

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000688-MR

GLENN D. PARRISH AND BRENDA PARRISH

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 04-CI-01819

ROBERT POPPY CONSTRUCTION AND EXCAVATING,
LLC

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This is an appeal from a judgment of the Warren Circuit Court, entered on March 2, 2006. Following a jury trial, the court awarded Robert Poppy Construction and Excavating, LLC, the balance and interest owing on a contract Poppy had entered into with Glenn D. and Brenda Parrish. The Parrishes then filed a motion for a new trial which was denied. Having reviewed the record and applicable case law, we find no error on the part of the trial court and therefore we affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Robert Poppy is the manager and majority member of Robert Poppy Excavating, LLC, which provides excavation and construction services in the Warren County area. The Parrishes are co-owners of several tracts of land in the Countryside Manor Subdivision.² Poppy had previously worked under contract with Parrish on part of Section VII of the subdivision to install sewer and water facilities, and streets. During 2003, Glenn D. Parrish solicited bids from various contractors to develop Section X, a tract consisting of nineteen lots. After lengthy negotiations, and consultations with the project engineer, Ralph Anderson, Jr., Poppy submitted a successful bid of \$124,900.00. He submitted itemized “bid sheets” that assigned a cost to each individual task involved in preparing the lots for development, such as excavation, leveling, and installing sewers and driveways. The contract between Poppy and Parrish was memorialized in a one-page document entitled “Work Agreement,” signed when the two men met in Bowling Green on December 26, 2003. It consisted of a preprinted form with handwritten entries. A serious dispute arose at trial about which was the “real” work agreement because the plaintiff and the defendant’s copies differed significantly in one important detail: Parrish’s copy specified a “completion date” for the project of March 30, 2004; whereas Poppy’s copy specified a “target completion date” of March 30, 2004. Both versions of the agreement described the job as “Turn key construction of Countryside Manor X.” Inspection fees were to be paid by the developer, Parrish. Both agreements also specified that payments to Poppy were to be made in installments, \$20,000.00 on the date of the

² Brenda Parrish testified that she had no direct involvement in the development of the subdivision, or in the contractual matters between her husband and Poppy. She is a party to the action only by virtue of her joint ownership of the real property.

agreement, \$20,000.00 upon completion of the sewer system, \$40,000.00 upon completion of the water system and the balance of \$44,900.00 upon completion of the project.

When Poppy began working on the project, he hit hard limestone rock in Section X, which he claimed slowed the project down drastically. Heavy rains also led to delays in the work. During the course of the construction, various jobs that were listed on Poppy's bid sheet, such as the construction of a dry well, the extension of a fire hydrant, and the installation of fourteen headwalls, were not performed, or were modified. Poppy claimed these omissions and modifications were made on the advice and with the approval of the project engineer. An error was also made in the placement of a drainage ditch.

As the project finally neared completion during September, 2004, approximately five months after the "completion date" or "target completion date" specified in the work agreement, Poppy feared that Parrish was not going to pay the final installment of the contract price, which at that time stood at \$19,977.49, plus \$25,272.00, the amount for which Poppy had sub-contracted with an asphalt company to pave the streets in Section X. At the end of September, Poppy filed a mechanic's and materialman's lien in the amount of \$45,249.45 against Parrish's property in the Warren County Clerk's Office. At that time, Parrish had not recorded the plat for Section X, so the legal description of the land against which the lien was taken included the entire parcel from which Section X had been developed. After the lien was filed, Parrish

obtained an updated legal description of Section X from his project engineer, and requested that the lien be amended to include only Section X. Poppy accordingly filed an amendment to the lien on October 13, 2004.

On December 9, 2004, Parrish filed suit against Poppy, claiming breach of contract. He later filed an amended complaint. Essentially, Parrish argued that the list of items in the bid sheet formed part of the contract he had made with Poppy, and that when Poppy did not perform these tasks, or modified them, he had breached the contract. Parrish argued that he was entitled to collect the amounts specified on the bid sheets for these individual items. He also contended that Poppy had failed to complete the project within the time frame specified in the work agreement. Parrish also alleged that the lien filed against his property by Poppy was improper and retaliatory. The complaint sought both compensatory and punitive damages. Poppy counterclaimed, seeking payment of the balance due on the contract of \$19,977.49.

At trial, a unanimous jury found for Poppy on all issues. He was awarded the balance due with interest. Parrish moved for a new trial. The motion was denied and this appeal followed.

We begin by setting forth our standard of review:

As a general rule,

[t]he decision of a trial court to overrule a motion for a new trial will not be disturbed on appeal absent a manifest error or abuse of discretion. In undertaking our analysis of the trial judge's . . . decision not to allow a new trial here, we must be mindful that the decision is presumptively correct, and that we cannot reverse unless it was clearly erroneous.

Embry v. Turner, 185 S.W.3d 209, 213 (Ky.App. 2006).

Furthermore, our case law has long held that

[i]t is the function of the jury to determine questions of credibility and issues of fact where the evidence is conflicting. While the trial court has a broad judicial discretion in granting or refusing a new trial, it may not set aside a verdict of a jury because it does not agree with the verdict if there was sufficient evidence to support it.

Id. at 213.

Parrish's first argument on appeal is that the trial court erred in not granting him a new trial because the jury disregarded the jury instructions in arriving at their verdict. The evidence showed that Poppy failed to construct a dry well, extend a fire hydrant, install fourteen driveway headwalls, and install gravel in seven driveways. These were all items listed on the bid sheets that Poppy submitted when he was bidding for the contract to develop Section X. Parrish maintains that he should have received the cost of each uncompleted item as his damages. He argues that the fact that the jury did not award him any damages shows that they disregarded the evidence and the jury instructions, which stated as follows:

Instruction No. 1

It was the duty of the defendant, Robert Poppy Construction and Excavating, LLC, under the agreement that it entered on December 26, 2003, with plaintiffs, Glenn D. Parrish and Brenda Parrish, to complete the work in a good and workmanlike manner, and under the terms that both the plaintiffs and the defendant understood at the time of the agreement. If you are satisfied from the evidence that the defendant, Robert Poppy Construction and Excavating, LLC,

substantially performed this duty, you will find in its favor and award it the sum of \$19,977.49, which is the unpaid balance of the contract price, less, however, such amount as you may find the Parrishes to be entitled to deduct under Instruction No. 2.

If you are satisfied from the evidence that defendant, Robert Poppy Construction and Excavating, LLC, did not substantially perform this duty, then you shall determine from the evidence and award it a sum of money in addition to the amount it has already received that will compensate the defendant, Robert Poppy Construction and Excavating, LLC, for the value of the work it performed, not to exceed \$19,977.49.

Instruction No. 2

Even if you award money to defendant, Robert Poppy Construction and Excavating, LLC, under Instruction No. 1, but are further satisfied from the evidence that the defendant's work under the contract was incomplete or defective, then you shall determine from the evidence the reasonable costs of remedying the defective performance, not to exceed \$9,790, and award that amount to the Parrishes, which figure the Court will then set off against any amount you have awarded to the defendant, Robert Poppy Construction and Excavating, LLC, under Instruction No. 1.

(Emphasis supplied.)

Parrish contends that because Poppy did not complete the items, his work was unquestionably incomplete and/or defective.

This argument, however, presupposes that the bid sheets formed part of the contract between Poppy and Parrish. This issue came up shortly before trial on a motion in limine. The trial court ruled that the bid sheets were not part of the contract, noting that the one-page work agreement had no attachments, and made no incorporations by

reference. The court also specifically stated that the contract was not divisible; in other words, that the plaintiff could not subtract the cost of individual items from the total contract price. Significantly, the work agreement described the project as “turnkey,” which supports the view that it was not divisible. The construction and interpretation of a contract are questions of law, to be decided by the court. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99 (Ky. 2003). The court held that if the jury believed that there was substantial performance of the contract, they could so find and then subtract what it would cost to fix any shortcomings from the amount (the remaining principal) to be awarded to Poppy.

Therefore, it was within the province of the jury to decide whether there was substantial performance of the contract. Our review of the record indicates that there was substantial evidence to support their finding. Testimony from the project engineer and others showed that the items Poppy did not complete which were listed in the bid sheets were either not needed or completed in a different manner. There was no error in the determination that Parrish had incurred no damages as a result of these alleged lapses.

Parrish’s next argument relates to Poppy’s building of a drainage ditch in the wrong location. He maintains that this was clearly defective work, and that he should have been awarded \$3,000.00 in damages as this was the cost of the ditch in the bid list submitted by Poppy. Expert witness Dennis Smith testified that it was the project engineer’s responsibility to perform the initial survey of the property and to stake the

primary features. The project engineer did not do so. Evidence was also presented at trial that Parrish and his project engineer were both mistaken as to the location of the ditch due to the encroachment of a neighbor's fence on the property. There was, therefore, more than sufficient evidence presented to support the jury's conclusion that Poppy was not responsible for the erroneous placement of the ditch.

Parrish next argues that the jury erred in finding under instruction three that the plaintiffs had suffered no damage from Poppy's delay in completing the project. As we have already noted, two different versions of the work agreement were presented to the jury, one of which specified a completion date and the other a target completion date. It is the "function of the jury to determine questions of credibility and issues of fact where the evidence is conflicting." *Embry*, 185 S.W.3d at 213. Substantial evidence was presented to support the determination of the jury that March 30, 2004, was merely a target date, and that Poppy had presented reasonable explanations for the delays in the project.

Parrish next addresses the matter of an affidavit submitted by the jury foreman, Joe Hullett, claiming it is proof that the jurors had been manipulated and bullied by Hullett, whom he describes as very assertive and persuasive juror, into reaching the unwarranted and outrageous conclusion that Parrish had set out to cheat Poppy. Hullett provided the affidavit at the request of Poppy's attorney after Parrish filed his motion for a new trial. The affidavit states in pertinent part as follows:

Neither passion nor prejudice were part of the deliberation by the jury. We followed the Court's instructions and made our

decisions based upon the evidence. . . . We did believe that Glenn Parrish was rude, conniving, and overbearing. We believed that Glenn Parrish set out to cheat Mr. Poppy.

. . .

While there were a lot of issues to consider in this trial, it was interesting that when the jury was instructed to deliberate the case under the Court's instructions that the notes we took were very similar, and even comments were similar.

"Issues of credibility are solely within the purview of the finder of fact and a reviewing court will not substitute its judgment for the jury's on such matters." *Pate v.*

Commonwealth, 134 S.W.3d 593, 599 (Ky. 2004). The jury found Poppy more credible than Parrish; we may not substitute our judgment for that of the jury on this matter.

Parrish next argues that the trial court erroneously refused to give specific jury instructions relating to water inspections and topsoil removal. He contends that Poppy made him incur additional expenses for allegedly unnecessary water inspections. Under the terms of the work agreement, Parrish was responsible for the cost of these inspections. Parrish claims that he had to pay additional expenses because Poppy was not present at the work site when the inspectors arrived, or because the job did not pass inspection and the inspector had to return at a later date in order to reinspect. Parrish also contends that Poppy removed and sold topsoil from Section X without his approval. On appeal, he argues that the trial court erred in failing to give specific jury instructions on these two matters.

From the case law and commentary, it is clear that Kentucky law mandates the use of "bare bones" jury instructions in all civil cases. . . . [J]ury instructions should refrain from

elaborating on an abundance of detail, but still strike the proper balance in providing enough information to a jury to make it fully aware of the respective legal duties of the parties.

Olface, Inc. v. Wilkey, 173 S.W.3d 226, 229 (Ky. 2005). “The concept [of barebones instructions] permits the instructions to be 'fleshed out' in closing argument.”

Lumpkins ex rel. Lumpkins v. City of Louisville, 157 S.W.3d 601, 605 (Ky. 2005).

When we apply this “barebones” standard, it is clear that the issue of the allegedly unnecessary inspection fees was adequately covered by instruction one, which asked the jury whether the agreement was performed as understood by the parties at the time of the agreement, and instruction three which directed them to award damages for delays caused by Poppy. The issue of the topsoil removal was similarly covered by instruction one, which also asked to jury whether the agreement was performed in a “good and workmanlike manner.” Furthermore, counsel for Parrish did not take the opportunity to “flesh out” the jury instructions by raising the issue of the inspections or the topsoil removal in his closing argument.

Parrish’s final argument concerns the lien. He contends that it was an attempt by Poppy to wrongfully extort money, by filing a lien against the entire subdivision, not just Section X; by filing the lien before payment was due under the contract and while the job was still incomplete; by filing the lien for substantially more than the amount that would have been owing under the contract and by refusing to reduce the excessive claim until the day of the hearing into the matter, which he claims caused him to incur unnecessary and substantial attorney’s fees, bank fees, and costs relating to

the release of the bond premium. Parrish argues that the trial court should have instructed the jury on all of these issues, whereas it only instructed on the attorney's fees.

The record shows that the trial court granted a directed verdict that the lien was proper and timely. The court also granted a directed verdict for the defendant on the issue of the breadth of the lien description, finding it was the narrowest legal description the defendant had of the property at the time. The court noted that the defendant revised the description when one was provided by the plaintiffs. The court also found that the plaintiffs were unable to show any damages stemming from the alleged delay in filing the revised description. The trial court directed a verdict on bond costs and bank fees because they were not incurred as the result of any delay, and were incidental to the lien which the court had already determined was not improperly filed. Parrish has not appealed the grant of the directed verdict on any of these issues. His attempt to resuscitate the argument through a challenge of the jury instructions is without merit.

Similarly, his argument that the jury disregarded the instruction that was given regarding the attorney's fees is without merit. He contends that he submitted uncontradicted evidence that he incurred \$2,602.50 in attorney's fees in connection with the lien. But the court had already directed a verdict on the propriety of the lien; therefore, any attorney's fees incurred could not be damages assessed against Poppy unless they were incurred as the result of an unreasonable delay in reducing the amount of the lien.

In light of this discussion of the lien, and Parrish's failure to appeal the directed verdict on this issue, his argument that he was entitled to an instruction on punitive damages stemming from the lien is moot.

Similarly, the appellees' argument that the instruction on attorney's fees was erroneous is moot.

The judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Chester I. Bays
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Lanna Martin Kilgore
Bowling Green, Kentucky