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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000933-MR
AND
NO. 2006-CA-000971-MR

W. C. HAMMOND

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 03-CI-00490

CECIL HALL

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * ** * **

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

WINE, JUDGE: W. C. Hammond (“Hammond”) appeals from a jury verdict in which he was ordered to pay Cecil Hall (“Hall”) \$5,000.00 as reimbursement for the cost of applying a decorative driveway sealant to Hall’s driveway. Hammond argues there was insufficient evidence to support Hall’s negligence claim and the trial court erred in denying his motion for a directed verdict. Further, Hammond asserts there was

insufficient evidence to support the jury's damage award. Hall cross-appeals claiming that the trial court erred in granting a directed verdict to Hammond on his claim under the Kentucky Consumer Protection Act. Having reviewed the record and applicable case law, we affirm in part and reverse in part.

The matter was heard before a jury on January 30 and 31, 2006. At the close of Hall's case-in-chief, the trial court granted a directed verdict to Arcrete, Inc. ("Arcrete"), on both the negligence and Consumer Protection Act claims, dismissing Arcrete, Inc., from this action. The trial court also granted a directed verdict to Hammond on the Consumer Protection Act claim but denied such as to the negligence claim. The court also granted a directed verdict in favor of Arcrete as to Hammond's cross-claim. The jury returned a verdict in favor of Hall finding that Hammond was negligent in this work and awarded Hall \$5,000.00. This appeal and cross-appeal followed.

Hall owns a home at 740 Cherokee Road in Raceland, Kentucky. Hall and Hammond became acquainted when Hammond did some concrete work on Hall's driveway prior to the sealant job. At that time, Hammond indicated to Hall that he did decorative concrete staining. Hall decided he wanted a tan base coat with brick trim around his driveway. Hammond quoted a price of \$5,000.00 to Hall for the job. Hall paid a \$1,000.00 down payment with the balance to be paid once the job was completed. Hammond began work on the project in September of 2002 and completed the work in early October 2002. Hall then paid the balance of the contract price. Hall testified that a

portion of the sealant began coming off the driveway within thirty days after Hammond finished the job. Hall testified he attempted to contact both Hammond and Artcrete and asked them to repair or reimburse him for the work done. Both Hammond and a representative from Artcrete looked at the driveway. When each denied responsibility, Hall filed suit in September 2003.

At trial, Hammond claimed he told Hall that the concrete on the driveway was deteriorating and he did not know how long the sealant would last. Although the driveway was only five years old, Hammond believed its poor condition was indicative of a driveway ten to fifteen years old. Hammond further asserted that he told Hall that the overlay would last as long as the concrete underneath lasted. Conversely, Hall testified that Hammond told him the product would last ten years. A brochure distributed by Artcrete and introduced into evidence does not warrant how long the product would last.

Hall alleges that Hammond was negligent in applying the sealant because the sealant peeled off thirty days after it was applied, thus breaching the duties which he owed under their contract. Primarily, Hall claims Hammond did not properly prepare the surface of the driveway by failing to use an acid wash before applying the decorative top coat. Photographs introduced at trial, as well as testimony of all witnesses, confirms the top coating was peeling off in random areas across the driveway. Hammond testified he was present when his work crew applied an acid etching to make the surface more porous and thus the coating more likely to successfully bond to the concrete.

Hammond argues there was insufficient evidence to show negligence and therefore the trial court erred in sending it to the jury. We agree. Specifically, Hammond asserts that Hall failed to present a nexus between the application of the decorative coating and the failure of the coating to adhere to the driveway. Hammond testified the driveway was properly prepared and he applied the coating in accordance with the manufacturer's instructions. Hammond defended his work, claiming either the concrete in Hall's driveway was defective or the product was defective. Mr. Mullins ("Mullins"), a representative of Artcrete, testified at trial that he could find no problems with the product, nor could he say it had not been properly applied. While Mullins conceded that a failure to use an acid wash might produce the observed condition, he could not affirmatively state Hammond did not use an acid wash. Further, both Hammond and Mullins testified as to various reasons why defects in the concrete could lead to the coating peeling off. It is well-established that tort liability for negligence requires the plaintiff to establish: (1) a duty; (2) a breach of that duty; (3) proximate causation; and (4) damages. *Illinois Central R.R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967); *Helton v. Montgomery*, 595 S.W.2d 257, 258 (Ky.App. 1980). *See also Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). The failure to prove any requisite element is fatal to a negligence claim. *Illinois Central R.R.*, 412 S.W.2d at 876, *citing Warfield Natural Gas Co. v. Allen*, 248 Ky. 646, 59 S.W.2d 534 (1933).

Duty presents a question of law, while breach and injury are questions of fact for the fact-finder to decide. *See Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89

(Ky. 2003). Proximate causation presents a mixed question of law and fact. *Id.* Further, in a professional negligence case, expert testimony is ordinarily required to establish the standard of care unless the negligence is so apparent that a layperson would have no difficulty recognizing it. *Baptist Health Care Systems, Inc. v. Miller*, 177 S.W.3d 676, 681 (Ky. 2005). Stated differently, an expert is required to establish the standard of care unless such standard is within the common knowledge of laypersons.

Here, Hall did not present expert testimony to repudiate Hammond's method of applying the sealant. Hall also testified that he had no knowledge or experience in applying decorative coating to his driveway, he was aware he had no written warranty, and he did not know why the application of the sealant failed. Hall's proof can be summed up in his statement to the jury, "I know what I paid for, and I didn't get it." There is no question the coating failed. The issue was why after only thirty days did it peel up in random areas. Both Hammond and Artcrete acknowledge three possibilities: product defects, improper application or concrete defects. All the parties conceded there was no evidence the product was defective. The court even directed verdicts in favor of Artcrete as to claims by Hall and Hammond. Hall denied there were problems with the concrete and Hammond asserted, without contradiction by Artcrete, that he had properly applied the product. Since the application of decorative concrete sealant, or the different possible defects to already poured and cured concrete, are not within the common knowledge of laypersons, we conclude that expert testimony was

necessary to establish the concrete was not defective and that Hammond breached an applicable standard of care.

Nevertheless, Hall also asserts that there were factual issues which precluded entry of a directed verdict. He points to the conflicting testimony about whether Hammond verbally guaranteed the sealant would last ten years or so long as the underlying concrete held. But since Hall does not assert a claim for breach of warranty, this factual dispute is not material, nor does it prove an element of negligence.

In denying the motion for a directed verdict, the trial court focused on the conflicting testimony about whether Hammond used an acid wash on Hall's driveway prior to applying the sealant. However, even if Hall's contentions are true that Hammond did not use an acid wash, Hall still failed to present evidence that Hammond's failure to acid wash the driveway caused the sealant to fail to adhere, leaving the jury to speculate as to the reason for the failure. Even accepting Hall's contention that expert testimony is not necessary, the jury was required to make a decision based on possibilities. In *Texaco, Inc. v. Standard*, 536 S.W.2d 136, 138 (Ky. 1976), the Court held:

“The proof in this case establishes no more than possibilities or combinations of possibilities. We can find no evidence of substance which would even tend to tilt the balance of causation as between an unavoidable accident, a defective condition in the pump house, or negligent activity on the part of appellant's employee. It is pure guesswork that the fire was attributable to the latter and, of course, that is the only conjecture upon which appellant's liability can be based. Since the claimants' proof did not pierce the veil of speculation, appellant was entitled to a directed verdict.”
Highway Transport Co. v. Daniel Banker Co., Ky., 398

S.W.2d 501 (1966). *See also Savill et al. v. Hodges*, Ky., 460 S.W.2d 828 (1970).

A directed verdict is proper when drawing all inferences in favor of the non-moving party a reasonable juror could only conclude that the moving party was entitled to a verdict. *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963). *See also Nugent v. Nugent's Executor*, 135 S.W.2d 877 (Ky. 1940). In the absence of evidence that Hammond breached a standard of care in applying the sealant or that his negligence caused the sealant to peel, Hammond was entitled to a directed verdict on the negligence claim. Therefore, the judgment in favor of Hall on this issue must be set aside.

Hammond further argues that there was insufficient evidence to support the jury's damage award of \$5,000.00. The measure of damages for breach of contract is the sum which would put the injured party back in the same position he would have been had the contract been performed. *Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995). As the contract price is a sufficient measure of damages for the breach, we do not take issue with Hall's proof of damages in this case. However, the more pertinent issue focuses on negligence, which we have already discussed.

In his cross-appeal, Hall asserts that the trial court erred in granting a directed verdict to Hammond on Hall's claim under the Consumer Protection Act. However, we agree with the trial court that Hall failed to present any material evidence that Hammond committed false, misleading or fraudulent acts in violation of the Act. Thus, a directed verdict on both of these issues was appropriate.

Accordingly, we affirm the trial court's directed verdicts to Artcrete on the issues arising under negligence and the Consumer Protection Act. We also affirm the trial court's directed verdict to Hammond on the issue of the Consumer Protection Act. However, we reverse the judgment in favor of Hall and remand this matter to the trial court for entry of a directed verdict on the negligence claim.

DIXON, JUDGE, CONCURS IN RESULT.

VANMETER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, CONCURRING: I concur in result and in most of the reasoning of the majority opinion. However, I disagree with so much of the majority opinion as states or implies that the application of a driveway coating, as in this case, is a profession.

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