

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001331-MR

GERALD WILCHER, d/b/a
WILCHER INTERIORS

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE STEPHEN M. SHEWMAKER, JUDGE
ACTION NO. 97-CI-00156

HORACE ELLIS AND
BETTY JO ELLIS, HIS WIFE

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: GUIDUGLI, McANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Gerald Wilcher d/b/a Wilcher Interiors (Wilcher) appeals from a judgment entered by the Boyle Circuit Court on February 7, 1999, in favor of Horace Ellis and Betty Jo Ellis (collectively Ellis) in the amount of \$1,204 following a jury trial. We vacate and remand for a new trial.

In March 1996, Betty went to Wilcher's business to price carpet for her home. She brought a sample of carpet from another dealer with her. Betty told Wilcher she wanted a carpet that would stand up to heavy traffic. According to Betty, Wilcher told her that his carpet was better than the sample she

brought in. He showed her a sample of a berber-type carpet and told her it was high quality carpet that would wear well in high traffic areas. Betty took Wilcher's sample home and showed it to Horace; and they agreed that they liked the carpet. The Ellises purchased the carpet from Wilcher for approximately \$1,200.¹

Ellis began having problems with the carpet approximately one week after it was installed. A piece of carpet thread caught in Ellis's vacuum cleaner and unraveled, leaving a bare patch which exposed the carpet's backing. As time passed, more raveling occurred at various places throughout the carpet. Some of the raveling occurred at locations where the carpet had been seamed or pieced together during installation, some occurred at locations other than seams.

When efforts to reach an agreement as to what to do about the carpet failed, Ellis filed suit against Wilcher in April 1997. Ellis claimed, among other things, that the carpet installed in the house was inferior in quality to the sample Wilcher showed them and this was a violation of Kentucky's Consumer Protection Act (KRS 367.170 et seq.). Following a jury trial, judgment was entered in favor of Ellis in the amount of \$1,204. This appeal followed.

I. DID THE TRIAL COURT ERR IN INSTRUCTING
THE JURY UNDER THE KENTUCKY CONSUMER
PROTECTION ACT?

Following the close of Ellis's case, Wilcher moved for a directed verdict on several grounds, including Ellis's claim

¹Apparently the Ellises also purchased vinyl flooring from Wilcher too. The vinyl flooring was not at issue in this case.

under the Kentucky Consumer Protection Act (KCPA). The trial court entered a directed verdict in favor of Wilcher on Ellis's KCPA claim on the ground that there was no testimony that the carpet installed in Ellis's home was second grade or factory reject. This statement by the trial court was astonishing as Wilcher's expert witness, Clifford Wethington (Wethington), clearly stated at least twice while testifying at trial that the carpet installed in Ellis's house was factory reject. Counsel for Ellis respectfully informed the trial court that it was mistaken and when the trial court persisted in insisting that there was no evidence to support the KCPA claim he asked the trial court to review the trial videotape. The trial court refused to do so, and entered a directed verdict in Wilcher's favor on the KCPA claim. In fact, when counsel for Ellis asked "So, you're not giving us an instruction under the Consumer Protection Act?" the trial court responded "No." In reliance on the trial court's entry of a directed verdict on Ellis's KCPA claim, counsel for Wilcher focused his defense on Ellis's breach of contract claim as that was the only claim that survived his motion for directed verdict.

While on the witness stand, Wilcher admitted that Wethington had testified that the carpet installed at Ellis's home was factory reject. No one objected to this testimony. Based on Wilcher's testimony, counsel for Ellis asked the trial court if it would reconsider its directed verdict on Ellis's KCPA claim. The trial court indicated it would do so at the close of evidence.

During the bench conference regarding jury instructions, counsel for Wilcher expressed his surprise and objection to the fact that the trial court proposed to instruct the jury under the KCPA. In response, the trial court stated that the KCPA claim could "come back in" because Wilcher stated that Wethington testified that the carpet installed in Ellis's home was factory reject, and that Wilcher's statement was sufficient evidence from which the jury could deduce that fraud had occurred. Counsel for Wilcher countered by arguing that Wethington's testimony had been excluded because he was not supposed to testify to that. The trial court noted that no objection to Wethington's testimony had been made, and that his testimony was proper. When a review of the videotape showed that no objection had been made, the court overruled Wilcher's objection to the KCPA instruction.

Wilcher contends that it was improper for the trial court to grant a directed verdict on Ellis's KCPA claim at the close of Ellis's case and then reverse itself at the close of evidence and give the jury a KCPA instruction. We agree. "[T]he above instruction was erroneously given to the jury as it allowed them to determine an issue which the trial judge had already ruled upon as a matter of law by granting [a] directed verdict." Investors Heritage Life Insurance Company v. Colson. Ky.App., 717 S.W.2d 840, 842-843 (1986). Although the trial court's decision to give the KCPA instruction was an attempt to remedy its mistake in granting a directed verdict to begin with, the attempted correction resulted in prejudice to Wilcher as he did not defend

against the KCPA claim in reliance on the trial court's earlier ruling.

Ellis's contention that this error was somehow unpreserved is without merit as Wilcher did bring the erroneous instruction to the trial court's attention during the bench conference on jury instructions. However, assuming for the sake of argument that Wilcher did not object, we note that "[w]hile the instruction itself was not objected to by any party, it was erroneous in that it conflicted with the trial court's prior ruling granting a directed verdict....The order of the court granting a motion for directed verdict is effective without any assent of the jury." Colson, 717 S.W.2d at 845.

In order to remedy the prejudice caused by the giving of the erroneous instruction, it is necessary to vacate the judgment of the trial court and remand this matter for a new trial. Therefore, it is not necessary for us to address Wilcher's arguments concerning the denial of directed verdict motions and rescission and return of the carpet. However, we will address Wilcher's arguments pertaining to the jurisdiction of the Boyle Circuit Court and the qualification of Wethington as an expert witness as these matters may resurface during retrial.

II. DID THE BOYLE CIRCUIT COURT HAVE JURISDICTION OVER THIS MATTER?

Prior to trial, Wilcher filed a motion to dismiss on the ground that the amount in controversy was less than the minimum jurisdictional limit for circuit court. The trial court denied the motion by order entered July 22, 1998, stating that "[t]he specific damages of over \$1,700 is the amount actually

paid by the Plaintiffs to the Defendant, but claims were made for other consequential damages." We find no error in the trial court's ruling.

Wilcher correctly argues that district courts have exclusive jurisdiction over cases in which the amount in controversy does not exceed \$4,000 pursuant to KRS 24A.120(1)(a). However, pursuant to KRS 367.220(1):

Any person who purchases or uses goods . . . primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170, may bring an action . . . in the Circuit Court in which the seller or lessor resides or has his principal place of business or is doing business, or in the Circuit Court in which the purchaser or lessee of goods or services resides, or where the transaction in question occurred, to recover actual damages.

KRS 367.220(1) (emphasis added). Based on this statute, the trial court did not err in finding that it had jurisdiction over Ellis's claim.

III. DID THE TRIAL COURT ERR IN ALLOWING ELLIS'S EXPERT WITNESS TO TESTIFY AS TO THE GRADE OF CARPET INSTALLED IN THE ELLIS'S HOME?

Ellis sought to offer the expert testimony of Wethington as to the grade of carpet installed in the house. Wilcher filed a motion in limine seeking to prohibit Wethington from testifying as an expert.

During a hearing on Wilcher's motion, Wethington testified that he had worked off and on as a carpet installer since 1965. In 1966, he went on a three-day tour of carpet mills in Dalton, Georgia, where he watched carpet being manufactured. According to Wethington, it is important to know the quality and grade of carpet for installation purposes, and he testified that he always inspected carpet before installing it to ascertain the grade. Wethington stated that you generally determine carpet grade by looking at the back of the carpet. He stated that a lay person would not be able to tell what grade a carpet was without looking at the back of it, but that someone like him with years of experience could do so. Wethington stated that the mill inspectors would be responsible for grading carpet. Wethington admitted that he does not know if the manufacturing process has changed since his tour of the carpet mills, but stated that he has more knowledge of carpet than the average person based on his years of experience.

In regard to the manufacturing of carpet, Wethington testified that inspectors look at the carpet as it comes off the machinery. The inspectors use "darts" to mark places where the thread broke during the weaving process, and then extra thread is used to repair those areas. If there are numerous thread breaks in a piece of carpet, it is labeled factory reject. If there are glue defects in the backing of a carpet, it is labeled second grade.

Wethington testified that the carpet sample given to Betty was first grade carpet. Based on his observation of the

carpet installed in Ellis's home, Wethington stated that it was mill reject. In his opinion, the raveling of the carpet was caused by thread breakage which occurred during the manufacturing process. Wethington admitted that he did not take the carpet up off the floor and look at the back of it. Although he did not offer an opinion at the hearing as to whether the carpet installed at the Ellis's home was the same as the carpet sample, he did testify at his deposition that the carpet sample was a better piece of carpet than what was installed.

Following Wethington's testimony at the hearing, the trial court ruled that he could testify as an expert, but limited his testimony to how the backing on the carpet was attached and how many thread defects he could observe. The trial court further ruled that Wethington could give his opinion on the grade of carpet on the sample and the grade of carpet installed in the house, but he could not give an opinion as to whether the carpet installed in the house was the same as the carpet sample.

Wilcher contends that the trial court erred in allowing Wethington to testify as an expert. He maintains that because Wethington's experience was in the area of installation, he could not testify about carpet grades. Wilcher also argues that because Wethington stated that the carpet defects could be seen by members of the jury, there was no need for expert testimony. We note that it is in the discretion of the trial court to decide if a witness is qualified to give expert testimony at trial, and we will not reverse a trial court's ruling on that issue unless

an abuse of discretion is shown. Murphy by Murphy v. Montgomery Elevator Company, Ky. App., 957 S.W.2d 297, 298-299 (1997).

Having reviewed Wethington's deposition and the testimony he gave at the qualification hearing, we are not persuaded that such an abuse has occurred.

While it is clear that a witness in order to be competent as an expert must show himself to be skilled in the business or profession to which the subject about which he is called to testify relates, there is no precise rule as to the mode in which such skill or experience must be acquired. A witness may be qualified by practice or acquaintance with the subject. He may possess the requisite skill by reason of actual experience or long observation.

Kentucky Power Co. v. Kilbourn, Ky., 307 S.W.2d 9, 12 (1957). We believe that Wethington's testimony concerning his years of experience as an installer is sufficient to qualify him as an expert. In regard to Wilcher's arguments concerning the factual aspects of Wethington's testimony, we further agree with Ellis that the weight and credibility of an expert's testimony are for the jury to evaluate once a witness has been qualified to give expert testimony. Commercial Union Assurance Co. v. Howard, Ky., 76 S.W.2d 246, 249 (1934).

Having considered the parties' arguments on appeal, the orders of the Boyle Circuit Court pertaining to jurisdiction and the qualification of Clifford Wethington as an expert witness are affirmed. However, due to the erroneous giving of a jury instruction pertaining to Kentucky's Consumer Protection Act, the judgment of the Boyle Circuit Court is vacated and this matter is remanded for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Clay
Danville, KY

BRIEF FOR APPELLEES:

Stephen B. Humphress
Theodore H. Lavit
Lebanon, KY