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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001869-MR

RICKY FERRELL and
TEREASA FERRELL APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 05-CI-01265

PAUL DAVIS RESTORATION, INC., d/b/a
PAUL DAVIS RESTORATION OF
BOWLING GREEN, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; HARRIS,[1] SENIOR JUDGE.

WINE, JUDGE: Ricky and Tereasa Ferrell ("the Ferrells") appeal from an adverse jury verdict rejecting their claims against Paul Davis Restoration, Inc., d/b/a Paul

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Davis Restoration of Bowling Green Inc. ("PDR"). The Ferrells contend that they were entitled to judgment as a matter of law based upon deposition statements by PDR's expert witness. They further contend that they were unfairly prejudiced by the expert's change in testimony at trial, that the jury's verdict was contrary to the evidence, and that the trial court abused its discretion in its evidentiary rulings. Finally, the Ferrells assert that the trial court was biased in favor of PDR. Finding no merit to any of these arguments, we affirm.

The underlying facts of this case are not in dispute. On August 31, 2004, the Ferrell's home in Oakland, Kentucky, was extensively damaged in a fire. At the time of the loss, the Ferrells had homeowners' insurance through Motorists Mutual Insurance Company ("Motorists Mutual"). Motorists Mutual referred the Ferrells to the PDR franchise in Bowling Green to provide restoration services.

On September 1, 2004, the Ferrells entered into an agreement with PDR to clean and repair their home and its contents. Under the terms of the contract, PDR would be paid in three draws primarily from the proceeds of the Ferrell's homeowner's policy. During the bidding, estimating, and repair process, PDR used the Xactimate[2] software program to calculate the cost of the repairs. The Xactimate program gives a line-by-line cost estimate for each portion of the

[2] Xactimate® is published by Xactware Solutions, Inc. and is a registered trademark of that company. http://www.xactware.com/ (accessed July 29, 2010).

repair work. In calculating these costs, the program factors in location, profit, and overhead, among other things.[3]

After PDR commenced the remediation work, a dispute arose between the parties concerning the amount to be paid to PDR. The Ferrells assert that PDR padded the costs of the repair work as set out in its estimates. The Ferrells also claim that PDR failed to return some of their personal property removed during the course of the repairs. In response, PDR states that the Ferrells and Motorists Mutual failed to make timely payments, and that the Ferrells repeatedly requested that PDR perform additional work which was not covered by the contract. The relationship broke down entirely on March 22, 2005, when the Ferrells fired PDR. The Ferrells hired another contractor to complete the remediation work.

In August of 2005, the Ferrells brought this action against Motorists Mutual and PDR, alleging breach of contract. The Ferrells subsequently settled their claims against Motorists Mutual and amended their complaint against PDR to allege violation of the Kentucky Consumer Protection Act, fraud, and bailment claims. Following extensive discovery, the matter proceeded to a jury trial in April of 2008. However, that trial ended in a mistrial because the Ferrells failed to provide timely disclosure on the amount of their claims. The matter was scheduled for a second trial in October of 2008.

[3] Xactimate has been utilized by other insurance companies and is accepted by various courts throughout the country. *Wickman v. State Farm Fire & Cas. Co.*, 616 F.Supp.2d 909 (Wis., 2009); *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir., 2008).

In August of 2008, PDR filed a supplemental pretrial compliance identifying Stephen Russell "Rusty" Neeper as an expert witness regarding the use of the Xactimate program. After taking Neeper's deposition, the Ferrells moved for summary judgment, alleging that Neeper had admitted that the Xactimate program was deceptive and misleading. The matter proceeded to a jury trial on October 1, 2008. The trial court ultimately denied the motion for summary judgment after the Ferrells closed their proof, conceding their expert's testimony created a question of fact for the jury.

At the close of trial on October 3, 2008, the court advised the parties that the jurors had been excused for the public school fall break during the weeks of October 6 and October 11. Consequently, the trial resumed on October 23, 2008. PDR completed its proof that day and the matter was submitted to the jury. The jury returned verdicts in favor of PDR on all of the Ferrell's claims. Thereafter, the trial court denied the Ferrell's motions for a new trial and a judgment notwithstanding the verdict, and entered a judgment in accord with the jury's verdict. The Ferrells now appeal from this judgment.

The Ferrells primarily argue that they were entitled to summary judgment, directed verdict, or a judgment notwithstanding the verdict based on the divergence between Neeper's deposition testimony and his trial testimony. In their supplemental pretrial compliance, PDR identified Neeper as an expert who would testify that the Xactimate program is widely used and accepted in the insurance

industry, and that the methods used by PDR to estimate the costs of repair are proper in circumstances involving a fire loss.

In his deposition, Neeper testified that the Xactimate program is commonly used in the insurance industry and that Motorists Mutual required PDR to use it to estimate the repair costs in this case. He further explained that the Xactimate program does not reflect PDR's actual cost of any given item or service, but the usual and customary cost of the item or service within the particular geographic area. The program then allows the contractor a 10% profit and 10% overhead charge on these latter amounts. Neeper stated that the Xactimate estimate is prepared for the benefit of the insurance company, which is aware of the nature of the program and how the estimate is calculated.

The Ferrells maintain that the Xactimate program can be misleading to a homeowner because it incorrectly lends the appearance that the contractor is to receive 10% profit and 10% overhead above and beyond the actual cost of any given item or expense. At one point in his deposition, Neeper agreed with the Ferrells' counsel that this misleading impression was "deceptive" to the homeowner. However, he denied that PDR had padded its costs or that it intended to deceive the homeowner.

At trial, the Ferrells called Neeper to testify. Neeper reiterated his deposition testimony that the Xactimate program is widely used in the insurance industry to estimate costs for fire-restoration services. However, he disavowed his prior testimony to the extent that he had described it as misleading or deceptive to

a homeowner. Rather, he explained that the output of the Xactimate program is not intended for the homeowner, who may find it difficult to understand. When asked about the discrepancy between his deposition and trial testimony, Neeper stated that he had been confused by the Ferrell's counsel's questions and he had not meant to describe the Xactimate program as deceptive.

The Ferrells argue that Neeper's deposition testimony amounts to a binding judicial admission which could not be withdrawn at trial. They also assert that Neeper perjured himself by changing his testimony at trial, thus rendering the verdict unfair. Based on their contentions about the binding effect of Neeper's deposition testimony, the Ferrells argue that they were entitled to summary judgment or a directed verdict on their Consumer Protection Act and fraud claims.

We find no support for the Ferrells' contention that PDR is bound by Neeper's deposition testimony. By definition, a judicial admission "is a formal act by a party in the course of a judicial proceeding which has the effect of waiving or dispensing with the necessity of producing evidence by the opponent and bars a party from disputing a proposition in question." *Nolin Production Credit Ass'n v. Canmer Deposit Bank*, 726 S.W.2d 693, 701 (Ky. App. 1986). As a non-party, Neeper could not make a binding judicial admission on PDR's behalf. *Id.* Consequently, the Ferrells were not entitled to a judgment in their favor based on Neeper's deposition testimony.

In the alternative, the Ferrells contend that they were deprived of their right to a fair trial because PDR did not give them advance notice of the change in

Neeper's testimony prior to trial. Kentucky Rule(s) of Civil Procedure ("CR") 26.02(4) provides for disclosure of expert witnesses. The rule allows a party to discover facts or opinions of experts which the other party intends to call including "the subject matter on which the expert is expected to testify, and . . . the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." CR 26.04(4)(a)(i). Here, PDR disclosed Neeper's name and the subject and substance of his expert testimony prior to trial. Furthermore, PDR made Neeper available for a deposition. Consequently, PDR fully complied with its obligations under CR 26.02(4).

A party may have a duty to supplement its responses concerning its expert witnesses under CR 26.05. But in this case, although PDR had designated Neeper as its expert witness, the Ferrells elicited the contradictory testimony from Neeper on direct examination during their case-in-chief. We find no language in CR 26.05 which would have required PDR to supplement its disclosures concerning Neeper's testimony under these circumstances.

Furthermore, the fact that Neeper changed his opinion between the deposition and the trial *was* admissible to impeach his expert testimony. *See Miller ex rel. Monticello Baking Co. v. Marymount Medical Center*, 125 S.W.3d 274 (Ky. 2004). The Ferrells extensively cross-examined Neeper on this matter. In both his deposition and trial testimonies, Neeper discussed the use of the Xactimate program in calculating fire loss damages for insurance purposes. At both times, he testified that the program is commonly used in the industry. The

only significant difference in his testimony concerned his original characterization of the Xactimate program as potentially misleading or deceptive to the homeowner. But even in his deposition, Neeper denied that the Xactimate program was unfair to the homeowner or that PDR had padded its costs underlying the estimate. As noted above, Neeper clarified this testimony at trial and recanted his prior characterization of the Xactimate program as deceptive. Under the circumstances, the inconsistency between his deposition and trial testimony was a matter involving the weight to be given to the evidence and did not require exclusion of his trial testimony.

For the same reason, we disagree with the Ferrells that the jury's verdict was contrary to the evidence. They contend that the evidence conclusively shows that PDR inflated its costs when it submitted the estimate to Motorists Mutual. The Ferrells primarily repeat their prior argument that PDR is bound by Neeper's deposition testimony. The Ferrells also point to other evidence as conclusively showing PDR overbilled them for particular services. However, PDR presented evidence that the Xactimate program is widely used in the insurance industry for estimating costs for fire-restoration work and that it billed items out at the amount allowed by the program. Although the allowed costs may have exceeded PDR's actual costs for particular items or services, the trial court properly allowed the jury to consider the Ferrells' claim that PDR's use of the Xactimate program was deceptive or fraudulent.

The Ferrells next argue that the trial court erred when it refused to admonish Bob Snodgrass, the project manager and job superintendent for PDR, about his Fifth Amendment right against self-incrimination. However, the Ferrells cite no authority for the proposition that they have standing to assert this claim.[4] Indeed, it is well established that the privilege against self-incrimination extends to the witness, not to other parties to the trial. *See Hoffman v. U.S.*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed.2d 1118 (1951). *See also Commonwealth v. Phoenix Hotel Co.*, 157 Ky. 180, 162 S.W. 823, 826 (1914). Moreover, they make no claim that they were unfairly prejudiced because the trial court declined to give an admonition. Therefore, we find no reversible error.

In their fourth ground of error, the Ferrells argue that PDR engaged in improper conduct to influence the jury during trial. On October 17, 2008, during the recess of the trial, the local newspaper ran an article about PDR. The article did not refer to the litigation or any of the issues between PDR and the Ferrells. Rather, the article was a human interest piece involving PDR's participation in a project to renovate the house of a local man who had been paralyzed after an assault.

[4] The Ferrells cite *Martin v. Commonwealth*, 2004 WL 2755854 (Ky. App. 2004), as authority for the proposition that the trial court should have admonished Snodgrass of his right against self-incrimination. However, *Martin* involved a claim by a criminal defendant that his prior testimony at a domestic violence hearing should have been excluded because he was not advised of his rights against self-incrimination. This Court agreed. Unlike in *Martin*, the Ferrells are not asserting the privilege against self-incrimination on their own behalf, but apparently on Snodgrass's behalf.

The Ferrells first raised the issue in their motion for a new trial. The trial court allowed the Ferrells to conduct limited discovery to determine the source of the article. Discovery revealed that the article was prompted by a press release from PDR and several e-mails from John and Jennifer Simms, the co-owners of PDR. After reviewing the evidence, the trial court questioned the timing of the article, suggesting that PDR should have been more circumspect that the case was pending. However, the court found no evidence that PDR manufactured the article in an effort to influence or communicate with the jury. Likewise, the court found no evidence that any juror was improperly influenced by the article.

As an initial matter, it appears that the Ferrells failed to timely raise this issue. The Ferrells' counsel admitted that he was aware of the article when the trial resumed on October 23, but he did not bring it to the court's attention at that time. Despite the inadequate preservation, the trial court fully considered this issue in the post-verdict motion. There is no allegation that PDR or its employees attempted to directly or indirectly contact any juror during the trial. In cases involving improper influence over the jury, the objecting party has the burden of proving that the jury was exposed to extraneous influences and that these influences created a real and substantial possibility that the jury's verdict was affected. Once the party meets this initial burden, the burden shifts to the opposing party to show that the error was harmless beyond a reasonable doubt. *Nevers v. Killinger*, 169 F.3d 352, 368 (6th Cir. 1999), *overruled on other grounds in Harris v. Stovall*, 212 F.3d 940 (6th Cir. 2000). The Ferrells have not met their initial

burden.[5] At most, the Simms merely instigated the publication of an article that publicized PDR in a favorable light. However, the article did not refer to the litigation or any of the issues between the Ferrells and PDR. Moreover, the Ferrells did not show that PDR ever sought to improperly influence the jury, or that the jury was influenced in any way by the article. Consequently, the trial court did not abuse its discretion by denying the Ferrell's motion for a new trial on this ground.

The Ferrells next object to the trial court's evidentiary rulings limiting their cross-examination of two of PDR's witnesses, Dave Raybould and Jennifer Simms. Neither of these issues was preserved by introduction of avowal testimony. Consequently, it is not possible to determine whether the Ferrells were unfairly prejudiced by the rulings.

Furthermore, we find no abuse of discretion in either of the trial court's evidentiary rulings. The Ferrells attempted to question Raybould about comments in Motorist Mutual's claim file which were critical of his handling of the Ferrells' claim. However, this matter tended to interject matters involving the

[5] The cases cited by the Ferrells involved direct or indirect contact with jurors, or some other improper influence on the members of the jury. In *Nevers v. Killinger*, *supra*, the jury was exposed to extraneous media and other influences during the defendant's trial for the murder of a police officer. Those outside influences were far more relevant and incendiary than those alleged in this case. In *Budoff v. Holiday Inns, Inc.*, 732 F.2d 1523 (6th Cir. 1984), an employee of the plaintiffs' counsel contacted the son of one of the jurors and discussed the case. *Id.* at 1525. Even in that case, the Sixth Circuit held that the contact did not automatically require a new trial, but the plaintiffs bore the burden of showing that the contact was harmless. *Id.* at 1527. Here, there was no evidence of any deliberate attempt to contact the jury. And finally, in *Sexton v. Lelievrre*, 44 Tenn. (4 Cold.) 11 (Tenn. 1867), the defendant in a civil case took the plaintiff, witnesses, and the jury out to a saloon during a recess in the trial. There was no such type of contact with the jury in this case.

Ferrells' claims against Motorists Mutual, which had been settled before trial. Given the potential for jury confusion and the limited relevance of the entries, the trial court was within its discretion to limit the cross-examination.

With respect to the questioning of Jennifer Simms, the trial court allowed the Ferrells' counsel to ask her why the Ferrells had received property belonging to another PDR customer. Counsel also asked Simms how this apparent mistake reflected on her prior assertions regarding the accuracy of PDR's record-keeping. The trial court questioned whether the underlying inventory list would be admissible because it had not been disclosed prior to trial. However, the court never ruled on this issue because the Ferrells did not seek to introduce it as an exhibit. Thus, the Ferrells do not present any valid claim of abuse of discretion.

Finally, the Ferrells contend that the trial court displayed bias in favor of PDR throughout the trial in its evidentiary rulings. However, the trial court's adverse rulings, even if erroneous, do not provide a basis for finding bias. *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007). Furthermore, the Ferrells did not raise any claim of alleged bias in their motion for a new trial, thus leaving the issue unpreserved.

Moreover, we find no evidence in the record of any conduct indicating an improper bias by the trial court. As noted above, the trial court's evidentiary rulings were well within its discretion. The Ferrells only identify one other example of the alleged bias, occurring at the end of their cross-examination of Jennifer Simms. The Ferrells' counsel questioned Simms about Bob Snodgrass's

encoding of estimates in the Xactimate program. Simms testified that she was not familiar with the Xactimate program and had no involvement with Snodgrass's work in estimate process. The trial court cut off the questioning, stating that it was going beyond the scope of cross-examination.

The Ferrells' counsel did not object or state that he had any additional questions for Simms. In addition to the lack of preservation, the Ferrells make no showing that they were unfairly prejudiced by the trial court's handling of this matter. And lastly, the trial court retains the right to set limitations on the scope and subject of cross-examination. *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-68 (Ky. 2005). Jennifer Simms was testifying about her record-keeping and PDR's handling of the Ferrells' property in the bailment claim. Since she had no knowledge about PDR's use of the Xactimate program, the trial court properly limited any further questioning of her on that subject. The trial court's actions did not cross the line into becoming an advocate for PDR.

In conclusion, we find that PDR was not bound by Neeper's testimony, and that the trial court properly submitted the Ferrells' Consumer Protection Act, fraud, and bailment claims to the jury. Although the evidence was conflicting, there was substantial evidence to support the jury's verdict in favor of PDR. The Ferrells lack standing to complain that the trial court refused to admonish Bob Snodgrass of his right against self-incrimination. The Ferrells have also failed to show that PDR engaged in improper conduct to influence the jury.

Finally, the trial court's evidentiary rulings and handling of this case did not amount to an abuse of discretion or indicate a bias in favor of PDR.

Accordingly, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

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