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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000477-MR

SCOTT PHELPS AND PAMELA PHELPS — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 01-CI-00533

AMERICAN RELIABLE INSURANCE COMPANY;
GREENTREE SERVICING, LLC; AND
GREEN TREE INSURANCE AGENCY, INC. — APPELLEES

AND

NO. 2012-CA-001603-MR

SCOTT PHELPS AND PAMELA PHELPS — APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 09-CI-00359

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: This case originates from a dispute over the amount of insurance coverage due to Scott and Pamela Phelps after a windstorm. The Phelpses appeal from two orders. One order was a judgment after a jury trial that held the Phelpses' damages did not exceed the amount already paid by the insurer Kentucky Farm Bureau Mutual Insurance Company (KFB). The other order granted summary judgment in favor of American Reliable Insurance Company and dismissed the Phelpses' claims against American Reliable. The Phelpses claim the trial courts in both cases made multiple errors; however, we disagree and affirm.

The Phelpses owned a two-story residence in Somerset, Kentucky, that was insured by KFB. The residence had been in foreclosure since May 21, 2001. The mortgagee, Greentree Servicing, LLC, purchased its own insurance policy on the residence through American Reliable in order to protect its interests.

On or about December 10, 2008, a windstorm caused shingles to blow off the roof of the residence. The Phelpses also alleged that rain water entered through the damaged roof and caused water damage in multiple rooms. They also alleged that this water damage resulted in mold damage to the residence and personal property. They also claimed that the mold exacerbated Mrs. Phelps's preexisting asthma condition. KFB sent a claims adjuster and contractor to the

residence a couple of days after the storm to inspect the damage. KFB arranged for a repairman to patch the roof shortly after the storm.

The Phelpses later alleged that a second windstorm occurred on February 11, 2009, and caused similar damage. The Phelpses made a claim on their KFB policy and demanded that the residence and personal property be declared a total loss. They requested that they be paid their policy limits of $425,100 for the dwelling and $212,550 for the personal property. They also asked to be compensated for Mrs. Phelps's personal injury.

KFB made some payments to the Phelpses. These payments totaled $58,110. KFB eventually learned that the Phelpses had made an insurance claim in 2004 for wind and water damage to Safeco Insurance. KFB believed that much of the damage alleged by the Phelpses was preexisting and refused to make any more payments.

The Phelpses filed suit on March 12, 2009. During this same timeframe, the Phelpses were already involved in an action with Greentree. The Phelpses brought a third-party claim in that action against American Reliable. An eight-day trial began on March 1, 2011. KFB argued that the Phelpses' claim exceeded the actual damage and that most of the damage was preexisting. KFB did not seek to recover any money it had already paid to the Phelpses. The jury found that the Phelpses were not entitled to any more than the $58,100 they were already paid. After this jury verdict, American Reliable moved for summary

judgment. The trial court granted the motion. The Phelpses then appealed the jury verdict and order granting summary judgment.

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The Phelpses' first argument on appeal is that the trial court erred in failing to rule as a matter of law on the issue of coverage and failed to properly instruct the jury on this issue. The Phelpses claim that they argued numerous times that the trial court should rule on the issue of coverage and moved for a directed verdict on the issue; however, the Phelpses do not cite to the portions of the record where this occurred as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv)-(v). The record is over 2,000 pages long and includes 8 days worth of video recordings. Although we could choose to ignore this argument for failing to cite to the record, *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010), we will not do so because we believe the trial court made no error.

"It is well established that construction and interpretation of a written instrument are questions of law for the court." *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). Although the trial court did not grant a directed verdict on this issue, it still properly instructed the jury on this issue. The pertinent jury instructions read as follows:

> INSTRUCTION NO. 2
> CONTRACT
>
> Kentucky Farm Bureau had a responsibility, pursuant to the terms of the policy, to pay for damages arising from a covered peril. You shall determine whether any loss sustained by the Plaintiffs was caused by a covered peril under the terms of the policy.

> You are instructed that the policy you have heard evidence about provides coverage for mold which is a direct result of a covered peril.
>
> INTERROGATORY NO. 1
> CONTRACT
>
> Are you satisfied from the evidence that the Plaintiffs suffered a loss as the direct result of a covered peril under the terms of the policy in an amount in excess of $58,110?

The Phelpses claim that these instructions left it to the jury to decide whether the policy covered the alleged wind and water damage. We disagree. We believe that the instructions indicate that the wind and water damages were covered and the Phelpses were entitled to at least $58,110. The instructions then left it to the jury to determine if the Phelpses were entitled to any additional amounts. The jury did not rule on the issue of coverage; this was done by the trial court using the above quoted instruction and interrogatory. The jury only determined if the Phelpses were entitled to more money. We find no error.[1]

The next argument on appeal is that the trial court erred in admitting evidence of property values that were approximately five and seven years old from a previous bankruptcy proceeding. The trial court allowed defense counsel to cross-examine Mr. Phelps about the valuation of personal property that he submitted during bankruptcy proceedings in 2002 and 2004. The Phelpses claim

[1] It is worth noting that KFB did not make a counterclaim for a refund of the money it had already paid to the Phelpses. This suggests that coverage was assumed and that the only issue to be determined was the extent of coverage and how much money the Phelpses were entitled to. Also, the Phelpses do not claim in their brief that KFB denied all coverage; it appears as though KFB only believed the Phelpses were not entitled to as much money as they were requesting and that most of the damage to the residence was preexisting.

that these valuations were irrelevant and prejudicial because too much time had passed between these valuations and the valuations used on the insurance claim. Also, the Phelpses argue that the bankruptcy valuation was based on a fair market value estimate whereas the property valuation for the insurance claim was based on replacement value. We find no error.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). The valuations from the bankruptcy proceedings showed the value of personal property as $3,000. This included a couch, end tables, entertainment center, TV, bedroom set, dinette, refrigerator, washer and dryer, and VCR. It also included $50 in clothing. The inventory of assets also indicated that the Phelpses owned no books, pictures, art, furs, jewelry, office equipment, animals, or other personal property. The inventory of assets submitted in the current insurance claim was valued by the Phelpses as being $352,392.25. This inventory included $54,309.25 of office equipment and furnishings; $13,000 of books, pictures, art, and "other personal property"; and $115,000 in clothing. Testimony submitted during trial by the Phelpses was consistent with that inventory.

The trial court did not abuse its discretion in this instance. The huge difference in the two different valuations and descriptions of property were

relevant to show the truth of the Phelpses' claimed damages and their credibility. Further, the passage of time does not does not make the valuations inadmissible. *Commonwealth, Dept. of Highways v. Whitledge*, 406 S.W.2d 833, 836 (Ky. 1966).

The Phelpses' next argument is that the trial court improperly excluded emails between Mr. Phelps and Arwin Dalton, a KFB employee, as sought through a pretrial motion *in limine*. The trial court found that the emails contained hearsay and could not be admitted absent a valid exception to the hearsay rule. The court further stated that the emails could be identified to demonstrate the fact that the correspondence took place, but any content of the email would be excluded. Even though the trial court made this pretrial ruling, the court would not allow the emails into evidence, even to prove the fact that the correspondence took place. Any error on this issue is harmless because the trial court allowed Mr. Phelps to testify regarding the contents of the emails and the dates they were sent. CR 61.01.

The next argument on appeal is that the trial court improperly excluded Mr. Phelps's testimony about statements made to him by Richard Madison, an employee of Environmental Safety Technologies, who inspected the residence for mold. During Mr. Phelps's testimony, he was explaining that he attempted to remove the mold from the residence himself, but stopped the work because of what he had been told by Mr. Madison. Defense counsel objected on the basis of hearsay and the trial court sustained the objection.

We are unable to consider this issue because there was no avowal testimony set forth in the record to inform us as to what Mr. Madison told Mr. Phelps.

Kentucky Rules of Evidence 103(a)(2); *Commonwealth v. Ferrell*, 17 S.W.3d 520, 523 (Ky. 2000). Furthermore, the Phelpses do not state in their brief what Mr. Madison said to Mr. Phelps.

The Phelpses also claim that the trial court abused its discretion in allowing Mrs. Phelps to be cross-examined regarding the lack of disclosure of mortgages on the insurance application. The Phelpses claim this issue was irrelevant and constituted impeachment on a collateral issue. We disagree and find no error.

This issue was first raised prior to Mrs. Phelps's testimony when the insurance application was introduced into evidence during the testimony of Jerome Whitaker, the insurance agent who sold the Phelpses their policy. The Phelpses did not object to this issue at that time, making it a relevant issue during Mrs. Phelps's cross-examination. Furthermore, the issue of the mortgage was relevant to a determination of Mrs. Phelps's credibility. When an insurance policy claim is paid, a joint check must be issued in the name of the mortgagee and the insured. We believe this was a valid line of questioning for cross-examination; therefore, the trial court did not abuse its discretion in allowing this testimony.

The Phelpses also claim that the trial court abused its discretion by allowing KFB to supplement its discovery responses to identify new expert opinions even though the discovery deadline had passed. The Phelpses also claim the court erred when it limited their use of expert testimony during their case in chief. We find no abuse of discretion and affirm.

Around two years after the initial insurance claim, counsel for KFB discovered that additional shingles were missing from the roof of the residence. KFB requested that the court allow its experts to inspect the residence again, which the court permitted. After this inspection, the court allowed KFB to supplement its discovery responses and include new expert opinions. A few months later, the Phelpses moved to be allowed to offer the opinion of a new expert witness, Arlis McMahon. The trial court granted the motion, but would not allow this new expert to testify during the case in chief. The court would only allow this expert to testify as a rebuttal witness. The Phelpses argue that the trial court gave more leeway to KFB in terms of new expert opinions and that not allowing Mr. McMahon to testify in their case in chief "significantly impaired [their] ability to present their case to a jury."

The trial court did not abuse its discretion in these matters because the Phelpses were allowed to cross-examine KFB's experts regarding these new opinions. Furthermore, they were allowed to call Mr. McMahon as a rebuttal witness. Moreover, Mr. McMahon did testify in the case at hand and the Phelpses do not state how Mr. McMahon's testimony would have differed had he been allowed to testify during their case in chief.

The Phelpses' seventh argument on appeal is that the trial court erred in instructing the jury in such a way that they were not given the opportunity to consider the negligence and injury claims of Mrs. Phelps. The Phelpses do not cite to any portion of the record for this argument, nor do they cite to any case law.

Because this is the second occasion in which the Phelpses have failed to provide citations as required by CR 76.12, we decline to rule on this issue. *Hallis*, *supra*.

The Phelpses' final argument concerning this appeal is that the trial court erred in failing to bifurcate the Phelpses' contract claim from the negligence and personal injury claims. In the early stages of this litigation, the trial court bifurcated the insurance bad faith claim from the other claims. The Phelpses' trial counsel at the time opposed any bifurcation of the claims and wanted all the issues tried at the same time. Eventually the Phelpses hired new counsel who moved for the negligence and personal injury claims to be bifurcated from the contract claims. The trial court denied the motion. The issue of bifurcation is left to the discretion of the trial court. *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339, 349 (Ky. App. 1982). We find no abuse of discretion because the original attorney for the Phelpses opposed any bifurcation. Additionally, the negligence and personal injury claims were closely related to whether or not the Phelpses were owed additional sums from the insurance policy.

For these reasons we affirm the judgment of the trial court.

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As for this Appeal, the Phelpses argue that American Reliable was not entitled to summary judgment. We disagree and affirm.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR)

> 56.03. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Steelvest,* 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor. . . ." *Huddleston v. Hughes,* 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

The trial court granted summary judgment in favor of American Reliable after the jury verdict in favor of KFB. The court found that the Phelpses were estopped from bringing a claim against American Reliable based on the theory of collateral estoppel, also known as issue preclusion. The court held that the Phelpses had the opportunity to fully argue their case to a jury in the KFB action and that the jury decided the Phelpses were not entitled to further compensation. The court also found that even if the claim were not barred by issue preclusion, the escape clause found in American Reliable's policy was valid and enforceable. We completely agree with the trial court.

Issue preclusion requires an identity[2] of issues, a final decision or judgment on the merits, a necessary issue with the estopped party having a full opportunity to litigate, and a prior losing litigant. *Jellinick v. Capitol Indem. Corp.*, 210 S.W.3d 168, 172-73 (Ky. App. 2006). The claim against American Reliable meets all the

[2] Identity in this context means similarity.

issue preclusion requirements. The Phelpses filed two lawsuits. Each lawsuit involved the same plaintiffs, the same residence, the same storms, and the same alleged damages. The Phelpses had an eight-day trial which was submitted to the jury. The jury then found in favor of KFB and determined the Phelpses were not entitled to more than the $58,100 they had already received. This meets the issue preclusion standard and the Phelpses were properly estopped from proceeding with their claims against American Reliable.

Furthermore, the American Reliable policy had an escape clause which would preclude the Phelpses from recovering under that policy. The clause stated: "If at the time of the loss there is other valid and collectible insurance on the covered property, this policy will be void."

The Phelpses argue that Kentucky has deemed escape clauses such as the one at issue to be against public policy. The only case they cite for this position is *Great American Ins. Co. v. Lawyers Mut. Ins. Co. of Kentucky*, 492 F.Supp.2d 709, 714 (W.D. Ky. 2007); however, lower federal court cases are not binding upon us. *Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 725 (Ky. 2005). In addition, we believe the Phelpses have misinterpreted the holding in *Great American*. In that case, a lawyer was accused of negligence and had two insurance policies. One policy had an escape clause which would prohibit payment under the policy if there was other insurance coverage. The other policy had an excess clause which provided only excess coverage over any other insurance available to the insured, whether

collectible or not. That court foresaw a situation in which two insurance policies had clauses that would operate to deny all coverage to an insured. The court stated that such would be against public policy. Such is not the case here. The Phelpses were covered by the KFB policy and KFB has always acknowledged coverage. The KFB policy did not have an escape clause or an excess clause. According to its policy, in the event there is other insurance, KFB was required to pay "the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss."

The Phelpses would have us hold that escape clauses such as the one at issue are always against public policy; however, they cite to no Kentucky case law supporting this position and we have been unable to find such. Because the Phelpses were able to collect on their KFB insurance, the American Reliable escape clause was invoked. The trial court was correct that the clause would preclude recovery from this policy.

Accordingly, we affirm the order granting summary judgment in favor of American Reliable. American Reliable was entitled to summary judgment as a matter of law due to issue preclusion and the escape clause.

COMBS, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur with the result reached by the majority, but I write separately to address the Phelpses' arguments regarding

insurance coverage, jury instruction on coverage and whether cross-examination on past property valuations was proper.

At trial, the Phelpses sought damages for losses they solely attributed to wind events which allowed water intrusions into their home in December 2008 and February 2009. The evidence at trial conclusively established the Kentucky Farm Bureau Mutual Insurance Company (KFB) policy covered any damage directly caused by the 2008 and 2009 events. KFB never disputed these events were "covered perils" for which it was obligated to pay resulting damages, whatever those might be.

The issue before the jury was whether the 2008 and 2009 events damaged the house and personal property to the extent the Phelpses claimed or if other excluded events or conditions caused the water and mold damage. The Phelpses presented evidence that the water and mold damage was solely attributable to these events. KFB presented evidence supporting alternative causes for much of the damage: (1) some of the damage preexisted from a storm in 2004 for which the Phelpses received payment from another insurance company, repairs had not been made and the mold could have resulted from the previous damage; (2) some of the water damage/mold was caused by a longstanding leak due to a defect in their roof's ridge cap; and (3) the extent of any mold damage from the 2008 and 2009 events was exacerbated by the Phelpses' failure to make timely and appropriate repairs.

The Phelpses argue the trial court erred by failing to rule, as a matter of law, that the insurance policy provided coverage for the damage sustained due to water intrusions into their home in 2008 and 2009. The trial court did not err in failing to make any ruling that the KFB policy provided coverage for the damage attributable to these events because this issue was never in dispute.

The Phelpses argue the trial court erred by failing to enter a directed verdict or judgment notwithstanding the verdict on the issue of whether the KFB policy covered the loss asserted by them because none of the policy exclusions applied and the only question that should have been before the jury was the appropriate amount of damages. The majority opinion implicitly rejects any error in failing to direct a verdict or judgment notwithstanding the verdict on this issue. I agree. The factual dispute as to the cause of the water damage precluded such a ruling. *Compare with Reynolds v. Travelers Indem. Co. of America*, 233 S.W.3d 197, 202 (Ky. App. 2007).

The Phelpses argue the trial court erred by formulating jury instructions that left the jury to determine the extent of the policy coverage without instructing it as to the finding it should make. This argument was preserved for appeal by the Phelpses' proposed instructions. *See Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 162-65 (Ky. 2004). These proposed instructions did not define what covered perils were, but clarified that damage caused by the 2004 occurrence or their failure to protect their home was excluded.

"The fundamental function of jury instructions is to set forth what the jury must believe from the evidence in order to return a verdict in favor of the party bearing the burden of proof." *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). "The question to be considered on an appeal of an allegedly erroneous instruction is whether the instruction misstated the law." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). If it did not, the trial court properly acts within its discretion in denying a party's alternative requested instruction. *Id.*

The jury instructions given by the trial court provided that KFB was responsible for paying "damages arising from a covered peril," the jury was to "determine whether any loss [including mold]. . .was caused by a covered peril" and determine whether the Phelpses "suffered a loss as a direct result of a covered peril under the terms of the policy in an amount in excess of $58,110."[3]

The majority opinion concludes the trial court did not err in the instructions given because "the jury instructions indicate that the wind and water damages were covered and the Phelpses were entitled to at least $58,110." I do not agree with the majority's interpretation of the jury instructions because the instructions did not state that the wind and water damages for the 2008 and 2009 events were covered,

[3] I note that normally the jury should be tasked with determining an amount of damages and it should be the task of the trial court to determine whether such damages have already been satisfied or exceed the available insurance coverage. However, the Phelpses did not object to the jury instructions on this basis.

or indicate any minimum amount of damages to which the Phelpses were entitled for these events. However, I believe any deficiency in the instructions is harmless.

The jury was not left to decide the extent of the policy coverage as to the 2008 and 2009 events. While the instructions did not state whether wind/water damage resulting from the 2008 and 2009 events were covered by the policy, coverage for these events was firmly established at trial. The jury instruction addressed any confusion the jury might have in regard to mold by specifying the policy "provides coverage for mold which is a direct result of a covered peril." While it may have been preferable for the trial court to explicitly instruct the jury that the KFB policy covered any damage directly caused by the 2008 and 2009 events, the Phelpses' proposed instructions also failed to specify that the 2008 and 2009 events were covered perils.

The Phelpses also argue the trial court erred by allowing the jury to determine the 2008 and 2009 events did not constitute a "covered peril." I disagree that the jury may have determined these events were not covered where the evidence was undisputed these events and resulting damages were covered by the policy. The jury had an adequate basis for understanding the term "covered peril" where its meaning was extensively discussed during the course of the eight-day trial. "A formal definition is not required to be included in jury instructions where the jury can understand the term without such a definition." *Commonwealth v. Hager*, 35 S.W.3d 377, 379 (Ky. App. 2000).

The Phelpses also argue the trial court erred by allowing KFB to cross-examine Mr. Phelps as to personal property valuations from 2002 and 2004 bankruptcy proceedings based on the lapse of time and those valuations were fair market value estimations rather than the replacement value estimations provided under the insurance policy. The trial court properly excluded any mention of the bankruptcy proceedings during such questioning. The majority states the trial court did not abuse its discretion in allowing questioning on these valuations where "[t]he huge difference in the two different valuations and descriptions of property were relevant to show the truth of the Phelpses' claimed damages and their credibility."

Past valuations are certainly relevant in determining current valuations. *Commonwealth v. Wood's Ex'x*, 297 Ky. 583, 590, 180 S.W.2d 312, 315 (1944). However, the different types of valuations could certainly confuse the jury as wide variations may exist in value assigned to the same item. *See generally CSX Transp., Inc. v. Georgia State Bd. of Equalization*, 552 U.S. 9, 15-16, 128 S.Ct. 467, 471-472, 169 L.Ed.2d 418 (2007) (reciting widely varying valuations in appraisers' assessment of the market value of property and noting "different methods can produce substantially different estimates"); *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 688-691 (6th Cir. 2012) (discussing insurance appraisers' widely varying determinations as to the actual cash value of real property and damage to it based on which of several methods of valuation were used); *Gaskill v. Robbins*, 282 S.W.3d 306, 309-310 (Ky. 2009) (discussing

widely varying valuations of a business). Therefore, the mere fact of different valuation figures based on different valuation methods does not imply deception or lack of credibility in assigning value to an item. However, to the extent that the valuations demonstrated the Phelpses claimed huge personal property damages for categories of property that purportedly did not even exist a few years earlier and were unlikely to be acquired during the intervening years, this testimony was relevant and admissible.

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