

RENDERED: AUGUST 15, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000797-MR

IMA RUTH THRASHER, INDIVIDUALLY;
IMA RUTH THRASHER, EXECUTRIX OF
THE ESTATE OF HOWARD THRASHER;
BARRY DOUGLAS THRASHER; REBA
COOPER; AND SALLIE B. THRASHER

APPELLANTS

APPEAL FROM CLINTON CIRCUIT COURT
v. HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 93-CI-00160

TILMOND DURHAM; TERRILL DURHAM; AND
WALTER POWELL, III, D/B/A DP ENTERPRISES

APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Douglas Thrasher and Ima Ruth Thrasher, individually and as executrix of the estates of Howard Thrasher, Reba Cooper, and Sallie B. Thrasher, appeal the dismissal with prejudice of their claims against Tilmond

Durham, Terrill Durham, and Walter Powell, III, d/b/a DP Enterprises (hereinafter "DP Enterprises"). The Thrashers specifically contend that the trial court committed reversible error by improperly excluding evidence at trial. After careful review, we affirm the judgment of the Clinton Circuit Court.

The Thrashers live on a farm a few miles south of Albany, Kentucky. In 1993, they initiated this lawsuit against DP Enterprises,¹ alleging that oil wells owned by the business and located across from their farm were producing hydrogen sulfide. The Thrashers testified that the hydrogen sulfide wafted over to their property and sometimes clouded over it. Hydrogen Sulfide at low levels has a strong odor and at high levels can cause death.

At trial, James E. Smith, an expert in the area of hydrogen sulfide, testified that the hydrogen sulfide had caused tarnishing of metal. Smith also testified that there was never any scientific testing conducted on the Thrashers' property that detected the presence of hydrogen sulfide. Smith further opined that the only proper way to test for the presence of hydrogen sulfide is with a chromatograph or Tutwiler's kit, which was never done on the Thrashers' property. Smith never actually visited the Thrashers' property.

As part of the defense's proof, Brett Miller, a metallurgical engineer specializing in the analysis of metal failure and corrosion, testified that the glass and metal materials Ruth Thrasher complained had been tarnished or corroded by exposure to hydrogen sulfide could be explained by normal oxidation consistent

¹ There was a settlement with the other parties originally sued, which is not germane to this appeal.

with the age of the materials and was not necessarily due to exposure to hydrogen sulfide. Also on the defense's behalf, Tilmond Durham testified that the well across from the Thrashers' property was not producing at all through the fall of 1992, the relevant time period at issue in this case. The Thrashers then sought to introduce documents to the contrary, which had been produced by DP Enterprises in their response to discovery requests. Defense counsel objected to the introduction, however, on the grounds that the documents were from a different lawsuit involving different counsel and had not been authenticated. The Thrashers countered that authentication was unnecessary because these documents were provided by DP Enterprises and were thus self-authenticated and/or admissions against interest. The court ruled that the documents were relevant but that the Thrashers were required to authenticate them. The Thrashers were unable to do so, and the evidence was subsequently put in as an avowal.

The Thrashers additionally sought to introduce glassware into evidence which their expert witness, Smith, had not examined. The glassware was intended to show the temporal relationship between the changes in color of the glassware and the presence of hydrogen sulfide. The trial court refused to admit the evidence, and it was again entered in as an avowal.

After considering all the evidence presented, the jury found that DP Enterprises had not failed to comply with their duty to avoid negligent release of hydrogen sulfide gas onto the property of and around the home of the Thrashers,

and it dismissed the claims of the Thrashers with prejudice. The Thrashers filed a motion for a new trial, which was subsequently overruled. This appeal followed.

The Thrashers first challenge the trial court's determination that documents pertaining to the activity of the specific oil well in dispute, produced in discovery by DP Enterprises, required authentication to be admitted into evidence. They specifically contend that because DP Enterprises produced the documents, the court should have found them admissible either as self-authenticated documents or admissions against interest. We disagree.

KRE 901(a) states: “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” “The proponent's burden of authentication is slight, which requires only a *prima facie* showing of authenticity to the trial court.” *See Johnson v. Commonwealth*, 134 S.W.3d 563, 566 (Ky. 2004), *citing United States v. Reilly*, 33 F.3d 1396, 1404 (3rd Cir. 1994). On appellate review, the trial court's finding of authentication is reviewed for abuse of discretion. *Johnson*, 134 S.W.3d at 566.

The Thrashers cite Justice Stevens' opinion, concurring in part and dissenting in part, in *U.S. v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), in which a sole proprietor's business documents were subpoenaed. They contend, as Justice Stevens opined, that production of records can be an admission of authentication. The important distinction, however, between this case, *Doe*, and others cited as examples in Justice Stevens' opinion, is that this case involves not an individual or

sole proprietorship but a business consisting of numerous parties. Additionally, the documents in dispute were in storage with another attorney, who had been counsel to DP Enterprises in another matter. Moreover, DP Enterprises' current counsel wrote a letter to the Thrashers' counsel on August 13, 2004, explaining that there were records in the possession of said former counsel that may have nothing to do with the now pending litigation but would still be produced as part of general discovery.

The Thrashers were given every opportunity to determine the author of the documents in question and to properly authenticate the documents. The record does not reflect any proof of authentication but instead contains only the assertion that the production of the documents should be considered self-authentication. There is no precedent to support such a finding, however, when the document was produced not by an individual but a company and not directly by that company but a former attorney. We therefore find that the trial court did not err in refusing to admit the evidence without proof of authentication.

The Thrashers additionally contend that the trial court erred in excluding exhibits of glassware, not offered to show that hydrogen sulfide gas caused the discoloration but instead offered to show the temporal relationship of the discoloration to the existence of the hydrogen sulfide gas. We disagree.

We review a trial court's evidentiary ruling only for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was

arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Kentucky Rule of Evidence 403 states that: “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.”

In this case, Ruth Thrasher sought to testify to the change in color of glassware located on her property after BP Enterprises began oil production. No expert testimony was offered, however, as to the change in color, the type of glass, or the causes of the change in color. The Thrashers’ counsel was very cautious not to ask about the cause of the discoloration but questioned Ruth Thrasher thoroughly about the change in color in and around 1992, the year drilling began. The record clearly reflects the Thrashers attempt to create inferences that the existence of hydrogen sulfide gas caused the change in color. KRE 403 was instituted to protect against such efforts to raise form over substance. Therefore, the trial judge did not err in determining that to allow the jury to speculate as to the alleged change of color would constitute unfair prejudicial evidence.

Accordingly, we affirm the judgment of the Clinton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert E. Reeves
Lexington, Kentucky

BRIEF FOR APPELLEES:

Robert S. Walker, III
Lexington, Kentucky