

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002519-MR

ANTHONY EARDLEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 04-CI-01063

PAUL F. WIGLER

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; MOORE AND VANMETER, JUDGES.

MOORE, JUDGE: Anthony Eardley appeals the Fayette Circuit Court's judgment denying his motion for a mistrial and accepting a jury verdict regarding a contract dispute. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties propose vastly different versions of the facts in this case. The only facts that appear undisputed are that Paul Wigler hired Eardley, an architect, to

design a sunroom to be added to the back of Wigler's home and that Eardley was to be compensated for his work.

Eardley claims that the parties' agreement included his designing the sunroom and that he would be paid as follows: initially, \$75.00 per hour for drawing time and then, when construction began, and to accommodate costs, the basis of the fee changed from an hourly rate to 12.5% of construction costs. Slowly, the 12.5% rate would overcome the hourly rate. Eardley testified that the reason why he is paid in such a manner is that in the event construction does not proceed, he is at least compensated for the time that he spends rendering drawings.

Eardley further attested that Wigler did not inform him that he had only \$50,000 to spend on the entire project, including construction, until the site was being cleared and workers were preparing to lay the footings for the room. Eardley testified that he then informed Wigler that the project could not be completed for \$50,000, and that, in fact, it was unlikely to be completed for less than \$100,000.

Eardley drew approximately forty drawings and twenty-six revised drawings for Wigler. When asked at trial if it was necessary for him to render all of those drawings, Eardley testified that it was. Eardley explained that the multiple drawings he rendered concerning the second-story kitchen that Wigler wanted to keep were necessary because Eardley opined that it would have been easier, quicker, and cheaper to demolish the kitchen and rebuild it, rather than having to "shore" it up, as necessary.

By the end of the project's twenty-second week, Wigler had already spent over \$71,000 on the project. Eardley testified that, despite the costliness of the project, Wigler nevertheless continued to insist that the room have a copper roof. Thus, Eardley believed that the cost of the project was not as significant as Wigler had previously stated.

Eardley attested that he asked Wigler to give him copies of the invoices he had been paying so that he could figure his fee, but Wigler failed to do so. Eardley withdrew from the project due to a dispute over his compensation. At that time, Wigler had invested \$129,587.90 in the project, and Eardley claimed to be entitled to 12.5% of that amount; thus, he alleged that he was entitled to be paid \$16,198.48. Eardley had invested over 160 hours in rendering drawings for the project, but because his 12.5% fee based on the cost of construction was greater than the amount that he would have received for the 160 hours of drawings, Eardley calculated his fee as 12.5% of the construction costs, rather than based on the hours spent on the drawings.

On April 17, 2002, Eardley went to Wigler's house to receive payment for his work. Eardley testified that he asked for \$6,000, which is the amount that Wigler paid him. Eardley sought this money at that time because he needed to pay taxes.

Construction on the project had begun approximately one and a half months earlier. Eardley attested that he had no indication from Wigler that Wigler believed that the \$6,000 was all that he was going to owe Eardley. Eardley testified that Wigler did not indicate that Eardley's fee was supposed to be \$5,000, and Eardley stated that if Wigler had done so, Eardley would have "stopped work right then and there."

Wigler also testified at trial, and his recollection of the events leading up to the filing of his lawsuit differed significantly from Eardley's.

Wigler obtained several cost estimates for the sunroom from other companies before he consulted with Eardley. He attested that the highest bid he had received from those other companies was \$54,000. Wigler had a \$50,000 budget for the room, and he testified that Eardley was aware of this budget because it was the first thing Wigler discussed with him during their first meeting, before construction began.

Several months later Eardley and Wigler met again, and Eardley showed Wigler dozens of drawings he had completed for the construction project. Wigler testified that prior to that time, they had not discussed how Eardley would be compensated. However, during that meeting, Wigler asked Eardley about his method for compensation. Wigler testified that Eardley responded by stating that it is customary for general contractors to be paid ten percent of the total construction costs. Wigler then replied by telling Eardley that the amount would then be \$5,000 (*i.e.*, ten percent of his \$50,000 budget for the project). Wigler attested that his understanding was that Eardley would obtain the laborers and the materials necessary to complete the construction project.

Wigler testified that during construction, Eardley made more than ten visits to the site the first month. Eardley continued to bring drawings to Wigler, and Wigler attested that the number of drawings became a running joke with the laborers because Wigler told them it was a good thing that he was not paying for all of the drawings,

considering that Wigler thought that Eardley would be paid ten percent of anticipated construction costs of \$50,000.00.

Approximately two weeks after construction began, Eardley informed Wigler that he would be leaving for England for two months. He had never mentioned it previously, which shocked Wigler. Work on the construction project moved slowly. Wigler testified that on April 17, 2002, Eardley showed up at his house and informed Wigler that he needed \$7,500 because he owed taxes to the Internal Revenue Service. Wigler protested, saying that he was not going to give Eardley \$7,500 because he had not worked on the project yet. Eardley informed Wigler that he had spent 100 hours on the drawings, and at \$75.00 per hour, that would equate to \$7,500. Wigler told Eardley that that was not their agreement and, after discussing this for a while, Eardley informed Wigler that his work on the project was almost complete, so they agreed on a fee of \$6,000, which Wigler paid at that time. Regarding the fee, Wigler testified that he then asked Eardley whether \$6,000 was going to be his full fee for the project, and Eardley responded affirmatively. So, Wigler wrote Eardley a check for \$6,000, expecting that to be payment in full for Eardley's fees.

Eardley visited the construction site a few times in October, and he visited again on November 1, 2002. The next time Wigler heard from Eardley was in March 2003, when Eardley sent Wigler a letter asking to pay him an additional \$6,000. Wigler responded with a letter informing Eardley that he was not going to pay the additional

\$6,000, because they had previously agreed that the initial \$6,000 payment was all that would be owed to compensate Eardley.

Wigler attested that Eardley drew many drawings that were unnecessary because many of the drawings did not meet Wigler's requirements. For example, Eardley drew at least one drawing reflecting that the upstairs kitchen would be taken out, even though Wigler had told Eardley that he wanted to keep that kitchen. During trial, Wigler showed many more of Eardley's drawings that were unnecessary, as the drawings either included things that Wigler did not ask for, or they did not include things that Wigler required.

After Eardley's last visit to the construction site, Wigler took over the project, and he occasionally had to hire people to help him complete it. From the time Eardley quit, it took Wigler an additional eight months to complete the project. In fact, the laborers left the project at about the same time as Eardley, without telling Wigler that they had another project on which to work.

At the close of the presentation of evidence, the court reviewed the jury instructions with the parties outside of the jury's presence. The instructions read as follows:

Interrogatory No. 1

Do you believe from the evidence that the Plaintiff, Anthony Eardley, and the Defendant, Paul Wigler, had an oral agreement regarding the employment of the Plaintiff and that the Plaintiff is entitled to a sum of money as a result of the agreement between the parties?

If your answer is "No," you shall proceed no further, having found for the Defendant, Paul Wigler.

If your answer is "Yes," you shall proceed to Interrogatory No. 2.

Interrogatory No. 2

Do you believe, based on the evidence, that the Plaintiff, Anthony Eardley, agreed to accept a \$6,000 payment from Paul Wigler as full satisfaction for his services, and that Paul Wigler paid the amount agreed upon?

If your answer is "Yes," then you have found for the Defendant and shall proceed no further.

If your answer is "No," then you shall proceed to Interrogatory No. 3.

Interrogatory No. 3

What amount, do you believe from the evidence, is Plaintiff, Anthony Eardley entitled?

Eardley objected to the second interrogatory, and Wigler objected to the first and third interrogatories. Following closing arguments during trial, the case was sent to the jury with these instructions. The jury returned their verdict, answering the first interrogatory "yes," and the second interrogatory "no." Then, with regard to the third interrogatory, the jury awarded Eardley zero dollars in damages.

The circuit court discussed the verdict with counsel during a bench conference. The court and counsel initially believed that the verdict was inconsistent. However, with regard to the jury's answers to the interrogatories, the court stated as follows:

I can't do anything, the way this has gone, because [the jurors] have found that [the parties] did have an agreement and that it was for money. [The jurors] have found that [Eardley] didn't

agree to just accept six thousand dollars, but they have also found that, whether he agreed or not, six thousand is all he's entitled to.

The jury was discharged, and Eardley's counsel then moved for a mistrial on the basis that the jury instructions were inconsistent. The court denied the motion, but recognized that there were appealable issues.

Eardley now appeals, claiming that the circuit court should have granted his motion for a mistrial and ordered a new trial or, alternatively, the court should have entered a judgment notwithstanding the verdict. Specifically, Eardley alleges that the award of zero dollars in damages under the third interrogatory was inconsistent with the jury's answers to the first two interrogatories.

II. STANDARD OF REVIEW

We review the denial of a motion for a mistrial for an abuse of discretion. *See Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005). "A manifest necessity for a mistrial must exist before it will be granted." *Id.*

III. ANALYSIS

Eardley alleges that his motion for a mistrial should have been granted, and a new trial ordered because the jury's verdict inconsistently awarded zero dollars in damages after answering the first interrogatory in the affirmative and the second in the negative. When a party seeks a new trial, "[i]f the motion for a new trial is based on a claim of inadequacy of the award of damages, the resolution of that issue depends on the

underlying evidence and whether probative evidence supported the jury's verdict."

Rippetoe v. Feese, 217 S.W.3d 887, 890 (Ky. App. 2007).

A trial court's decision to grant or deny a motion for a new trial based on inadequate damages is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial. Thus, we will not disturb a trial court's order denying such a motion so long as the order is supported by evidence and thus is not clearly erroneous.

Bledsaw v. Dennis, 197 S.W.3d 115, 117 (Ky. App. 2006) (internal quotation marks omitted). "[A] verdict which is merely irregular is sufficient if it shows that the jury expressed its opinion upon the issues of the case." *Simmons v. Atteberry*, 310 S.W.2d 543, 546 (Ky. 1958).

In the present case, the circuit court noted that the jury concluded the parties had an oral agreement concerning the employment of Eardley and Eardley should have been compensated for his work. Additionally, the jury concluded that Eardley did not agree to accept Wigler's initial \$6,000 payment as full satisfaction for his services, and Eardley's testimony supported this conclusion. The circuit court surmised that, nevertheless, the jury, as the fact finder, concluded that Eardley was not entitled to more than the \$6,000 he had previously been paid, as they awarded him zero dollars in damages. Thus, the court denied Eardley's motion, and the evidence of record supports that decision, particularly considering Wigler's extensive testimony regarding the numerous unnecessary drawings Eardley had rendered. Therefore, we will not disturb the circuit court's ruling on the motion.

As for Eardley's alternative argument on appeal that the circuit court should have entered a judgment notwithstanding the verdict, his claim lacks merit. When reviewing a trial court's decision to deny a motion for judgment notwithstanding the verdict, "we apply the same standard of review that we use when reviewing a lower court's decision to deny a motion for a directed verdict." *Radioshack Corp. v. Comsmart, Inc.*, 222 S.W.3d 256, 261 (Ky. App. 2007).

When a trial court considers a motion for judgment notwithstanding the verdict, it must view the evidence in a light that is most favorable to the opposing party and give the opposing party every fair and reasonable inference that can be drawn from the evidence. . . . Furthermore, the trial court may only grant judgment notwithstanding the verdict where there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Id. (internal quotation marks omitted).

Viewing the evidence in a light most favorable to Wigler, while the jury agreed with Eardley that the agreement was not for \$6,000.00 in compensation, Eardley was adequately compensated. Eardley spent a great deal of time on unnecessary drawings that did not meet the requirements that Wigler had set forth for the sunroom. Therefore, the evidence supports the jury's determination that Eardley was not entitled to more than the \$6,000 he had previously been paid for the work he completed on this project. Consequently, the circuit court did not err when it failed to enter a judgment notwithstanding the verdict.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE
OPINION:

COMBS, CHIEF JUDGE, DISSENTING: I must dissent. The verdict was so contradictory and inconsistent that a mistrial was not only warranted but required. Under the circumstances of this case, the evidence itself was too conflicting to enable the court to enter judgment notwithstanding the verdict. Consequently, I would vacate and remand for a new trial.

BRIEF FOR APPELLANT:

David A. Weinberg
Lexington, Kentucky

BRIEF FOR APPELLEE:

J. Thomas Rawlings
Lexington, Kentucky