

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000708-MR

TIM ALFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 00-CI-003989

KENTUCKY FARM BUREAU MUTUAL INSURANCE COMPANY
and SHUCKMAN'S RESTAURANT SERVICES, INC.
d/b/a SHUCKMAN'S FOOD COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. Tim Alford appeals from a jury verdict and judgment of the Jefferson Circuit Court in favor of Kentucky Farm Bureau Mutual Insurance (Farm Bureau@ Company and Lewis Shuckman. We affirm.

Farm Bureau and Shuckman filed this action against Alford in Jefferson Circuit Court on June 21, 2000. Shuckman is the owner and operator of a commercial seafood distribution

company. According to the complaint, Alford trespassed upon Shuckman's business premises on the evening of March 25, 1999, with the purpose of shutting off the electrical power to Shuckman's refrigeration unit involving a number of freezers. As a result, Shuckman's stock of fish and other seafood was lost. As the insurer of Shuckman's business premises, Farm Bureau consequently suffered losses flowing from its coverage. At trial, Farm Bureau and Shuckman were permitted to play before the jury a surveillance videotape showing Alford trespassing upon Shuckman's premises at (or close to) the time that the refrigeration unit lost power. The jury awarded Farm Bureau and Shuckman \$15,423.17 in damages.

Alford contends on appeal that the trial court erred by admitting the videotape into evidence. He argues that the videotape showing him walking along Shuckman's property line near the refrigeration unit was irrelevant and inadmissible. We disagree.

KRE¹ 401 defines relevant evidence as that which has any tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. This threshold test of relevance is ordinarily referred to as logical relevance. Richard H. Underwood and Glen Weissenberger, Kentucky Evidence ' 401 (2002). The videotape

¹ Kentucky Rules of Evidence.

evidence showed Alford opening a fence onto Shuckman's property near the refrigeration unit; his action occurred after business hours and at or near the time that the unit lost power. That evidence unquestionably tends to make the fact to be proven more probable than it would have been in the absence of the videotape. Alford contends that the surveillance tape does not show him actually touching or handling the unit's switch. However, his challenge relates only to the sufficiency or weight of the evidence rather than to the question of whether it is relevant pursuant to KRE 401.

Alford also argues that the videotaped evidence should have been excluded pursuant to the provisions of KRE 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, or needless presentation of cumulative evidence.

While all relevant evidence is presumed admissible (KRE 402), even relevant evidence may be excluded under KRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice. A merely cursory review of the videotape evidence indicates that the risk of unfair prejudice to Alford was slight -- if any. The trial court did not abuse its discretion by concluding that the probative value of the videotape was not substantially outweighed by any countervailing

factors. The surveillance camera recorded Alford's trek across Shuckman's property near the refrigeration unit as well as his hesitation there -- at or near the time that it was shut down. That evidence was both relevant and admissible under KRE 401 and KRE 403. The judgment cannot be reversed on this ground.

Alford next contends that the evidence introduced relative to a portion of Shuckman's business losses was insufficient to support the jury's verdict. However, the videotape record of the trial proceedings has not been included in the record on appeal. As there is no proper record, we are bound to presume that the trial court's decision to submit the issue to the jury was correct. Davis v. Commonwealth, Ky., 795 S.W.2d 942 (1990). A[W]hen the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court.@ Commonwealth v. Thompson, Ky., 697 S.W.2d 143, 145 (1985).

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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