IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

W. M. BARR & COMPANY, INC.,	)	
	)	
Plaintiff/Appellee	)	Shelby Chancery No. 103661
	)	
vs.	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES,	)	Appeal No. 02A01-9511-CH-00256
	)	
Defendant/Appellant.	)	

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

THE HONORABLE C. NEAL SMALL, CHANCELLOR

For the Plaintiff/Appellee:	For the Defendant/Appellant:
Carl H. Langschmidt, Jr. Cannon F. Allen Memphis, Tennessee	Bruce D. Brooke Memphis, Tennessee Frank C. Bedinger, III, Of Counsel Atlanta, Georgia

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

HOLLY KIRBY LILLARD, JUDGE

CONCUR:

DAVID R. FARMER, J.

PAUL G. SUMMERS, SP. J.

OPINION

In this case, the plaintiff sought to establish the existence and contents of lost insurance policies allegedly issued by the defendant insurance company. The trial court found that the policies existed for the years in question, found the proof sufficient to determine the terms of the policies, and found the defendant responsible for each policy. We affirm in part and reverse in part.

Appellee W. M. Barr & Company ("Barr") manufactures various chemicals. In 1993, Barr filed suit against Appellant Commercial Union Insurance Companies ("Commercial Union"), alleging that Commercial Union had issued insurance policies to Barr for the period of May 23, 1964, through May 23, 1970. Barr had in its possession a Commercial Union policy for May 23, 1969, through May 23, 1970, but could not locate copies of the policies for the five previous years. In the lawsuit, Barr sought to have the trial court "set up" the lost policies, that is, find that the policies existed and establish the terms of the policies, as well as determine that the policies were issued by defendant Commercial Union.

The 1969-70 policy in Barr's possession provided comprehensive general liability coverage with a $300,000/500,000 limit. Barr asserted that the lost policies had similar terms and policy limits. During the years in question, Barr had procured its insurance through an independent agency, the Whitfield King Insurance Agency ("Whitfield King"). One of the owners of Whitfield King, John S. King, also owned a significant amount of Barr stock. Commercial Union denied that it had issued any policies to Barr except for the one for 1969-70.

At trial, Jeffrey Jordan ("Jordan"), Barr's Director of Legal and Regulatory Affairs, testified that he had diligently searched for the lost policies but had been unable to find them. However, he stated that he found significant documentary evidence relating to their existence. This evidence included invoices for the disputed policies, check vouchers showing that the policies had been paid for, and various audit and risk experience documents created by Commercial Union which showed that Commercial Union had paid claims and charged additional premiums on the lost policies. In addition, Barr introduced into evidence "specimen" policies, stipulated to be Commercial Union's standard blank policies in use during the years in question.

George Conaway ("Conaway") also testified at trial. He had worked for Barr during the years covered by the lost policies. From 1965-66, he served as General Sales Manager; from 1967-68, as Executive Vice President; and in 1969 and 1970 as President. As General Sales Manager, Conaway had reason to know the limits of Barr's general liability insurance coverage, but did not

know the identity of the insurance carrier during that period. Conaway testified that Barr's general liability insurance coverage limits during 1965 and 1966 were $300,000/$500,000. Conaway also testified that, while he was Executive Vice President and President, his responsibilities included reviewing Barr's insurance coverage for approval. Consequently, for the years of 1967-70, he had personal knowledge that Barr's insurance was placed with Commercial Union, as brokered by Whitfield King, and that the coverage included comprehensive general liability with limits of $300,000/500,000.

Another witness called by Barr was Lee Quarles ("Quarles"). Quarles had been an insurance agent with Whitfield King from June of 1964 until 1969. He testified that he had been the agent who handled the Barr account and that he had seen the policies in question. He stated that from May 1965 until May 1969, Barr had comprehensive general liability coverage with Commercial Union and that the limits on those policies had been $300,000/500,000.

Doris Goodman ("Goodman") testified that, starting in 1976, she had worked at Barr as secretary to the Vice President. She stated that, in late 1976 or early 1977, she prepared a log listing Barr's insurance policies for the years in question. While preparing the log, she used the policies as a reference. She testified that she had seen the policies at issue, that each had a term of a year, and that the policies had been issued by Commercial Union.

Finally, Gene Mathis ("Mathis") testified on Barr's behalf as an expert in general liability insurance. He had examined the documents Barr had, as well as the generic specimen forms used by Commercial Union during the years in question. From his review of these documents, Mathis testified that he was certain that Commercial Union had issued insurance policies to Barr for the disputed years, that Barr had paid the premiums, and that the policies had included comprehensive general liability coverage with a $300,000/500,000 limit. Furthermore, he testified that the audit and risk experience documents compiled by Commercial Union showed that Commercial Union had paid claims on the disputed policies and charged additional premiums.

The evidence regarding the alleged lost policy for May 1964 through May 1965 was more sparse. The Whitfield King invoice for that year listed the insuring company as Central Surety Insurance Company ("Central Surety"), not Commercial Union. However, a multi-page audit for that year, while listing the insurer as Central Surety, was recorded on a form with Commercial Union's name pre-printed at the top of each page. Mathis testified that this form was evidence that

the two companies were affiliated, reasoning that one insurance company would not use another company's form to record an audit unless the two companies were related. Mathis also testified that the numbering sequence on the 1964-65 policy number was so similar to the sequence on Commercial Union's policies that the two companies had to be related. Finally, he testified that the 1965-66 policy was a renewal policy and that Commercial Union would not have renewed a Central Surety policy unless the two companies were affiliated.

Commercial Union elected not to put on any proof. The trial court found that Barr had proven by clear and convincing evidence that Commercial Union had issued the disputed policies for the years of 1965-69. The trial court also found that sufficient evidence had been presented to hold Commercial Union responsible for the 1964-65 policy issued by Central Surety. The trial court found that the lost policies provided coverage with a limit for each policy of "$300,000 per person and $500,000 per occurrence (and $500,000 in the aggregate for comprehensive general liability) with property damage limits of $25,000 each occurrence and $25,000 in the aggregate." The trial court found further that the remaining terms of the policies were contained in other documents in evidence. The trial court's oral ruling indicated that Commercial Union's failure to present proof had weighed against it. From this decision, Commercial Union now appeals.

On appeal, Commercial Union raises three issues. First, it argues that the evidence presented by Barr did not meet the standard of clear, cogent, and convincing evidence, the standard it asserts is required to prove the existence and terms of lost insurance policies. Second, Commercial Union contends that Barr failed to present proof of a relationship between Commercial Union and Central Surety sufficient to make Commercial Union liable for Central Surety's 1964-65 policy. Finally, Commercial Union claims that the trial court erred by drawing a negative inference from its decision to put on no proof.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Tenn. R. App. P. 13(d).

Commercial Union first contends that Barr failed to present sufficient evidence to prove the existence of the disputed policies and their contents. Barr argues that the standard to prove a lost policy is a preponderance of the evidence. Commercial Union contends that the standard is a higher one, that Barr must present clear, cogent, and convincing evidence. We have found no Tennessee cases on point on this issue. However, in general in Tennessee, evidence of a lost document must be clear and convincing. ***See Pearson v. McCallum***, 26 Tenn. App. 413, 433-34, 173 S.W.2d 150, 158 (1941) ("As to the sufficiency of the evidence, the law requires that the evidence offered to prove by parol the execution and the contents of a written instrument which is not produced shall be of the most satisfactory character, or what is known as clear, cogent and convincing evidence."). We find this to be the applicable standard.

In this case, Barr presented more than one witness who testified that he had seen the policies in question. The Whitfield King agent responsible for Barr's insurance testified that he remembered that Commercial Union had been the insurer, that the policies had included comprehensive general coverage, and that the limits had been $300,000/500,000. Conaway testified that from 1965-66, he had knowledge of the policy limits, $300,000/500,000, and that from 1967-70, he had personal knowledge of the Commercial Union policies for Barr. Goodman also testified that she had seen the policies. In addition, Barr introduced documentary evidence of the existence of the policies. Whitfield King invoices were introduced into evidence which listed Commercial Union as the insurer. Barr also introduced check vouchers with amounts matching the invoices, evidence that the policy premiums were paid. Finally, Barr introduced Commercial Union audits demonstrating that Commercial Union had audited Barr for the policies in question, had paid for losses on the policies, and had charged additional premiums for the policies. The evidence is clear and convincing that the policies existed and that, except for the years 1964-65, Commercial Union issued the policies. Moreover, the testimony and documents, when combined with the specimen forms supplied by Commercial Union and the 1969-70 policy still in Barr's possession, are sufficient to establish the terms of the missing policies. Therefore, we find that Barr established by clear and convincing evidence the existence of the lost Commercial Union policies for the years 1965-69, as well as their terms. The decision of the trial court as to the policies for the years 1965-69 is affirmed.

Commercial Union also asserts that Barr failed to present sufficient proof to hold Commercial Union liable for the 1964-65 policy, issued by Central Surety. Commercial Union contends further that the trial court erred in drawing a negative inference from Commercial Union's failure to present proof.

The only evidence that Commercial Union should be held liable for the 1964-65 Central Surety policy is the testimony of Mathis, Barr's insurance expert. He testified that a Central Surety audit on a Commercial Union form, the similarity in number sequences between the Central Surety policy and the Commercial Union policies, and an apparent renewal of the Central Surety policy by Commercial Union support the theory that Commercial Union should be liable for the Central Surety policy. Even the trial court characterized this evidence as "meager." Nevertheless, it found Commercial Union liable for the 1964-65 policy. Commercial Union argues that the trial court drew a negative inference against it for not putting on any proof. When asked by Commercial Union if its ruling finding Commercial Union liable for the lost policies included the Central Surety policy, the trial court responded:

> Well, again, they're -- well, the meager proof on that was that they were really one in the same, and there's been no attempt, absolutely no shred of -- well, not even an argument that they are not. So the Court will include that, yes.

Under certain circumstances, a negative inference may properly be drawn from a defendant's decision not to put on proof:

> The purpose of judicial proceedings is to establish the facts and the issues in dispute and apply the law to such facts. If the proof of plaintiff tends to establish such facts, and defendant, through his own knowledge or through the knowledge of witnesses peculiarly within his keeping, may fully disclose to the court all the facts and fails to do so, there is a strong presumption that such facts are adverse to his interests and contentions. We do not hold that the failure of a defendant to produce such witnesses would take the place of the proof which plaintiff must introduce to make out his case. But the inferences favorable to the contentions of plaintiff are strengthened and supported by the failure of defendant and the witnesses peculiarly in his keeping to testify when they know all the facts.

Marable v. State ex rel. Wackernie, 32 Tenn. App. 238, 246-47, 222 S.W.2d 234, 238 (1949). In the instant case, any adverse inference drawn from Commercial Union's decision not to put on evidence is immaterial because Barr clearly did not produce sufficient evidence to "make out his case" as to the 1964-65 Central Surety policy. Barr failed to meet the clear and convincing standard as to this policy.

Any negative inference drawn by the trial court as to the 1965-69 policies is also immaterial because, as noted above, Barr presented sufficient proof to establish the policies, their terms and conditions, and the fact that they were issued by Commercial Union, by clear and convincing evidence.

In sum, we affirm the trial court regarding each of the policies for the period of May 1965 through May 1969. We reverse, however, as to the May 1964-May 1965 policy, finding insufficient evidence that Commercial Union should be held liable for the policy issued by Central Surety.

The decision of the trial court is affirmed in part and reversed in part, as set forth above. Costs on appeal are assessed equally against Appellant and Appellee, for which execution may issue if necessary.

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HOLLY KIRBY LILLARD, J.

CONCUR:

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DAVID R. FARMER, J.

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PAUL G. SUMMERS, SP. J.