

**NOT DESIGNATED FOR PUBLICATION**

COMMERCIAL FLOORING AND MINI  
BLINDS, INC.

VERSUS

THE DAUGHTERS OF ST. PAUL, INC.

NO. 05-CA-8

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 580-895, DIVISION "J"  
HONORABLE STEPHEN J. WINDHORST, JUDGE PRESIDING

APRIL 26, 2005

COURT OF APPEAL,  
FIFTH CIRCUIT

FILED APR 26 2005

THOMAS F. DALEY  
JUDGE



Peter J. Fitzgerald  
CLERK

Panel composed of Judges Thomas F. Daley,  
Marion F. Edwards, and Walter J. Rothschild

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**AFFIRMED**

T.D.  
MFE  
WJR

The plaintiff, Commercial Flooring & Mini Blinds, Inc., has appealed the trial court's judgment in favor of The Daughters of St. Paul, Inc. For the reasons that follow, we affirm.

**FACTS:**

On July 6, 2001, the Daughters of St. Paul, Inc. (hereinafter referred to as DSP) contracted with Commercial Flooring & Mini Blinds, Inc. (hereinafter Commercial Flooring) for the purchase and installation of flooring in a bookstore owned by DSP. The contract price was for the amount of \$11,052.50 and DSP paid Commercial Flooring 50% of that amount, (\$5,526.25), on July 6, 2001. DSP was dissatisfied with the carpet itself and other aspects of the installation and did not pay the remaining amount due on the contract. On May 15, 2002, Commercial Flooring filed suit to collect the remaining sums. DSP answered and reconvened. In reconvention, DSP alleged that the carpeting installed was not suited for the needs of the bookstore in that it faded and wore quickly and needed to be replaced.

At trial, Patrick Rooney testified that he was the Chief Executive Officer of Commercial Flooring. His company installed Mohawk commercial grade carpet in the bookstore in August 2001. He inspected the carpet at the bookstore after he became aware that DSP had complaints about the carpet. Mr. Rooney testified that he noted water stains on the carpet and that the carpet was very unkempt and dirty. Mr. Rooney explained that he put a white towel on the carpet and a lot of dirt was transferred to the towel, which indicated to him that the carpet had not been "cared for well." Mr. Rooney testified as to the remaining amount due on the contract.

Daniel Borges testified that he worked for Mohawk industries handling customer complaints and he was called to inspect the carpet. Mr. Borges testified that DSP was unhappy with the color and performance of the carpet. He explained that when he inspected the carpet he noted shading caused by the pile of the carpet moving. This is a characteristic of pile carpeting. Mr. Borges testified that the carpet installed was appropriate for the DSP bookstore. Mr. Borges then had a third party inspect the carpeting.

A report by Ray Darrah of Floor Covering Inspectors was included in the record. This report states that the carpet was inspected on October 31, 2001 and Mr. Darrah concluded that the claim of wear is not justified. The report states that the shading is due to the pile surface and is characteristic of pile fabrics and is a result of differences in light reflection. The report further states that no fiber loss was detected.

Sister Julia Darencamp testified that she has been a member of DSP for 36 years and has managed the bookstore for three years. She testified that the existing carpeting in the bookstore was worn so she contacted Julie Ferrara with Commercial Flooring to install new carpeting. Sister Julia explained that she told Ms. Ferrara that they needed carpet that could withstand high traffic and not appear

worn for a long time. Sister Julia testified that the decision was made to put ceramic tile around the sales counter because the prior carpet was especially worn in this area. Because of the difference in color of the new and old flooring the baseboards around the counter had to be replaced. Sister Julia testified that when the job was completed she contacted the worker who installed the baseboards and tile and told him that the area between the tile and the carpet looked unfinished and that the baseboards around the sales counter did not fit flush and would not stay glued. The worker returned and installed rubber stripping between the tile and carpeting. He also re-glued the baseboards. During Sister Julia's testimony photographs of the carpeting were introduced. Sister Julia testified that she took the photographs in Exhibit Two in the summer of 2002 that depicted the baseboards peeling off. She explained that she used poster putty in an attempt to hold the baseboards in place. She later discovered that lizards had gotten under the baseboards and it became necessary to remove them completely. Sister Julia testified that she took the photographs in Exhibit Four that showed gaps in the rubber stripping between the tile and the carpet. She testified that there were six such gaps in this area. Sister Julia further testified that the carpet began unraveling and the color was changing from steel blue to pearly grayish white so she contacted Ms. Ferrara. Ms. Ferrara agreed that this seemed unusual so she contacted the Mohawk representative. Five photographs identified as Exhibit Five were introduced. Sister Julia testified that she took these pictures in the summer of 2002 and that they depicted areas of the carpet that were darker where there was not heavy traffic. Sister Julia testified that this change in color began one month after installation.

Sister Julia testified that when the Mohawk representative came to inspect the carpet, he took out a pocket comb and began to comb the carpet where people

walked. He explained that this would make the carpet go back to the original color. Sister Julia told him that they did not have time to comb the carpet and that they vacuumed the carpet every other day. Sister Julia testified that combing the carpet did not change the color very much.

Sister Julia testified that the carpet was professionally cleaned during Mardi Gras 2003. She testified that the professional cleaning did not make much difference in the appearance of the carpet as depicted in the photographs admitted in Exhibit Six that were taken just after the cleaning.

On cross-examination, Sister Julia admitted that there were water stains on the carpet. She explained that she did not blame Commercial Flooring for the water stains; rather, her concerns were related to the excessive wearing in the traffic areas. She was questioned regarding the darker spots on the carpet depicted in photographs on Exhibit Six. Sister Julia explained that these spots were the area where revolving bookcases were kept. These bookcases had been moved for the professional cleaning and had not yet been replaced when these pictures were taken.

Sister Margaret Timothy testified that she had been a member of DSP for 25 years. As the provincial treasurer of DSP she oversaw the administration of the bookstore. Sister Margaret testified that she approved the purchase of the carpet. When the problems with the carpet were brought to her attention, she advised that the remaining balance should not be paid.

Mr. Rooney took the stand in rebuttal and testified that Commercial Flooring attempted to correct the problems with the rubber molding, but was then told that Commercial Flooring could no longer contact DSP directly, rather they must be contacted through their attorney. He denied knowledge of specific complaints, but

admitted that in contacting DSP he was attempting to collect the remainder of the money due on the contract.

At the conclusion of trial, the trial court issued a written judgment in favor of DSP. The trial court found that there were obvious gaps in the rubber stripping adjoining the carpet, the baseboards came loose, and within a year the carpet showed excessive and unsightly wear and fading. The trial court specifically found the testimony of Sister Julia to be “very credible in her description of the unworkmanlike manner in which the job was done and the pre-mature wear and discoloration of the carpet.” The court went on to find that after examination of the carpet sample provided by the defendant “it is unlikely that such ‘shading’ occurred and caused so much discoloration so soon.” The court further found that there was no evidence of abnormal soiling in that the carpet looked no better after it was professionally cleaned. The court concluded that the carpet installed was unfit for the intended use that was known to Commercial Flooring. The court found that Commercial Flooring did not prove its claim for payment of the remainder of the contract price and that DSP did prove the reconventional demand for return of the amount paid excluding removal of existing carpet, removal of rubber tile at the entry, and installation of ceramic tile. The Court rendered judgment in favor of DSP in the amount of \$2,688.75, plus interest and costs. Commercial Flooring filed this timely suspensive appeal.

#### **LAW AND DISCUSSION:**

In its first Assignment of Error, Commercial Flooring contends the trial court erred in allowing evidence to be admitted that had not been produced in discovery or in the pre-trial order. Specifically, Commercial Flooring argues that the trial court erred in allowing the admission of the photographs into evidence

because they were not produced in response to discovery requests and were not turned over within the time frame dictated by the pretrial notice and order. Commercial Flooring goes on to argue that the photographs were prejudicial in that they were not dated and there was no indication as to when the photographs were taken and whether they were taken before or after cleaning the carpet.

The record reflects that when the photographs were introduced, the attorney for Commercial Flooring objected and entered continuing objections throughout the introduction of the photographs during Sister Julia's testimony. The trial court concluded that if Commercial Flooring had had the photographs earlier it would not have made a difference and that Commercial Flooring was not substantially prejudiced by the introduction of the photographs.

In its brief, Commercial Flooring focuses on the photographs contained in Exhibits Five and Six. Our review of the record indicates that Commercial Flooring's complaints regarding the photographer, the date the photographs were taken and when the photographs were taken in relation to the professional cleaning are unfounded. Sister Julia testified that she took all of the photographs herself. The photographs in Exhibit Five were taken in the summer of 2002, approximately one year after the installation of the carpet. The photographs in Exhibit Six were taken the morning after the professional cleaning.

The trial court is accorded vast discretion concerning the admission of evidence, and its decision will not be reversed on appeal absent an abuse of that discretion. Succession of Horn, 04-168 (La. App. 5 Cir. 6/29/04) 877 So.2d 1111. The record indicates that the trial court heard Commercial Flooring's arguments regarding the photographs and determined that admission of the photographs would not prejudice Commercial Flooring. We see no abuse of discretion in that ruling. On appeal, Commercial Flooring argues that had it known the photographs

would be admitted it would have called an expert to testify that the carpet was neglected, abused, and soiled. However, there is no indication in the record that Commercial Flooring asked the trial judge to hold the record open for the introduction of such testimony or that Commercial Flooring requested to proffer such evidence. Additionally, the expert's report is contained in the record. We agree with the trial court that Commercial Flooring was not prejudiced by the introduction of these photographs.

In its second Assignment of Error, Commercial Flooring contends the trial court erred in relying upon the credibility of Sister Julia "where a reasonable fact finder would not have believed her story due to inconsistency thereof." Specifically, Commercial Flooring contends that Sister Julia's testimony was unclear as to when the carpet was professionally cleaned and when the photographs were taken. Our review of Sister Julia's testimony indicates that this Assignment of Error is without merit.

Sister Julia testified that the carpet was professionally cleaned "Mardi Gras of this past year." She then answered affirmatively to the question of "Mardi Gras of 2002, February, March?" On the next page, when the pictures were introduced into evidence, DSP's attorney states that they were taken after a commercial cleaning in the spring of 2003. On cross-examination, Sister Julia testified that DPS waited to have the carpet commercially cleaned because of the pending lawsuit and that the carpets were cleaned "Mardi Gras 2003." Further, Sister Julia testified that the carpet was not combed before the pictures were taken, but it was vacuumed. Additionally, the attorney for Commercial Flooring questioned Sister Julia extensively as to whether any heavy objects had been dragged over the carpeting and what certain marks on the carpeting were.



While we note the one discrepancy in Sister Julia's testimony as to whether the carpets were professionally cleaned Mardi Gras 2002 or 2003, when her testimony is taken as a whole it is clear that the carpet was professionally cleaned Mardi Gras 2003. Sister Julia explained on direct examination that DSP wanted to have the carpet cleaned sooner, but because the problem with the shading happened "right away" DSP was afraid that Commercial Flooring would blame professional cleaning of the carpet for the altered appearance. She testified that the professional cleaning took place "Mardi Gras of this past year" and answered affirmatively to 2002. However, later in her testimony the photographs consisting of Exhibit Six were introduced as being taken after the commercial cleaning in the spring of 2003. On cross-examination Sister Julia was questioned again regarding the timing of the professional cleaning. She responded that the professional cleaning took place Mardi Gras 2003. Sister Julia then acknowledged that the report from the carpet inspection of November 2002 noted the carpet was heavily soiled; Sister Julia explained that the carpet had only been vacuumed, it had not been professionally cleaned. Thus, when Sister Julia's testimony is taken as a whole it is clear that the carpet was professionally cleaned Mardi Gras 2003.

Commercial Flooring's brief then goes on to reference water stains on the carpet. Sister Julia admitted that there are water stains on the carpet, but DSP does not blame the water stains on Commercial Flooring. Rather, the problem with the carpet is that it has faded and worn excessively. Indeed the photographs admitted into evidence clearly show that the carpet is a lighter color in the areas between the bookcases where there is foot traffic. The areas of carpet very close to the bookcases are much darker in color.

The trial judge heard all of the testimony and viewed the exhibits. The trial judge examined the carpet sample provided and concluded that it was "unlikely

that such 'shading' occurred and caused so much discoloration so soon." His judgment specifically finds the testimony of Sister Julia to be credible. Thus, it is clear that the trial judge chose to credit the testimony of Sister Julia over that of Mr. Rooney and Mr. Borges.

When the trial court's findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings. Karagiannopoulos v. State Farm Fire & Cas. Co., 94-1048 (La.App. 5 Cir. 11/10/99), 752 So.2d 202. When there are documents or objective evidence that contradicts the witness's story or the story itself is so inconsistent or implausible, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error even in a finding purportedly based upon a credibility determination. Id. When such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one witness over that of another, that finding can virtually never be manifestly erroneous or clearly wrong. Id. Our review of the record indicates that Sister Julia's testimony was not inconsistent or implausible and there were no documents or other objective evidence to contradict her testimony. Accordingly, we find that the trial court did not err in finding her testimony credible.

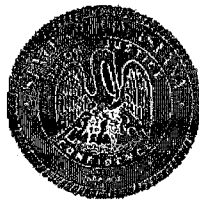
For the foregoing reasons the judgment of the trial court is affirmed. Appellant is to bear all costs of this appeal.

**AFFIRMED**

EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
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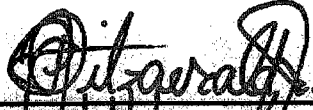
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### CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY APRIL 26, 2005 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
\_\_\_\_\_  
PETER J. FITZGERALD, JR.  
CLERK OF COURT

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