

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001243-MR

GERALD PARKS

APPELLANT

v. APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 99-CI-00630

GARY WALDEN

APPELLEE

OPINION
AFFIRMING IN PART,
AND
REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: BUCKINGHAM, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Whitley Circuit Court ordering appellant, Gerald Parks, to pay appellee, Gary Walden, \$7,010.84 for Walden's efforts in repairing Parks' truck, and further ordering Parks to pay Walden \$5,000 for attorneys' fees. On appeal, Parks asserts that the trial court erred in entering a directed verdict against him regarding his claims, in instructing the jury on a claim for

punitive damages based on fraud, and in awarding Walden attorneys' fees. For the reasons stated hereafter, we affirm in part and reverse and remand in part.

Parks owns a 1992 Dodge 350 truck which he uses on his farm. After one of his employees wrecked the truck in November 1998, Parks sought a repair estimate from Walden. Walden inspected the truck at least twice and told Parks that it was not worth repairing. According to Walden, when Parks expressed that he nevertheless wanted to continue to use the truck on his farm, Walden informed Parks that the truck had some mechanical problems, that there might be other hidden problems, and that he could not determine the full extent of the damage to the motor. Moreover, Walden testified that he told Parks that he did not do mechanical or frame work but that he could complete the body work for approximately \$6,500 to \$7,000. Parks, on the other hand, testified that he told Walden that he wanted his truck "on the road," and that Walden informed him that the truck could be repaired for \$6,500 to \$7,000, or maybe a little more. The terms of the estimate were not reduced to writing, and Parks testified that he never consented to amend this original agreement.

Walden began repairing the truck in January 1999, and Parks paid Walden a down payment of \$4,000 in mid-February 1999. Walden personally worked on the truck during time off from his

job and also hired several other people to perform work on the truck. Walden demanded an additional payment of \$4,000 from Parks, which Parks paid in July 1999. Walden completed repairing the truck in November 1999 and requested that Parks pay an additional \$7,010.84. Parks refused to pay this amount, so Walden kept the truck and placed a mechanic's lien on it.

Parks filed a complaint on November 30, 1999, in the Whitley Circuit Court, alleging breach of contract, fraud, and violation of the Kentucky Consumer Protection Act. Further, Parks requested compensatory and punitive damages and a determination of the reasonable value of the work Walden performed. On December 16, 1999, Walden's attorney notified Parks that Walden was going to publicly sell the truck in order to satisfy the lien. Upon Parks' motion, the court ordered Walden not to sell the truck. Walden then counterclaimed, seeking to collect the additional amount and alleging slander. Walden also alleged that Parks had failed to disclose that the truck had been wrecked on two prior occasions.

The matter proceeded to trial on October 17, 2003. At the close of his case, Parks requested that the court allow him to amend his complaint to eliminate his request for a determination of the reasonable value of the work performed. The court denied this motion as well as Parks' motion to direct a verdict in his favor regarding his other claims. Instead, the

circuit court entered a directed verdict in favor of Walden as to all of Parks' claims, as well as a directed verdict in favor of Parks as to Walden's slander claim. The court then instructed the jury on a claim for punitive damages based on fraud, as well as on Walden's counterclaim for the balance of Parks' account. In accordance with the jury's verdict, the circuit court entered a judgment for Walden in the amount of \$7,010.84 plus an additional \$5,000 for attorneys' fees. No punitive damages were awarded. Parks' motion seeking a new trial, or to alter, amend or vacate, and requesting the court to strike the attorneys' fee award, was denied on June 2, 2004. This appeal followed.

I. Directed Verdict on Parks' Claims

During his cross-examination, Parks admitted that he had no evidence to contradict Walden's claim as to the work performed on Parks' truck, as shown in Walden's bills and mechanic's lien. Based on this admission, Walden sought and was granted a directed verdict against Parks on all of Parks' claims. The circuit court based its decision on the fact that Parks had presented no evidence of any damages to the jury. On appeal, Parks contends that the trial court erred in directing a verdict against him. We agree.

"Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a

material issue or if no disputed issues of fact exist upon which reasonable minds could differ."¹ When ruling on a motion for directed verdict, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify. On appeal the appellate court considers the evidence in the same light."² Moreover, the appellate "court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous."³

The evidence showed that the terms of the oral agreement were disputed. Parks testified that Walden agreed to put the truck "on the road" for \$6,500 to \$7,000, or maybe a little more. Walden, on the other hand, testified that he agreed only to complete the body work for that amount, hired others to perform the mechanical and frame work, and then presented Parks with bills totaling \$15,010.84 after the truck was repaired. Since there was probative evidence to support both claims, reasonable minds could differ as to the terms of the parties' oral agreement and, ultimately, as to whether that agreement was breached. If a jury believed Parks' testimony, it

¹ *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

² *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991).

³ *Bierman*, 967 S.W.2d at 18.

could also conclude that Parks incurred damages amounting to the difference between the agreed price of \$6,500 to \$7,000 or maybe a little more, and the price Walden ultimately charged.⁴

Parks' admission that he had no proof to dispute the fact that Walden's services were performed does not alter our analysis. Even if this admission may have warranted a directed verdict as to the performance of those services, it does not affect the issue of whether there was a breach of an oral contract to repair the truck for a lesser price. Thus, the circuit court's entry of a directed verdict on the breach of contract claim was clearly erroneous.

II. Instruction on Walden's Fraud Claim

Next, Parks contends that the trial court erred in instructing the jury on Walden's fraud claim, or in the alternative, that the fraud instruction set forth an incorrect burden of proof. However, Parks prevailed on the fraud claim below and Walden did not cross-appeal as to the issue of fraud. Since this matter is being reversed and remanded on appeal for retrial on the breach of contract claim, the jury's finding as to fraud stands and shall not be considered on retrial.

⁴ Parks contends further that he was damaged when Walden placed a mechanic's lien on his truck, tried to sell the truck, and delayed fixing the truck, thereby depriving Parks of use of the truck for an entire growing season.

III. Attorneys' Fees

Finally, Parks asserts that the trial court erred in awarding Walden \$5,000 for attorneys' fees. In the alternative, Parks contends that the trial court's award should be set aside as an arbitrary and baseless amount, because the trial court did not conduct a hearing or hear any evidence regarding the appropriate amount to be awarded. We agree.

Generally, "in the absence of contractual or statutory liability, attorneys' fees are not recoverable as an item of damages."⁵ In the matter now before us, although the trial court purported to award attorneys' fees "in accordance with statute" it did not specify under which statute. Walden proffers for the first time on appeal, however, that Parks' complaint was frivolous and that the fees were awarded as sanctions pursuant to CR 11. As this court has stated, "[c]onsidering the punitive nature of sanctions and the impact sanctions may have on a party or an attorney's career and personal well-being, a trial court should not impose sanctions without a hearing and without rendering findings of fact."⁶ In the matter now before us, the trial court did not characterize the attorneys' fees as sanctions, conduct such a hearing, or render findings of fact.

⁵ *Lyon v. Whitsell*, 245 S.W.2d 926, 926 (Ky. 1952).

⁶ *Clark Equipment Co. v. Bowman*, 762 S.W.2d 417, 420-21 (Ky.App. 1988) (internal citation omitted).

We therefore decline to accept Walden's proffered rationale. In any event, CR 11 is not "a vehicle to obtain relief by one who has suffered damages by simple negligence in the filing of a lawsuit or by the filing of a meritless lawsuit."⁷ In the absence of any other statutory or contractual authorization of the circuit court's order awarding Walden attorneys' fees, we must conclude that the trial court erred by awarding such fees.

The judgment of the Whitley Circuit Court is affirmed in part and reversed in part, and this matter is remanded to that court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harold F. Dyche II
Jason E. Williams
London, Kentucky

BRIEF FOR APPELLEE:

K. David Kersey
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⁷ *Id.* at 420.