

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002122-MR

JOHN ROBERT THOMAS; WANDA
THOMAS, HIS WIFE

APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CI-00897

EUGENE "GENE" BOLTON, D/B/A
BOLTON TOWING

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY,¹ SENIOR JUDGES.

WINE, JUDGE: John Robert Thomas and Wanda Thomas ("the Thomases") appeal the Laurel Circuit Court's denial of their motions for a new trial and for a judgment notwithstanding the verdict based on their claim that the jury verdict was contrary to the

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

evidence. For the reasons stated below, we affirm in part, reverse in part, and remand for additional proceedings and a new judgment.

On August 23, 2004, the Thomases filed a complaint against Eugene Bolton (“Bolton”) claiming he had breached the parties’ lease agreement. The parties agreed that the Thomases would rent their commercial property to Bolton for his towing and vehicle storage business. The lease agreement was for a term of eight years, from July 1, 1996, to June 30, 2004. The Thomases alleged the breach occurred because Bolton owed them money for unpaid insurance, and he removed a furnace part, electrical circuits and light fixtures from the leased premises. Bolton generally denied the allegations of the complaint in his answer filed September 10, 2004. In his counterclaim, Bolton asserted that the Thomases terminated the lease prior to its expiration and illegally took his personal property from the leased premises.

The case went to trial on August 16, 2005. Pursuant to the lease, Bolton was responsible for insuring the office building and a garage he constructed on the leased premises. At trial, Bolton admitted that the lease required him to insure the premises. However, Bolton said that his insurance company told him that he could not obtain fire insurance on the garage because the building was made of steel, a fire retardant material. Further, he testified that he never got insurance on the office building because the cost of the insurance exceeded the value of the building. After learning that Bolton did not have insurance on the two buildings, the Thomases told Bolton to get insurance. When Bolton

refused to do so, the Thomases obtained insurance on the buildings for the remainder of the lease.

With respect to the removal of the furnace part, Bolton testified that it was necessary to remove a portion of the heating unit in the metal building and clean it every 800 hours or twice a year. He explained that he had removed the part, cleaned it, and stored it in a vehicle in the back of the lot. Bolton stated that the part still remained, intact, in the back lot but he was never able to return it because the Thomases had locked him out of the premises. Bolton stated that he would return the part to the Thomases following the trial. When questioned about the missing electrical circuits, Bolton said he had no knowledge of missing circuits or any electrical damage to the property.

At the conclusion of the evidence, the trial court directed a verdict for the Thomases on Bolton's liability for failure to maintain insurance and for his removal of the furnace part and electrical circuits. The court instructed the jury to make findings on the remainder of the Thomases' claims, the appropriate damages, and on Bolton's counterclaims. On the counterclaims, the jury unanimously found that the Thomases did not dispose of any of Bolton's personal property before July 5, 2004. Similarly, the jury unanimously found that Bolton had not failed to remove his personal property from the premises by July 5, 2004, pursuant to the lease agreement. Thus, the jury awarded no damages to Bolton for items he claimed the Thomases wrongfully removed from the premises.

Likewise, the jury awarded no damages to the Thomases on any of their claims. The jury found that the Thomases had incurred no damages for lost rent due to Bolton's tardy removal of personal property from the leased premises. And despite the directed verdicts on the Thomases' claims for property insurance and removal of the furnace part and electrical circuits, the jury again awarded the Thomases no damages.

On August 22, 2005, the Thomases filed a motion for a judgment notwithstanding the verdict, arguing they were entitled to a judgment as a matter of law in the amounts of \$2,219.00 for the furnace part and electrical repairs (\$8,719.00 if Bolton did not return the part within ten days as instructed), and \$1,111.00 for Bolton's failure to maintain insurance on the property. The Thomases also moved for a new trial, claiming the jury's verdict was inconsistent with the evidence. Both motions were denied on September 1, 2005, as the trial court entered a judgment confirming the jury's verdict. The Thomases filed the same two motions on September 8, 2005, post-judgment, again arguing they were entitled to damages and that the jury's verdict was contrary to the evidence. Again, their motions were denied. This appeal followed.

In reviewing the denial of a motion for judgment notwithstanding the verdict, we use the same standard of review that we use when we review a denial of a motion for directed verdict. *Pichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). When a trial court considers a motion for judgment notwithstanding the verdict, it must view the evidence in the light most favorable to the opposing party, in this case, Bolton, and give him every fair and reasonable inference that can be drawn from the

evidence. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.App. 1985). A trial court may only grant a judgment notwithstanding the verdict where “there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.” *Id.*

First, we address the issue of Bolton’s failure to secure insurance on the premises as provided for in the parties’ lease agreement. There is no dispute that the lease required Bolton to maintain insurance on the premises. It is also undisputed that Bolton failed to secure insurance leaving the Thomases to incur the cost of the insurance premiums. The Thomases presented evidence at trial that they paid insurance premiums of \$135.00 for the first year, April 1997 to April 1998, and \$166.00 for the remaining six years of the lease from April 1998 to April 2004, for a total of \$1,131.00.² In the absence of any contrary evidence, the the jury’s verdict awarding the Thomases no damages for Bolton’s breach as to the insurance was not supported by the evidence. Thus, the trial court should have entered a judgment notwithstanding the verdict for the Thomases in the amount of \$1,131.00.

The Thomases next argue that they were entitled to a judgment notwithstanding the verdict for their claimed damages with respect to the electrical equipment and the furnace part. They cite to a number of cases where a jury’s award of zero for pain and suffering was deemed inadequate and were thus reversed by the reviewing court for not having been supported by the evidence. These cases are not on

² A mathematical error in the instructions indicated the amount due was \$1,111.00.

point since the issue in the case *sub judice* does not involve pain and suffering but amounts which are susceptible to an exact determination. We also question the trial court's decision to grant a directed verdict on the matter of whether Bolton removed or destroyed electrical equipment from the metal building, as this was a disputed issue of fact that should have been submitted to the jury. However, this issue is not before us on cross-appeal. Rather, the sole issue concerns the sufficiency of the evidence supporting the jury's finding that the Thomases incurred no damages as a result of Bolton's actions.

At trial, the Thomases alleged that Bolton removed certain electrical equipment and light fixtures from the metal building. The jury heard Mr. Thomas testify that he was not able to rent the property as a result because the building lacked the proper electrical fixtures. The Thomases also presented a witness who testified as to the approximate cost of replacing the electrical equipment. In contrast, Bolton told the jury that he was the one who put the metal building on the premises. Bolton testified he was the one who installed the electrical work in the metal building. Bolton stated that, contrary to the Thomases' claims, he only ran 110 volts of energy along the ground and in the wall outlets. Bolton further testified that neither he nor any of his employees removed any of the electrical equipment at anytime.

Despite the directed verdict, the Thomases bore the burden of proving that they had incurred damages as a result of Bolton's actions. There was sufficient evidence to support either a conclusion that the Thomases did or did not incur damages to the electrical equipment in the metal building. Since the jury could reasonably reach either

conclusion based on the evidence, we find no basis to disturb the jury's award of zero damages to the Thomases. Therefore, we must affirm the trial court on this issue.

The issue involving the furnace part is a different matter. Bolton returned the portion of the furnace he removed to the Thomases in good working condition. However, the Thomases argue they are still entitled to damages as to the cost of the installation of the part. The Thomases' witness, Glenn Caudill, testified that the cost of installation would be between \$1,500.00 and \$2,000.00. However, the court's final order indicates that there is some question whether the Thomases will incur this expense because the furnace has since been removed from the property. But based on the evidence presented to the jury, we conclude that the Thomases were clearly entitled to some damages for Bolton's removal of the furnace part. As there is a factual dispute as to the amount of damages, we must reverse and remand this issue to the trial court for a new trial.

Accordingly, the judgment of the Laurel Circuit Court is affirmed in part, reversed in part, and remanded for a new trial and for entry of a new judgment as set forth in this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

David O. Smith
Marcia A. Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Hailey Scoville Bonham
London, Kentucky