RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001091-MR
AND
NO. 2004-CA-001120-MR

JOHN McKEEHAN AND
LOLA McKEEHAN — APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 00-CI-003657

AUTO-OWNERS INSURANCE COMPANY — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: In this case involving insurance coverage for a fire loss, Lola and John McKeehan have appealed from the Jefferson Circuit Court's Judgment in favor of Auto-Owners Insurance Company entered March 18, 2004. Lola and John dispute jury Instruction No. 3 relating to vacancy. Auto-Owners has filed a protective cross-appeal from the Judgment Notwithstanding a Verdict as to Instruction No. 2, entered May

7, 2004. We affirm as to the direct appeal, rendering the cross-appeal moot.

This case has an incredibly complex factual background. For purposes of this opinion, however, we will limit our recitation to only those facts salient to the issues before us. In 1994, John and his mother, Lola, purchased a multi-use building on a Y-intersection near Churchill Downs at 3136 Oakdale and 3141 S. 4th Street in Louisville, Jefferson County, Kentucky. Lola provided the down payment, and they financed the purchase price through the sellers, Walter and Jane Brumleve. As a part of the agreement, John and Lola were to keep insurance on the property and list the Brumleves' interest on the policy. John and Lola later filed suit against the Brumleves and their realtor due to zoning misrepresentations. They also stopped making their monthly payments. As a result, the Brumleves filed a foreclosure action against John and Lola in 1997. During this time, John and Lola listed the building for sale with at least two realtors.

This particular building has a long history of being hit by automobiles, both prior to and during John and Lola's period of ownership. In December 1997, a stolen truck hit the north wall of the building, resulting in $22,500 worth of damage. John collected that amount from American Resources Insurance Company, the company insuring the building at that

time. Plywood boards covered the front of the building following the 1997 collision.

In early 1998, new commercial insurance coverage was obtained on the property through Auto-Owners, in John's name only. The policy contained an exclusion for vacancy, which reads as follows:

> 6. Vacancy
>
> If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage, we will:
>
> a. Not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:
>
> (1) Vandalism;
>
> (2) Sprinkler leakage, unless you have protected the system against freezing;
>
> (3) Building glass breakage;
>
> (4) Water damage;
>
> (5) Theft; or
>
> (6) Attempted theft.
>
> b. Reduce the amount we would otherwise pay for the loss or damage by 15%.
>
> A building is vacant when it does not contain enough business personal property to conduct customary operations.
>
> Buildings under construction are not considered vacant.

The policy also defined “business personal property” as furniture and fixtures, machinery and equipment, stock, as well as all personal property owned by the named insured and used in the named insured’s business. The policy also contained an endorsement voiding coverage for fraud by the named insured, or for any intentional concealment or misrepresentation of a material fact concerning the covered property, the named insured’s interest in the property, or a claim made under the endorsement.

On June 17, 1998, the north side of the building again sustained a significant amount of damage, this time due to a fire. Because the fire appeared to be suspicious, the Louisville Arson Bureau opened an investigation into its origin. Investigators determined that firefighters had to remove the plywood boards covering the front of the building in order to gain access to the building, where they found a burned vehicle, which was determined to be stolen. John later reported in his claim to Auto-Owners that a car had hit the building, causing the fire to start. Following an investigation, Auto-Owners denied John’s claim, citing his misrepresentations in his application for coverage and in his claim for the fire loss; that John set the fire himself or had someone else set it; and that the building had been vacant for over sixty consecutive

days and the fire was the result of vandalism, triggering the vacancy exclusion.

John and Lola filed the present action in Jefferson Circuit Court against Auto-Owners and Crimm Insurance Agency (hereinafter "Crimm"), which had acted as the agent for Auto-Owners in securing the insurance policy that covered the property at issue.[1] Following a period of discovery, the matter proceeded to trial on March 2, 2004. At the conclusion of the testimony, the parties discussed the jury instructions. Counsel for John objected to Instructions No. 2 and No. 3. Instruction No. 3 read as follows: "Do you believe from the evidence that the building had been vacant for more than sixty (60) consecutive days before the fire? A building is deemed 'vacant' if it does not contain enough business personal property to conduct customary operations." Regarding that instruction, John objected to the lack of a definition of "business personal property." After noting that the policy had been admitted as evidence, the trial court indicated that counsel could point this out to the jury during closing argument. In the portion of his closing argument regarding the vacancy exclusion, counsel for John focused solely on the question of whether there was a tenant in the building during the period of time in question.

[1] Just prior to the trial of the matter, John and Crimm reached a settlement, and during the trial, the trial court determined that Lola had a third-party beneficiary status as she was not listed on the policy.

The jury returned a "Yes" verdict on the vacancy instruction, memorializing its finding that the building had been vacant for more than sixty consecutive days before the loss, and returned a verdict in favor of Auto-Owners.

The jury also returned a "Yes" verdict on Instruction No. 2, which stated, "Do you believe from the evidence that Auto-Owners Insurance Company would not have issued the insurance policy to John McKeehan if it had been advised of the Brumleves' interest and the fact that the property was in foreclosure?" The trial court entered a Judgment for Auto-Owners on March 18, 2004. On John and Lola's motion, the trial court granted a JNOV on Instruction No. 2, but specifically denied their motion as to the defense verdict arising from the vacancy instruction. John and Lola have appealed from the judgment relating to the verdict based upon the vacancy instruction, while Auto-Owners has cross-appealed from the JNOV on Instruction No. 2.

On direct appeal, John and Lola argue that the jury instructions should have contained the entire definition of "vacancy" as set out in the policy, including the "under construction" portion of the definition as well as the policy's definition of "business personal property." On cross-appeal, Auto-Owners argues that the jury's verdict on Instruction No. 2 was supported by probative evidence and should be reinstated.

This Commonwealth has for decades followed a "bare bones" approach to jury instructions. "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire."[2] Later, this Court made it clear that "the trial court's function herein is only to set forth the essentials for the jury. It is the respective counsel's duty to see to it that the jury clearly understands what such instructions mean, or do not mean."[3] Our Supreme Court very recently addressed this issue in Lumpkins v. City of Louisville,[4] emphasizing that the "bare bones" approach "applies to all litigation. . . . The concept permits the instructions to be 'fleshed out' in closing argument."

In this case, John and Lola argue that the trial court erred in failing to include the entire policy definition of "vacant" and to further define "business personal property." It has long been held "that a court need not define for the jury terms or language when the meaning of them is commonly understood by the lay public, but that it should do so when they are understood only by persons versed in the subject matter in

[2] Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974).

[3] Humana, Inc. v. Fairchild, 603 S.W.2d 918, 922 (Ky.App. 1980).

[4] 157 S.W.3d 601, 605 (Ky. 2005).

connection with which they are used."[5] John and Lola rely upon the opinion of Williams v. Wilson[6] to argue that jury instructions based upon a specific policy definition should follow that wording, just as in the case of statutory definitions. However, in Shemwell, the Court made it clear that "insurance policies like and similar to the one in this case will not be given a strict or verbatim construction."[7] In that case, the issue was whether "total and permanent disability" had to be defined for the jury.

The jury instruction on vacancy John and Lola tendered, but which was not used by the trial court, reads as follows:

> You will find for the Defendants under this instruction if you believe from the evidence that, for 60 consecutive days before the fire, the damaged building did not contain enough business personal property to conduct customary operations or the building was under construction during the 60 consecutive days preceding the fire. "Business personal property" as used in this instruction means one or more of the following items:
>
> (a) Furniture and fixtures, or
>
> (b) Machinery and equipment, or

[5] Lewis v. Wood, 173 S.W.2d 983, 984 (Ky. 1943). See also Aetna Life Ins. Co. v. Shemwell, 116 S.W.2d 328 (Ky. 1938).

[6] 972 S.W.2d 260 (Ky. 1998).

[7] Shemwell, 116 S.W.2d at 330.

(c) Other personal property owned by the Plaintiffs and used in their business, or

(d) Personal property of others that was in the Plaintiffs' care, custody or control and located in or on the building.

The trial court adopted the instruction tendered by Auto-Owners, which provided a definition of vacant as not containing "enough business personal property to conduct customary operations" for sixty consecutive days prior to the loss.

Recognizing that Kentucky has a long-standing practice of providing only "bare bones" jury instructions, we hold that the vacancy instruction given to the jury in this instance was sufficient to properly instruct the jury. The jury had the entire policy to review in its deliberations, and counsel for John and Lola had the opportunity to "flesh out" the instruction in his closing argument. That counsel chose not to do so does not render the instruction incorrect or lacking in any way. Counsel could also have identified for the jury those items of business personal property enumerated in John and Lola's brief, although the jury could very well have reviewed the photographs and determined that any business personal property the building might have contained and that was not damaged by the fire was in an unusable state. The trial court did not commit any error in instructing the jury on vacancy, especially as the entire policy

was in evidence and as counsel had the opportunity to "flesh out" the "bare bones" instruction in closing argument.

Because we are affirming the direct appeal, Auto-Owners' protective cross-appeal is moot, and we need not address it in this opinion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel B. Carl
Louisville, KY

BRIEF FOR APPELLEE:

Peter J. Sewell
Catherine M. Sewell
Louisville, KY