

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002428-MR

DEWEY LITTLE AND PHYLLIS LITTLE

APPELLANTS

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 03-CI-00287

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: In this action arising from the denial of an insurance claim, Dewey and Phyllis Little have appealed from the Grant Circuit Court's November 18, 2005, order denying their motion for a judgment notwithstanding the verdict following a jury trial.

The jury found in favor of Kentucky Farm Bureau Mutual Insurance Company, having determined that the Littles violated a condition of their mobile home policy prohibiting

the intentional concealment or misrepresentation of material facts, fraud, and the making of false statements to the insurance company, thereby voiding their policy. We affirm.

During the evening of July 24, 2002, the Littles' residence in Williamstown, Kentucky, was burglarized. Dewey arrived home from work just after midnight on July 25th, and noticed that the electricity was not working when he entered the back door. He found a flashlight and pointed it toward the living room area, where he noticed a mess. Once he determined that no one was in the house, he drove to Williamstown to call the police from a pay phone. By the time he returned, Deputy Andrew Reeves of the Grant County Sheriff's Department had already responded to the 911 call. Deputy Reeves and Dewey walked around to the back of the house and saw that the electric meter had been removed from the box on the utility pole. Deputy Reeves found the meter in a field over a fence. Dewey replaced the meter and restored the power. They both went into the shed behind the house, noting that the lock had been broken. Inside the shed, Deputy Reeves saw garden tools, a tool box on the bench, and hand tools. Deputy Reeves and Dewey spent two to four minutes in the shed before proceeding to the residence.

Once in the house, Dewey immediately discovered that three handguns were missing from a closet safe. Also missing were a Crown Royal bag containing coins and currency and his wife's jewelry, including her wedding/engagement ring. Deputy Reeves stated that Dewey was concerned about cowboy boots and leather jackets, items that Dewey located in the residence after looking for them. Dewey's wife, Phyllis, arrived home from work between 2:00 and 2:45 a.m., and was clearly upset about the

burglary. Deputy Reeves asked the Littles to take some time to make a list of the missing items and to give it to him so that he could complete his report. The following month, Dewey gave Deputy Reeves a lengthy list of items missing from the shed and the residence, including \$12,335 worth of items from the residence and \$3,790 worth of items from the shed, for a total of \$16,125.

Deputy Reeves filed a Uniform Offense Report on September 5, 2002. In his report, Deputy Reeves described responding to the burglary call, in particular noting Dewey's statement that the shed only contained "some old tools." The report also detailed the items Dewey identified as being missing at the time, including three handguns, jewelry, and bottles of liquor. In his testimony, Deputy Reeves stated that while he believed that a burglary had taken place, he grew suspicious of the Littles when he received the list of items that they claimed had been stolen. There appeared to be a large discrepancy between what Dewey had claimed was missing the night of the burglary and the list the Littles provided to Deputy Reeves several weeks later. Deputy Reeves talked to Sheriff Randy Middleton about his suspicions. Sheriff Middleton recommended that he contact the insurance agency, which Deputy Reeves did.

Tamara Click, a claims adjuster with Kentucky Farm Bureau, was the initial adjuster assigned to the case. She determined that the Littles were covered for this type of loss, and that their policy provided \$30,000 in replacement cost coverage. Furthermore, Click testified that the Littles took out the policy on June 13, 2002, with \$20,000 in content coverage. On July 1st, they raised the coverage amount to \$30,000.

The Littles filed their claim just over three weeks later on July 25, 2002. Notably, the policy contained a section relating to concealment or fraud, and provided as follows:

The entire policy will be void if, whether before or after a loss, an INSURED has:

- A. intentionally concealed or misrepresented any material fact or circumstance; or
- B. engaged in fraudulent conduct; or
- C. made false statements;

relating to this insurance.

In her investigation, Click identified several “red flags” that caused her to become suspicious of the Littles' claim. These “red flags” included the long, obsessive list the Littles submitted, which was beyond what she typically would see in theft loss claims in the area; that the Littles were anxious to settle the claim; that the policy was new; and that the coverage amount was increased less than a month before the loss. She also relied upon her discussion with Deputy Reeves, where she discovered his concerns about some of the items claimed on the list. Furthermore, the Littles did not provide her with any receipts, photographs, or repair receipts for any of the items claimed. For these reasons, Click decided to transfer the claim to Dan Keller, an adjuster in Kentucky Farm Bureau's special investigative unit who handled claims where fraud was suspected. On April 28, 2003, once the investigation was concluded, Click sent a letter to the Littles denying their claim due to the exclusion in their policy for concealment or fraud.

On July 22, 2003, the Littles filed suit in Grant Circuit Court, seeking damages, including punitive damages, for Kentucky Farm Bureau's wrongful denial of their insurance claim as well as for bad faith. The loss and bad faith claims were bifurcated on motion of Kentucky Farm Bureau, with the underlying loss claim to be adjudicated first. The matter proceeded to trial by jury on September 8, 2005. At the conclusion of the trial, the jury unanimously found under Instruction No. II that “the Plaintiffs suffered a theft and loss of items at their mobile home located at 7315 Stewartsville Road, Williamstown, Kentucky on July 25, 2003[.]” Under Instruction No. III, however, eleven members of the jury found that the Littles had committed one or more of the following acts in relation to the incident: “a) intentionally concealing or misrepresenting any material facts or circumstance, or b) engaging in fraudulent conduct, or c) making false statements to Kentucky Farm Bureau agents and employees[.]” Under its terms, such acts voided the entire policy.

The Littles immediately filed a motion for a judgment notwithstanding the verdict, to set aside the verdict, or for a new trial. In support of their motion, the Littles argued that the jury's decision not to award damages was grossly inadequate and unsupported by the evidence or law. Kentucky Farm Bureau objected to the motion, asserting that a significant amount of evidence supported the jury's findings. In addition, Kentucky Farm Bureau moved for summary judgment on the Littles' bad faith claim, arguing that in light of the jury's finding, the claim should be summarily dismissed as derivative. On November 2, 2005, the circuit court granted Kentucky Farm Bureau's

motion for summary judgment and dismissed the pending bad faith claim, making the order final and appealable. On November 18, 2005, the circuit court denied the Littles' motion for a judgment notwithstanding the verdict. It is from this order that the Littles have taken the present appeal. Finally, on November 22, 2005, the circuit court entered a Trial Order and Judgment dismissing the Littles' claims.

On appeal, the Littles continue to argue that the circuit court improperly denied their motion for a judgment notwithstanding the verdict or to set aside the jury's verdict. They assert that there was a complete absence of proof to justify the jury's decision that they had committed fraud, as the testimony of Click and Deputy Reeves regarding their personal opinions was not enough to meet the requisite standard of proof. They further assert that the verdict was not supported by sufficient evidence, citing the lack of evidence that they acted either dishonestly or fraudulently. Kentucky Farm Bureau disputes the Littles' arguments, pointing out that the evidence of record supports the jury's verdict.

JUDGMENT NOTWITHSTANDING THE VERDICT

Pursuant to Kentucky's Civil Rules, a party who moved for a directed verdict at the close of all evidence is permitted to file a motion for a judgment notwithstanding the verdict “to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]” CR 50.02. Kentucky courts have addressed the standard to be applied to such motions:

In ruling on a JNOV motion, the trial court is required to consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record. *Taylor v. Kennedy*, Ky., 700 S.W.2d 415, 416 (1985). The motion is not to be granted “unless 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. *Taylor*, 700 S.W.2d at 416. On appeal, we are to consider the evidence in the same light. *Lovins v. Napier*, Ky., 814 S.W.2d 921, 922 (1991).

Brewer v. Hillard, 15 S.W.3d 1, 9 (Ky.App. 1999). See also *Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541, 547 (Ky.App. 2005).

Reviewing the evidence in favor of the party opposing the motion (Kentucky Farm Bureau), we observe a plethora of evidence supporting the jury's finding under Instruction No. III. Both the claims adjuster and Deputy Reeves testified as to their suspicions regarding the list of items the Littles claimed were stolen. Deputy Reeves testified as to his observations that night. He stated that he actually saw several items in the house that later appeared on the list of stolen items and was shocked at the number of items listed as being missing from the shed, as Dewey told him that the shed merely contained some old tools. Likewise, Click testified that the list of missing items appeared obsessive and was several thousand dollars more than a normal claim for that geographical area. She also testified as to the many “red flags” that caused her to question the veracity of the Littles' claim and to turn the claim over to the special investigative unit. Although there was no direct proof that the Littles fabricated the list (such as proof that they were still in possession of a particular item), the testimony

elicited from both Click and Deputy Reeves provided the necessary basis for the jury's finding. For this reason, we disagree with the Littles' contention that there is a complete absence of proof on this issue. Therefore, we hold that the circuit court properly allowed this issue to go to the jury and then denied the motion for a judgment notwithstanding the verdict.

MOTION TO SET ASIDE THE VERDICT

The Littles have also argued that the circuit court erred in refusing to set aside the jury's verdict. A jury verdict may be set aside for insufficient evidence “only where the verdict of a jury is flagrantly and palpably against the evidence.” *Lindon v. Potter*, 306 Ky. 511, 514-15, 208 S.W.2d 515, 517 (1948). *See also Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998). “[W]e are not authorized to set aside a verdict merely because the evidence is conflicting[.]” *Lindon*, 208 S.W.2d at 517. Additionally, “[i]f, however, the jury gives the evidence more weight and value than the maximum it is entitled to, the appellate court has the power to set aside the verdict either on the ground of palpable excessiveness or on the ground that it is not sufficiently supported by the evidence.” *Kentucky Utilities Co. v. Bruner*, 400 S.W.2d 203, 205 (Ky. 1966), *quoting Commonwealth Dept. of Highways v. Tyree*, 365 S.W.2d 472 (Ky. 1963).

As with their previous argument, the Littles emphasize that neither Click nor Deputy Reeves had any evidence to support their suspicions that they had acted fraudulently. The Littles argue that there was no investigation as to the accuracy of the items reported as stolen or as to their value. For example, they point out that Click never

went to their residence as a part of her investigation before turning the claim over to the fraud unit. However, our review of the evidence included in the appellate record suggests that Kentucky Farm Bureau did investigate the Littles' claim through both Click and the fraud unit. Furthermore, Click detailed her many reasons for questioning the excessive number of items that the Littles claimed were stolen, including her conversation with Deputy Reeves. Clearly, the majority of the jury was convinced that the Littles' residence had been burglarized, but that they had acted less than honestly in filing their claim. We agree that there was sufficient evidence to support the jury's finding under Instruction No. III and that this finding was not flagrantly or palpably against the evidence.

For the foregoing reasons, the Grant Circuit Court's order denying the motion for a judgment notwithstanding the verdict or to set aside the jury's verdict is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Ed Massey
Dry Ridge, Kentucky

BRIEF FOR APPELLEE:

Jack S. Gatlin
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