

RENDERED: October 22, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000792-MR

AMERICAN NATIONAL PROPERTY AND
CASUALTY COMPANY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LAURANCE B. VANMETER, JUDGE
ACTION NO. 00-CI-02647

SASAN SHAFAGHI; AND
NURDAN SHAFAGHI

APPELLEES

OPINION AFFIRMING

** ** * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: American National Property and Causality
Company (ANPACC) has appealed from the trial order, verdict and
judgment entered by the Fayette Circuit Court on February 7,
2003, which, following a jury trial, awarded the appellees,
Sasan and Nurdan Shafaghi, \$127,500.00 in damages on their

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

breach of contract claim against ANPACC and \$51,000.00 in attorneys' fees pursuant to KRS² 367.220(3). Having concluded that the evidence was sufficient to support the jury's award, and sufficient to support the jury's finding that ANPACC acted "in an unfair, false, misleading, or deceptive manner" when handling the Shafaghis' claim, we affirm.

On February 4, 2000, the Shafaghis' home, which is located in Lexington, Fayette County, Kentucky, was severely damaged by fire. As a result of the damage caused by the fire, the Shafaghis were forced to relocate. On February 5, 2000, the Shafaghis reported the incident to their insurance carrier, ANPACC. On February 7, 2000, an adjusting agent from ANPACC, Clark Short, met with the Shafaghis and inspected their home. Shortly thereafter, Short contacted First General Services, a restoration company, to seek an estimate of the cost to repair the damage caused by the fire. On February 22, 2000, Rick Garrison, an estimator employed by First General, submitted a bid estimating that it would cost \$74,056.33 to repair the damage to the Shafaghis' home caused by the fire. On February 23, 2000, the Shafaghis entered into a written contract with First General, whereby they agreed to pay First General

² Kentucky Revised Statutes.

\$74,056.33 to repair their home.³

In the months that followed, a dispute arose between the Shafaghis and ANPACC which primarily concerned the extent of the repair work. The dispute involved the Shafaghis' demand for the replacement of all of the siding and brick on their home, and the extent of the repairs necessary to restore the roof. The disputed items were not covered in the \$74,056.33 figure agreed to between the Shafaghis and First General. The Shafaghis and ANPACC were unable to reach an amicable resolution concerning the extent of the repair work necessary to restore the Shafaghis' home to its condition before the fire. In April 2000 First General stopped work on the house.⁴

Between March, 7, 2000, and May 16, 2000, ANPACC issued several checks to the Shafaghis and their mortgage company totaling \$63,390.77, which it claimed represented the "actual cash value" of the damage to their home.⁵ Between February 7, 2000, and July 7, 2000, ANPACC also paid the Shafaghis \$25,282.48 for "personal property loss" and \$14,112.07 for "additional living expenses" resulting from the fire.

³ Pursuant to the contract, the Shafaghis were required to pay First General directly for the cost to repair their home.

⁴ The record is unclear as to the extent of the work performed by First General prior to the time it ceased working on the house in April 2000.

⁵ Pursuant to the Shafaghis' insurance policy with ANPACC, "actual cash value" is defined as "the amount it would currently cost to repair or replace the covered property with new material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence."

ANPACC informed the Shafaghis that any additional costs necessary to repair their home would be governed by the "replacement cost" provision contained in their insurance policy, which provides, in relevant part, as follows:

- (1) We will pay the cost of repair or replacement without deduction for depreciation, but not exceeding the smaller of the following amounts:
 - (a) the limit of liability under this policy applying to the building;
 - (b) the replacement cost of that part of the building damaged for equivalent construction and use on the same premises;
 - (c) the amount actually and necessarily spent to repair or replace the damaged building; or
 - (d) the replacement cost of your home or any part as described in [the] . . . [d]escription of [y]our [h]ouse [emphasis original].
- (2) We will pay the actual cash value of the damage not to exceed the applicable limit of liability, until actual repair or replacement is completed [emphasis added].

In sum, ANPACC maintained that it was not required to pay for any replacement costs "until such time as the repairs were completed."

On July 18, 2000, the Shafaghis filed a complaint against ANPACC, in which they alleged, inter alia, breach of

contract and violations of the Kentucky Consumer Protection Act⁶ and the Kentucky Unfair Claims Settlement Practices Act.⁷ On September 1, 2000, ANPACC filed an answer, in which it denied the allegations set forth in the Shafaghis' complaint.

In early 2001 while their case against ANPACC was pending in the Fayette Circuit Court, the Shafaghis contacted Jeff Wolfe, a restoration contractor, to seek another estimate for the cost of the repair work necessary to restore their home. After inspecting the residence, Wolfe submitted a bid estimating that it would cost \$59,523.92 to repair the damage caused by the fire. On April 20, 2001, the Shafaghis authorized Wolfe to begin making the necessary repairs to their home. Wolfe subsequently submitted several change orders which brought the total estimate for the repairs to \$106,612.73.⁸ Wolfe started the repair work in June 2001. As of July 31, 2001, Wolfe had received payment for services rendered in the amount of \$49,370.88. On August 30, 2001, Wolfe sent the Shafaghis an invoice totaling \$23,728.74. Wolfe was not paid for this invoice, and in September 2001 he ceased working on the house and filed a lien against the Shafaghis' residence.

⁶ KRS 367.110 et seq.

⁷ KRS 304.12-230 et seq.

⁸ The Shafaghis authorized the change orders.

In January 2003 after a great deal of procedural maneuvering between the parties, the Shafaghis' case was tried before a Fayette County jury. After hearing several days of testimony concerning the extent of the damage caused by the fire and the cost of the repair work necessary to restore the Shafaghis' home to its condition before the fire, the jury returned a verdict in favor of the Shafaghis.⁹ In sum, the jury awarded the Shafaghis \$127,500.00 on their breach of contract claim against ANPACC.¹⁰ According to the verdict, \$49,000.00 of this amount represented the cost of repairing the damage caused by the fire to the Shafaghis' home; \$8,500.00 represented additional living expenses the Shafaghis incurred as a result of the fire; and \$70,000.00 represented the cost of replacing the personal property damaged by the fire.¹¹

On January 27, 2003, the Shafaghis requested an award of attorneys' fees pursuant to KRS 367.220(3), which provides for the allowance of attorneys' fees and costs arising from a successful prosecution for a violation of the Kentucky Consumer Protection Act. On February 7, 2003, the trial court entered a

⁹ ANPACC moved for a directed verdict, which was denied.

¹⁰ The jury also found the ANPACC had acted "in an unfair, false, misleading, or deceptive manner" when dealing with the Shafaghis in violation of the Kentucky Consumer Protection Act. See KRS 367.110 et seq. The jury did not award any punitive damages with respect to the Shafaghis' Consumer Protection Act claim.

¹¹ These amounts were in addition to the amounts ANPACC had already paid to the Shafaghis under the policy.

trial order, verdict and judgment confirming the jury's award.¹² In addition, the trial court awarded the Shafaghis \$51,000.00 in attorneys' fees. On February 19, 2003, ANPACC filed a motion for judgment notwithstanding the verdict, a motion for a new trial, and a motion to alter, amend, or vacate judgment. On March 25, 2003, the trial court entered an order denying ANPACC's various post-trial motions. This appeal followed.

ANPACC raises several issues on appeal. In sum, ANPACC contends (1) it was not required to pay for any "replacement costs" related to the damage caused by the fire "until actual repair or replacement [was] completed;" (2) the evidence presented at trial was insufficient to support the jury's determination that the Shafaghis were entitled to an award of \$49,000.00 for the cost of repairing the damage to their home caused by the fire; (3) the damages awarded by the jury were speculative and excessive; (4) the evidence presented at trial was insufficient to support the jury's award of \$8,500.00 for additional living expenses; and (5) the evidence presented at trial was insufficient to support the jury's finding that ANPACC acted "in an unfair, false, misleading, or deceptive manner" when handling the Shafaghis' claim.

ANPACC's contention that it was not required to pay for any "replacement costs" related to the damage caused by the

¹² The trial court also awarded the Shafaghis \$566.90 in court costs.

fire "until actual repair or replacement was completed" ignores the disputed fact concerning the need to replace all the siding and brick because appropriate matches could not be made. In sum, ANPACC contends that under the terms of the policy it was only required to pay the "actual cash value" of the damage caused by the fire until the repair work was completed. ANPACC maintains that it paid the Shafaghis the "actual cash value" of the damage to their home.¹³ However, the Shafaghis' breach of contract claim was based in part on their contention that the amount ANPACC tendered as the "actual cash value," \$63,390.77, did not represent the true value of the "cost to repair or replace [the damage caused by the fire] with new material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence." In awarding the Shafaghis the additional \$49,000.00, the jury found that the Shafaghis "replaced or reasonably contracted to replace the damage resulting directly from the fire loss," and that the additional \$49,000.00 would "fairly and reasonably compensate them for the cost of repairing or replacing the damage to the house caused by the fire[.]"

¹³ As previously discussed, between March, 7, 2000, and May 16, 2000, ANPACC issued several checks to the Shafaghis and their mortgage company totaling \$63,390.77, which it claimed represented the "actual cash value" of the damage to their home.

ANPACC further contends that the evidence presented at trial was insufficient to support the jury's determination that the Shafaghis were entitled to an award of \$49,000.00 for the cost of repairing the damage to their home caused by the fire. ANPACC is essentially arguing that the trial court erred by failing to grant its motion for a directed verdict with respect to this issue. In Bierman v. Klapheke,¹⁴ our Supreme Court explained the standard for appellate courts to follow when reviewing a trial court's decision on a motion for directed verdict in a civil case:

In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. . . . The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld.¹⁵

¹⁴ Ky., 967 S.W.2d 16 (1998).

¹⁵ Id. at 18-19.

Wolfe testified at trial that it would cost from \$40,000.00 to \$50,000.00 to repair the remaining damage to the Shafaghis' home caused by the fire. Wolfe stated that this amount was in addition to the \$23,728.74 the Shafaghis still owed on the invoice he submitted on August 30, 2001. While ANPACC introduced testimony contradicting Wolfe's assessment as to the extent of the damage caused by the fire, we cannot conclude that the jury's verdict was "flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice."¹⁶ "[Q]uestions of credibility and weight of the evidence are jury matters."¹⁷

ANPACC next contends that the damages awarded by the jury were speculative and excessive.¹⁸ ANPACC raised this issue in its motion for judgment notwithstanding the verdict, its motion for a new trial, and its motion to alter, amend, or vacate judgment, which the trial court denied. In Davis v. Graviss,¹⁹ our Supreme Court explained the test for a trial court

¹⁶ Id. at 19.

¹⁷ Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997).

¹⁸ ANPACC does not specify which portion of the jury's award it considers speculative and excessive. Thus, we will assume that ANPACC is arguing that the entire award was speculative and excessive.

¹⁹ Ky., 672 S.W.2d 928 (1984). Davis was overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co., Ky., 83 S.W.3d 483, 493-95 (2002). Sand Hill was subsequently vacated by Ford Motor Co. v. Estate of Smith, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

to follow when reviewing an award of actual damages²⁰ for excessiveness or inadequacy:

When presented with a motion for new trial on grounds of excessive damages, the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." [Kentucky Rules of Civil Procedure] CR 59.01(d).

This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.²¹

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on the issue of excessive or inadequate damages:

"Upon reviewing the action of a trial judge in (granting or denying a new trial for excessiveness), the appellate court no longer steps into the shoes of the trial court to inspect the actions of the jury from his perspective. Now, the appellate court reviews only the actions of the trial judge . . . to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous."²²

²⁰ It is important to note that the jury in this case did not award any punitive damages against ANPACC.

²¹ Davis, 672 S.W.2d at 932. See also Miller v. Swift, Ky., 42 S.W.3d 599, 601 (2001).

²² Davis at 932 (quoting Prater v. Arnett, Ky.App., 648 S.W.2d 82, 86 (1983)). See also Burgess v. Taylor, Ky.App., 44 S.W.3d 806, 813 (2001)).

After a thorough review of the record, we cannot conclude that the trial court abused its discretion by denying ANPACC's motion for a new trial with respect to the issue of damages.

We now turn to ANPACC's assertion that the evidence presented at trial was insufficient to support the jury's award of \$8,500.00 for additional living expenses. In sum, ANPACC maintains that the Shafaghis had a duty to mitigate any damages for loss of use "by acting with due diligence to repair their property." Since we have concluded that the jury's award for the repairs to the house was supported by the evidence, it also follows that the Shafaghis were entitled to reasonable living expenses for a delay caused by ANPACC. Thus, we cannot conclude that the jury's award of \$8,500.00 for additional living expenses was unreasonable and not supported by the evidence.

In closing, ANPACC contends the evidence was insufficient to support the jury's finding that ANPACC acted "in an unfair, false, misleading, or deceptive manner" when handling the Shafaghis' claim. In sum, ANPACC asserts that "[t]he Shafaghis presented no credible, substantive or probative evidence at trial which would remotely support a finding of bad faith[.]"²³ We disagree.

²³ We note that the claim submitted to the jury was for a violation the Kentucky Consumer Protection Act not the Kentucky Unfair Claims Settlement Practices Act.

KRS 367.220(1) authorizes "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property . . . as a result of . . . a method, act or practice declared unlawful by KRS 367.170[.]" to bring an action for violation of the Kentucky Consumer Protection Act. It has been held that purchasing an insurance policy is a service within the meaning of the Act.²⁴ The Shafaghis' cause of action for violation of the Act was premised on its contention that ANPACC acted in an unfair, false, misleading, or deceptive manner when handling their claim.²⁵ A thorough review of the record reveals that a genuine dispute existed as to whether ANPACC acted in an unfair, false, misleading, or deceptive manner in refusing to pay the Shafaghis the "actual cash value" for the damage to their home and the full value of their "personal property loss." As noted above, "it is the responsibility of the jury to determine and resolve such conflicts[.]"²⁶ In sum, we cannot conclude that the evidence

²⁴ See Stevens v. Motorists Mutual Insurance Co., Ky., 759 S.W.2d 819, 820 (1988) (holding that "[t]he Kentucky Consumer Protection Act . . . provide[s] a homeowner with a remedy for the conduct of their own insurance company in denying such a claim because the act has provided a 'statutory' bad faith cause of action").

²⁵ See KRS 367.170(1). ANPACC's contention that the Shafaghis' consumer protection claim should have been bifurcated from its breach of contract claim is entirely without merit. See, e.g., Tharpe v. Illinois National Insurance Co., 199 F.R.D. 213, 214-15 (W.D.Ky. 2001).

²⁶ Bierman, 967 S.W.2d at 19.

presented at trial was not sufficient to sustain the jury's verdict with respect to the Shafaghis' claim for violation of the Kentucky Consumer Protection Act.²⁷

Based on the foregoing reasons, the trial order, verdict and judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

E. Patrick Moores
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES:

Thomas K. Herren
Lexington, Kentucky

²⁷ ANPACC further requests that the portion of the judgment awarding attorneys' fees be reversed. ANPACC provides no argument with respect to this issue. A trial court's decision on a motion for attorneys' fees under KRS 367.220(3) is reviewed for an abuse of discretion. See Alexander v. S & M Motors, Inc., Ky., 28 S.W.3d 303, 305 (2000)(stating that "[w]e, therefore, read [KRS 367.220(3)], to authorize, but not mandate, an award of attorney fees and costs in an action brought under the Kentucky Consumer Protection Act. Of course, whether to award such is a decision subject to the sound discretion of the trial judge"). We cannot conclude that the trial court abused its discretion by awarding the Shafaghis \$51,000.00 in attorneys' fees pursuant to KRS 367.220(3).