IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

July 25, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JOHN M. GERWELS	)	KNOX COUNTY
	)	03A01-9610-CV-00324
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. HAROLD WIMBERLY,
	)	JUDGE
	)	
CURT T. PHILLIPS	)	
	)	AFFIRMED IN PART; REVERSED
Defendant-Appellee	)	IN PART; and REMANDED

THOMAS A. BICKERS OF KNOXVILLE FOR APPELLANT

BEECHER A. BARTLETT, JR., and ADRIENNE L. ANDERSON OF KNOXVILLE FOR APPELLEE

OPINION

Goddard, P.J.

This is an appeal from a judgment entered by the Knox County Circuit Court in a suit arising from the construction of a private residential home. John M. Gerwels, Plaintiff-Appellant, filed suit alleging that Curt T. Phillips, Defendant-Appellee, was liable for defects in the construction of Mr. Gerwels' house, for cost overruns, and for alleged defamatory statements

concerning Mr. Gerwels. Mr. Phillips filed a counter-suit seeking monies owed for work performed.

The Trial Court granted the Defendant's motion for summary judgment on the Plaintiff's defamation claim. The parties proceeded to trial on the construction contract claims. The jury returned a verdict in favor of the Plaintiff in the amount of $20,000 and in favor of the Defendant on his counter-claim in the amount of $8000, to be paid to the suppliers who furnished materials and services for construction of the house.

The Plaintiff has raised five issues on appeal:

> I. WHETHER THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT ON PLAINTIFF'S DEFAMATION CLAIM.
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> II. WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR DIRECTED VERDICT ON PHILLIPS' COUNTERCLAIM.
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> III. WHETHER THE TRIAL COURT ERRONEOUSLY EXCLUDED THE TESTIMONY OF TOM BREAZEALE.
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> IV. WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL.
>
> V. WHETHER THE COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A DIRECTED VERDICT ON HIS BREACH OF CONTRACT CLAIM.

For the reasons stated below, the decision of the Trial Court is affirmed in part and reversed in part.

I. Facts

The Plaintiff owned improved lake front property in Loudon County where he planned to build a weekend house. After receiving bids on the building contract, the Plaintiff contracted with the Defendant to build the house. However, after submission of the original bid, the Plaintiff decided to change from building a weekend house to building a permanent residence. The Plaintiff submitted the new drawings to the Defendant for a revised bid. The facts are in dispute as to whether the parties contracted to keep the building costs below $200,000 or not. However, the written contract between the parties expressly provided:

> This contract is a "cost of construction contract" and the Owner agrees to pay the Contractor for the work described in the contract documents and shall pay the total cost of construction, which is approximately $200,000.00.

During construction of the house, the Plaintiff made some changes in the construction plans of the house. For example, the original plans were to leave the basement area as unfinished storage space. However, the Plaintiff later authorized the Defendant to perform additional work to finish the basement. Eventually, the parties began to dispute the charges for costs of construction in the invoices submitted by the Defendant to the Plaintiff for payment.

When the parties were unable to resolve their disputes, the Plaintiff mailed two identical letters, one to the Knoxville

Home Builders Association and one to the Better Business Bureau. The letters stated the following:

> This is to request your help in getting my contractor, Curt Phillips, who built my house to adequately compensate me for work not done, or improperly done. Until this is taken care of, I ask you to keep am open file on Mr. Phillips so that others will know of this unsatisfactory work. Also note that Mr. Phillips exceeded contract costs by 50% and did not tell me until January, 1991 (two weeks before completion).

The Better Business Bureau mailed a copy of the Plaintiff's letter to the Defendant requesting the Defendant to reply to the complaint. The letter stated that "the nature of the complaint and your response will be kept confidential." The Defendant responded to the complaints of the Plaintiff and then stated:

> Mr. Gerwels has a proven track record on not living to constructural obligations.[1] He has had his prior residence re-modeled and liens were placed on that residence at that time.

This statement provides the basis of the Plaintiff's defamation claim.

Soon thereafter, negotiations between the parties broke down. The Plaintiff has paid a total of $293,067.83 to the Defendant for construction of the house. Bills submitted to the Defendant by Morristown Dry Wall and Plastering Co. and landscaper Wayne Kitts, both subcontractors on the job, have not been paid. Their bills were $6643 and $1486 respectively.

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[1] The parties stipulated that the defendant meant "contractual obligations."

II. Defamation

The Trial Court granted the Defendant's motion for partial summary judgment finding that the complained of and alleged libelous words of the Defendant were true and that there was no publication of the alleged libelous words by the Defendant. It is axiomatic in Tennessee law that publication is an essential element of a libel action without which a complaint must be dismissed. Applewhite v. Memphis State University, 495 S.W.2d 190 (Tenn.1973); Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S.W.2d 255 (1929); Woods v. Helmi, 758 S.W.2d 219 (Tenn.App.1988). "Furthermore, we do not reach the matter of privilege, malice or any other question until there is a publication."

The Defendant contends that it was not a publication under Tennessee law for him to respond to the designated agents of the Plaintiff, the Better Business Bureau and the Tennessee Home Builders Association. It is undisputed that the Plaintiff requested their help in getting the Defendant "to adequately compensate me for work not done, or improperly done." As a result, the Plaintiff designated the Better Business Bureau and the Tennessee Home Builders Association as his agents in the letters to them. This information was in turn communicated to the Defendant, who received a copy of the letters. As a result, the statements made by the Defendant to the Plaintiff's designated agents are not to be considered as statements communicated or publicized to third persons.

The Plaintiff asserts that the Trial Court should not have granted summary judgment because their is evidence from which the jury could find that the statement was made with malice. However, having concluded that there was no publication and therefore no defamation, it is immaterial whether the statement was made maliciously. A malicious statement is not defamatory unless there is publication. Therefore, the Trial Court properly granted the Defendant's partial motion for summary judgment on the defamation claim. Since our determination that there was no publication of the alleged defamatory statement is dispositive of this issue, it is not necessary for us to address whether the statement was true.

III. Defendant's Counter-claim

The Plaintiff argues that the Trial Court should have granted a directed verdict on the Defendant's counter-claim to recover unpaid subcontractor's fees. The jury returned a verdict on the counter-claim in the sum of $8000 to be paid to the two contractors. The Court entered in the final judgment that the Defendant recover the sum of $8000, to be paid to Wayne Kitts in the amount of $1400 and Morristown Dry Wall and Plaster Company in the amount of $6600.

The Plaintiff argues that the Defendant did not have standing to bring the claims of the subcontractors because "Phillips can not act as a private attorney general to enforce obligations purportedly owed to others." At trial, on cross-examination, the Defendant was asked why he was asserting a claim

for the amount owed to Morristown Dry Wall and Plaster Company. The Defendant responded:

> Why, sure; he didn't pay his bill. I'm obligated to pay it if he doesn't. It was work done on his house, and I hired that gentleman, and I've got to pay him.

The Defendant was then asked whether the same thing is true with Mr. Kitts, the landscaper. The Defendant replied:

> Yes, sir. He hired him; he asked me about him; he hired him. I referred the man to him. And I feel semi-obligated that these people should be paid, you know, this is not the first or second time John Gerwels didn't pay someone on that job. And I felt obligated, yes.

A subcontractor may not assert a contractual claim against a homeowner with whom the subcontractor is not in privity. See R.S. Wilkerson v. R.T. Fant & Co., 4 Tenn.App. 259 (1926); Eastern States Electrical Contractors, Inc. v. William L. Crow Construction Co., 544 N.Y.S.2d 600 (A.D. 1 Dept., N.Y.Sup.Ct.App.Div.1989). Therefore, Morristown Dry Wall and Plastering Company does not have standing to sue Mr. Gerwels. The Defendant is the only party who can sue the Plaintiff for monies owed. As a result, the Defendant had standing to bring the suit to recover monies owed to Morristown Dry Wall and Plastering Company. The counter-claim judgment of $6400 to be paid to Morristown Dry Wall and Plastering Company is affirmed.

However, Mr. Kitts was hired by the Plaintiff himself and not by the contractor. Mr. Kitts has privity of contract with the Plaintiff and could bring suit on his own behalf to

recover monies owed. Taillie v. Chedester, 600 S.W.2d. 732 (Tenn.App.1980). Therefore, the Defendant does not have standing to sue on behalf of Mr. Kitts. The counter-claim judgment of $1400 to be paid to Mr. Kitts is reversed and dismissed.

IV. Expert Testimony

The Plaintiff claims that the Trial court erred in not allowing Tom Breazeale, the Plaintiff's insurance agent for his homeowner policy, to testify as to the replacement cost of the house. The Plaintiff sought to have Mr. Breazeale testify that the replacement cost of the house is $196,600. However, in a hearing outside the presence of the jury, Mr. Breazeale testified that the figure represented the value that the insurance companies field underwriter placed on the house. According to Mr. Breazeale, field underwriters are specialists who make inspections of buildings and then put a value on the structure.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c) of the Tennessee Rules of Evidence. Since the opinion of the filed underwriter is hearsay, it is admissible only if it falls into one of the hearsay exceptions. The Plaintiff claims that Mr. Breazeale is an expert pursuant to Rule 702 of the Tennessee Rules of Evidence. As a result, the field underwriter's testimony is admissible as data relied upon by Mr. Breazeale in forming his opinion as to the value of the house pursuant to Rule 703 of the Tennessee Rules of Evidence.

However, the Plaintiff was required to establish Mr. Breazeale as an expert to the satisfaction of the Trial Court. This Court reviews the trial court's decision as to whether a person is qualified as an expert under an abuse of discretion standard. State v. Anderson, 880 S.W.2d. 720 (Tenn.Crim.App. 1994). The Trial Court found that Mr. Breazeale was not an expert competent to testify as to the value of the Plaintiff's house because he was merely repeating the opinion of the field writer as to the value of the house and was not providing his expert opinion as to the value of the house. Since the Plaintiff did not adequately establish that Mr. Breazeale was even qualified to give an expert opinion as to the value of the house, we find no abuse of discretion by the Trial Court.[2]

V. Motion for a New Trial

The Plaintiff contends that the Trial Court erred in denying the Plaintiff's motion for a new trial because the jury's verdict is inconsistent with the evidence of the Plaintiff's claim for reimbursement for overcharges and that the jury's verdict is inconsistent with the evidence on the Plaintiff's claim for damages for defects in construction. The rule of an appellate court in reviewing a jury verdict is well defined in the law. "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Rule 13(d) of the Tennessee Rules of Appellate

[2] We also note that it is within the sound discretion of the trial court to admit evidence under Rule 703 that is not otherwise admissible. "If the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction." Rule 703, Tennessee Rules of Evidence, Advisory Commission Comments.

Procedure. This Court's review does not include weighing the evidence or deciding where the preponderance lies, but merely to determine whether there is material evidence to support the verdict. Budiselich v. Rigsby, 639 S.W.2d 663 (Tenn.App.1982). When a jury verdict is approved by a trial court, the appellate court does not weigh the evidence, but rather determines whether there is material evidence to support the jury's verdict. Given v. Low, 661 S.W.2d. 687 (Tenn.App.1983); Loftis v. Finch, 491 S.W.2d. 370 (Tenn.App.1972). We find that there is material evidence to support the jury's verdict. Consequently, this contention of the Plaintiff is without merit.

VI. Motion for Directed Verdict

The Plaintiff contends that the Trial Court erred in not directing a verdict on his breach of contract claim. In light of the jury finding for the Plaintiff on his breach of contract claim, we find that the Plaintiff's position is moot.

The Plaintiff also argues that the jury should have assessed damages at $90,000, the cost of replacing defects in the house. The Plaintiff contends that the proper measure of damages in a breach of a construction contract to build a home or personal residence is the cost of making the structure comply with the specifications. In Edenfiled v. Woodlawn Manor, Inc., 62 Tenn.App. 280, 462 S.W.2d 237 (1970), the Court held that the proper measure of damages for defects in the construction of a residential building or home is the cost of repairing the building to make it meet the plans or specifications, rather than the difference in value of the home as contracted or as

constructed.[3] Thus, the Plaintiff argues that since the only proof as to the cost of reconstruction is the $90,000 figure testified to by his expert, he is entitled to a $90,000 judgment.

This Court is not willing to accept the Plaintiff's argument that expert testimony concerning the measure of damages is conclusive upon a jury. The Supreme Court has stated:

> [T]his opinion testimony -- although not contradicted by an opposing contrary opinion -- is not conclusive. Expert opinions, at least when dealing with highly complicated and specific matters, are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are purely advisory in character and the trier of facts may place whatever weight it chooses upon such testimony and may reject it, if it finds that it is inconsistent with the facts in the case or otherwise unreasonable. Even in those instances in which no opposing expert evidence is offered, the trier of facts is still bound to decide the issue upon its own fair judgment, assisted by the expert testimony. Act-O-Lane Gas Service Co. v. Hall, 35 Tenn.App. 500, 248 S.W.2d 398 (1951). In our view, this is especially true when the opinion, as in this case, amounts to no more than prediction and speculation.

Gibson v. Ferguson, 562 S.W.2d. 188, 189 (Tenn.1976). The general rule in this State is that expert testimony is not conclusive unless it is of such a technical or scientific nature that laymen may be supposed to have insufficient knowledge upon which to base a correct judgment. England v. Burns Stone Co. Inc., 874 S.W.2d 32 (Tenn.App.1993). The expert in this case does not fall into this category. Therefore, we affirm the jury's verdict of $20,000.

VII. Conclusion

[3] It is undisputed that the jury was properly instructed as to the law.

For the foregoing reasons, we affirm the Trial Court in all respects except that we reverse the $1400 judgment to be paid to Mr. Kitts. The cause is remanded for collection of the judgments and costs below. Costs of Appeal are adjudged one-half against the Plaintiff and one-half against the Defendant.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.