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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000383-MR

CLAUDE H. SIMMONS,
WILMA ANN BARKER,
OSCAR WAYNE SIMMONS, AND
ADDIE L. POWERS, INDIVIDUALLY
AND ON BEHALF OF THE ESTATE
OF GERTRUDE SIMMONS — APPELLANTS

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 07-CI-00052

HERBERT WENDELL SIMMONS;
VANESSA GAYE MAGGARD;
HAROLD D. SIMMONS; AND THE
ESTATE OF GERTRUDE SIMMONS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: This appeal arises from a dispute between seven siblings related to transfers of real and personal property by their mother prior to her death. Four of the siblings contended that the other three siblings exerted undue influence over their mother to transfer the property to themselves. Following a trial, the jury returned a verdict in favor of the defendants, finding that they had not exerted any undue influence and that their mother retained the mental capacity to make the contested transfers. The Elliott Circuit Court entered a trial verdict and judgment dismissing the plaintiffs' complaint and denied the plaintiffs' post-trial motions for relief. Finding no error in the trial court's rulings, we affirm the judgment and orders on appeal.

Gertrude and James Simmons were the parents of seven children; namely, Claude H. Simmons, Wilma Ann Barker, Oscar Wayne Simmons (Oscar), Addie L. Powers, Vanessa Gaye Maggard (Gaye), Herbert Wendell Simmons (Wendell), and Harold D. Simmons. In 1996, Gertrude and James executed mutual wills in which each spouse left everything to the surviving spouse. If one died without a surviving spouse, the wills devised real estate to Oscar, Claude, Gaye, and Gaye's husband, and devised personal property to Claude (a Ford SU 4000 tractor) and to Wendell (all other farm equipment except the tractor listed above, livestock, and the contents of the house). The remainder of the property would be bequeathed to all seven children, jointly, share and share alike. Gertrude named James as the executor of her will, and in the event he predeceased her, named Wendell and Gaye as co-executors. James passed away on November 23, 2004.

His will was probated in Elliott District Court, and his property passed automatically to Gertrude.

After James' death, Gertrude made several property transfers that are the subject of this litigation. On November 29, 2004, Gertrude placed money in joint bank accounts, naming Wendell and Gaye as co-owners. In early January, Gertrude listed Wendell and Gaye as agents on her accounts. Two days later, Gertrude executed a durable power of attorney naming Wendell and Gaye as her attorneys-in-fact. Later that month, Gertrude changed the accounts back to a joint account with Wendell and Gaye, and then to Wendell's and Gaye's individual accounts. The amount in the accounts totaled $245,545.68.

In addition to bank accounts, Gertrude conveyed several pieces of other property. On March 13, 2005, Gertrude transferred real estate adjoining the property where she and her husband lived to Gaye.[1] On May 17, 2006, Gertrude transferred an interest in the farm where she lived to Wendell. She retained a life estate in that property, with the remainder interest going to Wendell. She also transferred her interest in livestock, farm equipment (except one tractor), machinery, and tools to Wendell.[2] In September 2005, Gertrude transferred her interest in Brown Ridge Farm to Harold.[3]

[1] Gaye was to inherit this property pursuant to Gertrude's will.

[2] Wendell was to inherit this real and personal property pursuant to Gertrude's will.

[3] Oscar and Claude were to have inherited this property under Gertrude's will.

In October 2005, four of the siblings, Claude, Oscar, Wilma, and Addie, filed a petition in Elliott District Court[4] to determine whether Gertrude was statutorily disabled and needed a court-appointed guardian. A three-member interdisciplinary team concluded that she was not disabled and did not need a guardian, and the petition was dismissed.

Gertrude passed away on June 6, 2006, at the age of 87, and her will was probated in Elliott District Court. Wendell and Gaye were named the co-executors.

On April 21, 2007, Claude, Oscar, Wilma, and Addie (hereinafter "the plaintiffs" or "the appellants") filed a complaint against Wendell, Gaye, and Harold ("the defendants" or "the appellees") seeking compensatory and punitive damages for claims of tortious interference with an inheritance, breach of fiduciary duty, breach of contract to make a will, breach of contract to devise property, and for enforcement of a constructive trust. They also sought to settle the estate, to cancel the prior property conveyances, and to remove the co-executors. The plaintiffs contended that the defendants began exercising dominion, control, and custody over Gertrude after James died and that they misled Gertrude or exercised undue influence to persuade her to transfer her property. Based upon Wendell and Gaye's positions as attorneys-in-fact, the plaintiffs labeled their relationship as confidential.

[4] Action No. 05-H-0009-001.

After the defendants filed their answer to the complaint, both parties began discovery. Several trial dates were set, and a jury trial was eventually scheduled for June 2, 2009. In April 2009, the defendants moved for a partial summary judgment, arguing that Gertrude's mental capacity had already been litigated in Elliott District Court and any additional litigation would be barred by collateral estoppel; that any claims against Harold should be dismissed as unsupported by any evidence; that the plaintiffs failed to establish a *prima facie* case for breach of contract to devise property; and that Kentucky does not recognize the tort of interference with an inheritance. In their response, the plaintiffs indicated that they would not be pursuing any breach of contract claims at trial, but otherwise objected to the motion. By order of stipulation entered April 4, 2009, the claims for breach of contract to make a will and to devise property were dismissed.

Shortly before the June 2009 trial date, the plaintiffs moved to change venue pursuant to Kentucky Revised Statutes (KRS) 452.030. As grounds for the motion, the plaintiffs stated that the jury list revealed a large number of potential jurors who were related to or were associated with the defendants or the defendants' witnesses. In response, the defendants argued that the grounds given were insufficient to justify a change in venue, stating that the mere fact that they were well known in the county was not enough to establish that the plaintiffs would not receive a fair trial. The trial date was later rescheduled for February 4, 2010.

In a motion in limine filed in January 2010, the defendants raised the burden of proof issue and whether the burden would be shifted to them. They also argued that it was improper to comment upon any shift in the burden of proof to the jury. The plaintiffs, in turn, argued that because of the confidential relationship between Wendell and Gaye and their mother, the burden of proof would shift to them and an elevated standard of proof of clear and convincing evidence would apply.

The matter went to trial on February 4, 2010, but the court declared a mistrial when a jury could not be seated. In May 2010, the plaintiffs' new attorney entered an appearance and the firm formerly representing them withdrew in July. By order entered July 26, 2010, the court scheduled a trial date for late November 2010, noting that a larger panel of jurors would be seated and that the jury trial would be held in Elliott County without objection from the parties. If a sufficient number of qualified jurors could not be obtained in Elliott County, the court permitted the parties to renew the motion to change venue. The trial was again rescheduled for March 15, 2011, at the request of the plaintiffs, due to their attorney's recent entry into the case and the need to review the volumes of material and witnesses.

On March 3, 2011, the defendants filed a third supplement to their exhibit list, which included a letter dated May 30, 2005, from Gertrude to attorney Steve Gray.

At the pretrial conference held on March 7, 2011, the parties addressed the filing of the new exhibit, the letter purportedly from Gertrude to attorney Gray. Defense counsel had just received the letter from attorney Gray, one of the planned witnesses in the case. Gray told him that he had inventoried the office safe for the first time in forty years and found the letter. He sent the letter to defense counsel, who had one of his clients verify that the handwriting was Gertrude's. Plaintiffs' counsel requested to see the original letter as well as the opportunity to seek an expert opinion on handwriting. The court noted that the 2005 letter was written after the deeds were made to Gaye and Wendell, but before the deed to Harold was made. Attorney Gray had prepared these deeds and an acknowledgement of gift made in March 2005.

The discussion shifted to whether the trial should be delayed, and the court and the parties developed a plan to address the existence of the letter. Plaintiffs' counsel indicated that he had discussed the issue with his clients and had made an initial contact with an expert, who could have a response by the following Wednesday, the first day of trial, if the letter and exemplars were overnighted to him. The court agreed that the plaintiffs had a right to have the letter examined, and suggested that to maintain the scheduled trial date, the trial would begin on Tuesday with the seating of the jury, and they would take the day off on Wednesday to confer regarding the expert's opinion and determine whether further opinions would be sought. If favorable to the plaintiffs, but unfavorable to the defendants, the defendants would then have the opportunity to perform their own

review and a mistrial would be declared. If found to be valid, the plaintiffs would have had their opportunity to examine the validity of the document.

In addition to discussing the issue of the letter, the parties discussed whether the burden of proof should shift as well as the tortious interference with an inheritance claim. The defendants argued that this cause of action had not been adopted in Kentucky and that the plaintiffs only cited to the Restatement; no Kentucky case had addressed this particular claim. The court indicated that it would consider the pending issues and wait to hear back from the parties regarding the handwriting expert.

On March 10, 2011, counsel for the plaintiffs sent correspondence by fax to counsel for the defendants and the court stating, in part:

> I wanted to let everyone know our expert's review is not helpful to the Plaintiffs' case. Therefore, I do not intend to present any additional proof from him. Therefore, I assume we will proceed as scheduled.

The matter proceeded to trial on March 15, 2011. Prior to the start of the trial, the court summarized its rulings on several pretrial motions.[5] The court denied the motion for partial summary judgment as to Harold and for the tortious interference claim, noting that such claim had not been disallowed in Kentucky. The court addressed the motion for change in venue, stating that the plaintiffs were improperly attempting to change the venue of the trial based upon potential juror disqualification prior to voir dire. The court noted that a large pool had been called

[5] These rulings were also memorialized in an order entered June 10, 2011, following the trial in this matter.

for the March trial date. The trial court spent the first day seating a jury, and thereafter the parties called witnesses for several days.

At the conclusion of the testimony, the plaintiffs renewed their motion for directed verdict, and the defendants moved for a directed verdict as well. The court ultimately denied both motions and permitted the matter to go to the jury. The court decided to omit the instruction for tortious interference with an inheritance because of the posture of the case and because the plaintiffs failed to establish a *prima facie* case; the mere existence of a will was not enough. On breach of fiduciary duty, the court held that Gertrude's estate would be entitled to damages, not the individual plaintiffs. The court also held that the proof in this case did not rise to the level of punitive damages. The plaintiffs objected to both the omission of the instructions for tortious interference and punitive damages. The parties also discussed jury instructions. Regarding the shift in the burden of proof, the court noted that the heightened standard of proof must be enumerated in the instructions, but not which party has the burden of proof. Further, the clear and convincing standard may not be defined in the instructions. Finally, based upon the shift in the burden of proof because of the confidential relationship, counsel for the defendants moved the court to present his closing argument last. The court agreed. Counsel for the plaintiffs questioned whether this was correct because the jury would not be informed about the shift in the burden of proof. He thought this affected only the jury instructions, not the procedural order of the arguments. The court explained that in civil trials, the party with the burden of proof presents his

argument last and that it would be appropriate to shift the order of the closing arguments.

The jury returned a verdict in favor of the defendants, finding that Gertrude had sufficient mental capacity to convey her property and that the defendants had not exerted undue influence over her. The trial court entered a judgment of dismissal on June 10, 2011.

The plaintiffs filed a motion to reconsider and for a judgment notwithstanding the verdict pursuant to Kentucky Rules of Civil Procedure (CR) 59.01(c), citing jury bias (the foreperson was a classmate of Gaye and deliberation was stifled per another juror); evidentiary surprise in the introduction of the letter from Gertrude; the failure to instruct the jury on tortious interference with an inheritance; the failure to inform the jury of the shift in the burden of proof; that the weight of the evidence supported the plaintiffs' claims; that evidence was not timely produced; and that they were entitled to an instruction on punitive damages. A later motion included additional information about the foreperson, Mary Smith Jones, who failed to disclose that she was related to the family.

On January 27, 2012, the trial court entered a detailed order denying the plaintiffs' post-trial motions. The plaintiffs filed a motion to alter, amend, or vacate that order. The court denied the motion on February 29, 2012, briefly addressing the merits but noting that the motion was not procedurally appropriate. This appeal now follows.[6]

[6] The notice of appeal was timely filed in this case on February 22, 2012, before the entry of the order denying the second motion to alter, amend, or vacate. We note that the court orally ruled

On appeal, the plaintiffs (now the appellants) continue to argue that they were entitled to a new trial due to juror misconduct and problems during deliberations; that the trial court erred in failing to inform the jury that the burden of proof had been shifted; that the trial court erred in failing to instruct on tortious interference; and that they were entitled to a directed verdict on the weight of the evidence. We shall address each issue in turn.

First, we recognize that the appellants sought relief below pursuant to CR 59.01 and CR 59.05. We shall set forth those rules as well as the standard of review as described in the applicable case law. CR 59.01 provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
>
> (a) Irregularity in the proceedings of the court, jury or prevailing party, or an order of the court, or abuse of discretion, by which the party was prevented from having a fair trial.
>
> (b) Misconduct of the jury, of the prevailing party, or of his attorney.
>
> (c) Accident or surprise which ordinary prudence could not have guarded against.
>
> (d) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court.
>
> (e) Error in the assessment of the amount of recovery whether too large or too small.

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on the motion at the February 13, 2012, hearing, and later entered a written order.

> (f) That the verdict is not sustained by sufficient evidence, or is contrary to law.
>
> (g) Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.
>
> (h) Errors of law occurring at the trial and objected to by the party under the provisions of these rules.

The standard of review in appeals from orders denying a CR 59.01 motion is set forth in *Shortridge v. Rice*, 929 S.W.2d 194, 196 (Ky. App. 1996):

> Our standard of review on such issues was described in *McVey* [*v. Berman*], 836 S.W.2d at 448:
>
> > [O]ur only function in reviewing the denial of a motion for new trial is to decide whether the trial judge abused his discretion. The decision of the trial judge is presumptively correct. Thus, we will not reverse the decision of a trial court unless that decision is clearly erroneous. (Citations omitted.)

CR 59.05 provides: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment."

> CR 59.05 authorizes the trial court to "alter or amend a judgment, or to vacate a judgment and enter a new one" on a motion properly filed by a party within ten days after entry of a final judgment. Recognizing the scope of the power accorded trial courts by CR 59.05, this Court has stated that "a trial court has 'unlimited power to amend and alter its own judgments.'" *Gullion v. Gullion*, 163 S.W.3d 888, 891–92 (Ky. 2005) *citing Henry Clay Mining Co. v. V & V Min. Co.*, 742 S.W.2d 566 (Ky. 1987). In *Gullion*, we cited favorably the four grounds recognized by the federal courts in construing

> the federal counterpart, Federal Rule of Civil Procedure 59(e):
>
> > There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.
>
> 163 S.W.3d at 893 *citing* Federal Practice And Procedure § 2810.1. A trial judge's ruling pursuant to CR 59.05 is reviewed by an appellate court under the abuse of discretion standard. *Gullion*, 163 S.W.3d at 892.

Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478, 483 (Ky. 2009).

A. Juror Misconduct

The first argument the appellants raise is that the trial court should have granted a new trial or amended the judgment because of juror misconduct during both *voir dire* and deliberations. The trial court found no merit in the appellants' arguments below, and neither does this Court.

First, we disagree with the appellants' assertion that the jury was biased based upon the location of the trial in Elliott County. While the first trial of this matter ended in a mistrial due to the inability to seat a jury, the court made specific considerations to prevent this from happening in the second trial, including

increasing the number of the jury pool from which the jury would be selected. In addition, the parties had sufficient time to question the jury panel to uncover any possible disqualification or conflict issues.

Second, we disagree with the appellants' argument that the seating of Ms. Jones as a juror entitles them to a new trial. They discovered after the trial that Ms. Jones had been a high school classmate of one of the defendants and was related to Gertrude, but that she had failed to disclose either of these relationships. We cannot hold that Ms. Jones and Gaye's relationship as classmates several years before was sufficiently close so as to warrant a new trial. Furthermore, as the appellees point out, the relationship between the parties is distant at best; Ms. Jones's step-grandmother was an aunt of the parties' mother, Gertrude. Finally, if Ms. Jones is related to Gertrude, then she is related to all of the parties, both the appellants and the appellees.

Third, we cannot agree with the appellants' belief that the jury was biased and failed to fairly consider the evidence based upon Gaye's position as the school principal and her service with the farm loan subsidy programs, or juror Clyde Oliver's affidavit that discussion was stifled during deliberations. We agree with the appellees that both parties had sufficient time to extensively question the jurors about any potential conflicts and that Mr. Oliver did not wholly disagree with the jury's complete verdict, having voted with the majority on one of the verdicts.

The circuit court properly denied the appellants' motion for a new trial on this basis.

B. Shift in Burden of Proof

Next, the appellants contend that the trial court should have informed the jury of the shift in the burden of proof and should not have permitted the appellees to argue last during closing arguments. The appellants rely upon *Hardin v. Savageau*, 906 S.W.2d 356, 358 (Ky. 1995), which states:

> If the elevated evidentiary standard is to have meaning and effect, the jury must be informed of the standard and directed to apply it to the evidence. Without instructing on the heightened standard, only the judge will have given it any consideration and the jury will make its determination using an erroneous standard, less than the law requires. When the law requires a particular evidentiary standard, both the judge and the jury must consider the evidence in that light. The nature of the inquiry is substantially different when the jury must say whether it "is satisfied from the evidence" or whether it "believes by clear and convincing evidence."

However, the appellees point out that *Hardin* addresses the evidentiary standard of proof, not the allocation of the burden of proof. "[T]he jury should not be told specifically upon whom the burden rests, or that a presumption of law is against one of the parties, although the instructions must be framed so as to indicate the burden." *Gorman v. Berry*, 289 Ky. 88, 158 S.W.2d 155, 157 (1942). Accordingly, the trial court correctly declined to inform the jury of the shift in the burden of proof.

Likewise, we find no merit in the appellants' argument that the proceedings were out of order in that the appellees were allowed to present their closing argument last and that this gave them an unfair advantage. There is some question regarding whether this issue was preserved. While the appellants did not show how and where in the record this issue was preserved at the beginning of the argument pursuant to CR 76.12(4)(c)(v), this Court was able to determine that the issue was raised during the discussions prior to closing arguments. However, we disagree with the appellants that permitting the appellees, as the party with the burden of proof, to present their closing argument last was at all in error. CR 43.02 provides for the order of proceedings in a trial:

> When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons otherwise directs:
>
> (a) The plaintiff must briefly state his claim and the evidence by which he expects to sustain it.
>
> (b) The defendant must then briefly state his defense and the evidence he expects to offer in support of it.
>
> (c) The party on whom rests the burden of proof in the whole action must first produce his evidence; the adverse party will then produce his evidence. The party who begins the case must ordinarily exhaust his evidence before the other begins. But the order of proof shall be regulated by the court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence.
>
> (d) The parties will then be confined to rebutting evidence, unless the court, for good reasons in furtherance of justice, permits them to offer evidence in chief.

> (e) The parties may submit or argue the case to the jury. **In the argument, the party having the burden of proof shall have the conclusion and the adverse party the opening**. If there be more than one speech on either side, or if several defendants having separate defenses appear by different counsel, the court shall arrange the relative order of argument. [Emphasis added.]

See also Moss v. Mittel, 253 Ky. 504, 69 S.W.2d 1046, 1048 (1934) ("The burden of proof, and the right to the closing argument, is upon the party who will be defeated if no evidence is given.").

Accordingly, the trial court did not commit any error in instructing the jury or in permitting the parties with the burden of proof to present their argument last.

C. Tortious Interference

Next, the appellants contend that the trial court erred in failing to instruct the jury on the tort of tortious interference with an inheritance. The trial court held that the appellants had not met their *prima facie* case and therefore did not include this claim in the instructions. The appellants contend that this cause of action is recognized in Kentucky, citing *Allen v. Lovell's Adm'x*, 303 Ky. 238, 241, 197 S.W.2d 424, 425 (1946), while the appellees maintain that this cause of action has not yet been recognized in Kentucky.

Restatement (Second) of Torts § 774B (1979) defines the tort of intentional interference with an inheritance or gift as: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third

person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

In *Lovell's Adm'x*, the former Court of Appeals addressed the destruction of a will, examining the question, "may an action in tort be maintained for the destruction or suppression of a will?" *Id*. at 425. The Court held:

> [W]e are impelled to the conclusion that the better rule, and the one supported by weight of authority, is that if a destroyed will can be probated, it should be, but if not, a tort action may be maintained. This rule gives effect to practically all of the authorities cited, and it will be seen that most of them can be reconciled. It is possible that proof which would be inadequate to probate a lost or destroyed will in the county court might be sufficient to support a verdict and judgment in a tort action, *Anderson v. Irwin*, 101 Ill. 411; Dean Evans' treatise, *supra*, but since that question is not presented here it is not necessary to pass upon it. This recognizes and gives full weight to the general principle of law that whenever the law prohibits an injury it will also afford a remedy.

Id. at 426. In a pretrial ruling in the case before us, the trial court held that based upon the authority in *Lovell's Adm'x*, a case could be stated, but it did not address

the merits of the claim at that time.[7] We agree that while Kentucky has never overtly recognized and adopted this cause of action, neither has it been rejected.

However, we do not need to get to that particular question because we agree with the trial court and the appellees that the appellants failed to establish a *prima facie* case. Establishing the mere existence of a will is not sufficient to maintain this cause of action. Accordingly, we find no error or abuse of discretion in the trial court's decision to not instruct the jury on this cause of action.

D. Evidentiary Surprise

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[7] In addition, the trial court addressed the unreported case of *O'Brien v. Walker*, 2002-CA-000976-MR, 2003 WL 22799031 at *2 (Ky. App. Nov. 26, 2003), which discussed this tort in detail:

> In their brief to this Court, the appellants have cited the *Restatement (Second) of Torts*, Section 774B as the basis for the cause of action in their proposed amended complaint. The text of that provision states in full as follows:
>
> > One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.
>
> In the case *sub judice*, the appellants do not dispute the fact that Raymond gave Homer the holographic will in question and that after Homer's death, Ruth subsequently took possession of the will. Nowhere have the appellants alleged that Raymond ever asked for the will to be returned to him or for the will to be destroyed, or that Ruth or Karen ever tortiously refused such a request. The appellants have also not alleged that Ruth or Karen ever affirmatively misled Raymond into thinking that he had no will. In short, the appellants have not alleged any conduct on the part of Ruth or Karen which would establish a cause of action under the tortious interference with an inheritance provision of Section 774B. Rather, the appellants have merely claimed that Ruth and/or Karen remained silent after they may have learned from other people that Raymond believed he did not have a will. This silence simply does not rise to the level of tortious conduct under Section 774B. Accordingly, the trial court did not err by denying the appellants' motion to amend their complaint.

Next, the appellants contend that they were entitled to a new trial due to the last minute filing of a letter to attorney Gray from Gertrude, which they claim constituted an evidentiary surprise and an "ambush." The trial court addressed this issue in the January 27, 2012, order denying the appellants' post-trial motions as follows:

> Finally, the Court would note that the assertions as to "evidentiary surprise" are not well taken. First, the Court notes that no Motion to continue was filed by the Plaintiffs with regard to the ultimate Trial date. To the contrary, the parties conducted a lengthy Final Pre-Trial Conference days before the start of the Trial during which the issue as to the letter was fully discussed, and the manner in which the letter would be addressed was fully discussed. While the Court has not reviewed the video record of the Final Pre-Trial Conference, the Court specifically recalls requesting from the Plaintiffs information as to how long the Plaintiffs' expert would need to examine the document, for the Plaintiffs had already been in contact with an expert.
>
> Once the options were reviewed, a plan was devised as to how the parties would proceed. This plan is clearly noted on the record of the Final Pre-Trial Conference and was never in dispute. The letter was to be made available to the Plaintiffs' expert for analysis. If the Plaintiffs' expert believed the letter was not authentic, the Defendants would be given time to have an expert review the letter, and the Trial would be continued. Otherwise, if the Plaintiffs' expert believed the letter was authentic, the Trial would proceed.
>
> This Court received correspondence from the attorneys herein which further evidenced this understanding. Such correspondence is being attached hereto as exhibits to this Order. Significantly, upon the completion of the analysis by the Plaintiffs' expert, the Court and opposing counsel received a faxed message from the Plaintiffs' counsel (identified as Exhibit 4)

> indicating that the expert's review was not helpful and that he assumed the Trial would proceed as scheduled. No request for a continuance was made. No Motion for a continuance was filed. No request for a continuance was made on the morning of Trial.
>
> This Court is well aware that the Plaintiffs had a separate action in Fayette County filed by their prior counsel that they had to address. However, this Court continued the Trial in this matter after Mr. Bailey began representing the Plaintiffs as a result of the separate action and the need for Mr. Bailey to have additional time to get "up to speed" while addressing two (2) cases. Furthermore, the Court took great efforts at the various Pre-Trial Conferences conducted after Mr. Bailey's entry into the case to inquire as to his ability to acquire documents from prior counsel. The record even reflects the Court's willingness to enter Orders, if requested, directing that materials be provided by former counsel, and the record reflects opposing counsel's willingness to assist Mr. Bailey in copying documents from the Defendants' filed as appropriate.
>
> There is simply no basis whatsoever to assert that the trial was by "ambush." The letter in question was discovered by the attorney to whom it was written (Hon. Steve Gray) and was promptly disclosed to the Defendants. Thereafter, the Defendants promptly disclosed same to the Plaintiffs. *No time was requested* by the Plaintiffs for a *second* expert to review the letter once the first expert did not support the Plaintiffs' claims. To now assert, after the fact, that an additional expert was desired is simply not proper. [Emphasis in original.]

We agree with the above analysis and hold that the trial court did not commit any error or abuse its discretion in denying the appellants' motion for a new trial on this issue. The trial court and the parties agreed to and put into effect a well-crafted and detailed plan for addressing the authenticity of the letter, keeping in mind the upcoming trial date. And not only did the appellants fail to

seek a continuance of the trial due to the letter, but their counsel specifically stated in his faxed correspondence that he assumed the trial would proceed as scheduled because the expert's review was not helpful to the appellants' case.

E. Directed Verdict

For their last argument, the appellants contend that they were entitled to a directed verdict on the weight of the evidence. We disagree.

> In ruling on a directed verdict motion, the trial court should draw all inferences in favor of the nonmoving party, and a verdict should not be directed unless the evidence is insufficient to sustain the verdict. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996) (citing *Spivey v. Sheeler*, 514 S.W.2d 667, 673 (Ky. 1974)). Questions as to the weight and credibility to be given to the evidence are reserved for the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991).

Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93, 106 (Ky. 2008).

Here, the appellants are simply re-arguing the facts of the case in light of the jury's verdict in favor of the defendants. There was certainly sufficient evidence to submit the case to the jury for consideration, and the trial court properly denied the appellants' motion for a directed verdict and for a new trial.

For the foregoing reasons, the judgment and orders of the Elliott Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Dwight O. Bailey
Flatwoods, Kentucky

BRIEF FOR APPELLEES:

M. Benjamin Shields
Mt. Sterling, Kentucky