

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002134-MR

ARDELL BANKS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 04-CI-01113

JOHN TAGGART, JR., TRUSTEE
AND MARGARET L. TAGGART, TRUSTEE

APPELLEES

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Ardell Banks appeals from a judgment entered by the Kenton Circuit Court on September 14, 2005, after a bench trial. In the judgment, the trial court dismissed Banks's complaint against John Taggart, Jr., trustee, and Taggart's wife, Margaret L. Taggart, trustee. On appeal, Banks argues that he produced sufficient credible evidence to prove that Taggart owed money to Banks for work Banks had

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

performed. In addition, Banks argues that he presented sufficient evidence at trial to prove that Taggart owed him \$369.15 for 500 feet of plastic pipe. Finding that the trial court failed to address the issue of the plastic pipe, we affirm in part, vacate in part and remand.

The facts behind this appeal are not complicated. According to the record, John Taggart, Jr. owned a farm in Kenton County, Kentucky. Upon Taggart's farm, he had a small pond and earthen dam. Taggart discovered that the dam was leaking, so, in February or March of 2003, he approached Ardell Banks, a bulldozer operator with experience building and fixing such ponds, to repair the dam. Taggart hired Banks and paid a total of \$7,000.00 to him for the repair work. Sometime after July 6, 2003, Banks presented Taggart with a bill for the repair work. The bill reflected that the total cost of the repair work was \$10,820.00 although it did show that Taggart had paid \$7,000.00 towards the balance. According to this bill, Taggart owed to Banks a balance of \$4,189.15 which included \$369.15 for 500 feet of plastic pipe that Taggart had used in a separate project. Taggart refused to pay, so Banks filed suit against Taggart and his wife in the Kenton Circuit Court. In Banks's complaint, he alleged that he and Taggart had entered into an oral service contract and that Taggart had breached that contract by refusing to pay the balance regarding the repair work and by refusing to pay for the cost of the pipe.

On September 9, 2005, the trial court conducted a bench trial. Regarding the repair work, Banks testified that he told Taggart that he could not give Taggart an

estimate since he did not know how difficult the repair work would be and did not know how much time it would take. According to Banks's testimony, he used two different bulldozers to complete the work, and he charged \$85.00 per hour for work performed with the large one and \$70.00 per hour for work performed with the small one.

According to Banks, he recorded the number of hours he worked each day in a tablet. Later, an employee would take Banks's handwritten time-keeping notes and produce a simple handwritten, itemized bill for his customers. According to Banks, he began working on Taggart's dam on May 25, 2003, and he finished the work on July 6, 2003. He detailed the repair work he performed and introduced the bill he sent to Taggart and his handwritten time-keeping notes which purported to show how many hours he worked repairing the dam.

Regarding the 500 feet of plastic pipe, Banks testified that he arranged for Taggart to acquire 500 feet of plastic pipe from Mr. Kinman, one of Banks's other customers. According to Banks, Taggart retrieved the pipe but never paid for it. We note that Banks never testified that he either purchased the pipe from Kinman or reimbursed him for it.

At the bench trial, Taggart testified on his own behalf. According to Taggart's testimony, after Banks had demanded more money, Taggart told Banks that he would not pay more than \$7,000.00 for the work. Then, on July 6, 2003, Taggart demanded that Banks "close the hole" and remove his equipment from Taggart's property. Regarding the time Banks allegedly spent on the repair work, Taggart claimed

that Banks did not work every day and did not work the number of hours allegedly documented in Banks's records. Taggart insisted that Banks's records were inaccurate. According to Taggart, Banks procrastinated in performing the repair work. Furthermore, while Taggart admitted that he had no experience with bulldozer work, he opined, based on his commonsense, that if Banks had worked diligently, then he would have completed the repair work in two weeks. Taggart also testified that Banks charged him more than he expected and insisted that he could have had a new pond built for \$5,000.00.

Regarding the plastic pipe, Taggart testified that he originally approached Banks because he needed a waterline installed between his pump house and barn. Taggart testified that he paid Banks's son \$600.00 to dig a trench and to install the waterline. Taggart testified that he acquired 500 feet of plastic pipe and used it in the waterline project, but he was not sure where he had gotten it. Taggart claimed that he simply went to a field and loaded the pipe into his truck. In addition, Taggart admitted that he did not pay for the pipe, but he claimed that Banks's son never asked him to pay for it. According to Taggart's testimony, he assumed that the price of the pipe was included in the \$600.00 he paid to Banks's son.

After the close of the evidence, the trial court made the following pertinent findings of fact: 1) Banks and Taggart had entered into an oral contract; 2) the real dispute in the case was how many hours Banks had actually worked; 3) neither party had kept good records; 4) Banks had the burden of proving his case by a preponderance of the evidence; thus, he had the greater burden to keep good records; 5) the trial court found

Banks's records unimpressive; 6) Banks should have kept better records given that he had the burden of proof; and 7) Banks had failed to persuade the trial court that he had worked all the hours that he claimed. Ruling in Taggart's favor, the trial court dismissed Banks's complaint. Now, Banks appeals to this Court.

Regarding the repair work, Banks reasons that the evidence he presented regarding that work was substantially reliable. He avers that he introduced his handwritten time-keeping records but argues that the trial court ignored them. In his brief, Banks analyzes his records and, not surprisingly, concludes that they were credible. So, Banks contends that the trial court abused its discretion because it refused to be persuaded by his evidence. In addition, citing *Threlkeld v. Breaux Ballard, Inc.*, 296 Ky. 344, 177 S.W.2d 157 (Ky. 1944), Banks argues that once he established a *prima facie* case, then judgment should have been in his favor since Taggart did not produce sufficient evidence to rebut Banks's *prima facie* case.

When reviewing actions tried before the bench, we will give due deference to the trial court's opportunity to judge the credibility of witnesses and will not disturb its findings of fact unless they are clearly erroneous; that is not supported by substantial evidence. Kentucky Rules of Civil Procedure (CR) 52.01; *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1965). According to the Supreme Court of Kentucky, substantial evidence consists of “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). In other words, it is that

“evidence which would permit a fact-finder to reasonably find as it did.” *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

While Banks believes that his time-keeping records were credible and that the trial was bound to be persuaded by them, this is not the case. Since the trial court was acting as the fact-finder, it had the sole responsibility to weigh the evidence and judge the credibility of all witnesses. It was not bound to accept the testimony of any witness as true. *Dunn v. Commonwealth*, 286 Ky. 695, 151 S.W.2d 763, 764-765 (Ky. 1941). It was the trial court's duty to weigh the probative value of the evidence and to choose which testimony it found most convincing. *Commonwealth, Dep't of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971). The trial court was free to believe all of a witness's testimony, part of a witness's testimony or none of it. *Gillispie v. Commonwealth*, 212 Ky. 472, 279 S.W. 671, 672 (Ky. 1926). In this case, the trial court chose to disbelieve Banks and his records, which was soundly within its discretion; thus, it did not act erroneously when it dismissed Banks's complaint regarding the repair work.

Additionally, Banks argues that he produced evidence that he had arranged for Taggart to acquire the 500 feet of plastic pipe, but Taggart never paid for it. According to Banks, he presented sufficient evidence regarding this issue, but the trial court simply ignored the issue, thereby, abusing its discretion.

After reviewing the record, we find that the trial court did not address the issue of the plastic pipe in its findings of fact and conclusions of law. Therefore, we

cannot properly review the issue. Thus, we vacate part of the judgment and remand the issue of the plastic pipe to the trial court.

The judgment regarding the issue of the repair work is affirmed but is vacated regarding the issue of the pipe. That issue is remanded for the Kenton Circuit Court to make written findings of fact and conclusions of law.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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