

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000544-MR

EDWIN GLENN WILCHER, SR.

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 08-CI-01227

LEANDER FLOYD AND LINDA VARWIG

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: NICKELL AND THOMPSON, JUDGES; ISAAC,¹ SENIOR JUDGE.

NICKELL, JUDGE: Edwin Glenn Wilcher, Sr., has appealed from the Laurel

Circuit Court's findings of fact, conclusions of law and judgment entered

following a jury trial awarding Leander Floyd and Linda Varwig (collectively

"Floyd") judgment in the amount of \$16,000.00 as compensation for damage to

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

their land caused by Wilcher. Following entry of the judgment, Wilcher moved for a judgment notwithstanding the verdict (JNOV) and for leave to file a motion for a new trial, which the trial court denied. It is from this denial that Wilcher appeals to this Court. After a careful review of the record, the law and the briefs, we reverse and remand for further proceedings.

Floyd conveyed a parcel of property in Laurel County, Kentucky, to his daughter, Varwig, retaining a life estate in the land. Wilcher owns an adjoining parcel. In 2003, Wilcher began filling in low-lying areas on his property near the boundary line. This filling operation occurred near the drainage areas for a pond and stream located mainly upon Floyd's lands. Wilcher and Floyd agreed to install a drain tile in the bank of the pond to facilitate drainage and accommodate the fill dirt operation. During the construction and filling operations, the relationship between the neighbors became strained and the drain tile was ultimately not installed as planned. No accommodation was made for the pond, water flow or drainage. On November 5, 2008, Floyd filed the instant suit alleging the changes made by Wilcher unreasonably interfered with the flow of water from his property and caused damage to the land. Wilcher filed a countersuit asserting claims of nuisance, wrongful dumping of garbage upon his lands, and damages resulting from water leakage from Floyd's pond.

A jury trial was convened on February 18, 2010. Floyd and Varwig each testified regarding the extent of damage to their property but were unable to

give estimates as to the cost to restore the property to its original state. Todd Bronk, Floyd's construction expert, testified as to the damages and opined the cost to perform the necessary repairs and restoration would be approximately \$10,000.00. No further evidence was presented regarding the amount of Floyd's damages. Upon the closing of Floyd's case-in-chief, Wilcher moved for a directed verdict which motion was denied.

Wilcher testified as to his actions leading up to the filing of the instant suit. He also testified about the damage to his land resulting from Floyd's leaking pond and briefly regarding his nuisance claims. He presented the testimony of construction expert Virgil McKnight who estimated it would cost \$32,700.00 to complete repairs upon Wilcher's lands to remedy the current problems. Upon questioning, he noted that \$2,500.00 of that estimate was to undo the work performed by Wilcher and that due to a minor measurement error, his estimate could be \$3,000.00 to \$4,000.00 too high.

At the close of Wilcher's proof, both sides moved for directed verdicts. Wilcher's motion was denied. Floyd's motion was granted as to Wilcher's nuisance claims. The remaining issues were given to the jury who returned a verdict in favor of Floyd setting damages in the amount of \$16,000.00 for repair and restoration of the damaged property. Wilcher moved for a JNOV alleging the verdict was contrary to the evidence as Floyd had presented proof of only \$10,000.00 in damages. The trial court denied the motion without explanation. This appeal followed.

Wilcher contends the trial court erred in denying his motion for a JNOV as the verdict was unsupported by the evidence. He states Floyd presented evidence of only \$10,000.00 in damages but the jury inexplicably awarded him \$16,000.00. Wilcher claims the jury's verdict was so "palpably and flagrantly against the evidence" that it must have been influenced by passion or prejudice and should therefore be overturned. Floyd counters that when considering the evidence as a whole, the jury's verdict was reasonably supported. Floyd believes that, in addition to his testimony and that of his expert, Wilcher's own expert's testimony was sufficient to support the verdict. We agree with Wilcher.

With regard to the standard of law applicable to this case, we note at the outset that a motion for JNOV shall not be granted unless "there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ." *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998); *see also Fister v. Commonwealth*, 133 S.W.3d 480, 487 (Ky. App. 2003) (quoting *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985)). This Court presumes the trial court's denial of a motion to set aside a jury verdict or for a new trial is correct and will reverse only upon a finding of clear error. *Bayless v. Bayer*, 180 S.W.3d 439, 444 (Ky. 2005).

Floyd and Varwig each testified they were unaware of the cost of repairing the damage to their property caused by Wilcher's actions or how much they sought to be awarded. Their expert gave a figure of \$10,000.00 to correct their problems, but no additional evidence regarding Floyd's damages was

presented. “We have often said that the amount of damages recoverable for any specific item is limited by the amount proven in evidence as well as the amount claimed in the pleadings.” *Allen Co. v. Thoroughbred Motor Court*, 272 S.W.2d 343 (Ky. 1954). Floyd’s complaint sought damages “in excess of the minimum jurisdictional limits” of the trial court but did not request any specific amounts, and the proof presented at trial revealed \$10,000.00 would repair the damage caused by Wilcher.

Contrary to Floyd’s contention, Wilcher’s expert McKnight opined only as to the cost to make repairs on Wilcher’s land. This opinion did not address the issue being experienced on Floyd’s land. McKnight clarified that the work he would have performed would have begun approximately fifteen feet away from the closest bank of Floyd’s pond so as to not interfere with its levy. All of the work he proposed to accomplish was intended to remedy water damage issues for Wilcher without regard to Floyd’s land. Thus, Floyd’s attempt to “piggy-back” onto Wilcher’s tendered testimony is inappropriate.

In light of the fact that Floyd provided no basis for the jury to conclude the damages to his property exceeded \$10,000.00, we agree with Wilcher that the trial court should have granted his JNOV motion because there was “a complete absence of proof on a material issue in the action.” *Fister*, 133 S.W.3d at 487. Thus, we are compelled to reverse and remand for entry of an appropriate judgment conforming to the evidence presented.

Therefore, for the foregoing reasons, the judgment of the Laurel Circuit Court is reversed and the matter remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jason E. Williams
Jennifer Caudill Bundy
London, Kentucky

BRIEF FOR APPELLEE:

Scott M. Webster
London, Kentucky