[Cite as *Low v. Ohio Historical Soc. Museum*, 2012-Ohio-6164.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Edward Low, By the Executor of the Estate of Edward Low, Dorothy K. Low,	:	
Plaintiff-Appellant,	:	No. 12AP-321
	:	(C.P.C. No. 10CVH-06-8356)
v.	:	(REGULAR CALENDAR)
Ohio Historical Society Museum,	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2012

Joel R. Rovito, for appellant.

Squire, Sanders LLP, Tara A. Aschenbrand, Traci L. Martinez, and *D. Lewis Clark, Jr.*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Edward Low ("Low"), by the executor of the estate of Edward Low, Dorothy K. Low, plaintiff-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court found in favor of the Ohio Historical Society Museum ("OHS"), plaintiff-appellee, on appellant's breach of contract claim.

{¶ 2} In 1942, Low, who died during the course of the proceedings before the trial court, found a stone tablet ("tablet") engraved by the Adena Indians while playing as a boy in Parkersburg, West Virginia. In 1971, Low contacted Dr. Raymond Baby, who was the curator of the archeology department at OHS in Columbus, Ohio, and who is also now deceased, to discuss the tablet with him. After Low met with Dr. Baby, Martha Otto, the assistant curator at OHS, and other OHS employees, OHS took possession of the tablet

and has since retained possession of it publicly displaying it continuously at its center. In 2007, Low requested the return of the tablet, claiming he had only loaned it to OHS. OHS refused to return the tablet to Low, claiming he had gifted it to OHS.

{¶ 3} On June 3, 2010, Low filed an action against OHS, asserting claims of breach of contract, breach of duty of bailee, conversion, and fraud. The trial court subsequently dismissed all of Low's claims except for the breach of contract claim. On February 21, 2012, a jury trial commenced on Low's breach of contract claim. On February 23, 2012, the jury ruled in favor of OHS. On March 12, 2012, the trial court issued a judgment in favor of OHS. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] The trial court abused its discretion in refusing to allow the testimony of a necessary witness for the Plaintiff (James Murphy) to serve as direct testimony and impeachment evidence surrounding Defendant's only witness (Martha Otto) and the main issue in question of whether or not the tablet was on loan or a gift.
>
> [II.] The trial court abused its discretion by allowing the testimony of Dr. Baby, who is deceased, to come in through the testimony of Martha Otto, Appellant's only witness.
>
> [III.] The trial court erred in not qualifying the expert as an expert witness and failing to allow the expert report as direct evidence.

{¶ 4} We address appellant's third assignment of error first, as it is dispositive of the entire appeal. Appellant argues in her third assignment of error that the trial court erred when it did not qualify her witness, Robert Converse, as an expert witness and when it failed to allow the Converse's report as direct evidence. With regard to qualifying Converse as a witness, the following took place at trial:

> [PLAINTIFF'S COUNSEL]: Your Honor, I would move to have Mr. Converse as an expert witness.
>
> THE COURT: I don't decide expertise. It's up to the jury. Unless there's an objection, you can go ahead and ask your questions, but I don't put my thumb on that scale.

> [PLAINTIFF'S COUNSEL]: Very good, thank you, Your Honor.
>
> THE COURT: You decide, ladies and gentlemen, what expertise Mr. Converse has as part of your overall evaluation of the credibility of all the witnesses.
>
> * * *
>
> [PLAINTIFF'S COUNSEL]: Your Honor, if you're going to have the jury be the finder of fact on an expert, I want to go through in detail that he's an expert on the subject if you're not going to qualify him as one.
>
> THE COURT: I think we've covered it. Move on.
>
> [PLAINTIFF'S COUNSEL]: So are you going to qualify him as an expert?
>
> THE COURT: I told you I don't qualify. It's up to the jury. You've laid a foundation for why they might find him to be an expert.

(Tr. 177-80.)

{¶ 5} However, Evid.R. 104(A) provides, in pertinent part, that "[p]reliminary questions concerning the qualification of a person to be a witness * * * shall be determined by the court." Thus, it is well established that "[p]ursuant to Evid.R. 104(A), the trial court determines whether a witness qualifies as an expert." *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶ 46, citing *State v. Hartman*, 93 Ohio St.3d 274 (2001), and *State v. Williams*, 4 Ohio St.3d 53, 58 (1983). *See also Scott v. Yates*, 71 Ohio St.3d 219, 221 (1994); *State v. Waugh*, 10th Dist. No. 07AP-619, 2008-Ohio-2289, fn. 5; *Gadberry v. Eastgate Lawn & Tractor, Inc.*, 12th Dist. No. CA2006-05-037, 2007-Ohio-2849, ¶ 19 (the trial court never made a threshold determination regarding witness's qualifications to testify as an expert witness); *Park W. Galleries, Inc. v. Global Fine Art Registry, LLC*, E.D.Mich. No. 2:08-cv-12247 (Mar. 8, 2010) ("It is undisputed that it is the Court, not the jury, who will determine whether a witness is qualified to testify as an expert"), citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993). Therefore, in the present case, it is clear that it was the trial court's,

not the jury's, duty to determine whether Converse was qualified to testify as an expert, and the trial court erred when it found that it was the jury's duty to make such determination.

{¶ 6} Having found error, the next issue is whether appellant suffered prejudice as a result of the trial court's error. *See Smith v. Flesher*, 12 Ohio St.2d 107 (1967), paragraph one of syllabus (it is elementary that an appellant, in order to secure reversal of a judgment, must not only show some error but must also show that that error was prejudicial). OHS claims that there was no prejudicial effect from the trial court's erroneous refusal to qualify Converse as an expert based upon several cases that conclude a trial court need not expressly state on the record that the witness is qualified as an expert prior to that witness offering opinion testimony. *See, e.g.*, *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 95; *State v. Horton*, 9th Dist. No. 26030, 2012-Ohio-3340; *State v. Waskelis*, 11th Dist. No. 2011-P-0035, 2012-Ohio-3030; *State v. Washington*, 1st Dist. No. C-950371 (Apr. 10, 1996); *State v. Skinner*, 2d Dist. No. 11704 (Sept. 26, 1990); and *State v. Shively*, 6th Dist. No. L-87-412 (May 19, 1989).

{¶ 7} However, the circumstances in the present case differ from those in the cases cited by OHS. In the cited cases, the courts apparently presumed the jury below considered the witness's expert testimony because the trial court was silent on the issue of expert qualification and never instructed the jury to do otherwise. Thus, the courts in the above cases found no prejudice resulted from the trial court's silence on the issue of expert qualification because the jury simply heard and considered the non-qualified expert's testimony as it would any other witness. To the contrary, in the present case, the trial court expressly instructed the jury to determine whether the witness qualified as an expert. As explained above, it was not the jury's duty to determine whether Converse qualified as an expert. Therefore, it is possible that the jury found that Converse was not qualified to be an expert and dismissed his testimony in its entirety, when the trial court might have qualified him as an expert. Under these circumstances, there is no way for this court to ascertain with certainty that prejudice occurred. Although we cannot determine for certain how the trial court treated Converse and his testimony, the fact that the jury may have committed error as a consequence of the trial court's error destroys our confidence in the jury's verdict. *See, e.g.*, *Kaffeman v. Maclin*, 150 Ohio App.3d 403, 2002-Ohio-6479 (8th

Dist.) (finding because it was impossible to assess the prejudicial effect of the trial judge's conduct on the proceedings, there is simply no way that any review of the matter could render satisfaction that justice was done); *Bambeck v. Berger*, 8th Dist. No. 89597, 2008-Ohio-3456 (same). *See also McDonald v. Burton*, 2d Dist. No. 24274, 2011-Ohio-6178, ¶ 247, citing *Kaffeman* (same). Here, the trial court should have either expressly qualified or not qualified Converse as an expert or, at least according to the authorities cited by OHS above, remained silent on the issue. Because we cannot determine whether the jury found Converse was not qualified as an expert, whether the trial court would have qualified Converse as an expert, or whether the trial court's clear error had prejudicial impact upon the jury's deliberations, we must reverse the trial court's judgment.

{¶ 8} Given that we must return the matter to the trial court for a new trial, we need not address appellant's second argument under his third assignment of error or his first and second assignments of error, as any opinion on those matters would be advisory at this juncture. Therefore, appellant's third assignment of error is sustained in part and rendered moot in part, and appellant's first and second assignments of error are rendered moot.

{¶ 9} Accordingly, appellant's third assignment of error is sustained in part and rendered moot in part, and appellant's first and second assignments of error are rendered moot. The judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings consistent with this decision.

Judgment reversed;
cause remanded.

SADLER and DORRIAN, JJ., concur.

_____