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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001127-MR
AND
NO. 2006-CA-001179-MR
AND
NO. 2006-CA-001928-MR

KESSLER HOMES, INC. — APPELLANT/CROSS-APPELLEE

ON REMAND FROM SUPREME COURT
2008-SC-000106-DG

FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 02-CI-04138

ADOLPH PETZOLD AND
MARILYN PETZOLD — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This matter comes to us on remand from the Kentucky Supreme Court for consideration of issues that were presented in an appeal before this panel, but not addressed due to our previous holding. *See Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467 (Ky. 2010). Kessler Homes, Inc. appeals from judgments entered by the Fayette Circuit Court involving the construction of Adolph and Marilyn Petzold's home. The Petzolds cross-appeal from the dismissal of their Consumer Protection Act claim against Kessler Homes.

This appeal addresses attorney and expert fees, the dismissal of Kessler's claim for breach of contract, the trial court's finding that the Petzolds were entitled to damages for billing discrepancies, the admission of certain expert testimony, and whether a home construction contract is exempted under the Consumer Protection Act. For the reasons set forth herein, we affirm all of the trial court's orders except for its award of attorney fees. The attorney fee ruling is vacated, and this matter is remanded for further proceedings.

I. Factual Background

The factual background is as follows:

> On August 30, 2000, the Petzolds and Kessler entered into a contract for the construction of a residence. Toward the end of the construction project, disputes arose between the parties concerning the quality of the work and Kessler's billing practices. In light of the disagreements, the Petzolds refused to pay Kessler. The efforts of the parties to resolve their differences failed.
>
> On October 14, 2002, Kessler filed suit against the Petzolds in Fayette Circuit Court seeking amounts it believed were owed by the Petzolds under the contract.

> The Petzolds filed a counterclaim asserting various causes of action relating to fraud, violations of the applicable building codes, and violations of Kentucky's Consumer Protection Act. Protracted litigation followed. The parties waived their respective rights to a jury trial, and a four-day bench trial was held from August 29, 2005, to September 1, 2005, presided over by Judge Goodwine.
>
> On February 3, 2006, Judge Goodwine entered an opinion, order, and judgment. The judgment dismissed Kessler's claims against the Petzolds; awarded the Petzolds $21,668.00 upon their claim for building code violations; awarded the Petzolds $8,466.00 upon a finding that Kessler breached its duty of good faith and fair dealing, but dismissed the underlying fraud claim; dismissed the Petzolds [sic] claims for damages for other construction defects, for violation of the Consumer Protection Act, and for the loss of the use and enjoyment of their residence; and found that the Petzolds were entitled to recover their attorney fees and expenses, expert fees and expenses, and costs. Both parties thereafter filed motions to alter, amend, or vacate. On May 2, 2006, the trial court entered an order denying Kessler's motion to amend, sustaining the Petzolds' motion to amend, and finalizing the award of $106,024.59 for attorney fees and expenses and $5,367.60 for expert fees. Both parties appealed the trial court's rulings to the Court of Appeals.

Id. at 469.

II. Kessler Homes' Appeal

In its first assignment of error, Kessler Homes contends the trial court erred in its award of attorney and expert fees to the Petzolds. An award of fees shall not be set aside unless there is an abuse of discretion. *Ford v. Beasley*, 148 S.W.3d 808, 813 (Ky. App. 2004) (citing *King v. Grecco*, 111 S.W.3d 877, 883

(Ky. App. 2002)). Upon careful review, we affirm the trial court's award of expert fees but vacate its award of attorney fees.

Kessler Homes concedes that the trial court was authorized to award attorney and expert fees to the Petzolds under Kentucky Revised Statues (KRS) 198B.130(1), which establishes a private right of action for persons damaged by building code violations. The Petzolds alleged, and the trial court found, that Kessler Homes violated building codes by constructing a defective roof on the Petzolds' home. Kessler does not appeal this ruling. Awards under KRS 198B.130(1) "may include damages and the cost of litigation, including reasonable attorney's fees." *Id.*

Kessler Homes maintains, however, that KRS 198B.130(1) should not be considered on appellate review because "it appears the trial court did *not* award attorney or expert fees based upon the building code violation for the roof." (Emphasis in original). Upon review of this record, we disagree with Kessler's interpretation of the trial court's order.

While the order did fail to cite specifically to KRS 198B.130(1), the trial court's order repeatedly referenced the Petzolds' motion for attorney fees. The Petzolds' motion cited KRS 198B.130 as authority for the trial court's exercise of discretion. Moreover, a reasonable reading of the order establishes that the trial court did consider the damages incurred as a result of the building code violation in its calculation of the attorney and expert fees award. Accordingly, we reject

Kessler's argument that the trial court failed to consider KRS 198B.130(1) in its ruling.

Kessler Homes argues in the alternative that even if the trial court did utilize the discretion granted to it under KRS 198B.130(1), the trial court erred in failing to apportion attorney and expert fees between the various claims and defenses asserted by the Petzolds. The general rule regarding the apportionment of fees is set forth in *Young v. Vista Homes, Inc.*, 243 S.W.3d 352 (Ky. App. 2007). That rule provides as follows:

> Generally, attorney fees must be apportioned between claims for which there is statutory authority for an award of attorney fees and those for which there is not. But where all of plaintiff's claims arise from the same nucleus of operative facts and each claim was "inextricably interwoven" with the other claims, apportionment of fees is unnecessary.

Id. at 368.

The trial court did make an apportionment of fees in this case. As to its apportionment of the expert's fee, the trial court found as follows:

> The Court finds that the major portion of the Petzolds' construction defect claim related to the roof and its replacement cost. Therefore, 90% of Pasha's fees will be awarded.

The expert in this case was Sasan Pasha, a structural engineer who testified regarding construction defects at the Petzolds' home. In light of the above finding, we discern no abuse of discretion in the trial court's apportionment of Pasha's fee. Kessler's argument to the contrary is without merit.

Upon review of the trial court's apportionment of attorney fees, however, we are unable to determine whether the trial court's ruling is in compliance with the guidelines set forth in *Young*. Accordingly, we must vacate the trial court's attorney fee award and remand this matter for specific findings and conclusions that are consistent with *Young*.

In support of its order awarding the Petzolds eighty percent (80%) of their attorney fees, the trial court referenced the Petzolds' successful defense of the contract claim and the significant amount of labor and time their counsel utilized in the review and prosecution of the billing claims. The trial court went on to conclude that "[i]t would be difficult for any practicing attorney to detail billing hours to the extent of deciphering which hour was spent on a particular issue, particularly once that matter proceeded to trial."

Yet, under *Young*, practicing attorneys can and must detail the billing hours spent on issues not arising from the same nucleus of operative facts which provided grounds for the attorney fee award. Such a requirement, we believe, is not unduly burdensome since attorneys need not detail hours spent on those issues which are "inextricably interwoven" with eligible claims. *Id.* In this case, any time spent on issues related to the billing practices of Kessler Homes must and can be apportioned as they do not arise from the operative facts which comprised the KRS 198B.130 building code violation.

Kessler Homes argues that apportionment in cases such as these must involve mandatory deductions for every claim or defense that was either

unsuccessful or not eligible for an award of fees. Thus, if the party claiming attorney and expert fees asserted ten (10) claims or defenses, but only two (2) were successful and eligible for fees, then that party would only be entitled to twenty percent (20%) of their attorney fees.

We reject such an inflexible formulation of the *Young* apportionment rule. As set forth in *Young*, fees generated from any claim arising out of the "same nucleus of operative facts" need not be apportioned, regardless of whether the claim was successful or eligible for a fee award. *Id.* We believe this reasoning necessarily applies to defenses, also. Accordingly, on remand, we direct the trial court to make its award based on the differing sets of operative facts and not on the ratio of claims or defenses deemed "eligible" versus those that are deemed "ineligible."

Kessler Homes next contends the trial court erred in dismissing its complaint for breach of contract. The parties contracted for a high-end custom built home. The Petzolds agreed to pay the cost of the build, plus a twelve percent (12%) builder's fee. Kessler Homes maintained that the total amount owed to it was $569,725.66, excluding the deck, and that the Petzolds only paid $540,273.80 of that amount. Thus, it sought $29,451.86 in damages for breach of contract.

The Petzolds denied owing Kessler Homes any additional money. They further contended that the billings rendered by Kessler Homes were so flawed that they were not obligated to pay any additional money unless Kessler

Homes could substantiate the amount actually owed on the home. The Petzolds also filed counterclaims, including several alleged instances of fraudulent billings.

After considering the evidence presented, the trial court determined that Kessler Homes failed to prove that the actual cost of construction plus the fee owed to it was in excess of the amount paid by the Petzolds. *See Estes v. Grissom*, 490 S.W.2d 492, 493 (Ky. 1972) (burden of proof as to amount due under contract lies with party seeking damages). In making this determination, the trial court found that the evidence presented by Kessler Homes was not credible or trustworthy. Findings regarding credibility or trustworthiness are reviewed for clear error. Kentucky Rules of Civil Procedure (CR) 52.01.

In presenting evidence to support its claim, Kessler Homes failed to submit any documentation regarding the actual cost of construction, such as canceled checks or subcontractor invoices. Rather, it only produced internal "billing records." These records documented all of the charges that were billed to the Petzolds by Kessler Homes. After considering the testimony of Mr. and Mrs. Kessler as to how they generated these "billing records," the trial court determined that the "internally generated documents without supporting or corroborating documentation" were not trustworthy. The trial court was "disturbed by the fact that it would take an internal bookkeeper in excess of months to reconcile the books of his or her own company."

Kessler Homes argues that the trial court's finding regarding the trustworthiness of its documentation is clearly erroneous. In support of this

argument, it contends that it did not introduce "the thousands of invoices from all of the subcontractors and vendors" because it relied on two "judicial admissions" made by the Petzolds.

The first alleged admission was a statement made by the Petzolds' attorney during a pretrial hearing. In addressing the Petzolds' fraudulent billing claims, Kessler's attorney requested that he be given advanced notice of all of the Petzolds' specific disputes because his client needed time to research these disputes prior to trial. The Petzolds' attorney replied that it was her belief that such notice had been given. Kessler Homes now argues for the first time on appeal that this statement should be construed as a complete admission of liability for all charges made by Kessler Homes that were not specifically disputed by the Petzolds as fraudulent.

The second alleged judicial admission was set forth in the Petzolds' answer to Kessler's complaint. In its complaint, Kessler Homes alleged that the contract between the parties was "cost plus." The Petzolds disagreed, alleging in their answer that the contract between the parties was "fixed price." The answer further stated that the Petzolds had paid in excess of this "fixed price" and that all such sums should be refunded to them. The trial court eventually found in Kessler's favor, ruling the contract to be "cost plus."

The record contains a good faith estimate for the total price for the home at $571,899.62. However, in its final order the trial found the Petzolds had only paid a total of $546,573.80. In light of the statements made in the Petzolds'

original answer to their complaint, Kessler Homes alleges that the Petzolds should be deemed to have admitted owing at least $25,325.82 on the contract.

The Petzolds counter that Kessler's arguments are without merit, and in any event, they are unpreserved since Kessler Homes never presented them to the trial court. *See Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court."). For the reasons set forth herein, we agree on both fronts.

A judicial admission is "a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it." *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 380 (Ky. 1992) (citing *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021 (1941)). Judicial admissions are to be "narrowly construed . . . in light of all conditions and circumstances proven in the case." *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448 (Ky. App. 2006) (internal citations and quotations omitted).

As to the first alleged admission, it is obvious from this record that the statement made by the Petzolds' attorney at the pretrial hearing in no way constituted a deliberate or unequivocal waiver of Kessler's burden to produce evidence demonstrating the amount due under the contract. *See George M. Eady Co. v. Stevenson*, 550 S.W.2d 473, 473-474 (Ky. 1977). Kessler's protestations to the contrary seem disingenuous, at best, since it never mentioned the alleged

admission at trial. If Kessler Homes truly believed the Petzolds had admitted partial liability, it would have simply moved for a directed verdict as to the amounts not specifically disputed by the Petzolds. It did not do this and, thus, we reject Kessler's argument as being unpreserved and without merit.

The second alleged admission is also unpreserved and without merit. Once the contract was ruled "cost-plus," it became Kessler's burden to establish a *prima facie* case of its actual costs of construction. *See Estes v. Grissom*, 490 S.W.2d at 493; *H.C. Whitmer Co. v. Richardson*, 271 Ky. 112, 111 S.W.2d 577, 579 (1937) ("When the company established its account and the balance due, the burden then shifted to defendants to establish payment, satisfaction, or that the account was incorrect"). The fact that the Petzolds initially defended the suit under a "fixed price" theory of the case does not constitute a waiver of Kessler's burden.

Kessler Homes next argues that their billing records were sufficient to establish a *prima facie* claim of breach of contract. The trial court specifically found that such a *prima facie* case was not made due to the untrustworthiness of the documentation submitted by Kessler Homes. Upon review of this record, we discern no reversible error.

In addition to Kessler's refusal to produce any evidence to corroborate the "billing records" submitted at trial, the trial court found that many of Kessler's billings were either incorrect or altered. The unreliability of Kessler's internal records was further demonstrated by numerous instances in which two different versions of the same billing invoice were presented at trial. Kessler Homes

admitted billing the Petzolds for many costs that had never actually been incurred. When asked to explain the discrepancies, Kessler's officers presented inconsistent and contradictory testimony. Upon consideration of the totality of this evidence, we agree with the trial court that Kessler's internal billing records were not sufficient to meet its burden in this case. Accordingly, we affirm the trial court's determination that Kessler Homes failed to produce a *prima facie* claim of breach of contract.

In its final argument addressing this issue, Kessler Homes contends that it "presented substantial evidence showing that the deck was a separate fixed price contract and that the Petzolds did not pay the full amount owed on the deck." The trial court found that "[n]o evidence was presented that there was ever a meeting of the minds between the parties to construct the Petzolds' deck for a pre-determined amount of money." Kessler's officers maintained that the contract was oral. The trial court rejected this testimony, choosing to believe the testimony of the Petzolds. They claimed that deck construction was simply an extension of the original contract. Because Kessler Homes failed to present a *prima facie* case establishing a breach of the original contract, the trial court ruled that no damages were due to Kessler Homes for the construction of the deck. We discern no reversible error in the trial court's determination of this issue.

In its next assignment of error, Kessler Homes argues that the trial court erred in its award of $8,466.00 in compensatory damages for breach of its duty of good faith and fair dealing. We review a trial court's calculation of

damages for clear error. *See Smith v. Carbide and Chemicals Corp.*, 226 S.W.3d 52, 57 (Ky. 2007) (calculation of damages is an issue of fact).

The trial court's award was based on evidence presented by the Petzolds that they had been overcharged for several cost items related to the construction of their home. Kessler Homes does not appeal the trial court's finding that it overcharged the Petzolds for certain items. Rather, Kessler Homes argues that the Petzolds failed to prove that damages were incurred from these overcharges.

The Petzolds conceded that they did not pay for all of the amounts billed to them. Yet, upon review of the trial court's order, we agree with the Petzolds that the trial court set forth sufficient findings determining that the Petzolds did pay Kessler Homes for these overcharged items. Kessler Homes fails to set forth anything of a specific nature which would substantially undermine these findings. Accordingly, we discern no clear error in the trial court's calculation and award of compensatory damages to the Petzolds for the overpayment of several cost items.

In its final argument, Kessler Homes contends the trial court abused its discretion in admitting certain testimony of the Petzolds' expert witness, Sasan Pasha. *See Clark v. Commonwealth,* 223 S.W.3d 90, 95 (Ky. 2007) (trial court's decision to admit evidence is reviewed for abuse of discretion). Pasha was a structural engineer with twenty-one years of experience. Kessler Homes stipulated that Pasha was qualified to testify as an expert regarding the Petzolds' roof.

In giving his expert testimony, Pasha opined that the Petzolds' roof was defective and in violation of the building code. He further opined that it would cost $21,668.00 to replace the roof. Kessler Homes objected to the testimony concerning roof replacement cost, arguing that Pasha's opinion was derived from inadmissible hearsay. Specifically, Pasha considered estimates from two different roofing companies when formulating his opinion.

The Petzolds cited to Kentucky Rules of Evidence (KRE) 703(a), which reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Id. Because Pasha testified that he customarily consults with service providers regarding the cost of implementing various components of his structural engineering recommendations, the trial court overruled the objection rendered by Kessler Homes.

On appeal, Kessler Homes relies upon the unpublished case of *Hudson v. Anthony*, 2004 WL 2984836 (Ky. App. 2004), to support its argument. In *Hudson*, this Court held that a realtor was not qualified to testify as to the amount of damages sustained to a home because "there was no evidence that [the realtor] had experience in inspecting and estimating damages caused by faulty construction." *Id.* at *3. Likewise, Kessler Homes contends that Pasha, a

structural engineer, was not qualified to testify as to the cost of replacing a roof. Rather, he was only qualified to testify as to whether the roof was defective or not.

The Petzolds counter that Kessler Homes never challenged Pasha's qualifications regarding his expertise or experience in estimating replacement costs. Rather, they only argued that use of the roofing estimates was hearsay. We agree that Kessler's argument regarding Pasha's qualifications is unpreserved. *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980) ("An issue not timely raised before the circuit court cannot be considered as a new argument before this Court."). Therefore, we will not address it.

Kessler next argues that Pasha's opinion should be excluded because it was based on inadmissible hearsay. In explaining how he derived his opinion regarding replacement cost, Pasha stated that he consulted with two roofing contractors and then averaged their estimates. He testified that he frequently estimates replacement costs. Sometimes the estimates are derived "in-house" and other times they are derived after consultation with third-party service providers. Pasha maintained that the roofing estimates were only used to help him formulate his own opinion.

Kessler Homes contends that Pasha relied too heavily on the opinion of the roofing contractors. Because of this, it maintains that his opinion should have been deemed inadmissible because it was simply a backhanded way of introducing the inadmissible hearsay of the roofing contractors. In light of Pasha's

testimony that he customarily relied on these types of consultations in his profession, we disagree.

KRS 703(a) specifically provides that the "facts or data in the particular case upon which an expert bases an opinion . . . need not be admissible in evidence." "Thus when the expert witness has consulted numerous sources, and uses . . . his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *Buckler v. Commonwealth*, 541 S.W.2d 935, 940 (Ky. 1976) (quoting *U.S. v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971)); *see also Baraka v. Commonwealth*, 194 S.W.3d 313, 315 (Ky. 2006) (an expert's underlying factual assumptions are properly left for scrutiny during cross-examination); *Brown v. Commonwealth*, 934 S.W.2d 242, 247 (Ky. 1996) ("[A]n expert may testify as to what a third party said as long as that expert customarily relies upon this type of information in the practice of his or her profession.").

Pasha met the standards set forth above. He consulted more than one source and then utilized his professional knowledge and experience to derive an opinion regarding roof replacement cost. Kessler Homes was not precluded from substantive cross-examination as Pasha was available and did testify regarding the basis of his opinion. Any inadequacies exposed from this cross-examination properly affected the weight of his testimony and not its admissibility. Accordingly, we discern no abuse of discretion in the trial court's admission of Pasha's opinion regarding cost replacement.

In its final argument, Kessler Homes contends that Pasha's opinion does not assist the trier of fact because "any person can call two roofing companies and obtain estimates and then average the estimates." As set forth above, Pasha did more than just telephone roofing companies. He also used his professional expertise and experience to review and analyze the estimates for the purpose of formulating his own opinion. We discern no abuse of discretion in the trial court's determination that Pasha's opinion was of assistance to it. *See* KRE 702 (expert opinion admissible if it will assist trier of fact to understand the evidence or to determine a fact in issue); *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000) ("Application of KRE 702 is addressed to the sound discretion of the trial court.").

III. Petzolds' Cross-appeal

In their cross-appeal, the Petzolds argue that the trial court erred as a matter of law in dismissing their Consumer Protection Act claim. *See* KRS 367.110 *et seq.* Upon careful review of the pertinent caselaw, we must affirm the trial court's ruling.

The trial court determined that the holding set forth in *Craig v. Keene*, 32 S.W.3d 90 (Ky. App. 2000), was preclusive to the Petzolds' claim. In *Craig v. Keene*, this Court held that parties engaged in "single real estate transactions" were exempt from the Consumer Protection Act. *Id.* at 91.

The Petzolds argue that hiring a general contractor to oversee the building of a home is not a real estate transaction. We tend to agree since no

transfer of real estate or other tangible structure occurred in this case.[1] When there is nothing tangible to inspect prior to the consummation of a sale, it is unrealistic and inequitable to apply the doctrine of *caveat emptor* (the buyer beware). *See Crawley v. Terhune*, 437 S.W.2d 743, 745 (Ky. 1969) (creating exception to *caveat emptor* rule for the sale of new dwellings by builders).

The contract in this case involved only the prospective services of a building contractor. This type of transaction seems expressly encompassed within KRS 367.220(1). This statute states as follows:

> Any person who purchases or leases goods or *services* 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 under [this Act] . . . .

Id. (emphasis added).

However, as written, the *Craig* case is quite broad in scope and specifically involved a contract for home construction services. 32 S.W.3d at 91. A fair reading of the *Craig* case therefore mandates that the term "real estate transactions" shall include any and all contracts for home construction services. *Id.* at 92. It has been ten (10) years since this Court's opinion was rendered and the legislature has not seen fit to remedy this "loophole" in the Consumer Protection Act. *See Craig*, 32 S.W.3d at 92 (Combs, J., concurring). Accordingly, we hold

[1] The Petzolds owned the real property prior to contracting with Kessler Homes.

that the trial court did not err as a matter of law when it ruled that our holding in *Craig v. Keene* barred the Petzolds' claim under the Consumer Protection Act.

IV. Conclusion

For the reasons set forth herein, we hereby affirm the judgments entered against Kessler Homes by the Fayette Circuit Court involving the construction of Adolph and Marilyn Petzold's home except for the court's award of attorney fees. That order is hereby vacated, and the matter is remanded for further proceedings consistent with this opinion. As for the Petzolds' cross-appeal, we hereby affirm the trial court's dismissal of their claim under the Consumer Protection Act.

ALL CONCUR.

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