

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2008 Session

**RICHARD HUNTER, ET AL. v. NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY**

**Appeal from the Circuit Court for Williamson County
No. 07663 Jeffrey S. Bivins, Judge**

No. M2008-00434-COA-R3-CV - Filed September 9, 2008

Appellants, Richard and Roxanne Hunter, filed a breach of contract action against Nationwide Mutual Fire Insurance Company, Appellee, in Circuit Court for Williamson County seeking compensation under their insurance policy for damage allegedly caused by hail. Following a trial, the jury returned a verdict in favor of Nationwide. Finding material evidence in support of the jury's verdict, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ. joined.

Richard Hunter and Roxanne Hunter, Franklin, Tennessee, pro se.

Christian M. Garstin, Nashville, Tennessee, attorney for appellee, Nationwide Insurance Company.

MEMORANDUM OPINION

Richard and Roxanne Hunter,¹ are the owners of a home located at 108 McGavock Circle, Franklin, Tennessee, in Williamson County. In February 1996, the Hunters insured their home against damage, including wind and hail damage, under a ten year policy. During the fall of 2005 and spring of 2006, there were allegedly three hail storms of varying degrees in Williamson County occurring on August 16, 2005, September 7, 2005, and April 7, 2006.

The Hunters became aware of a leak in their skylight in September 2005. They hired a contractor, Ed Samples, in early January 2006, to inspect and repair the skylight. During his inspection, Mr. Samples went onto the roof and observed pea-sized hail damage to the attic vents.

¹ The parties, Appellants/Richard and Roxanne Hunter and Appellee/Nationwide Mutual Fire Insurance Company, will be referred to herein as "the Hunters" or "insured," and "Nationwide" or "insurance company," respectively.

The Hunters subsequently reported the hail damage to their roof and skylight to Nationwide.

Nationwide sent an adjuster, Mike Busey, to the Hunters' home on January 11, 2006, to inspect their roof for hail damage. Mr. Busey's inspection discovered the same pea-sized dents in the attic vents that Mr. Samples found, but Mr. Busey did not find any hail damage to the roof's shingles. Mr. Busey did not inspect the home's interior for any damage.² Mr. Busey told Mr. Hunter when he finished his inspection that he did not believe the Hunters' roof had suffered hail damage, and that Nationwide was likely to deny their claim; however, he also told Mr. Hunter that, to be sure, Nationwide would hire an independent firm, Donan Engineering, to conduct a more thorough inspection of the roof.³

Nationwide continued to investigate the Hunters' claim by retaining Matt Richardson of Donan Engineering to inspect their roof, which he did on January 19, 2006. Mr. Richardson's report noted the slight impact of hail on the attic vents, but did not find hail damage to the shingles. Mr. Richardson opined that the only damage to the Hunters' roof was caused by foot traffic on the roof and age-related deterioration.

In early March 2006, the Hunters hired Paul Vitolins of Gordon Construction Company to assess the roof damage to their home. Mr. Vitolins estimated that the Hunters' roof required repairs costing \$3,972.72, not including the gutters or any interior work. The Hunters did not hire Mr. Vitolins to complete any repairs.

Based on Donan Engineering's report, Nationwide sent a written denial of the Hunters' claim on March 9, 2006, explaining that the claim was not a covered loss under the policy. Some time later in March, the Hunters cancelled their insurance policy. On April 7, 2006, there was another, reportedly severe, hail storm that hit Middle Tennessee including the area around the Hunters' home. At trial, the Hunters asserted that no hail damage occurred from that storm and refuted Nationwide's suggestion that the hail storm pictures produced at trial by the Hunters were actually taken during this storm rather than in September 2005.⁴

² Mr. Busey testified that he asked Mr. Hunter if there was any interior damage, and Mr. Hunter told him "no." Mr. Hunter disputed this testimony.

³ Nationwide claims that it did not formally deny the Hunters' claim on this day as the Hunters allege. Mr. Hunter disputed Mr. Busey's testimony that he did not verbally deny the Hunters' claim on January 11, 2006; however, Mr. Hunter acknowledged in cross-examination that he had testified at the March 6, 2006, General Sessions trial, from which this case stems, that he never received a "verbal or written denial" from Mr. Busey or Nationwide.

⁴ The date of hail damage to the Hunters' roof was much disputed during the trial. In the General Sessions action, the Hunters alleged their home suffered damage from a hail storm on August 16, 2005, and made no mention of a September 2005 hail storm. The Hunters' Circuit Court complaint, however, explained that the Hunters actually believed that their home suffered hail damage from the September 7, 2005, storm, but that they were told by their local insurance agent to use the August 16, 2005, date because there had been reports of hail damage on that date to other homes. Nationwide's Middle Tennessee adjuster, Mike Busey, testified that he was not aware of any hail storms or reports of hail damage in Middle Tennessee in August or September 2005. At the Circuit Court trial on February 14, 2008, Mr. Hunter produced for the first time photographs of a hail storm at the Hunters' home, and Mr. Hunter testified

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In anticipation of the Circuit Court trial, the Hunters hired Terry Willoughby of Southern Restoration and Remodeling on February 7, 2007, to inspect their home for hail damage. Mr. Willoughby testified at trial that he found hail damage to the shingles, gutters, and attic vents on the roof and to the interior of the home above the skylight and living room; he could not, however, identify the date the damage occurred.

The Hunters hired Quality Exteriors to replace their roof on May 23, 2007. The total invoiced price for a new roofing base, shingles, ice and water shield, skylights, gutters, and chimney flashing including demolition, overhead and profits was \$15,341.18; at the time of the Circuit Court trial, the Hunters had only been required to pay \$8,100.

The Hunters filed an action against Nationwide in Williamson County General Sessions Court on January 11, 2006. Trial was held on March 6, resulting in a judgment in favor of Nationwide, which the Hunters appealed to Circuit Court. On October 8, 2007, the Hunters requested a voluntary non-suit to their initial appeal, which was granted. The Hunters filed a new, virtually identical complaint against Nationwide in Williamson County Circuit Court on October 10, 2007. The case was heard on February 14, 2008, before a 12 person jury, which returned a verdict in favor of Nationwide.

On appeal, the Hunters challenge the evidence in support of the jury's verdict and argue that the verdict should be reversed because the jury was improperly charged. They also raise for the first time allegations that Nationwide violated the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* Finally, the Hunters ask this Court to reverse the trial court's award of discretionary costs to Nationwide.

ANALYSIS

I. Jury Verdict

The standard of this court's review of jury verdicts is set out in Tenn. R. App. P. 13(d), which provides, "[f]indings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." *Id.* The Tennessee Supreme Court has stated that "when addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence." *Whaley v. Perkins*, 197 S.W.3d 665, 671 (Tenn. 2006) (internal citations and brackets omitted); *Barnes v. Goodyear Tire & Rubber Co.*, 48 S.W.3d 698, 704-05 (Tenn. 2000). Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. *Whaley*, 197 S.W.3d at 671. If the record contains "any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise, the

⁴(...continued)

the pictures were taken during the September 7, 2005, storm. Nationwide challenged the authenticity of the date of the photographs because they were not date-stamped and they were only first produced after the April 2006 hail storm, which was after the parties had entered into litigation.

parties would be deprived of their constitutional right to trial by jury.” *Whaley*, 197 S.W.3d at 671; *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn.1978). The issue before this Court, therefore, is whether any material evidence supports the jury’s verdict.

In this case, the jury was able to review and consider all of the evidence put forth, including testimony, depositions, photographs, damage reports, and the insurance contract. The jury heard testimony from Mr. and Mrs. Hunter, three contractors hired by the Hunters to assess damage to their roof and skylight, a civil engineer testifying as an expert for Nationwide, Nationwide’s insurance adjuster, and the accountant of the contractor who completed the repairs to the Hunters’ roof. Nationwide challenged the credibility of Mr. Hunter’s testimony by highlighting his conflicting prior testimony in the General Sessions trial and his deposition. Mr. Hunter produced photographs of a hail storm at his home, but was unable to authenticate the date the pictures were taken, raising suspicion that the photos could have been taken on April 16, 2007, rather than September 7, 2005, as Mr. Hunter contends.

The credibility of witnesses was particularly important in this case as the underlying documentation of damage to the Hunters’ roof presented by each party was virtually identical. Appellate courts do not have the same ability to reconcile conflicting testimony or to evaluate credibility because they do not have the opportunity to observe the witnesses while they are testifying. *Grissom v. Metro. Gov’t of Nashville, Davidson County*, 817 S.W.2d 679, 684 (Tenn. Ct. App. 1991).

In our view, the record contains material evidence upon which the jury could reasonably have concluded that Nationwide did not breach the terms of the insurance contract with the Hunters. Accordingly, finding material evidence to support the jury’s conclusion, we affirm the jury’s verdict.

II. Jury Charge

The Hunters raise as an issue whether the jury applied the “correct legal standards,” and assert in their brief that “the jury erred in their [sic] determination that the Appellee did not Breach [sic] their Duty [sic] In [sic] not honoring the claim of the Appellants.” We have reviewed the trial court’s charge to the jury and find no error.

Moreover, both parties submitted proposed jury charges, and were given an opportunity to review and object to the final jury charge before it was given to the jury; Mr. Hunter raised no objection. As such, the Hunters cannot now raise objection for the first time on appeal. *See Lovell v. Metro. Gov’t of Nashville and Davidson County*, 696 S.W.2d 2 (Tenn. 1985); *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983). Tenn. R. App. P. 36(a) permits the appellate courts to grant relief to a party on the law and facts; however, such relief cannot be granted “to a party responsible for the error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”

III. Tennessee Consumer Protection Act Claim

The Hunters assert that Nationwide violated the Tennessee Consumer Protection Act

(“TCPA”), Tenn. Code Ann. § 47-18-101 *et seq.* The Hunters have raised this allegation for the first time on appeal. It is a well settled principle of law that issues not raised in the trial court cannot be raised on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 152 (Tenn. 1991); *See Lovell*, 696 S.W.2d 2; *See Lawrence*, 655 S.W.2d 927. The Hunters did not allege any violations of the TCPA in the trial court and, therefore, the defendant had no opportunity to introduce evidence which might be pertinent in considering the claim. This issue is without merit.

IV. Discretionary Costs

The Hunters challenge the trial court’s award of discretionary costs to Nationwide. Tenn. R. Civ. P. 54.04(2) permits a trial court to award costs not included in the bill of costs prepared by the clerk. Allowable discretionary costs are:

reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

Tenn. R. Civ. P. 54.04(2).

Awarding costs in accordance with Tenn. R. Civ. P. 54.04(2), is within the trial court's reasonable discretion. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992). Accordingly, we employ a deferential “abuse of discretion” standard when reviewing a trial court's decision either to grant or to deny motions to assess discretionary costs. *Massachusetts Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 35 (Tenn. Ct. App. 2002); *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000). A trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, and reasonable minds can disagree about its correctness. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001); *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Parties are not entitled to costs under Tenn. R. Civ. P. 54.04(2) simply because they prevail at trial. *Massachusetts Mut. Life Ins. Co.*, 104 S.W.3d at 35; *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998). However, courts should, as a general matter, award discretionary costs to a prevailing party if the costs are reasonable and necessary, and if the prevailing party has filed a timely and properly supported motion. *Massachusetts Mut. Life Ins. Co.*, 104 S.W.3d at 35; *Scholz*, 40 S.W.3d at 84. Once a party seeking discretionary costs has filed its motion, the non-moving party may present evidence and argument challenging the requested costs. *Massachusetts Mut. Life Ins. Co.*, 104 S.W.3d at 35. The party who takes issue on appeal with a trial court's decision regarding discretionary costs has the burden of showing how the trial court abused its discretion. *Id.*; *Sanders*, 989 S.W.2d at 345.

When deciding whether to award discretionary costs, the courts should (1) determine whether the party requesting the costs is the prevailing party, (2) limit awards to the costs specifically identified in the rule, (3) determine whether the requested costs are necessary and reasonable, and

(4) determine whether the prevailing party has engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled. *Massachusetts Mut. Life Ins. Co.*, 104 S.W.3d at 35; *Scholz*, 40 S.W.3d at 85.

The trial court awarded discretionary costs in the amount of \$2,958.68 to Nationwide for court reporter expenses incurred for depositions and trial and fees for expert witness' appearance. All of the expenses awarded by the trial court were of the type specifically permitted by Tenn. R. Civ. P. 54.04, and there is nothing in the record to show that they are unreasonable. The Hunters offered no evidence or argument to the trial court challenging the requested costs.

The Hunters argue in this Court that Nationwide engaged in conduct during the litigation that warrants depriving it of discretionary costs. Specifically, they allege that Nationwide acted "in collusion" with its witnesses and misrepresented the facts and circumstances of the Hunters' insurance claim. The Hunters neither raised this objection with the trial court nor did they move for a new trial based on misconduct of the parties or counsel as required by Tennessee Rules of Appellate Procedure 3(e).⁵ The Hunters have offered no evidence of misconduct to this Court and our review of the record does not reveal any misconduct or any basis to conclude that the trial court abused its discretion; consequently, we affirm the trial court's award of discretionary costs to Nationwide.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the trial court in all respects. Costs are assessed to the Hunters, for which execution may issue, if necessary.

RICHARD H. DINKINS, JUDGE

⁵ Tenn. R. App. P. 3(e) provides that an appeal as of right may be made to the Court of Appeals, "[p]rovided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon ... misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, ... unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived...."