

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-000463-MR

KYLE CAMPBELL AND  
I.C.U. SURVEILLANCE, LLC

APPELLANTS

v.

APPEAL FROM KNOX CIRCUIT COURT  
HONORABLE GREGORY A. LAY, JUDGE  
ACTION NO. 13-CI-0411

RUSSELL FOLEY, INDIVIDUALLY AND  
D/B/A I.C.U. SURVEILLANCE

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE, DIXON, AND JONES, JUDGES.

ACREE, JUDGE: Appellants, Kyle Campbell and I.C.U. Surveillance, LLC,<sup>1</sup>

appeal a partial directed verdict entered in favor of Appellee, Russell Foley,

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<sup>1</sup> I.C.U. Surveillance, LLC, was created by Campbell prior to filing this lawsuit. It has since lost good standing with the Kentucky Secretary of State.

individually and doing business as “I.C.U. Surveillance.” Campbell alleges the circuit court erred by: (1) directing a verdict on his claim for defective equipment; (2) excluding certain photographs from evidence; and (3) giving improper jury instructions relating to Foley’s counterclaim for wrongful use of civil proceedings. After careful review, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

Campbell is a general contractor who operates his business primarily out of his residence. To combat frequent theft of the equipment he uses in his business, he contacted Foley, the owner of I.C.U. Surveillance, to install a surveillance system. Campbell testified he wanted a surveillance system that could clearly identify the face of anyone on his property and could capture nighttime images.

After assessing Campbell’s property, Foley prepared a quote for the sale and installation of a moderately priced six-camera system and DVR recorder. The parties presented conflicting testimony regarding oral warranties made by Foley. Campbell asserts Foley assured him the system would do what he wanted – capture clear, identifiable images of individuals’ faces at nighttime.

Foley, on the other hand, testified he expressed to Campbell his concerns the cameras may not be sufficient for certain areas of the property. He further testified he quoted not only the moderately priced camera system, but also a

higher end camera, with higher quality image recognition and better nighttime resolution. He claims to have left a brochure, including the pricing and specifications of the higher end camera along with a website address for different systems, so Campbell could make his own decision on which system to purchase.

Campbell purchased a package including, among other things, seven of the moderately priced cameras Foley quoted. Foley testified he expressed concerns that Campbell “may have problems with at least three of those cameras.” But he agreed to replace them with the higher end cameras if he was not satisfied, for the difference in price. Ultimately, Campbell was not satisfied with the surveillance system and requested his money back; Foley refused.

Campbell filed suit alleging, among other things, Foley: (1) sold him defective equipment; (2) breached express warranties; (3) breached the implied warranties of merchantability and fitness for a particular purpose; (4) was negligent; and (5) converted the trade name of Campbell’s business – I.C.U. Surveillance, LLC<sup>2</sup> – for his own use. Foley filed a counterclaim, asserting wrongful use of civil proceedings for each claim contained in Campbell’s complaint. A jury trial took place in December 2017.

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<sup>2</sup> After Foley refused to refund Campbell’s money, Campbell filed Articles of Organization with the Kentucky Secretary of State for a limited liability company named I.C.U. Surveillance, LLC – the trade name (minus the “LLC”) under which Foley had been doing business.

To support his claim that the cameras were not of the quality Foley warranted, Campbell sought to introduce three different sets of photographs. The first set – Plaintiff’s Exhibits 3, 5, 7, 9, 11, and 14 – were photographs of the area each camera was surveilling, taken with a handheld camera during daytime and printed on copy paper. The trial judge excluded these photographs for lack of authentication and because they were not the best evidence. Additionally, because there was no way of knowing the resolution or number of pixels of the camera, the court expressed concern “the jury would be left with guesswork or speculation” to conclude the photographs are what the cameras were warranted to show.

The next set of photographs Campbell offered – Plaintiff’s Exhibits 4, 6, 12, 15, 21-26 – supposedly correspond with the first set of daytime photographs, but they were taken of the monitor with a handheld camera while the monitor displayed nighttime images captured by the cameras. These photographs were excluded on similar grounds. The last set – Exhibits 10, 17-20 – appear to be photographs printed directly from the surveillance system. They were excluded for lack of authentication because Campbell could not explain how they were produced or who produced them.

However, the jury was not deprived of photographic evidence. Foley successfully introduced original photographs printed directly from the system

showing what the monitor depicted of the same areas Campbell had photographed with the handheld camera.

At the close of evidence, the circuit court directed a verdict in favor of Foley on Campbell's claims of defective equipment and conversion of trade name.<sup>3</sup> It also entered a directed verdict in favor of Campbell on Foley's counterclaims for wrongful use of civil proceedings for each claim in the complaint, except for wrongful civil proceedings for conversion of trade name. The remaining claims for breach of express warranty, breach of the implied warranty of fitness for a particular purpose, negligence, and wrongful use of civil proceedings for conversion of trade name, were decided by the jury. The jury found in favor of Foley on all claims. It awarded him \$12,000 in compensatory damages and \$15,000 in punitive damages. Campbell appeals.

### **ANALYSIS**

Campbell asserts the Knox Circuit Court erred by: (1) directing a verdict on Campbell's claim for defective equipment; (2) excluding the photographs from evidence; and (3) giving improper jury instructions on the issue of damages relating to Foley's counterclaim for wrongful use of civil proceedings. We address each issue in turn.

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<sup>3</sup> Directed verdicts were also entered in Foley's favor on other claims not relevant to this appeal.

### ***The Circuit Court Properly Entered a Directed Verdict***

A directed verdict should only be granted when “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.” *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 215 (Ky. App. 2009) (citation omitted). “[W]hen presented with a motion for directed verdict, a trial court ‘must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion.’” *Toler v. Sud-Chemie, Inc.*, 458 S.W.3d 276, 285 (Ky. 2014) (quoting *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998)). On appeal, we may not “substitute [our] judgment for that of the trial judge unless the trial judge is clearly erroneous.” *Bierman*, 967 S.W.2d at 18.

The trial judge noted the thrust of the evidence presented at trial was not that the cameras were defective, but rather they did not have the nighttime capabilities Foley allegedly warranted. The trial judge concluded there was insufficient evidence to present a defective equipment claim but, even if there had been such evidence, it would be “subsumed or merged” into the warranty claims.

Campbell contends “a reasonable jury could conclude that Campbell told Foley that the cameras must deliver useable images at nighttime, that Foley understood this requirement, and Foley provided defective equipment.” Campbell

also relies on the testimony of his secretary that some of the cameras had red and white dots and orbs floating on the screen.<sup>4</sup>

A product is not defective simply because it fails to meet the customer's expectations, which may or may not be reasonable. The bulk of the testimony and photographs relied upon by Campbell does not demonstrate the cameras were not operating properly, *i.e.*, were defective. Rather, it simply indicates the cameras did not perform as he expected. The issue of breach of warranty was tried to a jury and not raised in this appeal. Moreover, the photographs introduced at trial show the cameras were in fact operating, albeit in a manner inferior to Campbell's desires. We conclude the trial judge did not err by directing a verdict in favor of Foley on this issue.

***The Circuit Court Committed No Reversible Evidentiary Errors***

Campbell claims the trial judge erred by excluding certain photographs from trial. A trial court's evidentiary rulings are reviewed for abuse of discretion. *Brown v. Commonwealth*, 313 S.W.3d 577, 605 (Ky. 2010); *Walker v. Commonwealth*, 288 S.W.3d 729, 739 (Ky. 2009). "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).

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<sup>4</sup> Foley concedes one of the cameras had spots on it; he replaced it at his own cost.

Before a photograph may be admitted at trial, it must be authenticated. KRE<sup>5</sup> 901(a). “An authentic photograph is one that constitutes a fair and accurate representation of what it purports to depict.” *Gorman v. Hunt*, 19 S.W.3d 662, 669 (Ky. 2000) (citation omitted). This requirement may be satisfied with testimony by a witness who has knowledge of the document in question and who testifies that it is what it claims to be. KRE 901(b)(1); *see also Mollette v. Kentucky Personnel Board*, 997 S.W.2d 492, 495 (Ky. App. 1999).

The three sets of photographs were offered during Campbell’s direct examination. He testified the first set were handheld photographs of the area each camera was supposed to be surveilling and were of the quality of images Foley warranted the cameras would produce. He testified the second set were photographs of what the inside monitors showed at night, again, taken on a handheld camera.<sup>6</sup> He identified the third set of photographs as having been printed directly from his security system. This testimony was sufficient to authenticate the photographs. Concerns relating to the resolution of the photographs, who printed them, and what time they were printed were an issue for the jury to weigh in assessing their credibility.

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<sup>5</sup> Kentucky Rules of Evidence.

<sup>6</sup> Campbell was attempting to compare the photographs from set one with their counterparts in set two.



Nonetheless, we find this error harmless. “[W]e will reverse or modify a judgment only when the error prejudices the substantial rights of the complaining party.” *Combs v. Stortz*, 276 S.W.3d 282, 291-92 (Ky. App. 2009). As noted above, the photographs were intended to support Campbell’s assertion that the cameras did not have nighttime capabilities, as warranted. However, the jury was only instructed as to whether there was a breach of warranty regarding the camera’s ability to show “facial imagery” of subjects surveilled.<sup>7</sup> Therefore, exclusion of these photographs did not prejudice Campbell.

Moreover, original daytime and nighttime photographs were admitted into evidence, all of which depicted similar scenes as the copies of excluded photographs. Assuming the excluded photographs should not have been excluded on authentication grounds, they still would have been inadmissible under the best evidence and cumulative evidence rules. Finally, because the jury was given original photographs of what the system actually depicted, presenting copies of similar photographs would not have affected the outcome. After reviewing the photographs, the jury found Foley had not breached any warranty.

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<sup>7</sup> Campbell does not appeal the circuit court’s jury instructions regarding a breach of warranty. Nor does it appear that he preserved this issue for appeal.

### ***The Circuit Court's Jury Instructions Were Not Erroneous***

Lastly, we turn our attention to Campbell's assertion that the circuit court gave erroneous jury instructions on the issue of damages relating to Foley's counterclaim for wrongful use of civil proceedings. The jury instruction on damages stated, "If you found for the Defendant . . . you will determine from the evidence and award him a sum of money that will fairly compensate him for his reasonable expenses in defending the claim for conversion of trade name."

Campbell contends the jury instructions were vague and should have directed the jury to allocate Foley's reasonable expenses among every claim for wrongful use of civil proceedings. Campbell is not asserting the circuit court misstated the law; rather, he is asserting the court failed to give an instruction to allocate Foley's expenses. Accordingly, our standard of review is for an abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015).

We find no abuse of discretion. The jury was appropriately directed to award Foley reasonable expenses related only to his defense of conversion of trade name.

### **CONCLUSION**

Based on the foregoing, Campbell's claims of error are either without merit or do not require reversal. The rulings of the Knox Circuit Court are therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Travis Rossman  
Barbourville, Kentucky

BRIEF FOR APPELLEES:

Sandra J. Reeves  
Corbin, Kentucky