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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000279-MR

EDNA MEFFORD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHELIA ISAAC, JUDGE
ACTION NO. 96-CI-03113

KEN RAYFIELD D/B/A
RED ROCK COLLECTIBLES — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Edna Mefford (Mefford) appeals from a trial verdict and judgment entered by the Fayette Circuit Court on January 11, 1999, which dismissed her claim against Ken Rayfield d/b/a Red Rock Collectibles (Rayfield) after the jury returned a verdict in Rayfield's favor. We affirm.

At trial, Mefford testified that she and her son went to Rayfield's store on September 29, 1995. While in the store she heard her dog barking in the car and went outside to investigate. As Mefford was leaving the store she felt her foot catch in the carpet on the step outside the door, which caused

her to fall and injure her foot. According to Mefford, she saw nothing other than a tear in the carpet covering the step which would have caught her foot. Mefford returned to the store the next day and took a picture of the step. The picture was introduced into evidence at trial.

Various other individuals who testified at trial stated that there was a worn spot in the carpet covering the step leading inside Rayfield's store which showed the concrete underneath. One witness stated that the worn spot was 6-7" long and 2" wide.

Kevin Deitemeyer (Deitemeyer), a friend of Rayfield's, testified that he observed the carpet the next day. He stated that the carpet was "flush tight against the top of the concrete where the step is." He also stated that there was a separation on the vertical face of the step in an area that would not be walked on. Deitemeyer stated that he could not see how someone could have fallen because of the carpet.

Rayfield testified that he vacuumed the step on the morning of the day Mefford fell but noticed nothing unusual about the carpet. He stated that he looked at the carpet after Mefford fell and noted that "it wasn't loose on the top part, but on the front facing the glue was coming away." Rayfield testified that he could get his finger into the gap. Rayfield admitted that he replaced the carpet the next day and threw the old piece away. Rayfield stated that he did not see how anyone could have tripped over the carpet, but he was upset and did not want to take any more chances of someone else falling.

Following deliberations, the jury returned a verdict in favor of Rayfield. Mefford's claim was dismissed by order of the trial court entered January 11, 1999, and this appeal followed.

Mefford maintains that the trial court erred in not allowing Steve Nichols (Nichols) to testify as an expert witness on her behalf.[1] According to Mefford's appellate brief, Nichols would have testified in regard to "1) whether the carpet was damaged; 2) how badly it was damaged; 3) how and why it was damaged; 4) how the carpet damage would have affected the condition of the step; and 5) how the carpet damage would have looked."

At his deposition, Nichols testified that he has been employed by Hart's Laundry and Dry Cleaning as a manager for the last sixteen years. Prior to working at Hart's, he worked as a production manager at ServPro Carpet Cleaning for two years and as a carpet cleaning technician at Service Master for one year. While Nichols has attended several dry cleaning seminars, none of them dealt specifically with carpet. When asked if any of the seminars dealt with carpet wear and tear, Nichols replied:

> wear and tear of carpets could be like wear and tear on clothes. They're - it all is the same. It's all material[.]
>
> . . . .
>
> [T]hey had carpet seminars there, but I didn't attend many of those because I was dealing directly with clothes.

[1]Nichols, who is Mefford's supervisor at work, was permitted to testify about Mefford's physical condition following the accident.

Nichols testified that he saw the picture Mefford took of the step and observed that the carpet appeared to be worn. He admitted that all he had seen was the picture Mefford took. In his opinion, the store owner should have either replaced the carpet with a better grade of carpet or should have painted the step instead of carpeting it. He could not tell from the picture what kind of carpet it was. Nichols also stated:

> [M]ost people that you would ask out of the profession, out of the carpet cleaning and dry cleaning, anybody off the street would see that, would say that's wear, in and out, in and out. My mom could come in here and tell you that's worn carpet[.]

Pursuant to KRE 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

"On appeal, the standard of review is whether in deciding the admissibility of the evidence the trial judge abused his or her discretion." Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 102 (1995), overruled in part on other grounds by Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999). Having reviewed both the record on appeal and the trial transcript, we do not believe that an abuse of discretion occurred in this case.

As KRE 702 makes clear, expert testimony is allowed only when it "will assist the trier of fact to understand the evidence or to determine a fact in issue." In this case, we fail to see how any evidence Nichols would offer would assist the

trier of fact. Several witnesses testified to the fact that the carpet was worn, and the picture taken by Mefford showed the worn spot on the carpet. Even Nichols admitted that anyone could look at the carpet and tell it was worn. However, the issue of whether the carpet was worn and how and why it got in that condition was not relevant. The true question of this case was whether Rayfield was negligent in failing to replace the carpet.

This case is somewhat similar to Kenton County Public Parks Corporation v. Modlin, Ky. App., 901 S.W.2d 876 (1995), which involved a golf cart driver who was injured when he was "clothes-lined" by a rope being used as a barrier to keep golf carts off of a certain part of the fairway. At trial, the County sought to introduce expert testimony to establish that the "stakes and rope" method of barriers to control golf cart traffic was in common use throughout golf courses across the country. In upholding the trial court's refusal to allow the expert testimony, this Court stated:

> Our case does not involve any technical matters. It's a question of "garden variety negligence." Therefore, the admissibility of expert testimony will be the "call" of the trial judge, subject to our scrutiny under the abuse of discretion standard.
>
> . . . .
>
> The issue was whether a golf course was negligent in putting a rope, without adequate warning, in a position where golfers could be hurt. Being a case of ordinary negligence, it required nothing more than ordinary testimony from ordinary people. The trial court's ruling is supported by KRE 702. . . . There was no error in this regard.

Modlin, 901 S.W.2d at 881.

Like Modlin, this case does not involve any technical matters. Based on the fact that Nichol's testimony would not have aided the jury in understanding the facts of the case, the trial judge did not err in refusing to allow him to testify as an expert witness.

Mefford also contends that the trial court erred in not instructing the jury to draw a negative inference against Rayfield from the fact that he disposed of the carpet after it was replaced. Mefford maintained that she was prejudiced not by the fact that the carpet was replaced, but rather due to the fact that it was destroyed after her accident. We disagree.

In Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988), a prosecutor deliberately erased taped witness statements while the defendant's motion to produce them was pending before the court. In holding that the giving of an instruction dealing with the inference to be drawn from the erasure of the tapes was proper, the Kentucky Supreme Court stated:

> The relief requested and denied was not dismissal or exclusion, but simply an instruction permitting the jury to draw a favorable inference for the defendant from the destruction of the evidence. Reversal with directions to give the requested instruction is the appropriate remedy.

Sanborn, 754 S.W.2d at 540 (emphasis added). Contrary to Mefford's argument, Sanborn does not stand for the proposition that such an instruction is required every time evidence is lost or destroyed. The Court's ruling in Sanborn is that such an instruction is but one of several remedies which may be fashioned to remedy situations where evidence is no longer available.

As Rayfield points out, "[o]ur approach to [jury] instructions is that they should provide only the bare bones which can be fleshed out by counsel in their closing arguments if they so desire." Cox v. Cooper, Ky., 510 S.W.2d 530, 535 (1974). In this case, there was testimony that the carpet was thrown away, but also as to why it was removed. There was no testimony or evidence which showed that Rayfield disposed of the carpet in bad faith.

Furthermore, counsel for Mefford stated as follows during opening argument:

> And I guess, lastly, about the carpet. There isn't any. He goes out and replaces it the next day.

After counsel for Rayfield objected to this statement, the trial court overruled the objection, stating:

> I think he has a right to a reasonable inference. So, I mean, I think this is going to - These are the facts that are going to come out.

Counsel for Mefford then continued with his opening statement and made several remarks regarding the absence of the carpet. Counsel for Mefford failed to readdress this issue during closing argument, despite being given permission by the trial court to argue in favor of an inference in Mefford's favor

before the jury.[2] We believe that the trial court's remedy in this case was adequate.

Having considered the parties' arguments on appeal, the trial verdict and judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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[2]During a conference regarding whether such a jury instruction was proper, the trial court stated:

> I think the jury's going to use that, and I think you can argue it, but I don't think we can give you your inference. You know I think you have brought that up, you've said 'where is it?' 'we don't have it,' 'we can't look at it,' he's already done something with it' . . . I think in the back of their minds they can use it for whatever, and I'm not going to give them the opposite inference that we will not hold that against [Rayfield], but, you know, it's there for however the jury wants to use it.