

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-002021-MR

BURL HUDSON

APPELLANT

V.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
CIVIL ACTION NO. 98-CI-00144

PAUL ANTHONY,  
D/B/A PAUL ANTHONY BUILDING CONTRACTOR

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MINTON, JUDGES.

MINTON, JUDGE: Burl and Marilyn Hudson brought a suit against Paul Anthony, d/b/a Paul Anthony Building Contractor, on claims that Anthony had not built their house in a workmanlike manner. During the ensuing bench trial, the Breckinridge Circuit Court awarded the Hudsons a \$1,733 judgment. They now appeal, claiming that certain evidence excluded from trial was not hearsay and that the judge erroneously held the testimony of J.R. Hatfield was insufficient to establish damages. Because we believe that the evidence was properly excluded and because the

judge's findings regarding the amount of damages were proper, we affirm.

In 1997, the Hudsons hired Anthony to construct a house in Caneyville, Kentucky. The contract price for the house was \$80,600. Upon completion, the Hudsons discovered several defects. Burl contacted Anthony several times to request he make the necessary repairs; but Anthony refused, and the Hudsons filed suit.

The Hudsons alleged four specific problems with the house: the substructure of the house was faulty, leading to uneven and bowed floors; the exterior brick was cracked; the patio door leaked; and the master bedroom door did not fit into the doorframe. Several inspections of the house resulted in estimated damages of approximately \$11,650. The inspections by at least seven different inspectors took place at various times in both October 1998 and March 1999.

A bench trial was held on April 18, 2003. During the trial, two different evidentiary issues arose. The judge asked counsel for each party to brief those issues. The questions to be addressed were whether Burl could introduce written estimates of the repair costs for the house without presenting testimony from those who prepared the estimates and whether the testimony of J.R. Hatfield was properly introduced at trial.

In his memorandum to the court, Anthony argued that the written estimates were not admissible because they constituted hearsay statements under KRE 801(c). He also claimed Hatfield's testimony should have been excluded since Hatfield had not been included as a witness on the Hudsons' answers to interrogatories; moreover, the Hudsons' answers to the interrogatories had not been supplemented to add Hatfield as a trial witness or to indicate Hatfield's intended testimony. Since he had not been put on proper notice, Anthony claimed the testimony should have been excluded.

The Hudsons' memorandum took a different approach. They argued that the written estimates were not hearsay because the documents were authenticated in court. Likewise, they argued that Hatfield's testimony was admissible because Anthony was put on notice that Hatfield would serve as a trial witness. The Hudsons claimed that at the March 5, 2003, pretrial conference, Anthony was given a supplemental list of witnesses, which included Hatfield, to which no objection was made.

On September 4, 2003, the court entered its Findings of Fact, Conclusions of Law, and Judgment. The court concluded that the introduction of the written estimates was hearsay as defined by KRE<sup>1</sup> 801(c). Citing Wright v. Premier Elkhorn Coal

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<sup>1</sup> Kentucky Rules of Evidence.

Co.,<sup>2</sup> the court stated that written reports of experts should not be introduced into evidence; therefore, the estimates were ruled to be inadmissible.

With regard to the admissibility of Hatfield's testimony, the court did not address whether or not Hatfield should have been permitted to testify; rather, it maintained that "the testimony of J.R. Hatfield relative to the difference in fair market value [was] not sufficient." Since the court determined that Hatfield's testimony was inadequate and that the Hudsons had only satisfied their burden of proving damages in the amount of \$1,733, judgment was awarded to them in that amount.

On appeal, we are asked to review the trial court's conclusions with regard to both of these issues. We affirm.

First, we agree that the introduction of the written estimates at trial constitutes hearsay. KRE 801(c) states that "[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The word "statement" is further defined in KRE 801(a) as "[a]n oral or written assertion." In Wright, this Court held that reports

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<sup>2</sup> Ky.App., 16 S.W.3d 570 (1999).

prepared in anticipation of litigation "constitute out-of-court statements utilized to prove the truth of the matter asserted."<sup>3</sup>

The Hudsons argue that the evidence is not hearsay because the record was authenticated at trial. But merely authenticating a record does not make it non-hearsay. Even if a document is properly authenticated under KRE 901, it is nevertheless considered hearsay if it is introduced to prove the truth of the matter asserted.<sup>4</sup> Authentication merely affirms that the document is what it is purported to be; meaning, in this case, Burl's "authentication" of the written estimates only affirmed that the documents were, in fact, written estimates. This affirmation had no effect on the fact that the documents were nonetheless being introduced to prove the truth of the matter asserted—namely that the damages to the house amounted to \$11,650.

For introduction of the estimates to be permissible, the Hudsons would either have to prove that the documents fell within one of the exceptions to the hearsay rule or that the people who prepared the estimates were unavailable.<sup>5</sup> Since there is no applicable hearsay exception in this case and since the

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<sup>3</sup> Wright, 16 S.W.3d at 572.

<sup>4</sup> KRE 801(c); see also, Robert G. Lawson, *The Kentucky Evidence Law Handbook*, §7.05(7) (4<sup>th</sup> ed.).

<sup>5</sup> KRS 803, 804.

unavailability of the inspectors was neither alleged nor proved, we hold that the written estimates were hearsay. So the trial court properly excluded them.

Second, we agree with the trial court's determination that Hatfield's testimony was insufficient to establish the amount of damages. Since his testimony was deficient, whether or not he should have been permitted to testify is immaterial. The trial judge held, "[i]t is apparent Hatfield's opinion of damages was taken from the estimates which are inadmissible and upon comparable sales from a different county and area from where this home is located making his opinion in reliance thereon ineffective." Hatfield testified that based on the fair market value of the Hudsons's home (as he determined it to be), the amount of damages was \$13,400.

CR<sup>6</sup> 52.01 states that "[f]indings 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."

We do not believe the court's findings in this case with regard to the amount of damages were clearly erroneous. The court properly determined that the correct measure of damages in a case such as this where the house has not been

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<sup>6</sup> Kentucky Rules of Civil Procedure.

deemed uninhabitable is the cost of remedying the defect, not the difference in fair market value.<sup>7</sup> Since Hatfield's testimony established damages to the Hudsons's house based solely on the loss of fair market value, we believe it was erroneous. Moreover, we are not convinced that Hatfield was qualified to give testimony regarding damage to the house. Although it was established that Hatfield was a realtor and a real estate appraiser, there was no evidence that he had experience in inspecting and estimating damages caused by faulty construction. Therefore, we find no error with the court's conclusion that his testimony was lacking.

Since the Hudsons were precluded from introducing the written estimates and because Hatfield's testimony was deemed insufficient, the court concluded that the Hudsons had only met their burden of proof in the amount of \$1,733.00 for repairs to the sagging floors. We find no fault with that decision.

For these reasons, the judgment of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

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<sup>7</sup> Baker Pool Company, Inc. v. Bennett, Ky., 411 S.W.2d 335, 338 (1967) ("[I]f the structure can reasonably be repaired 'the real measure of damages for defective performance of a construction contract is the cost of remedying the defect, so long as it is reasonable'. . . [I]f the structure cannot be repaired, or if the expense of repair is unreasonable, the test is the difference between market value of the building as it should have been constructed and the market value as it actually was constructed.")

BRIEF FOR APPELLANT:

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