IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 16, 1996

Cecil W. Crowson
Appellate Court Clerk

SHOLODGE, INC.	)	HAMILTON COUNTY
	)	03A01-9605-CV-00180
Plaintiff-Appellant	)	
	)	
	)	
v.	)	HON. ROBERT M. SUMMITT,
	)	JUDGE
	)	
W. MIKE GARY, d/b/a	)	
SHONEY'S INN OF CHATTANOOGA	)	
	)	
Defendant-Appellee	)	VACATED AND REMANDED

EUGENE N. BULSO, JR., OF NASHVILLE FOR APPELLANT

ARVIN H. REINGOLD OF CHATTANOOGA FOR APPELLEE

OPINION

Goddard, P.J.

This is an appeal from a judgment entered by the Hamilton County Circuit Court in a suit arising from a dispute over a 30-year hotel management contract which was terminated three years into its term.

Plaintiff-Appellant ShoLodge, Inc., filed suit against Defendant-Appellee W. Mike Gary as owner of the Shoney's Inn located in Chattanooga. Although the Plaintiff offered proof through expert testimony that the present value of the remaining 27 years of the contract was $544,178.00, the jury returned a verdict of only $75,000. The Trial Court denied the Plaintiff's motion to alter or amend the judgment under Rule 59.04 of the Tennessee Rules of Civil Procedure or, in the alternative, for a new trial on the issue of damages, from which the Plaintiff appeals. The Trial Court awarded the Plaintiff $2,081.98 in discretionary costs from which the Defendant appeals.

The facts surrounding this case are as follows. The Defendant reacquired title to the property and hotel in question in 1989 after the previous buyer defaulted on a loan. After unsuccessful attempts at selling the property with the old hotel on it, the Defendant began negotiations with Leon Moore in 1990 for construction of the hotel and for its subsequent management. At that time Mr. Moore was President of Gulf Coast Management, a predecessor of the Plaintiff. Mr. Moore and the Defendant agreed that a portion of the old hotel should be torn down and reconstructed and that the remainder of the hotel should be gutted. The Defendant, who was retired, stated his intention was to reconstruct the hotel in order to increase its marketability for resale. Mr. Moore and the Defendant agreed that the Plaintiff would manage the hotel upon its completion in return

for five percent of the room revenues. However, no management agreement was signed at that time.

During construction of the hotel, Mr. Moore informed the Defendant that the furniture, fixtures, and equipment were not covered under the real estate mortgage and that additional financing through a separate leasing agreement would be necessary. Bobby Marlowe, Chief Financial Officer of the Plaintiff, was responsible for finding a leasing company to obtain the necessary financing for the interior of the hotel. The leasing company selected by Mr. Marlowe required a management agreement as a condition for the approval of the lease.

The Plaintiff managed several other Shoney's Inns, each having similar management agreements. Mr. Marlowe informed the Defendant of the management agreement requirement. Upon obtaining the Defendant's approval, Mr. Marlowe selected an existing management agreement from one of the Plaintiff's other Shoney's Inns agreements, changed the relevant terms, and sent the agreement to the Defendant. Although the parties did not negotiate the length of the agreement, the agreement selected by Mr. Marlowe was for a term of 30 years. While the parties had earlier agreed to base compensation on five percent of the monthly room rental, the agreement selected by Mr. Marlowe based compensation on five percent of the monthly gross cash receipts.

The Defendant placed a "Post-It" note on the front of the document stating, "Bob Marlowe, I do not agree with some of the terms of this but Leon says I can work it out with him." The Defendant signed both the management agreement and the "Post-It" note and returned them to Mr. Marlowe. Mr. Marlowe received the management agreement accompanied by the Defendant's attached note.

The renovated hotel opened in December 1990 under the Plaintiff's management. The Plaintiff continued to manage the hotel for the next three years. The annual total revenues for that period were $874,788 in 1991, $957,538 in 1992, and $1,096,872 in 1993. The annual room revenues for that period were $860,479 in 1991, $938,786 in 1992, and $1,079,592 in 1993. The hotel operated for losses of $135,986 and $61,207, respectively, in the first two years. The hotel generated a profit of $26,443 in the third year under the Plaintiff's management.[1]

During this three-year period, the parties did not follow the terms of the written agreement requiring the Plaintiff to be paid a percentage of the total revenue, but instead followed the earlier verbal agreement requiring that the payment

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[1] The figures for the period from the termination of the Plaintiff's management to the commencement of this action are:

	1994 (12 months)	1995 (7 months)
Total Revenue	$1,127,811	$637,486
Room Revenue	1,108,703	628,068
Profit	89,028	55,629
Plaintiff's lost 5 percent management fee (based on room revenue)	55,435	31,403

be based on a percentage of the room revenues. Responding to the Defendant's concern over losses in the first two years, the parties deviated again from the written agreement in 1992 by allowing the Defendant to pay the Plaintiff at yearly intervals instead of monthly intervals. Additionally, the Plaintiff agreed to waive the fee for the year if the hotel was not profitable. On December 16, 1993, the Defendant sent the Plaintiff a letter terminating the Plaintiff's management of the hotel.

The Plaintiff filed its complaint on September 6, 1994. On January 23, 1995, the Plaintiff filed a motion for partial summary judgment on the issue of the contractual liability of the Defendant. In that motion, it contended that the only issue which needed to be addressed in trial was the amount of damages to which it was entitled. This motion was denied by the Trial Court on March 16, 1995.[2]

A jury trial was held on November 30, 1995. The Plaintiff introduced proof of damages at trial through the expert opinion of Kelley D. Slay. Mr. Slay projected the future revenues of the Defendant's hotel for the 27 years remaining in the management agreement and used this number to determine the Plaintiff's projected management fee for this period. Discounting this figure to present value, Mr. Slay determined that the total loss sustained by the Plaintiff for the

[2] It is interesting to note that, while the essence this appeal is that the damages are conclusive, the Plaintiff took the opposite view in its motion.

Defendant's cancellation of the management agreement was $544,178. Mr. Slay's computations were based on the terms of the management agreement with the exception that the fee was calculated based not on total revenues as required by the management agreement, but on room revenues as consistent with the parties' earlier verbal agreement. Mr. Slay testified that this alteration in the calculation was made to reflect the parties' actual practice during the three-year period prior to the Defendant's cancellation of the management agreement. Mr. Slay testified that the 30-year term of the contract was atypical for management agreements of this type. Mr. Slay further testified that a downturn of the location of the hotel would affect the property and that he was not aware of an office complex being foreclosed across the street from the hotel. Mr. Slay was the only witness to testify as to damages at trial.

At the close of the parties' proof, the Judge gave the following instruction concerning contracts:

> The claimed agreement in this case is in writing if you believe the plaintiff. It is partly in writing -- well, it's verbal if you believe the defendant.
>
> . . . .
>
> If you find the handwritten note is a part of the document entitled Management Agreement, where there is a conflict between written and typewritten provisions of a document, the written provision will prevail because a handwritten provision is a more deliberate and immediate expression of the intentions of the parties.
>
> . . . .

> . . . So if you find that the contract was good without the addition, then you will take up damages. If you find that the addition had something to do with this or that you find that there were verbal contracts, then you must take that up next. And if you do that, then you will act accordingly with your verdict.

Counsel for both parties objected to the jury instruction concerning the issue of damages for verbal contracts. While the jury was deliberating, counsel for the parties agreed that an additional instruction should be read in the event the jury had a question pertaining to the issue of contracts. After the jury returned, requesting to be again instructed about the effect of written changes to a contract, the Court conferred with counsel, and then charged as follows:

> All right. Members of the jury, in regard to the question, I will repeat a charge that I gave you. If you find the handwritten note is a part of the document entitled management agreement and where there is a conflict between handwritten and typewritten provisions of a document, the handwritten provision will prevail because a handwritten provision is a more deliberate and immediate expression of the intentions of the parties.
>
> Now, I'm going to give you the contentions of the parties which I gave you earlier and add something to it. The plaintiff contends that the September 20th, 1990 management agreement signed by the parties is a valid and enforceable contract. The defendant contends that the -- under all the circumstances the signed note attached to the face of the agreement made it clear that he did not assent to all of its terms and it was, therefore, not a binding contract.
>
> This is what I'm adding. If you find from all the evidence that the plaintiff's contentions are valid, your verdict will be for the plaintiff. If you find from all the evidence that the defendant's contentions are valid, your verdict will be for the defendant.

At the conclusion of the new charge, a juror asked the Court if it was possible to have a copy of the instructions. The Court declined, stating that was not allowed under Tennessee law. As already noted, the jury returned a verdict in the amount of $75,000 in favor of the Plaintiff.

The Plaintiff filed a motion for discretionary cost and to alter or amend the judgment, or, in the alternative, for a new trial solely on the issue of damages. The Trial Court denied the Plaintiff's requests to alter or amend the judgment and for a new trial, but awarded the Plaintiff $2081.98 in discretionary costs.

The following issues, which we restate, are presented to this Court for appeal by the Plaintiff:

> I. Whether the Trial Court erred in denying the Plaintiff's motion to alter or amend the jury's award.
>
> II. Whether the Trial Court erred in denying the Plaintiff's motion in the alternative for a new trial limited to the issue of damages.

Additionally, the Defendant submits the following issues on appeal, which we also restate:

> I. Whether the trial courts or the appellate courts have the right to alter a damage award returned by a jury that conflicts with an expert's projections as to future damages.
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> II. If the jury verdict cannot be upheld and a new trial is mandated, whether the case should be remanded on all issues.

III. Whether the Trial Court abused its discretion in awarding discretionary costs for items that were not necessary and not used in trial.

For the reasons hereinafter set out, we vacate the judgment entered and remand the case for a new trial.

The Plaintiff argues that since the jury found the Defendant liable, it was required to award the damages projected by the Plaintiff's expert. The Plaintiff, relying on Spence v. Allstate Ins. Co., 883 S.W.2d 586 (Tenn. 1994), argues that the Trial Court should have modified the jury's verdict because the damages awarded conflict with the undisputed and uncontradicted evidence. The evidence concerning damages is undisputed, the Plaintiff contends, because the jury may not ignore the unimpeached, uncontradicted testimony of an expert concerning projected future damages since those projections and the application of discount rates are beyond the jury's reliable knowledge. Supporting this proposition, the Plaintiff relies on Hudson v. Capps, 651 S.W.2d 243 (Tenn. App. 1983); Reserve Life Ins. Co. v. Whittemore, 59 Tenn. App. 495, 442 S.W.2d 266 (1969); and Hill v. King, an unreported opinion of this Court filed in Nashville on October 8, 1985.

The Plaintiff's reliance on Spence is misplaced. The Tennessee Supreme Court in Spence affirmed the trial court's decision to alter the jury's verdict. Thus, the Court in Spence held that a trial court has the authority under Rule 59.04 of the

Tennessee Rules of Civil Procedure to "modify a judgment when the damages awarded by the jury conflict with the undisputed facts concerning damages." However, Spence does not hold that the trial court is required to or "should" modify an award as the Plaintiff contends, or that the appellate courts can modify the judgment on appeal.

Furthermore, this Court is not willing to accept the Plaintiff's argument that expert testimony concerning projected damages is conclusive upon a jury. The Supreme Court of Tennessee 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, 249 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, 190 (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 testimony in this case does not fall into this category. Testimony concerning the prediction of future damages is just that, a prediction. Predictions are inherently speculative and are not binding on the trier of fact. Therefore, we hold that the Trial Court did not err in denying the Plaintiff's motion to alter or amend the jury's verdict.

The record reveals that the jury was confused about the instruction concerning contracts. This is indicated by the jury's request for a clarification of the original instruction regarding contracts and their subsequent request for a written copy upon hearing the amended instruction. Additionally, the Trial Court's amended instruction was not consistent with its previous instruction. The original instruction allowed the jury to find that the parties had agreed to a written contract, a written contract modified by the handwritten note attached by the Defendant, or a verbal contract. While the instruction clearly required the jury to decide the issue of damages if it found that the parties had entered into the written contract, the instructions were unclear in regard to the other two options. However, the amended instruction required the issue of damages to be addressed only if the jury found that a written contract existed. If the Trial Court intended the second instruction to replace the first, the issue of damages concerning a modified written contract was eliminated along with any damages for a verbal contract.

In light of the foregoing and the further fact that the jury was confused about the two inconsistent jury instructions, we deem it appropriate to remand the case for a new trial on all the issues. First, appellate courts cannot consider the issue of whether the jury verdict was contrary to the weight and preponderance of the evidence. Rule 13(d), Tennessee Rules of Appellate Procedure. Shelby County v. Barden, 527 S.W.2d 124 (Tenn. 1975); England v. Burns Stone Co. Inc., supra. Second, it has long been the rule in this State that appellate courts are to remand a case for a new trial on all issues where, "from the inadequacy of damages awarded, in view of the evidence, or the conflict of evidence upon the question of liability, or from other circumstances, plain inference may be drawn that the verdict is the result of a compromise." W.T. Grant Co. v. Tanner, 170 Tenn. 451, 95 S.W.2d 926, (1936). A decision to remand on all issues is further supported where the inadequacy of the verdict allegedly resulted from an erroneous jury charge by the trial court or indicates that the jury had doubts as to a defendant's liability. Acuff v. Vinsant, 59 Tenn. App. 727, 443 S.W.2d 669 (1969). All of these factors are present in this case.

For the foregoing reasons, the judgment of the Trial Court is vacated, and the cause remanded for a new trial on all issues. Costs of appeal are adjudged one-half against the Defendant, and one-half against the Plaintiff and its surety.

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Houston M. Goddard, P.J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.