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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001121-MR

EMC/HAMILTON MUTUAL INSURANCE COMPANY OF CINCINNATI, OHIO — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR. JUDGE
ACTION NO. 02-CI-00093

MICHELLE LOWE, ADMINISTRATRIX OF THE ESTATE OF BRANDY MICHELLE LOWE, DECEASED — APPELLEE

OPINION
AFFIMRING

** ** ** ** **

BEFORE: DIXON AND MOORE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: The single question in this appeal is whether substantial evidence supports a jury determination that appellant Hamilton Mutual Insurance Company failed to mail a notice of non-renewal to appellee Michelle Lowe. We affirm.

Lynn and Michelle Lowe purchased a personal automobile insurance policy with EMC/ Hamilton Mutual Insurance Company of Cincinnati, Ohio (Hamilton) through

[1]Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Kentucky Constitution Section 110(5)(b) and KRS 21.580.

Rankin Insurance Center in Monticello, Kentucky. The policy provided that Hamilton could decide not to renew the policy by mailing a notice to the Lowes at the address shown on the declarations page of the policy at least 75 days prior to the end of the policy term. Hamilton alleges that it mailed two separate non-renewal notices on June 19, 2000, one to the Lowes and a second to Firstar Bank, the holder of the lien on the automobile covered by the policy. The letter in question informed the Lowes that Rankin Insurance Center no longer represented Hamilton and that provisions in their present policy "make it necessary for us to send you this notice of our intention not to renew." Hamilton also maintains that a copy of this letter was received by Chilton Rankin in his Monticello, Kentucky office on June 22, 2000.

In the upper right-hand corner of the letter was the following information:

POLICY # 38A-98-05---009
EXPIRING 09/11/00
AGENCY # RT-0626-3
RANKIN INSURANCENTER, INC.
7 PUBLIC SQ
MONTICELLO, KY 42633-1460

Ms. Lowe maintains that she has no recollection of receiving this letter. She does, however, remember receiving a monthly bill on or about September 21, 2000 which she paid on October 16, 2000. She testified that she received another monthly invoice in October which she paid on or about November 17, 2000. Ms. Lowe also stated that these invoices looked just like the ones she had regularly received from Hamilton. An accounting supervisor for Hamilton testified that these invoices were for premiums due

prior to cancellation and that Ms. Lowe's second check was returned upon receipt on November 20, 2000.

On November 24, 2000, the Lowes' eighteen-year-old daughter Brandy was killed in an automobile accident. A complaint seeking underinsured motorists coverage against Hamilton was filed on March 8, 2002. At trial, the jury was instructed to find for Ms. Lowe unless they believed from the evidence that Hamilton had mailed notice of its intention not to renew the policy to the Lowes at the address shown on the policy. The parties had previously agreed that if Ms. Lowe was successful under that instruction, she would be entitled to judgment against Hamilton without the necessity of additional findings.

The jury found that Hamilton did not mail notice of its intention not to renew the policy and on March 22, 2006, judgment was entered for Ms. Lowe in the amount of $100,000.00 plus pre-judgment interest in the amount of $36,657.30. The trial court denied Hamilton's subsequent motion for judgment notwithstanding the verdict and this appeal followed.

The law regarding mailing notices of cancellation is well-settled. In *Koscot Interplanetary, Inc. v. Com., By Allphin,* 649 S.W.2d 201, 202 (Ky. 1983), the Supreme Court of Kentucky held:

> . . . summary judgment is improper where there is no proof of a regular system or scheme for mailing the notices. Once such positive proof of a regular system of mailing has been offered, a mere denial of receipt would not overcome the presumption that a letter properly mailed has been received.

> In the absence of such proof, it is a question of fact whether the movant received the notice of assessment.

Hamilton argues that the proof offered by Ms. Lowe is insufficient to overcome the presumption established by its proof of a regular mailing system or to create a fact question for the jury. We disagree.

Implicit in the *Koscot* analysis is the submission of "positive proof of a regular system of mailing" which allows for a presumption that the system was applied to the notice in question. Here, however, Ms. Lowe sufficiently countered Hamilton's evidence on the pivotal issue by challenging the proof which provided the factual underpinning for the presumption. In addition to her statement that she did not remember having received the non-renewal letter, Ms. Lowe offered additional evidence concerning: 1) the fact that Hamilton had no written policy as to its mailing system; 2) the fact that the testimony of its own employees demonstrated that the group of letters which allegedly contained the notice to the Lowes was treated differently than other groups of letters mailed the same day in that the mailing certification did not contain a list of addressees as did the other groupings; 3) the fact that Hamilton's employees could not explain this discrepancy in terms of type of correspondence; 4) the fact that Hamilton's own documentation concerning events affecting the Lowes' policy does not show that a notice of non-renewal was ever entered into the system; and 5) the fact that Hamilton could not produce copies of the "earned premium notice" it allegedly sent to the Lowes and which it cites as support for its contention that the non-renewal notice was in fact mailed. In fact, the computer entries refer to the latter as "monthly invoices." Given the

conflicting evidence as to implementation of Hamilton's mailing system in reference to this particular letter, we are convinced that a jury question was presented as to whether the non-renewal notice was indeed mailed to the Lowes.

As noted in Hamilton's brief, this Court's role in reviewing a ruling on a motion for JNOV is well-summarized in *Lewis v. Bledsoe Surface Mining Co*., 798 S.W.2d 459, 461-62 (Ky. 1990):

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Kentucky & Indiana Terminal R. Co. v. Cantrell,* 298 Ky., 743, 184 S.W.2d 111 (1944), and *Cochran v. Downing,* Ky., 247 S.W.2d 228 (1952). The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is " 'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" *NCAA v. Hornung,* Ky., 754 S.W.2d 855, 860 (1988).

An appellate court, then, is to "review all the evidence presented to the jury and must uphold the trial court's decision [to grant a JNOV] if 'after all the evidence is construed most favorably to the verdict winner, a finding in his favor would not be made by a reasonable [person].'" *Moore v. Environmental Construction Corp*., 147 S.W.3d 13, 16 (Ky. 2004)(internal citation omitted). Having conducted that inquiry, we are convinced that there was substantial evidence supporting the jury verdict. Given the conflicting evidence as to the implementation of Hamilton's mailing system with regard to the notice to the Lowes, we cannot conclude that the verdict was palpably contrary to

the evidence or that a reasonable person could not have reached the same decision as the jury. We are thus persuaded that the trial court correctly declined to set aside the decision of the jury on the issue of mailing.

Accordingly, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

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