

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000416-MR

EARL BENNETT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NOS. 07-CI-02096 & 07-CI-02514

LEXINGTON TRUCK SALES, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND COMBS, JUDGES.

COMBS, JUDGE: Earl Bennett appeals the judgment of the Fayette Circuit Court in favor of Lexington Truck Sales, Inc., (LTS) in a lawsuit to enforce a promissory note. After our review, we affirm.

In 2002, Bennett purchased a 1996 Volvo tractor trailer registering approximately 500,000 miles. LTS operates a repair service for tractor trailers. Bennett took the truck to LTS for service on several occasions without incident.

On September 25, 2006, he took the truck to LTS because it had excessive “blow-by,” an internal engine problem involving excessive pressure as oil improperly blew through a tube. LTS discovered that one of the cylinders was scored and recommended an overhaul of the engine. Bennett decided against the overhaul in an effort to keep down the cost of repairs. LTS replaced the piston liner and put the engine back together. The bill was \$4,402.61. At this point, the tractor trailer had about 755,555 miles.

On October 6, 2006, Bennett brought his truck back to LTS because the air compressor failed. Bennett also complained of an engine problem. LTS did not bill Bennett for the engine work, but its bill for the air compressor problem was \$1,124.62.

Five days later, on October 11, 2006, Bennett returned to LTS with the truck and complained that it had excessive blow-by and an engine miss. This time, LTS discovered that silicone and metal shavings were contaminating the engine. A bolt had worn through the front cover. Someone had improperly repaired the hole by attaching a metal ash tray with silicone.¹ At this juncture, Bennett did not authorize LTS to overhaul or rebuild the engine – although it was their recommendation to do so. Instead, LTS replaced the oil pump, cylinder liners, and front cover. The total charge was \$6,151.66.

On October 30, 2006, Bennett signed a promissory note secured by his truck and agreed to pay LTS the \$11,700 that he owed for repairs. It was to be paid in twelve (12) monthly installments, beginning in December 2006.

¹ Bennett does not contend that LTS made the improper repair.

On November 6, 2006, Bennett's truck broke down in Florence. He called LTS complaining of a coolant leak. LTS sent two drivers from Lexington to Florence with coolant and fuel, and they drove the truck back to Lexington. LTS replaced an O-ring that was leaking at the coolant tube. LTS did not believe that the leak was related to previous repairs; nonetheless, they did not charge Bennett for the repairs or fuel as a gesture of customer goodwill. The repair was valued at \$849.15. Bennett now argues that this "gesture of goodwill" is evidence of LTS's failure to perform this repair and other repairs in a workmanlike manner.

On November 27, 2006, Bennett's truck was towed into LTS with engine failure. LTS discovered that a piston had come apart, destroying the engine by putting a hole in the engine block. LTS e-mailed photos to Volvo, the manufacturer, because LTS suspected that a part had failed. However, Volvo determined that the cylinder failed because of the contamination in the engine that resulted from the improperly improvised silicone and metal. Although the contamination was not its fault, LTS filed a claim with its insurance company and replaced the engine with a used engine at no additional charge to Bennett. LTS released the truck to Bennett on January 29, 2007.

The day after Bennett received his truck, he called LTS and complained that the engine "wasn't worth a damn." When LTS asked Bennett to bring it back for evaluation, he replied that he would see them in court. Bennett has not made any payments toward the promissory note; nor has he surrendered his truck to LTS in accordance with its lien.

On May 3, 2007, LTS filed a complaint in Fayette Circuit Court seeking enforcement of the promissory note. On May 29, 2007, Bennett also filed a complaint in Fayette Circuit Court claiming that LTS had acted negligently and fraudulently in its course of business with him concerning his truck. The lawsuits were consolidated on July 17, 2007. A bench trial was conducted on April 16, 2009. The court entered its findings and judgment on February 3, 2010, determining that LTS had performed its services in a workmanlike manner and that the engine problems were caused by the outside contamination rather than by LTS's work. Finding that the promissory note was valid and enforceable, the court awarded LTS judgment against Bennett in the full amount of the promissory note, plus interest and court costs. Bennett then appealed.

Our standard of review is governed by Kentucky Rule[s] of Civil Procedure (CR) 52.01: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Findings are not clearly erroneous if they are supported by substantial evidence. *God's Center Found., Inc. v. Lexington Fayette Urban County Gov't*, 125 S.W.3d 295, 300 (Ky. App. 2002). "The test of substantiality of evidence is whether taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Williams v. Cumberland Valley Nat. Bank*, 569 S.W.2d 711, 714 (Ky. App. 1978) (quoting *Kentucky State Racing Comm. v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972)).

Bennett argues that the trial court clearly erred in its findings of fact. He supports his argument with his trial testimony; *i.e.*, LTS's negligence was demonstrated by: (1) the number of repairs made by LTS on the truck and (2) the fact that LTS filed an insurance claim to pay for the replacement engine. However, both at trial and on appeal, LTS presented significant evidence showing that it offered to perform additional work that was necessary but that Bennett refused in order to hold down costs. The major damage to Bennett's engine was caused by the ash tray repair, work which was not performed by LTS. LTS supported its employees' testimony with business records.

The predecessor of our Supreme Court has clearly instructed that when there is "substantial and credible evidence **both** ways, . . . CR 52.01 seals those findings against appellate intervention." *White v. Howard*, 394 S.W.2d 589, 590 (Ky. 1965). (Emphasis added.) LTS has presented evidence that was sufficient to demonstrate its workmanship. Although Bennett argues to the contrary, we have found no basis in the record before us to disturb the trial court's findings relating to the absence of negligence on the part of LTS.

Bennett also argues that the court erroneously found the promissory note to be valid and enforceable. He bases this argument on his contentions that LTS's work was negligently performed. The trial court properly found no negligence on the part of LTS, negating Bennett's argument to avoid and invalidate the promissory note.

We affirm the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Ed Massey
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BRIEF FOR APPELLEE:

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