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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001714-MR

JERRY GOHEEN AND
KAREN GOHEEN APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 95-CI-00146

RICHARD DILAURA AND
LINDA DILAURA APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

MOORE, JUDGE: Jerry and Karen Goheen appeal the Marshall Circuit Court's judgment in this defective home construction case. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, Richard and Linda DiLaura entered into a contract with Jerry and Karen Goheen, in which the Goheens agreed that Goheen's Construction would build a home, meeting certain specifications, for the DiLauras in exchange for $116,000.00.

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[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Construction began, and after it was completed, the DiLauras began to notice construction problems with the home. The DiLauras filed a complaint in circuit court, alleging that the Goheens had built their home defectively.

Through the course of litigating this case, the DiLauras specified that the work needed to repair the house included: sloping the garage floor to allow water to run off; adding supports under the house, as well as support braces, and extra nails in the attic; repairing the foundation; fixing sheetrock stains and tears throughout the house; ensuring proper caulking of light fixtures to keep water out; fixing siding above a door to prevent water from dripping underneath the siding; replacing the parquet floor due to water intrusion during rainy weather; checking the sub-floor for water damage; replacing a door that had rotted at the bottom; adjusting the rug in front of the mantle, as it was uneven; preventing water from entering a hole under house; replacing trim work, frame and support woodwork that had hammer marks, chips, and other imperfections; repainting walls; fixing problems with the chair rails; trimming doors; squaring up a window; replacing soil above the septic tank; sealing the front porch and three stoops; inspecting the dining room door to determine why it leaked; sanding and adding coats of urethane to beams and railings; adding a coat of paint to spindles; replacing destroyed wallpaper; rounding out and repainting windows in the foyer; installing shower stalls; sealing off the roof and stopping a leak in the skylight; installing an exhaust fan over the Jacuzzi; installing four sets of stairs; replacing and rewiring lights; fixing leaky windows; fixing foundation cracks; and correcting the shape of the back porch.

In their interrogatories propounded to the Goheens, the DiLauras asked the Goheens to disclose their expert witnesses, as well as the subject matter of those witnesses' testimonies, and "[t]he substance of facts and opinions to which the expert is expected to testify," as well as a "reasonable summary of grounds upon which each

opinion is based." The Goheens responded by providing a list of expert witnesses and their addresses, and at the bottom of this list, the Goheens stated as follows: "Each witness identified herein shall testify as to the condition of the subject property based upon personal observation and any defects and/or flaws that may have existed in the past or may exist presently, and the probable cause thereof."

Trial commenced,[2] and Richard DiLaura testified that he had obtained a floor plan for the house and, once Goheen's Construction was chosen as the contractor to build the home, Richard drafted the construction contract. The contract was signed by Richard and Linda DiLaura, as well as Jerry and Karen Goheen. A couple of weeks after the DiLauras moved into the home, they began to see problems with the house, such as the workmanship on the windows and the doors. They noticed that woodwork had been cut but not sanded, and that there were hammer marks on some of the woodwork.

Soon thereafter, the house began to settle, and when they walked through certain parts of the house, there were vibrations and the floors would move. The DiLauras discussed the problems with the Goheens. Richard DiLaura testified that in attempting to remedy the problem with the foundation settling, Jerry Goheen placed pieces of brick in or under the foundation to prop it up. That solved the problem for a little while, but then the house began to move again. Jerry came back to the house and fixed the problem a second time, but the house again began to move a third time. At that point, Richard noticed that all Jerry had done to fix the problem with the house moving was to wedge some wood into the foundation to make "the fit" a little tighter.

Richard testified that after the first rainstorm, he noticed that the garage was full of water. The DiLauras also noticed that rain was seeping under the garage

[2] We note that when we mention the trial, we are referring to the trial that formed the basis for this appeal. Apparently, a prior trial in this case was begun, but a mistrial was declared on the third day of that trial, due to improper communication between the jurors.

doors. During subsequent rainstorms, the rain came in not only around the garage doors, but around the windows in the front of the house, under the front door on the porch, and it seeped up through the parquet floors. In trying to prevent the rain from coming into the house, Richard caulked around the windows and the front door. Soon thereafter, rain began coming through the roof and the skylight, and Richard went up to the roof to try to stop the leak. He informed Jerry Goheen about the leaky roof and skylight, and Jerry responded by stating that skylights tend to leak.

After seeing what Jerry had done to fix the foundation, Richard attested that he realized he could not rely on Jerry to fix the other problems with the house, so the DiLauras hired an attorney and filed this lawsuit. The DiLauras obtained estimates from various contractors for repairing the problems with the house.

During Richard DiLaura's deposition, he was asked about repairs that were recommended by his expert witness, an engineer named Jack Williams. Specifically, Richard was asked why he had not replaced all the piers with the exception of three that were within the foundation's perimeter, as recommended by Williams. Richard attested that he did not "have the funds or the means to do that. And if [he] did that, [he] would not have evidence of the house not being properly supported."

Jack Williams testified at trial. He attested to various problems that he found during his inspection of the home, including problems with the placement of all but three of the piers in the foundation. He testified that the problem with the piers was that the girders bearing down on those piers were not placed in the centers of the piers, as they should have been to keep an even load of weight on the foundation. Rather, the girders were off-center, causing the piers to push down into the foundation unevenly and, thus, putting more weight on the soil supporting the foundation on one side of the pier than on the other, causing the foundation to become uneven.

On cross examination, Williams testified that he was unable to inspect the entire roof of the house because it was covered up when he was there and, thus, he could not say with any certainty that the roofing system had caused any defect with the house. Williams also attested that two piers in particular were a problem because they had tilted, and those were the only piers that he could testify to, with any certainty, that had caused a defect with the house. Furthermore, Williams testified on cross examination that the only defect that he could, with certainty, point to as a result of the construction of the house was a crack in a corner between the ceiling and the wall. However, Williams also attested that the safe spans for some of the floor joists had been exceeded, and that it was not a matter of "if" they would fail, but "when" they would fail. Williams further stated that those joists may not fail in any of the parties' lifetimes, but they would fail eventually due to the unsafe spans.

Andrew Miller, a real estate appraiser, testified that he appraised the DiLauras' house in December 2003. He provided two different appraisals for the property. The first appraisal was the value of the property if there was no damage to the property. Miller assigned a value of $225,000.00 to the property in this appraisal. The second appraisal was based on the "as is" value of the property, and Miller valued the property at $100,000.00 in this condition. Thus, the difference in the values of the property was $125,000.00. Miller testified that he estimated it would cost $70,000.00 to repair the house.[3]

When the Goheens were ready to begin presenting their case at trial, which was to include expert testimony, the DiLauras objected, claiming that the subject

[3] When asked what he would say if he was told that it actually would cost $90,000.00 to put the house in the condition it should have been without any damage, based on estimates obtained from contractors, Miller responded that such a number would have no affect on the $225,000.00 appraisal for the house without damage, but it would have lowered the appraisal on the house in the "as is" condition to $80,000.00.

matter to which the Goheens' experts were prepared to testify had not been disclosed to the DiLauras prior to trial, as required by both court order and CR[4] 26.02(4), and as requested in the DiLauras' pre-trial interrogatories propounded to the Goheens. A hearing concerning the expert testimony was held in chambers and outside of the jury's presence and the circuit court sustained the DiLauras' objection. Therefore, the Goheens were not permitted to present their expert witnesses' testimonies.[5] Consequently, the Goheens had to resort to using lay witness testimony.

The Goheens moved for a directed verdict concerning Karen Goheen, arguing that there was no testimony showing that she was involved in the construction of the house. The circuit court denied this motion.

After all of the evidence was presented and while discussing the instructions that would be given to the jury, the Goheens' attorney requested an instruction on the DiLauras' comparative fault. Counsel's basis for requesting such an instruction was that Richard DiLaura had been the one to draft the construction contract and there was an issue of fact about whether the DiLauras had been the ones to hire the contractor who installed the skylights. The circuit court denied the Goheens' request to include a comparative fault jury instruction. However, the court did include an instruction concerning mitigation of damages.

The Goheens' counsel also requested the jury instructions to include a $25,000.00 cap on the amount of damages that could be awarded. Counsel's reason for this request was that the house was appraised in 1996 for $200,000.00, and there was testimony that, if the house was free of defects, its value would be $225,000.00.

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[4] Kentucky Rule of Civil Procedure.

[5] We note that there is no order in the record to show that the circuit court sustained the DiLauras' objection and denied the Goheens permission to present their expert witnesses' testimony, and the video tape of the in-chambers hearing on this matter was cut short, so it also does not include the circuit court's ruling. However, the parties agree that the circuit court sustained this objection by the DiLauras. Therefore, we will treat the objection as sustained.

Thus, counsel argued that the difference between the two, *i.e.*, $25,000.00, should be the maximum amount that the jury could award. The circuit court denied this request, reasoning that it was a factual issue for the jury to determine whether the damages awarded should be for the cost to repair the house or the difference in value between the house "as is" and the house as it would have been without the defects.

Following deliberations, the jury returned a verdict in favor of the DiLauras. The jury awarded the DiLauras $55,000.00 in damages.

The Goheens now appeal, claiming as follows: (1) the circuit court should have limited the maximum damages available to be awarded by placing a cap in the jury instructions; (2) the circuit court erred by allowing expert testimony to remain in the record when the expert witness could not state that his opinions were within a reasonable degree of certainty; (3) the circuit court erred when it did not allow the Goheens' expert witnesses to testify; and (4) the circuit court erred in denying the Goheens' motion for a directed verdict.

II. ANALYSIS

A. CLAIM THAT CIRCUIT COURT SHOULD HAVE CAPPED DAMAGES

The Goheens first argue that the circuit court should have put language in the jury instructions limiting the maximum amount of damages that the jury could award. The Goheens claim that the jury instruction used in *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66 (Ky. 2000), should have been used in this case. However, *Ellison* was not a defective construction case; rather, it was a case involving a trespass that resulted in damage to land. Thus, the Goheens' reliance on *Ellison* is misplaced.

We find the jury instruction in *State Property & Buildings Comm'n of Dep't of Finance v. H. W. Miller Construction Co.*, 385 S.W.2d 211 (Ky. 1964), on point with this case. *State Property* was a defective construction case in which the Court held

"that in this state the real measure of damages for defective performance of a construction contract is the cost of remedying the defect, so long as it is reasonable." *State Property*, 385 S.W.2d at 214. The Court stated:

> As we construe the relationship between market value and cost of remedying the defect, the latter becomes unreasonable only (a) if it exceeds the difference between the market value of the building as it should have been constructed and its market value as actually constructed (assuming the defective condition to be known), or (b) if it amounts to more than is reasonably necessary in order to bring the building into substantial conformity with the contract.
>
> In simple terms, the measure of damages is the amount that is reasonably necessary in order to make the building conform to the requirements of the contract, but in no event to exceed the difference, if any, between its market value as it should have been constructed and its market value as it was actually constructed.

Id.

In the present case, the jury instruction concerning the amount of damages to be awarded read, in pertinent part, as follows:

> You will now determine from the evidence the difference between the fair market value of the [DiLauras'] property with the home as it should have been constructed and its fair market value with the home as it actually was constructed, and award the [DiLauras] either the amount of this difference or the reasonable costs of remedying or correcting the defects, whichever is the lesser amount. However, if you are further satisfied from the evidence that [the DiLauras] failed to exercise ordinary care for the protection of [this] property after learning of the defects to which it was exposed, and that by reason of such failure on [the DiLauras'] part the damage was greater than it would otherwise have been, you will exclude from the amount of your award so much of [the DiLauras'] damages as you believe from the evidence would have been avoided by the exercise of such care.
>
> The term "fair market value" as used in this instruction is the price that a person who is willing but not compelled to buy would pay and a seller willing but not forced to sell would accept for the property in question.

> The term "ordinary care" means such care as the jury would expect an ordinary prudent person to exercise under similar circumstances.

We find the jury instruction concerning damages in this case to be in accord with the jury instruction utilized in *State Property* and, thus, proper. Additionally, regarding the instructions' lack of a cap on damages, the circuit court properly held that such a cap should not be included in the instructions because the amount to be awarded was a factual determination for the jury to make, based on the evidence presented at trial.

The Goheens also contend that the circuit court should have included an instruction regarding comparative fault. The DiLauras argue that this comparative fault claim is waived because comparative fault is an affirmative defense "that must be specifically pled in a responsive pleading." However, comparative fault, or comparative negligence as it is sometimes called, is not required to be pled in a responsive pleading. Rather, it may be raised in "pleadings, briefs, tendered instructions, post-trial motions, or the appeal itself, in order to be properly 'preserved.'" *Commonwealth Transportation Cabinet v. Morrison*, 715 S.W.2d 899, 901 (Ky. App. 1986). Thus, because the Goheens asked the circuit court for a jury instruction on comparative fault, this issue is not waived.

Turning to the merits of the comparative fault issue, "comparative negligence . . . divide[s] the damages between the parties who are at fault. A finding of fault involves an examination of the duties of each party and a determination of whether those duties were breached." *Regenstreif v. Phelps*, 142 S.W.3d 1, 4 (Ky. 2004) (internal quotation marks and footnotes omitted).

Because this case is about the defective construction of the DiLauras' house, and the DiLauras had no duty regarding the construction of their home, the

DiLauras are not at "fault," as that term is defined for purposes of comparative negligence. Thus, the circuit court properly denied the request for a comparative negligence jury instruction.

Furthermore, we note that to the extent the Goheens contend that the DiLauras could have and should have prevented further damage to their home by getting it repaired at an earlier date, the jury instruction regarding damages did allow the jury to reduce the amount of damages awarded due to the DiLauras' failure to mitigate their damages. Moreover, it appears from the $55,000.00 awarded that the jury took this failure to mitigate into consideration. Therefore, we find no error in the jury instruction on damages.

B. CLAIM THAT THE CIRCUIT COURT ERRED BY ALLOWING JACK WILLIAMS'S EXPERT TESTIMONY TO REMAIN IN THE RECORD

The Goheens next contend that the circuit court erred by allowing Jack Williams's expert testimony to remain in the record when Williams could not state that his opinions were within a reasonable degree of certainty. We review a trial court's ruling regarding the admission or exclusion of evidence for an abuse of discretion. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. (internal quotation marks omitted).

As an initial matter, we note that the Goheens did not object to Williams's qualifications as an expert. Therefore, any challenge to Williams's qualifications is waived. *See Commonwealth v. Petrey*, 945 S.W.2d 417, 419 (Ky. 1997).

The Goheens allege that Williams's opinion was not certain enough to qualify as an expert opinion. As previously noted, on cross-examination, Williams testified that he was unable to inspect the entire roof of the house because it was covered up when he was there and, thus, he could not say with any certainty that the

roofing system had caused any defect with the house. This testimony was presented to the jury, and Williams did not appear to allege that the home's defects were caused by the problems with the roof. Therefore, there was no error in admitting this testimony.

Williams attested that two piers in particular were a problem because they had tilted, and he was able to testify with certainty that those piers had caused a defect with the house. Furthermore, Williams testified that he could point with certainty to a crack in a corner between the ceiling and the wall as a defect that resulted from the way the house was constructed. Williams also attested that the safe spans for some of the floor joists had been exceeded, and that it was not a matter of "if" they would fail, but "when" they would fail. Based on this testimony, we find that the circuit court did not abuse its discretion by allowing Williams's testimony.

C. CLAIM THAT THE CIRCUIT COURT IMPROPERLY DISALLOWED THE GOHEENS' EXPERTS TO TESTIFY

The Goheens next assert that the circuit court erred when it did not permit their expert witnesses to testify. During discovery, the DiLauras propounded interrogatories to the Goheens, in which the DiLauras asked the Goheens to disclose their expert witnesses, as well as the subject matter of those witnesses' testimonies, and "[t]he substance of facts and opinions to which the expert is expected to testify," as well as a "reasonable summary of grounds upon which each opinion is based." The Goheens responded by providing a list of expert witnesses and their addresses, and at the bottom of this list, the Goheens stated as follows: "Each witness identified herein shall testify as to the condition of the subject property based upon personal observation and any defects and/or flaws that may have existed in the past or may exist presently, and the probable cause thereof."

Kentucky Rule of Civil Procedure 26.02(4), titled "Trial Preparation: Experts," provides, in pertinent part:

> Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> > (a)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

This Court has held that

> [a] generalized statement outlining a broad subject matter about which an expert *may* testify does not sufficiently apprise the other party of the information needed to prepare for trial as contemplated and mandated by the notice requirements of CR 26.02(4)(a). The discovery of the substance of an expert witness's expected testimony is essential to trial preparation.

Clephas, 168 S.W.3d at 393.

In the present case, the Goheens provided a mere generalized statement concerning the subject matter about which their experts may testify. The Goheens failed "to state the substance of the facts and opinions to which the[ir] expert[s were] expected to testify and a summary of the grounds for each opinion," as required by CR 26.02. Therefore, the circuit court did not abuse its discretion when it disallowed the Goheens' experts to testify.

D. CLAIM THAT THE CIRCUIT COURT ERRED IN DENYING MOTION FOR A DIRECTED VERDICT

The Goheens last contend that the circuit court erred in denying their motion for a directed verdict concerning Karen Goheen. The Goheens argue that there was no evidence showing that she was involved in the construction of the house.

> On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate

> review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous.

Bierman v. Klapheke, 967 S.W.2d 16, 18 (Ky. 1998) (internal citations omitted).

In the present case, Karen Goheen signed the contract for construction of the house at issue, and this case is about the defective construction of the house. Therefore, the circuit court's denial of the Goheens' motion for a directed verdict was not clearly erroneous.

E. CONCLUSION

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Brad Goheen
Benton, Kentucky

BRIEF FOR APPELLEE:

Jason F. Darnall
Benton, Kentucky