

RENDERED: JANUARY 24, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001651-MR

JEANNE CRAWFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 99-CI-006819

BOB PITTMAN

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS AND PAISLEY, Judges; and JOHN D. MILLER, Special Judge.¹

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Jefferson Circuit Court. Appellant, Jeanne Crawford, claims that the court committed error by directing a verdict on her claims of fraud and violation of the Kentucky Consumer Protection Act, and by failing to certify one of her witnesses as an expert. Finding no reversible error, we affirm.

¹ Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

In October 1997, appellant contracted with appellee to restore a 1955 Ford Thunderbird. Appellant, who was not satisfied with the restoration, subsequently filed an action against appellee for fraud, breach of contract, and violation of the Kentucky Consumer Protection Act. KRS 367.170, 367.220. At the close of the evidence at trial, the court directed a verdict in favor of appellee on the claims involving fraud and the Kentucky Consumer Protection Act. The contract claim went to the jury, which found in favor of appellee.

Appellant first claims that the trial court erred by directing a verdict in favor of appellee on the claims of fraud and violation of the Kentucky Consumer Protection Act. We disagree.

Bierman v. Klapheke, Ky., 967 S.W.2d 16, 18 (1998), illustrates the standard for reviewing a directed verdict:

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. . . . Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.

In addition, "[g]enerally a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which

reasonable minds could differ.” Id. at 18-19, citing Taylor v. Kennedy, Ky. App., 700 S.W.2d 415 (1985).

Here, appellant had the burden of proving, by clear and convincing evidence, the six elements of fraud: a material representation, which was false, which was known to be false or made recklessly, which was made with inducement to be acted upon, which was acted upon in reliance thereon, and which caused injury. United Parcel Service Company v. Rickert, Ky., 996 S.W.2d 464, 468 (1999), citing Wahba v. Don Corlett Motors, Inc., Ky.App., 573 S.W.2d 357, 359 (1978). The only evidence offered by appellant to support her fraud claim was her assertion that the car’s brakes did not work properly although appellee said that he fixed them, and some indication that the car’s manifold was already cracked when appellee painted it. Neither of these allegations, even if taken as true, demonstrates by clear and convincing evidence that appellee intentionally or recklessly misled appellant and thereby committed fraud. Thus, the trial court did not err by granting appellee’s motion for a directed verdict on this issue.

Appellant also asserts that the evidence of the defective brakes and the cracked manifold supports her claim that appellee violated the Kentucky Consumer Protection Act. However, in Capitol Cadillac Olds, Inc., v. Roberts, Ky., 813 S.W.2d 287, 291 (1991), the Kentucky Supreme Court held that

proof of a violation of that act requires some showing of intentional or grossly negligent conduct. As appellant adduced no evidence to show that appellee engaged in intentional or grossly negligent conduct in performing his work, we cannot say that the trial court erred by granting a directed verdict as to this issue.

Finally, appellant argues that the trial court erroneously failed to qualify one of her witnesses, Kevin Franklin, as an expert. We agree, but conclude that the error was harmless in these circumstances.

Abuse of discretion is the proper standard of appellate review regarding this and other evidentiary rulings by a trial court. Goodyear Tire and Rubber Company v. Thompson, Ky., 11 S.W.3d 575, 577-578 (2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Id. at 581, citing Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999).

Here, it was undisputed below that Franklin had been repairing and restoring classic vehicles on a full-time basis for the nine years prior to his testimony. He also operated a home-based business involving the restoration of classic cars. He had considerable experience in working on antique cars, as well as on convertibles like appellant's Thunderbird. More

specifically, he had previously worked on three 1955 Thunderbirds, and he had completely restored a 1956 Thunderbird. Having carefully reviewed the evidence, we conclude that the trial court's refusal to qualify Franklin as an expert witness was arbitrary and that the court abused its discretion by failing to permit him to be so qualified.

In addition, it appears from the videotape record of the proceeding below that the trial court may have believed that Franklin's opinion testimony regarding the quality and results of appellee's work was inadmissible as concerning an ultimate issue of fact. If so, the court was in error, as the Kentucky Supreme Court held in Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), that KRE 702 abrogated the common law "ultimate issue" rule. "The real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" Id. at 889, quoting KRE 702.

Nevertheless, we do not believe that the court's ruling on Franklin's testimony warrants a reversal. The record shows that Franklin testified for approximately 40 minutes about the proper way to restore a vehicle such as appellant's Thunderbird. He also used photographs of the vehicle at different stages of the repair process to illustrate his

testimony that appellee used improper procedures. Thus, although the court did not allow Franklin to answer questions which asked directly for his opinion, Franklin was permitted to testify in detail concerning the shortcomings of appellee's work, and his opinion regarding the quality of that work was made abundantly clear to the jury. Any error in excluding the opinion testimony was harmless.

The judgment is affirmed.

MILLER, SPECIAL JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING. I believe that entry of a directed verdict was clearly erroneous. The testimony offered on the age and defective condition of brakes that had supposedly been "fixed" should have been heard by the jury. The cracked manifold that had been painted over was also a matter for jury resolution. These errors, combined with the abuse of discretion in qualifying Kevin Franklin as an expert witness, merit vacating the judgment and remanding this matter for a new trial.

BRIEF FOR APPELLANT:

Joseph S. Elder II
Louisville, Kentucky

BRIEF FOR APPELLEE:

Timothy Denison
Louisville, Kentucky