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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000372-MR

AUTO-OWNERS INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-00910

LISA WARREN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND MOORE, JUDGES.

MAZE, JUDGE: Appellant, Auto-Owners Insurance Company (hereinafter "Auto-Owners"), appeals the trial court's decisions on various motions filed during the litigation and trial of Lisa Warren's suit against it alleging breach of an insurance contract. Finding no error among the many rulings of the trial court, we affirm.

Background

I. Factual History

In 2003, Warren purchased an "all perils" homeowner's insurance policy on her property in Frankfort, Kentucky. This policy insured Warren's home, premises, and personal property from, *inter alia*, a wind storm. Warren purchased additional insurance which covered her home in the event of "earth movement meaning earthquake." However, the policy excluded "flood or tidal wave; landslide, mud flow, erosion, earth sinking, rising or shifting…." Warren made timely payment of her insurance premiums and her coverage never lapsed.

During a March 1, 2009 storm, a tree, soil, and several large rocks fell from above the sheer rock face of a hill behind Warren's home, landing on the roof of the home and causing significant damage to the home's roof and structure. Immediately following the storm, Warren notified Auto-Owners of the damage and submitted a claim. She also employed a local contractor to clear the debris from the roof and to place large tarps over the damaged areas of the roof. In the subsequent days, Warren obtained several estimates for repair of the damage. One of these was provided by Meyer-Midwest, Inc., and totaled $27,900.

Sixteen days after the incident, Auto-Owners notified Warren that it was denying coverage of the damage because the terms of the insurance contract specifically excluded "earth movement," which Auto-Owners had determined caused the damage. Warren requested that Auto-Owners reconsider this decision;

however, in a May 7 letter, the company again declined to cover the damage, citing the exclusion under the contract for "landslide."

After briefly attempting to inhabit the damaged home, Warren found other living arrangements, eventually incurring more than $36,000 in living expenses. These expenses included costs associated with her purchase of another home. During this time, the condition of Warren's home deteriorated due to mold infestation and continuing cracking and settling. Accordingly, in the summer of 2011, Warren sought and received updated estimates for repairs on the home totaling $59,850 for structural improvements and more than $33,000 for the remediation of mold which developed in the time since the incident.

Following Auto-Owners' denial of coverage for the damage to her home, on June 1, 2009, Warren filed suit, alleging, *inter alia*, that the company breached several provisions of the insurance contract.

II. Procedural History

Following the deposition of several witnesses, including Warren and the insurance adjuster initially assigned to Warren's claim, both Warren and Auto-Owners sought summary judgment. In a January 12, 2011 order, the trial court granted partial summary judgment in favor of Warren. Specifically, the court held that the terms of the insurance policy were ambiguous and provided coverage for the damage to Warren's home. Hence, the court ruled that Auto-Owners was liable as a matter of law. However, the case proceeded on the issue of damages.

Following further discovery and a plethora of pretrial motions, the case proceeded to a jury trial on damages in October 2012. Warren testified to the events surrounding the damage to her home, to her efforts to make temporary repairs to her home, to the costs and estimated costs associated with further repairs, as well as the costs she incurred in finding another place to live. In addition to Warren's testimony, the jury heard from those who had provided Warren advice regarding damage to the home, necessary repairs, and the cost of those repairs.

Following proof, the jury returned a verdict for the full amount of compensatory damages Warren sought for repair of the home, her additional living expenses, and damaged or lost personal property. The jury's award totaled $119,913.47, plus interest. Auto-Owners filed motions for judgment notwithstanding the verdict ("JNOV") and for a new trial. Auto-Owners now appeals from the denial of these motions. Further facts are provided *infra* as necessary to fully develop our analysis of the several issues raised on appeal.

Analysis

Auto-Owners raises a multitude of grounds for its appeal of the trial court's orders concerning summary judgment, directed verdict, JNOV, and new trial. It alleges error by the trial court on issues pertaining to its interpretation of the insurance contract, Warren's duty to mitigate her damages, admission of expert testimony, and the court's instruction of the jury. Auto-Owners also claims that the trial court erred in not setting aside the jury's award of damages because it was

excessive and based upon "passion and prejudice." We address all of these issues in light of their appropriate standards of review, which are set out *infra*.

I. Provisions of the Insurance Contract

Auto-Owners first attacks the trial court's ruling granting partial summary judgment as to its liability under the insurance contract. In reviewing that ruling, we remember that "[t]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Therefore, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). We review *de novo* the trial court's decision as to whether Warren made such a showing, as the question is purely a matter of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

A. Coverage and Exclusions Under the Contract

Warren's homeowner's policy was an "all perils" policy. She purchased additional coverage for "accidental direct physical loss" to her home, other structures, and personalty from damage "caused by earth movement meaning earthquake…." However, the policy also stated that it did not cover "[l]oss caused to any extent by … landslide, mud flow, erosion, earth sinking, rising or shifting… ." The trial court concluded that this language was ambiguous, while Auto-

Owners argues on appeal that the language was clear and that the damage to Warren's home was not covered because it was caused by erosion.

Kentucky law is well-settled in its preference for effectuating, not defeating, insurance coverage. *See Pacific Mut. Life Ins. Co. v. Sutherland*, 125 S.W.2d 769, 771 (Ky. 1939) (citing to *Sun Life Assur. Co of Canada v. Wiley*, 79 S.W.2d 937, 939 (Ky. 1935)). In service to this preference, an insurance policy's "exceptions and exclusions should be strictly construed…." *Kentucky Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 166 (Ky. 1992); *see also State Auto Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801, 803 (Ky. App. 1985) (citing to *Davis v. American States Ins. Co.*, 562 S.W.2d 653 (Ky. App. 1978)).

We must also remember that an insurance policy is a contract. Consistent with traditional principles of contract, our Supreme Court has held that an insurance company, as the drafter of the policy, "must be held strictly accountable for the language used." *Eyler v. Nationwide Mut. Fire Ins. Co.*, 824 S.W.2d 855, 860 (Ky. 1992). All doubts as to the interpretation of an insurance contract will be resolved in favor of the insured. *See K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751, 753 (Ky. App. 2005); *see also Ellis*, *supra*, at 803. However, unambiguous terms will be assigned their plain and ordinary meaning. *See K.M.R. v. Foremost Ins. Group*, 171 S.W.3d 751 at 753.

We first state that the trial court was correct in examining the language of the earthquake rider and deeming it ambiguous. On appeal, Auto-Owners asserts that the trial court erroneously focused on the "earthquake-related

language" of the policy in finding that an ambiguity existed. Auto-Owners instead states that the court should have examined what it calls "the unambiguous erosion exclusion" of the earthquake rider. This argument is disingenuous at best.

We first remember that the parties asked the trial court to interpret an "all perils" policy, not an "all perils but…" policy. Throughout the timeline of this case, Auto-Owners has changed the stated cause of the damage to Warren's home from "shifting and movement of the earth" (in its initial letter denying coverage) to "landslide" (in a second letter denying coverage) to a "rockfall" caused by "erosion" (in opposition to Warren's motion for summary judgment and on appeal). As the initial denial letter demonstrates, it was Auto-Owners, not the trial court, who first referenced "earth movement" as it was used in the earthquake rider. The trial court's attention was properly focused upon both the "earthquake-related language" and the exclusions under the earthquake rider.

We also agree with the trial court and Warren that at least one term of the insurance policy, "earth movement," is ambiguous as used in the coverage and exclusions portion of the policy. Warren's purchase of the earthquake policy modified the original homeowner's policy to include coverage for damage due to "earth movement meaning earthquake[,]" but to exclude coverage for damage caused by "earth movement" in the form of erosion, landslide, as well as "earth sinking, rising or shifting." These provisions are difficult to reconcile, as the exact interplay between them is difficult to definitively determine "according to the usage of the average man and as they would be read and understood by him."

Fryman v. Pilot Life Ins. Co, 704 S.W.2d 205, 206 (Ky. 1986). Hence, the trial court was correct in finding them to be ambiguous. Indeed, we share the trial court's perplexity regarding the policy's coverage of "earth movement meaning earthquake" but its simultaneous exclusion of "earth sinking, rising, or shifting."

At the very least, these provisions create an apparent conflict that leaves the average person to wonder what the policy actually covers. We resolve this question in favor of Warren and in favor of giving effect to the coverage the insurance contract purportedly provides.

B. The "Reasonable Expectations" Doctrine

Similar to the rule of law we employ above, the doctrine of reasonable expectations provides that only a "plain and clear manifestation of the company's intent to exclude coverage" will defeat the insured's reasonable expectation of coverage under the policy. *See Simon v. Continental Ins. Co.*, 724 S.W.2d 210, 212 (Ky. 1986). It follows that this doctrine applies "only to policies with ambiguous terms…." *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003). Overall, our inquiry is "what the [insured] could reasonably expect in light of what [she] actually paid for…." *Estate of Swartz v. Metropolitan Prop. & Cas. Co.*, 949 S.W.2d 72, 76 (Ky. App. 1997).

Given the aforementioned ambiguity involving the term "earth movement" in the insurance contract and its earthquake rider, the trial court properly applied the reasonable expectations doctrine. Having paid every premium since 2003, Warren had a reasonable expectation that her "all perils" homeowner's

insurance policy and accompanying earthquake coverage protected her home from the very event which Auto-Owners initially said caused the damage: "settlement and movement of the earth." As the trial court's well-reasoned opinion stated, "Ms. Warren did not purchase a nullity. She timely paid premiums for insurance coverage. However, under [A]uto-Owner's strained interpretation of the insurance contract[,] Ms. Warren's property would never be covered. Indeed, it boggles the mind to imagine an 'earthquake' that does not cause 'earth movement.'" (Quotations and emphasis in original).

We see no error in the trial court's grant of summary judgment as to Auto-Owners' liability under the insurance contract. Furthermore, because we affirm the trial court's ruling on partial summary judgment, we do not address Auto-Owners' allegation of error concerning the court's overruling of its Motion to Reconsider that judgment.

II. Warren's Duty to Mitigate Her Damages

"[I]t is well-established that a party claiming damages for a breach of contract is obligated to use reasonable efforts to mitigate its damages occasioned by the other parties' breach." *Deskins v. Estep*, 314 S.W.3d 300, 305 (Ky. App. 2010) (quoting *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767 (Ky. App. 2007)). Additionally, Warren's insurance contract with Auto-Owners provided, "[i]f a covered loss occurs, the insured must … protect property from further damage or loss; make necessary and reasonable temporary repairs; and keep records of the cost." Auto-Owners' position, in the context of both its pretrial

motion for summary judgment motion and a motion for JNOV, is that Warren failed to mitigate her damages in accordance with Kentucky law and the provisions of the insurance contract. We address the denial of each motion in turn.

A. Auto-Owners' Motion for Partial Summary Judgment

In denying Auto-Owners' Motion for Partial Summary Judgment, the trial court held that Warren had a legal duty to mitigate her damages, but that genuine issues of material fact remained as to whether she breached that duty. Auto-Owners asserts on appeal that it was entitled to a judgment as a matter of law that Warren's efforts to protect her home were inadequate under the above law and the provisions of the insurance contract.

The record is replete with testimony and evidence regarding Warren's remedial efforts immediately following the damage to her home. It is undisputed that Warren employed a contractor to remove debris and place sealed tarps over the damaged portions of her home. When moisture and insects entered the home despite these tarps, she had the tarps reapplied. Warren also repaired a broken window in the home and moved personal property into storage and away from the damaging conditions inside the home. Warren did all of this at her own expense.

Nevertheless, Auto-Owners asserts that Warren's duty to mitigate required her to repair the home completely, immediately, and at further expense, for the quoted price of $27,900. Withholding judgment as to the reasonableness of this position, we simply state our agreement with the trial court that genuine issues of material fact remained regarding whether Warren satisfied her duty of care.

B. Auto-Owners' Motions for Directed Verdict and JNOV

In seeking a directed verdict and JNOV regarding Warren's duty to mitigate her damages, Auto-Owner's burden was a high one. As we have held many times before,

> In ruling on either a motion for a directed verdict or a motion for a [JNOV], a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or [JNOV] 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.

Estate of Moloney v. Becker, 398 S.W.3d 459, 461 (Ky. App. 2013) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)); *see also Peters v. Wooten*, 297 S.W.3d 55, 65 (Ky. App. 2009). In other words, if only one fair and reasonable conclusion may be drawn from the evidence, the case should not be submitted to the jury. *See Crest Coal Co., Inc. v. Bailey*, 602 S.W.2d 625, 627 (Ky. 1980). Furthermore, a reviewing court may not disturb a trial court's ruling on a JNOV motion unless that decision is clearly erroneous. *See Peters* at 65 (citing *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998)).

Auto-Owners essentially argues that there was a "complete absence of proof" that Warren met her duty to mitigate the damage to the home. Citing the same facts we state above, we disagree. As even Auto-Owners points out, Warren made efforts immediately after the incident to remedy at least some of the damage.

Given these efforts, we cannot agree with Auto-Owners that only one fair and reasonable conclusion – that Warren breached her duty to mitigate – flows from the evidence of record. Rather, the facts surrounding Warren's efforts to temporarily and limitedly repair her home constitute at least some proof that Warren fulfilled her legal duty. Therefore, Auto-Owners was not entitled to a directed verdict or JNOV.

III. Trial Court's Evidentiary Rulings

Auto-Owners next takes exception to three of the trial court's evidentiary rulings during trial. In making such rulings, a trial court holds the position of "gatekeeper" in admitting appropriate evidence and excluding that which is inappropriate under the Rules of Evidence. *See*, *e.g.*, *West v. KKI*, *LLC*, 300 S.W.3d 184, 195 (Ky. App. 2008). In reviewing whether a trial court properly fulfilled this role, we will not overturn the trial court's evidentiary rulings absent an abuse of discretion. *See Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). This includes matters regarding the qualification of experts under Kentucky Rules of Evidence (KRE) 702. *Id.* (citing *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995) (*overruled on other grounds by Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999)).

A. Evidence of Settlement Negotiations

During direct examination of Warren by her attorney, Warren testified regarding the various updated estimates she sought and received for repair of the

damage to her home. She testified that she communicated these estimates to the insurance company. The following exchange ensued:

> Counsel: Did the insurance company ever ask you to go get an alternate estimate?
>
> Warren: No.
>
> Counsel: Did they ever say 'these are too high'?
>
> Warren: No.
>
> Counsel: Did they ever say 'we're just not paying mold?'
>
> Warren: I received no feedback at all from the insurance company on any estimate.
>
> Counsel: And did they ever pay it?
>
> Warren: No.
>
> Counsel: Did they ever pay any of these additional living expenses?
>
> Warren: No. They have not paid, nor offered, or investigated . We haven't – no.

In cross-examination, counsel for Auto-Owners attempted to rebut Warren's latter statement, asking, "Ms. Warren, the insurance company did make you offers to resolve this issue, didn't they?" Following Warren's objection, a conversation at the bench ensued during which the court stated its belief that the above-quoted testimony meant only that Auto-Owners never made any offers to adjust the claim "before the lawyers got involved." The trial court disagreed that Warren had opened the door to evidence concerning settlement negotiations and refused to

permit Auto-Owners to reference what occurred at a prior mediation.[1] The trial court permitted Auto-Owners to ask Warren only about offers to adjust the claim made prior to legal action. Auto-Owners contends that this limitation constituted error.

> KRE 408 renders irrelevant all evidence pertaining to the
>
> [f]urnishing or offering or promising to furnish; or [a]ccepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

KRE 408(1)-(2). This rule "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness [or] negativing a contention of undue delay…." *Id*. It has also been held that impeachment of a witness can qualify as "another purpose" under Kentucky Revised Statutes 408. *See Miller ex rel. Monticello Baking Co. v. Maymount Medical Center*, 125 S.W.3d 274, 280 (Ky. 2004).

Nevertheless, the content of Warren's testimony and the trial court's considerable discretion over evidentiary matters combine to defeat Auto-Owners' allegation of error. The trial court expressed its inference from Warren's testimony that her response to her attorney's question referred to her interaction with Auto-

[1] Auto-Owners asserted that it had, in fact, offered to settle Warren's claim at mediation of this case and that it was entitled to evoke testimony to this effect from Warren on cross-examination. However, Warren objected both on the basis of KRE 408 and the parties' confidentiality agreement signed at mediation.

Owners prior to litigation. The record reveals this to be a reasonable inference drawn from the testimony and the context in which it was given. It was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles" to conclude that Warren was referring to Auto-Owners' failure to offer to adjust the claim, as opposed to settle her lawsuit. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Hence, no abuse of discretion occurred.

In so ruling, we acknowledge the impact of the considerable discretion the trial court enjoys over such evidentiary issues. Such discretion also stems from the language of KRE 408, which did not require the trial court to permit Auto-Owners to pursue its desired line of questioning. The rule merely states that evidence offered "for another purpose" such as impeachment "does not require" the court to exclude it. Hence, the rule does not diminish the trial court's discretion, and it is that discretion to which we ultimately yield.

B. Admission of Expert Testimony

The trial court also made several rulings concerning the admissibility of certain expert testimony. Auto-Owners contends that the trial court erred in denying its motion to exclude the testimony, opinions, and estimates of Jeremy Roberts of Meyer-Midwest[2] because his estimates "failed to meet the methodology requirements" required of expert testimony. The trial court held instead that Roberts was a lay witness. Similarly, Auto-Owners asserts that information Danny

[2] Roberts inspected the home in 2009, estimating the total cost of repair to be $27,900. He re-inspected the home two years later and quoted Warren $59,850 due to the deterioration in the condition of the home.

Woods provided the court regarding the cause of the damage[3] was inadmissible because Warren did not timely disclose him as a witness and because the jury heard it despite the court's order that it was inadmissible. According to Auto-Owners, the admission of both testimonies was prejudicial and required either an admonition of the jury or a new trial. We address the testimonies of Roberts and Woods in turn.

1. Testimony of Roberts

The Rules of Evidence limit opinion or inferential testimony from lay witnesses to that which is: "(a) Rationally based on the perception of the witness; (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) Not based on scientific, technical, or other specialized knowledge within the scope of KRE 702." KRE 701. A trial court may admit opinion or other testimony of a qualified expert regarding "scientific, technical, or other specialized knowledge" "[i]f [it]…will assist the trier of fact to understand the evidence or to determine a fact in issue…." KRE 702. However, any such testimony must be "(1) … based upon sufficient facts or data; [and] (2)…the product of reliable principles and methods[.]" *Id*. Additionally, the "witness [must] appl[y] the principles and methods reliably to the facts of the case." KRE 702(3).

[3] Woods inspected the home and drafted a one-page report listing the structural damage to the home, including its walls; and he testified that wind blew the tree onto the home causing the root ball to pull dirt and rocks on to the home's roof. Woods briefly testified to this effect at trial.

The trial court properly concluded that Roberts was a lay witness. Roberts testified regarding the damage to Warren's home, the progression in that damage during the two years between his estimates, and to the factual bases for his estimates to repair the home. Importantly, this testimony did not cross the line which exists between KRE 701 and KRE 702. Though admittedly based upon his knowledge and experience as a contractor, Roberts's testimony was nonetheless based upon, and limited to, his observations, or "perception" as KRE 701 says, during his two inspections of the home. Therefore, pursuant to KRE 701, his qualification as an expert was not required, nor was additional scrutiny of his methods under KRE 702.

B. Woods's Testimony

Immediately prior to the beginning of proof, Warren's counsel stated their intention to call Danny Woods as a witness. Auto-Owners voiced its strenuous objection on the basis that Warren had not listed Woods as an expert witness until days before trial and that his testimony regarding causation was "highly prejudicial" to its case. The trial court ordered that Woods's testimony be confined to the contents of his report, and even more specifically, what he observed at Warren's home. Warren disclosed Woods's report in response to discovery requests from Auto-Owners months prior to trial.

During his testimony, following the trial court's order forbidding it, Woods testified that high winds "blew the tree over [pulling] all the weathered rock with this and it all piled up against the basement wall." Counsel for Auto-

Owners stated its objection once again and the trial court sustained that objection, ordering Warren's counsel to "move on." Auto-Owners did not request an admonition of the jury or a mistrial. Auto-Owners argues on appeal that Woods's testimony was prejudicial in that it confused the jury and constituted a "surprise" to which Auto-Owners was unable to respond in kind with its own expert.

Though Woods's testimony exceeded the scope of the trial court's initial ruling, it did not unduly prejudice Auto-Owners. Several other witnesses testified to the undisputed fact that wind preceded the damage to Warren's home. Furthermore, Woods's testimony was limited to the contents of a document of which Auto-Owners was aware well in advance of trial. For this reason, it can hardly be said that his views regarding causes came as a surprise to Auto-Owners.

We further point out that the trial court sustained Auto-Owners' latter objection, ending Woods's brief testimony regarding causation almost as soon as it had begun. Therefore, Auto-Owners – having requested neither an admonition for the jury to disregard this testimony, nor a mistrial – received exactly the relief it requested and is not entitled to a new trial. *See*, *e.g.*, *Lewis v. Charolais Corp.*, 19 S.W.3d 671, 676-77 (Ky. App. 1999) (citations omitted).

IV. Jury Instructions

Auto-Owners next alleges several errors in the trial court's handling of a question from a juror, as well as the instructions provided to the jury following the close of proof. Alleged errors regarding jury instructions are considered

questions of law that we examine under a *de novo* standard of review. *Reece v. Dixie Warehouse and Cartage Co.,* 188 S.W.3d 440, 449 (Ky. App. 2006).

"The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict. If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (quoting *Ballback's Adm'r v. Boland–Maloney Lumber Co.,* 306 Ky. 647, 652–53, 208 S.W.2d 940, 943 (1948)). Overall, jury instructions in civil cases should be simple, *see, e.g., Lumpkins ex rel Lumpkins v. City of Louisville*, 157 S.W.3d 601, 603 (Ky. 2005), and they "must be based upon the evidence and they must properly and intelligibly state the law." *Hamilton*, *supra*, at 275 (citing *Howard v. Commonwealth,* 618 S.W.2d 177, 178 (Ky.1981)).

A. Question from the Jury

On the second day of trial, prior to the close of proof, the jury sent a note to the trial court requesting the specific reason Auto-Owners would not pay Warren's claim. The trial court informed counsel of the question but not its substance. Prior to closing arguments, on the record, the trial court informed the juror who asked the question that the jury instructions would address his question. Finally, after the jury retired, the trial court told counsel the exact nature of the question, as well as the court's belief that the jury instructions addressed it.

Auto-Owners contends that the court erred by not disclosing the wording of the question prior to the close of proof, thus preventing counsel from calling additional witnesses or addressing the question in its closing argument. Auto-Owners states that this constituted prejudice and requires a new trial.

Auto-Owners' argument is raised for the first time on appeal and is therefore unpreserved. To raise the issue of the juror's question on appeal, Auto-Owners was first required to "precisely preserve[] and identify in the lower court" its allegation of error. *Catron v. Citizens Union Bank*, 229 S.W.3d 54, 59 (Ky. App. 2006) (quoting *Skaggs v. Assad, By and Through Assad*, 712 S.W.2d 947, 950 (Ky. 1986)). Despite being given at least three opportunities to do so, Auto-Owners did not object. Hence, we will not review an objection the merits of which the trial court was not given the opportunity to confront.

We further point out that CR 76.12(4)(c)(v) required Auto-Owners to cite for this Court where in the record each of its allegations of error was preserved for appeal. Auto-Owners did not do so regarding the juror question. Based on this, we are entitled to disregard or even strike the relevant portion of Auto-Owners' brief. *See* Kentucky Rules of Civil Procedure 76.12(8)(a); *see also Oakley v. Oakley*, 391 S.W.3d 377, 378 (Ky. App. 2012), and *Bridgefield Cas. Ins. Co., Inc. v. Yamaha Motor Manufacturing Corp. of America*, 385 S.W.3d 430, n. 4 (Ky. App. 2012). However, we merely decline further review of this issue.

B. Instruction on Warren's Duty to Mitigate Her Damages

Auto-Owners next argues that the trial court should have instructed the jury differently on Warren's duty to mitigate her damages, consistent with the court's prior ruling on summary judgment that Warren had such a duty. At trial, Auto-Owners proffered Instruction No. 2 which referred to the trial court's ruling on summary judgment that Warren "had a duty to mitigate her damages and was also required to protect the property from further damage or loss." Instead, the trial court submitted to the jury an Instruction No. 2 which stated that Warren "had a duty to protect the property from further damage or loss; make necessary and reasonable temporary repairs; and keep records of the costs."

Similarly, Auto-Owners proffered Instruction No. 6, which stated the same legal duty:

> But if you are further satisfied from the evidence that [Warren] failed to exercise ordinary care to mitigate her damages or to protect 655 Taylor Avenue from further damage or loss after the rock fall, and that by reason of that failure on her part the increase in her living expenses was greater than it otherwise would have been, you will exclude from your award….

Instead, the trial court tendered Instruction No. 6 to the jury reading as follows:

> But if you are further satisfied from the evidence that [Warren] failed to exercise ordinary care to ~~mitigate her damages or to protect 655 Taylor Avenue~~ protect her property from further damage or loss after the rock fall, and that by reason of that failure on her part the increase in her living expenses was greater than it otherwise would have been, you will exclude from your award….

Auto-Owners contends that the court's instruction failed to communicate Warren's "contractual obligation to protect the property from further loss." We disagree.

Both jury instructions, as tendered, clearly and properly stated the law, both as it existed in Kentucky and as the trial court had held in its summary judgment order. Contrary to Auto-Owners' contentions, the phrases "had a duty to protect the property from further damage or loss" and "failed to exercise ordinary care to protect her property from further damage or loss" adequately communicated to the jury the existence of Warren's legal duty to mitigate her damages. Indeed, the language of Instruction No. 2, as submitted to the jury, tracked the language of the insurance contract nearly *verbatim*. In sum, the instructions Auto-Owners proffered and those which the trial court tendered were nearly identical and their differences did not give rise to prejudicial error.

C. Instruction on the "Shortest Time Required"

Finally, Auto-Owners asserts that it was entitled to an instruction limiting Warren's recovery for costs associated with repair or permanent relocation to another home under the insurance contract. This instruction concerned Warren's claim of $36,513.47 for additional living expenses she incurred following the damage to her home. These included closing costs, mortgage insurance, and mortgage payments associated with Warren's purchase of a new home. Pursuant to the insurance contract, Auto-Owners would pay "the reasonable increase in [her] living expenses necessary to maintain [her] normal standard of living while [she] live[d] elsewhere[.]" However, the contract provided that Auto-Owners "will pay for only the shortest time required to repair or replace the residence premises or for [Warren] to permanently relocate."

In a pretrial order, the trial court refused to exclude evidence of Warren's purchase of another home in Lexington. In its order, the trial court deemed relevant the question of "what the 'shortest time required' actually is," and left it to the trier of fact to determine whether the entire amount Warren requested, or a lesser amount, was appropriate.

Auto-Owners tendered a lengthy jury instruction which included a separate interrogatory asking the jury to fill in the blank a period of time it believed to be the "shortest time required." Instead, the trial court provided the jury with Auto-Owners' tendered jury instruction with the one-sentence interrogatory omitted. The instruction stated that the jury's award "must be for the shortest time required for [Warren] to repair 655 Taylor Avenue or for [her] to permanently relocate, not to exceed $36,513.47 (the amount claimed)." Auto-Owners submitted during its closing arguments that this time period should not exceed sixty days.

The instruction provided to the jury adequately stated the law. Auto-Owners implies on appeal that the trial court's refusal to include its interrogatory resulted in the jury's failure to consider and conclude what the "shortest time required" actually was. However, the given instruction clearly established that, though Warren requested more than $36,000 for the entire period of time she was out of her home, her award could be less if the jury determined that she could have repaired her home or relocated sooner. Hence, no prejudice resulted from the trial court's minor amendment to Auto-Owners' proposed instruction.

V. The Jury's Verdict

Auto-Owners last contends that it was entitled to a new trial because the jury's verdict was excessive and unsupported by the evidence. Specifically, Auto-Owners argues that the verdict was not based on the facts and evidence but on "passion and prejudice" evoked, at least in part, by Warren's attorneys. Auto-Owners argues that the trial court's failure to grant a new trial constituted error.

When a party contends that a jury's award of damages is excessive, the trial court is charged with the responsibility of deciding whether the jury's award appears to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court. *Gersh v. Bowman*, 239 S.W.3d 567, 574 (Ky. App. 2007) (quoting *Burgess v. Taylor,* 44 S.W.3d 806, 813 (Ky. App. 2001) (internal quotation marks omitted). In reviewing the trial court's assessment of excessiveness, we do not step

> into the shoes of the trial court to inspect the actions of the jury from his perspective. [Rather], the appellate court reviews only the actions of the trial judge ... to determine if his actions constituted an error of law. There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his decision clearly erroneous.

Id. Similarly, when judging the sufficiency of the evidence, we "must respect the opinion of the trial judge who heard the evidence." *Bierman*, *supra*, at 18.

We disagree with Auto-Owners that the jury's award of damages was so obviously the product of passion and prejudice, nor did it go against the weight of the evidence presented at trial. Auto-Owners points to statements by Warren's counsel during closing arguments regarding the company's out-of-state corporate residency. Auto-Owners asserts that Warren sought "to inflame the jury," and it cites to *Clement Bros. Co. v. Everett*, 414 S.W.2d 576 (Ky. 1967), in which plaintiff's counsel repeatedly referenced the defendant's wealth and foreign status.[4]

Upon reviewing the record, we observe nothing in Warren's counsel's conduct which approaches the incendiary comments made in *Clement Bros.*; nor do we observe anything exceeding the weighted rhetoric typically found in a closing argument. Contrary to Auto-Owners' assertions, the jury's award did not exceed figures provided in evidence. Hence, we see nothing in that award which indicates that it is the product of passion and prejudice stirred by Warren's counsel.

We also hold that there was sufficient evidence to support the jury's verdict at trial. The jury heard much testimony from Warren and others as to the initial costs of repair ($27,900) and the increased costs of repairing the home due to further damage ($59,850). Warren testified with specificity as to costs she

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[4] In *Clement Bros*., in addition to counsel's reference to the defendant's wealth and out-of-state residency,

> [t]he appellant was compared to a wolf devouring a lamb. The jury was asked to imagine a little child in the appellees' yard having been struck and killed by a large boulder from the blasting operation. The jurors were told that if they did not give the requested damages the appellees 'will have to look at your faces then in their memory.'

Clement Bros. at 577.

incurred in relocating to another home ($36,513.47 as of trial). The jury also heard evidence of Warren's loss of $2,000 in personal property and an estimated cost of $33,703 for mold remediation, for which the insurance policy limited recovery to $20,850. This testimony was sufficient to support the jury's award of $119,913.47. That Auto-Owners submitted some evidence countering that which Warren proffered does not, by itself, eliminate the sufficiency of Warren's evidence.

Conclusion

Having found no grounds for reversal in any of the trial court's many rulings in this case, we affirm all of the several orders of the Franklin Circuit Court from which Auto-Owners appeals.

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