

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000785-MR

JEFFREY BAIRD

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 00-CI-00016

G.W. NEWSOM and
DEBORAH NEWSOM

APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. Jeffrey Baird, a home builder, appeals from judgments of the Madison Circuit Court in which he was ordered to pay to G.W. and Deborah Newsom the sum of \$24,181.00 to compensate them for defective work performed on the construction of their home in Madison County, Kentucky. He was also ordered to pay an additional sum of \$3,483.57 as partial reimbursement of the Newsoms' expert witness fees. The jury awarded Baird the

sum of \$819.00, the outstanding balance on the Newsoms' contract. We affirm in part, vacate in part, and remand.

In June 1998, the Newsoms contracted with Baird to build them a house in Berea. They agreed to pay Baird \$129,250.00 for a ranch-style house and lot. Baird agreed to build the house as represented and agreed upon within 120 days of execution of the contract. Over the course of construction, the Newsoms modified the contract several times. Some amenities or upgrades were added to the house plan while some features were deleted entirely. Soon after construction began, the Newsoms expressed concern about the nature and quality of the work that they were observing. Nevertheless, after much delay, the Newsoms moved into the house in late February 1999.

After moving in, the Newsoms continued to notice deficiencies in the house's construction. They complained to Baird about the quality of the workmanship and pointed out to him that the construction did not comply with the applicable building code. Although he acknowledged that there were problems with the construction, Baird never corrected the deficiencies.

The Newsoms filed this action against Baird alleging a violation of the applicable building code, breach of contract, negligence, misrepresentation, and violation of the Kentucky

Consumer Protection Act. Baird answered the complaint and asserted a counterclaim in which he alleged substantial performance and demanded the balance due on the contract price. Through pleadings and discovery, the Newsoms detailed numerous defects and described what they considered substandard workmanship in the construction.

At trial, the only claims submitted to the jury were breach of contract and violation of the building code. The jury returned a verdict in favor of the Newsoms and awarded them \$25,000.00 in damages based upon its finding that Baird had failed to construct the house in a good and workmanlike manner according to the applicable building code. The jury also found in favor of Baird on his counterclaim and awarded him damages of \$819.00 -- "the amount due under the terms of the contract." Jury's Verdict, Interrogatory No. 6. In a supplemental judgment, the Newsoms were awarded sums representing attorney fees and a portion of their expert witness fees. Baird's motion to alter, vacate, or amend was denied. This appeal followed.

Baird presents two arguments on appeal. First, he contends that the trial court erred by refusing either to order a new trial or to amend the judgment, alleging that the jury's award was inconsistent with the proof. Next, Baird argues that the court erred by awarding the Newsoms any sum representing

their expert witness fees. We shall address each argument in turn.

With respect to his first argument, Baird contends that after the jury found that he had substantially performed the contract, it was bound to accept uncontroverted evidence of the Newsoms' outstanding contract balance and to award him the sum of \$13,419.74 accordingly. It is true that upon proving substantial performance of the contract, Baird was entitled to recover the full contract price -- regardless of the defective or incomplete nature of the work performed. Meador v. Robinson, Ky., 263 S.W.2d 118, 118 (1953), see also Shreve v. Biggerstaff, Ky.App., 777 S.W.2d 616, 618 (1989).¹ Baird asserts that the evidence necessary to determine his damages was essentially uncontroverted and that, therefore, the jury was bound to believe his proof and required to award him the sum he demanded. He argues that when the jury failed to make that award to him, the court abused its discretion by denying his motion to amend the judgment or to grant a new trial based on the inadequacy of damages.

Rule 59.01 of the Kentucky Rules of Civil Procedure allows trial judges to grant a motion for a new trial under

¹In turn, the remedy of a homeowner is the recovery of damages attributable to the incomplete or defective work.

certain specific circumstances. Civil Rule 59.01(d) addresses the possibility of a new trial due to excessive or inadequate damages if the award appears to have been made under the influence of passion or prejudice or in disregard of the evidence or instructions.

Granting a motion for a new trial under Civil Rule 59 is entrusted to the discretion of the trial court. Davis v. Graviss, Ky., 672 S.W.2d 928 (1984). Its ruling will not be disturbed on appeal without a finding of abuse of that considerable discretion. City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964). On appeal, our review is carefully circumscribed; we may not step into the shoes of the trial judge in order to re-visit and to re-assess the jury's decision from his perspective. Prater v. Arnett, Ky. App., 648 S.W.2d 82 (1983). We may not substitute our judgment for that of the trial judge, who has the unique advantage of observing the trial firsthand. Id. Instead, we approach the decision of the judge as presumptively correct. McVey v. Berman, Ky. App., 836 S.W.2d 445 (1992).

Baird contends that the trial court abused its discretion by failing to order a new trial in this case because the jury's award did not conform to the uncontradicted evidence. He argues that the contract modifications (including additions

and deletions to the original plan) as agreed to by the Newsoms resulted in a net increase to the original contract price in the amount of \$7,966.15. At the time of litigation, the Newsoms had paid Baird \$123,796.41, an amount that represented a shortfall of more than \$13,000.00 according to Baird. According to Baird, the Newsoms cannot point to any contradictory evidence of a substantial nature. We agree.

The doctrine of substantial performance is intended to prevent a windfall to the homeowner. While the doctrine authorizes the homeowner to recover damages for defective or incomplete work, it still requires the homeowner to tender the full contract price. The jury's verdict on the Newsoms' complaint made the Newsoms whole with respect to the defects in the construction of the house. But the award on Baird's counterclaim fell short of a full accounting for the unpaid balance of the contract. The Newsoms acknowledged their numerous modifications (additions, upgrades, and deletions) affecting the original contract price. They offered no evidence to contradict Baird's claim of a resulting increase of \$7,966.15 as to the original contract, nor did they show that sum to be otherwise unreasonable. They also acknowledged that they had paid only about 90% of the contract price prior to trial. Baird's substantial compliance with the contract -- undertaken

in good faith -- entitles him to recover the entire contract price.

Although the court correctly instructed the jury to award Baird an amount "not to exceed \$13,419.74" on his counterclaim, the jury awarded him only \$819.00 (the cost of the building permit). In light of our review of the evidence, we believe that award to be patently contrary to the evidence and in conflict with the court's instructions to award him the full balance of the contract. Consequently, the trial court erred by failing either to amend the judgment or to order a new trial limited to Baird's damages.

Baird next contends that the trial court erred by permitting the Newsoms to recover a portion of their expert witness fees as part of the cost of litigation. The term *costs* is commonly used in statutes and the civil rules. See CR² 54.04 and KRS³ 453.040. The phrase "costs of litigation" was used in 1980 when the General Assembly amended KRS 350.020, which allows a person to bring an action to compel a public officer to enforce a provision of the Surface Mining Act. KRS 350.250(2) provides that a court may award Acosts of litigation (including attorney and expert witness fees).[@] The phrase Acosts of litigation[@] was also used when the General Assembly amended the

² Kentucky Rules of Civil Procedure.

³ Kentucky Revised Statutes.

penalty section of the Whistleblower Act in 1986. KRS 61.990 (4) provides that a court may award the Acosts of litigation, including reasonable attorney fees and witness fees.@ While he does not contest the reasonableness of the fees paid to the Newsoms=expert, Baird relies upon our decision in Brookshire v. Lavigne, Ky. App., 713 S.W.2d 481 (1986), to support his argument that fees paid to an expert witness are not recoverable as costs. The plaintiffs in Brookshire obtained a judgment in a personal injury action and then sought payment of their costs. The trial court allowed the witness fees of the plaintiffs=physician as recoverable costs. In reversing the award, we stated:

As a general rule, A[f]ees paid by a party to expert witnesses are not recoverable as part of the cost of the action, unless specifically authorized by statute.@ 20 Am.Jur.2d Costs '65 (1965). KRS 453.040 states that A[t]he successful party in an ordinary action shall recover his costs,@but the statute makes no provision for the recovery of expert witness fees. CR 54.04 lists the types of taxable costs and the criteria for ascertaining them:

[I]ncluding filing fees, fees incident to service of process and summoning of witnesses, jury fees, warning order attorney and guardian ad litem fees, costs of deposition, fees for extraordinary services ordered to be paid by the Court, and such other costs as are ordinarily recoverable by the successful party.

Neither the statute nor the derivative civil rule purports to authorize the recovery of expert witness fees, such as the physician fees awarded in this case. Moreover, such fees were not recoverable at common law. Absent statutory authority, we conclude that the lower court erred in awarding appellees physician's fees.

The case before us is distinguishable from Brookshire because the Newsoms are relying on the statutory authority of KRS 198B.130(1)⁴, which provides as follows:

[A]ny person . . . damaged as a result of a violation of this chapter or the Uniform State Building code, has a cause of action . . . against the person or party who committed the violation. An award may include damages and the cost of litigation, including reasonable attorney's fees.

When enacting this section of the statute in 1978, the General Assembly specifically chose to include the language *cost of litigation*.[@] Since the more abbreviated term *costs* is used in KRS 453.040 and CR 54.04, we believe that the General Assembly must have specifically intended to expand the coverage of KRS 198B.130(1) by selecting the phrase *cost of litigation*.[@] We must indulge the presumption that the General Assembly chooses its language deliberately with knowledge of its import. ^{At}

⁴KRS Chapter 198B provides authority for adopting building codes and systems of public inspection. KRS 198B.130 creates a private cause of action for violation of the provisions of KRS Chapter 198B and the applicable building code.

must, of course, be presumed that the Legislature is aware of the status of the law at the time of the enactment of a statute. @ Commonwealth, Dept. of Banking & Securities v. Brown, Ky., 605 S.W.2d 497, 498 (1980), citing Cook v. Ward, Ky., 381 S.W.2d 168 (1964). Moreover, A[i]t is a rule of statutory construction that a statute should be construed so that no part of it is meaningless or ineffectual. @ To interpret "cost of litigation" as being synonymous with "costs" would imply that when the General Assembly enacted KRS 198B.130(10), it wholly ignored the provisions of KRS 453.040, which already provided for the recovery of "costs." We believe that such an interpretation of the provisions of KRS 198B.130(1) would render meaningless the phrase Acost of litigation@ in contravention of the rules of statutory construction. Thus, we hold that the trial court did not err by awarding a portion of the Newsoms=expert witness fees as a portion of the cost of litigation.

For the foregoing reasons, the judgments of the Madison Circuit Court are affirmed in part, vacated in part, and remanded for entry of a judgment as directed by this opinion.

McANULTY, JUDGE, CONCURS.

PAISLEY, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

PAISLEY, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I fully concur with the majority opinion as it relates to

the Newsoms' recovery of a portion of their expert witness fees as costs of litigation. However, I must respectfully dissent from that portion of the majority opinion which vacates the jury verdict and judgment determining the damages which Baird was entitled to receive under the contract.

The majority has clearly and correctly set out the standard this court must follow in addressing this issue. As they frame the issue, "Baird contends that the trial court abused its discretion by failing to order a new trial in the case because the jury's award did not conform to the uncontradicted evidence." It seems clear, however, that the evidence was not uncontradicted, since the Newsoms disputed and contradicted Baird's contentions. The jury in this case heard all the evidence, and it was clearly and properly instructed before it rejected Baird's theory of the case. As it seems clear that there was evidence to support their decision, I would affirm the judgment of the trial court in all respects.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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