RENDERED: October 5, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-001080-MR (DIRECT APPEAL)
AND
NO. 2000-CA-001177-MR (CROSS-APPEAL)

WISE INDUSTRIES, INC. and
DJSJ, INC. APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 97-CI-01830

GRW KENTUCKY INC. and
GRANT WILSON APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, EMBERTON AND HUDDLESTON, JUDGES.

EMBERTON, JUDGE: This is a contract dispute between Grant Wilson and GRW Kentucky, Inc., and Wise Industries, Inc., n/k/a/ DJSJ, Inc., a tool and die company which manufactures parts for the automotive industry.

In 1985, Grant Wilson, through his company GRW Kentucky, Inc., worked in the automotive industry as a manufacturer's representative. He became aware that Wise Industries was for sale and on behalf of NARMCO, a Canadian company interested in acquiring Wise, contacted Wise.

Eventually, Douglas Wise, president of Wise Industries, became interested in hiring Wilson to solicit business for Wise, and on January 3, 1996, the parties entered into a written contract providing that Wilson would act as Wise Industries' representative and would be paid a $5,000 monthly retainer. At the time of Wilson's employment, Wise had existing contacts with The Budd Company, Dana Corporation, and Johnson Controls.

Shortly after being employed by Wise, Wilson learned that Dana Corporation in Elizabethtown planned to out-source some of its parts. Wilson ultimately negotiated a sales contract with Dana on behalf of Wise. When estimating the sales price, Wilson included a commission into the price with the expectation that Wise would be sold to NARMCO and he would be paid his commission.

During the fall of 1996, the sale of Wise to NARMCO having fallen through, Wilson requested a raise from Wise. Wise admits that he agreed to pay Wilson $8,000 per month, but denies that this was ever reduced to writing. Wilson, however, maintains that an amendment to the January 3, 1996, contract is contained in a second letter agreement dated October 1, 1996, and provides for a 3% commission on any new or added customer for the life of the contract in addition to his monthly salary. Wise maintains that the signature on the October document is a forgery.

In the spring of 1997, Wilson proposed to Wise that they form a partnership to be called Versatile Manufacturing for the production of automotive crash bars; the venture, however, never came into existence. Wilson continued to work for Wise and in June 1997, when it was anticipated that Wise would be sold to

a company called Leggett & Platt, Wilson was paid a finders fee. Wilson continued to work for Wise and negotiated new contracts with Dana Corporation and The Budd Company.

In September 1997, Wilson proposed a draft of a contract including a provision that he would receive "four percent commission on all sales made to the represented companies, including Dana Corporation and The Budd Company." Wise made several handwritten changes to the proposed agreement; the commission provision, however, was left unchanged and the agreement was signed on September 16, 1997.

In November 1997, Wilson presented to Wise an invoice for payment. Wise maintains that invoice was for $5,000, which he approved with his initials. Wise further contends that Wilson subsequently forged Wise's initials to an invoice for $52,997. Wilson claims that the invoice initialed by Wise for $52,997 reflected 4% of the gross sales from Dana Corporation and The Budd Company from which he subtracted the advance he received in the summer of 1997 on the proposed sale to Leggett & Platt. He submitted the invoice for payment to Charlie Barber, Wise's comptroller, who issued a check in the amount of $52,997, which Wilson deposited in his account. Wise stopped payment on the check and the following day fired Wilson for forging his initials and attempting to misappropriate $48,000.

Wilson filed suit on December 17, 1997, alleging breach of contract seeking damages in the amount of $1,952,774.10, which represented a 4% sales commission allegedly earned between October 1997, through December 31, 1999. Wise counter-claimed for advances made to Wilson in the amount of $52,000. The case

was submitted to a jury which was unable to reach a verdict. A second trial was held and the jury found that the parties had agreed Wilson would serve as sales representative and Wise would pay a 4% commission on all sales contracts with Dana Corporation and The Budd Company. Wilson was awarded $950,000, and Wise $52,000.

Wise contends that the term "all" refers only to the sales contracts made after the signing of the employment contract. Prior to trial, Wilson moved for partial summary judgment contending that the agreement is clear and unequivocal and that the parole evidence rule precludes evidence which would vary the terms of the written agreement. Wilson then moved for the court to construe the contract to entitle him to a 4% commission on all sales made to the companies listed in the agreement, including those made prior to its effective date, and requested that summary judgment be entered in its favor. Wise did not move for summary judgment. To the contrary, in its response to Wilson's motion, Wise vehemently argued that the contract was ambiguous and extrinsic evidence was admissible to determine the parties' intent. The construction of the contract, Wise persuaded the court, was one of fact, not of law.

"It is an elementary rule that trial courts should be given the opportunity to rule on questions before those issues are subject to appellate review."[1] Although this case was submitted to the jury on two occasions, Wise never contended that the case should be decided as a matter of law. Wise is precluded

[1] Swatzell v. Commonwealth, Ky., 962 S.W.2d 866, 868 (1998).

from arguing a completely contrary position after the jury reached a verdict unsatisfactory to him. In BTC Leasing, Inc. v. Martin,[2] the court held that a party who took the stance that summary judgment was appropriate because there was no genuine issue of material fact was precluded on appeal from contending that a material issue of fact existed. Similarly, in this case, Wise cannot now maintain that the contract was not ambiguous and the trial court erred in submitting the case to the jury. Wise invited the error, if any, and cannot now complain that the trial court accepted his argument.[3] Declining to review the issue of whether the contract is ambiguous, we accept the trial court's conclusion that it was a submissible jury issue and extrinsic evidence was admissible.[4]

At trial Wilson presented the testimony of two manufacturer's representatives, Robert Chandler, a salesman in the automotive business since 1963, and since 1974 an independent contractor acting as a manufacturer's representative, and Ken Seroka, an independent manufacturer's representative for nine years. Both testified as to the meaning of the phrase "shall be paid commission of four percent (4%) on all sales contracts represented" and "for the life of the product," or "for the life of the contracted part" in the automotive industry. They were specifically prohibited from addressing the intent of the parties

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[2] Ky. App., 685 S.W.2d 191 (1984).

[3] Hovermale v. Central Kentucky Natural Gas Co., Ky., 282 S.W.2d 136 (1955).

[4] White Log Jellico Coal Co., Inc. v. Zipp, Ky. App., 32 S.W.3d 92 (2000).

to the Wilson/Wise contract. Wise contends that neither Chandler nor Seroka were properly qualified as experts.

Whether a witness is properly qualified as an expert is left to the sound discretion of the trial court.[5] Both Chandler and Seroka were experienced in the automotive industry and aware of the customary method of payment to sales representatives. Neither witness expressed an opinion on the meaning of the particular contract at issue and both were merely stating the use of certain terms in the industry based on what they had observed through years of working in the industry.[6] We find no abuse of discretion in admitting the testimony.

Wilson cross-appeals contending that the issue of damages should not have been submitted to the jury. At the close of proof Wilson argued to the trial court that the 4% sales commission was a readily ascertainable amount to be determined by the court. Liquidated damages are defined as:

> Ascertained; determined; fixed; settled; made clear or manifest; cleared away; paid; discharged . . . declared by the parties as to amount . . . made certain as to what and how much is due . . . made certain or fixed by agreement of the parties or by operation of law.[7] (Citations omitted).

Although the jury found that Wilson was entitled to a 4% sales commission on all sales to Dana Corporation and The Budd Company for as long as the contracted parts are sold to those

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[5] Gentry v. General Motors Corp., Ky. App., 839 S.W.2d 576, 578 (1992).

[6] See Louisville & Jefferson County Board of Health v. Mulkins, Ky., 445 S.W.2d 849 (1969).

[7] Miller v. Stumbo, Ky. App., 661 S.W.2d 1, 2 (1983).

companies, there was conflicting evidence as to what parts were sold during the disputed period and who was responsible for acquiring the contract. We find no error.

Wilson's contention that the trial court erred in denying his motion to preclude testimony concerning his alleged forgery of Wise's initials on the 1997 invoice is without merit. The issue of forgery was not merely collateral to the issue of commissions owed. In addition to maintaining he was entitled to commissions under the contract, Wilson also maintained that he was entitled to damages for breach of the consulting portion of the same contract because he was not terminated for just cause. Clearly, Wilson's alleged forgery of Wise's initials was relevant.

The trial court held that a purchase asset agreement entered into in June 1998, pursuant to which Wise Industries sold its assets to Wise Manufacturing for approximately twenty-seven million dollars was irrelevant. Relevancy determinations rest in the sound discretion of the trial court.[8] We agree with the trial court that the sale of Wise Industries does not tend to establish the meaning of the contract at issue in this case. Informing the jury of the multi-million sale could serve no purpose other than to demonstrate the depth of Wise's pockets.

Finally, we find no merit to Wilson's contention that Wise Manufacturing, not Wise Industries, is the real party in interest and that Wise's counterclaim for $52,000 against Wilson should have been dismissed. The sale occurred after the instant

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[8] Glens Falls Ins. Co. v. Ogden, Ky., 310 S.W.2d 547 (1958).

litigation was filed and there was evidence that Wise Manufacturing was aware of the litigation when negotiating the purchase price.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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ORAL ARGUMENT FOR APPELLANTS/CROSS-APPELLEES:

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