens' Nationwide policy unambiguously precluded coverage. As a result, the trial court entered a declaratory judgment that the damage to his house was not a covered loss under the policy. This timely appeal followed.

Skeens advances four assignments of error for our review. His first assignment of error is as follows:

1. "The Court failed to consider this as a Declaratory Judgment action and instead attempted to consider the case on its merits for breach of contract, even though the Defendant-Appellant did not have an opportunity to present his case in chief on the merits."

Skeens' initial assignment of error bears no relationship to the actual arguments he presents thereunder. He first asserts that the jury's response to interrogatory number six precluded the trial court from finding that he intentionally drove the front-end loader into his house. Therefore, he contends the trial court should not have entered a declaratory judgment finding no coverage.

Skeens' argument lacks merit. Interrogatory number six established Nationwide's failure to prove that the incident was not an accident. The declaratory judgment entered in favor of Nationwide does not conflict with this interrogatory. The trial court did not base its ruling on a finding that Skeens intentionally drove into his house. Instead, it based its declaratory judgment on the jury's response to the first three interrogatories, which established that Skeens intentionally had concealed or misrepresented a material fact or circumstance, had committed fraud, and knowingly had made a false statement relating to his loss. The trial court determined that these acts by Skeens precluded coverage under the policy, regardless of whether he drove into his house intentionally or accidentally.

Skeens next argues that his misrepresentations to a Nationwide investigator concerning his purchase of the front-end loader were not material. This argument concerns Skeens' admitted lies to the investigator regarding where he purchased the front-end loader and how much he paid for it. Skeens told the investigator that he bought it in the Cincinnati/Northern Kentucky area from someone named "Dave," that he paid \$8,000 cash,

and that no bill of sale existed. In reality, Skeens purchased the front-end loader locally from Piqua Materials, Inc., paid \$3,000 for it using a check from his business, and received a bill of sale and disclaimer of warranty. On appeal, Skeens insists that these misrepresentations were not material because (1) Nationwide's investigator later independently uncovered the truth and (2) the facts concerning his purchase of the front-end loader turned out to be of no assistance to Nationwide.

We are unpersuaded by Skeens' arguments. "The requirement that a misrepresentation be material is satisfied, in the context of an insurer's post-loss investigation, if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding. Accordingly, false answers are material if they might have affected the attitude and action of insurer, and they are equally material if they may be said to have been calculated either to discourage, mislead, or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. * * * Since the purpose of requiring answers to questions is to protect the insurer against false claims, the materiality of false answers should be judged at time of the misrepresentation, and not at time of trial." 6 Russ & Segalia, *Couch on Insurance* (3d Ed. 2005), Section 197:16 (footnotes omitted).

At the time of Skeens' misrepresentations, his response about the origin of the front-end loader was material to Nationwide's investigation. A representative of the insurance company explained that facts about the purchase of the front-end loader were relevant to a potential subrogation claim against the seller. Additionally, in light of Skeens' assertion that a malfunction of the front-end loader's brakes and steering caused the incident, Nationwide wanted to identify the seller to inquire about the machine's operational and

repair history. Skeens' false answer about where he got the machine reasonably might have affected Nationwide's course of action, and the misrepresentation admittedly was calculated by Skeens to mislead the company in its investigation. The fact that Nationwide later discovered the truth and had no subrogation claim against Piqua Materials does not affect the materiality of Skeens' false statement because materiality is judged at the time of the misrepresentation. *Id.*; see also *Abon, Ltd. v. Transcontinental Ins. Co.*, Richland App. No. 2004-CA-0029, 2005-Ohio-3052, ¶82 ("Most courts have construed materiality broadly, emphasizing that the subject of the misrepresentation need not ultimately prove to be significant to the disposition of the claim, so long as it was reasonably relevant to the insurer's investigation at the time.").

Skeens next asserts that the materiality of his misrepresentation and the exclusionary terms of his policy were unclear to him. Therefore, he argues that Nationwide should be required to pay his claim, notwithstanding any false statements on his part. We reject this argument for at least two reasons. First, as Nationwide points out, an insured such as Skeens "has a duty to examine the coverage provided him and is charged with knowledge of the contents of his own insurance policies." *Fry v. Walters & Peck Agency, Inc.* (2001), 141 Ohio App.3d 303, 312. Second, we find nothing ambiguous or confusing about the pertinent policy language, which precludes coverage based on the misrepresentation or concealment of a material fact, the commission of fraud, or the making of false statements related to the loss. Skeens' first assignment of error is overruled.

His second assignment of error states:

II. "The Court did not require Plaintiff-Appellee to prove all of the elements of a recoverable fraud, including justifiable reliance and/or damages."

Skeens argues that his false statement regarding the origin of the front-end loader was insufficient to support the jury's finding of fraud. In particular, Skeens argues that a finding of fraud requires proof that Nationwide justifiably relied on his misrepresentation and that the insurance company was injured by such reliance. Absent justifiable reliance and a resulting injury to Nationwide, Skeens argues that coverage for his loss cannot be denied on the basis of fraud.

Upon review, we need not decide whether Nationwide proved fraud under the terms of the policy. Even assuming, arguendo, that Nationwide failed to establish actionable fraud, the trial court properly entered a declaratory judgment finding no coverage under the policy. As set forth above, the jury's response to the first three interrogatories established that Skeens (1) intentionally had concealed or misrepresented a material fact or circumstance, (2) had committed fraud, and (3) knowingly had made a false statement relating to his loss. Under the terms of the Nationwide policy, any one of these three findings precluded coverage.

In our analysis of Skeens' first assignment of error, we found that his false statement about where he purchased the front-end loader qualified as an intentional misrepresentation of a material fact. On this basis alone, Nationwide was justified in denying coverage under its policy, regardless of whether Skeens' false statement about the origin of the front-end loader also qualified as being fraudulent. Accordingly, we overrule his second assignment of error as moot.

Skeens' third assignment of error asserts:

III. "The Court inappropriately concluded that the Defendant-Appellant tore the house down in order to prevent the Plaintiff-Appellee and a possible law enforcement agency from further investigating or testing."

Shortly after Nationwide's investigation into Skeens' claim, he used his front-end loader to demolish the remainder of his house. Based on this act, the jury found in its fourth interrogatory that Skeens had failed to use all reasonable means to preserve or protect his property from further damage. In its written opinion, the trial court inferred from the evidence and the jury's fourth interrogatory "that the Defendant removed the building and all material to prevent the Plaintiff and possibly a law enforcement agency from further investigation or testing."

Skeens takes issue with the foregoing statement by the trial court. He contends he was entitled to raze the house. He also asserts that the insurance company was not prejudiced by his conduct. As noted by Nationwide, however, the trial court expressly declined to base its declaratory judgment on the jury's fourth interrogatory or Skeens' act of tearing down the house. Instead, the trial court found coverage unavailable based on other policy exclusions. Because the trial court's declaratory judgment was not based on a finding that Skeens impermissibly tore down his house, the third assignment of error is overruled as moot.

Skeens' final assignment of error states:

IV. "The Court's decision is manifestly against the weight of the evidence for a summary (sic) for a Declaratory (Summary) Judgment action."

Skeens reiterates arguments made elsewhere in his brief and insists that the trial court's declaratory judgment finding no insurance coverage is against the manifest weight

of the evidence.

Under the civil manifest-weight standard, a judgment supported by some competent, credible evidence going to all the essential elements will not be reversed as being against the manifest weight of the evidence. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. When conducting our review, we must presume that the findings of the trier of fact are correct. *Id.*, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. We may not reverse based on a mere difference of opinion regarding the credibility of the witnesses and the evidence submitted at trial. *Id.*

Here, the manifest weight of the evidence supports the jury's finding that Skeens intentionally made a material misrepresentation when he lied to Nationwide about where he got the front-end loader. We adequately addressed the materiality of Skeens' false statement under his first assignment of error. Moreover, as the trial court correctly found in its written opinion, Skeens' Nationwide policy unambiguously excludes coverage if an insured intentionally misrepresents a material fact. Therefore, the trial court's declaratory judgment, finding no coverage available under the Nationwide policy, is not against the manifest weight of the evidence.

Skeens' various arguments under his fourth assignment of error do not persuade us otherwise. He first contends he was honest with Nationwide about everything except where he got the front-end loader. Nationwide disputes this assertion, arguing that Skeens lied about numerous things, including whether the home had termites and whether the brakes and steering on the front-end loader malfunctioned at the time of the accident. But even if Skeens lied about nothing more than where he purchased the front-end loader, that

material misrepresentation alone was sufficient for Nationwide to deny coverage.¹

Skeens next stresses Nationwide's failure to prove, by a preponderance of the evidence, that the incident was not an accident. He contends the jury's finding on this issue in interrogatory number six proves that he was truthful about the front-loader's brakes and steering malfunctioning. Once again, however, even if the incident was an accident, Skeens' material misrepresentation about the origin of the front-end loader justified Nationwide's denial of coverage.

Skeens also contends the evidence does not support a finding that he tore down his house after the incident to prevent further investigation. As we noted above, however, Skeens' destruction of the remainder of the structure was not the basis for the trial court's declaratory judgment in favor of Nationwide.

Finally, Skeens reiterates his fraud argument, asserting that Nationwide failed to prove justifiable reliance on his misrepresentation about where he got the front-end loader or any injury resulting from the false statement. Under Skeens' second assignment of error, however, we concluded that his lie about where he purchased the front-end loader qualified

¹Throughout its brief, Nationwide asserts that Skeens made numerous false statements. A review of the record—including Skeens' depositions and the trial transcript—tends to support Nationwide's assertion. Skeens gave varying, conflicting accounts about how the accident occurred and the functioning of the brakes and steering. On their face, some of his statements appear questionable. Nevertheless, it is axiomatic that assessing credibility is primarily the function of the trier of fact. In this case, a jury concluded that Nationwide had failed to prove the incident was not an accident. Seemingly implicit in this determination is a finding that the front-end loader's brakes and steering did not work when Skeens drove it downhill into his house. Indeed, if the brakes and steering were working, he presumably could have stopped or turned to miss the house. Therefore, for purposes of our analysis herein, we have assumed, *arguendo*, that Skeens did not lie about the functioning of his brakes and steering. Instead, we have focused exclusively on his admitted falsehood about where he purchased the front-end loader.

as an intentional misrepresentation of a material fact. As we explained above, the misrepresentation justified Nationwide's denial of coverage under the terms of its policy, regardless of whether the insurance company also proved fraud. Skeens' fourth assignment of error is overruled.

The judgment of the Miami County Common Pleas Court is affirmed.

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FAIN, J., and DONOVAN, J., concur.

Copies mailed to:

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Thomas J. Buecker
Hon. Robert J. Lindeman

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

NATIONWIDE MUTUAL
INSURANCE CO.

Plaintiff-Appellee

v.

JOHN L. SKEENS

Defendant-Appellant

Appellate Case No. 07-CA-29

Trial Court Case No. 06-370

(Civil Appeal from
Common Pleas Court)

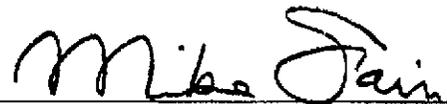
FINAL ENTRY

Pursuant to the opinion of this court rendered on the 18th day
of April, 2008, The judgment of the trial court is **Affirmed**.

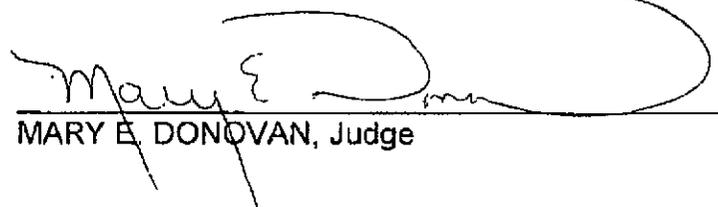
Costs to be paid as stated in App.R. 24.



JAMES A. BROGAN, Judge



MIKE FAIN, Judge



MARY E. DONOVAN, Judge

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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