197 P.3d 904 (Kan.App. 2008)

DAVIS TREE CARE, Appellee,

v.

Ron SEXTON, Appellant.

No. 98,718.

Court of Appeals of Kansas.

December 19, 2008

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Appeal from Johnson District Court; Thomas E. Foster, Judge.

Frederick K. Starrett, Carrie E. Josserand, and Jehan Kamil, of Lathrop & Gage, L.C., of Overland Park, for appellant.

Brandon D. Mizner, Samuel G. MacRoberts, and Jessica Bernard, of Ensz & Jester, P.C., of Kansas City, Missouri, for appellee.

Before MALONE, P.J., ELLIOTT and MARQUARDT, JJ.

MEMORANDUM OPINION

PER CURIAM.

Davis Tree Care (Davis Tree) sued Ron Sexton for breach of contract and unjust enrichment, arising from tree trimming services at Sexton's residence. Sexton counterclaimed under the Kansas Consumer Protection Act (KCPA), alleging deceptive practices and unconscionable acts.

The jury found against Davis Tree on its breach of contract claim, but it awarded Davis Tree $6,500 on the unjust enrichment claim. The jury also found against Sexton as to deceptive practices. And the trial court ruled against Sexton as to unconscionable acts. Sexton appeals only with respect to the KCPA counterclaims; he does not appeal the $6,500 unjust enrichment award in favor of Davis Tree. We affirm.

Sexton states the standard of review to be whether there is substantial competent evidence to support the jury's findings that Davis Tree did not engage in deceptive practices. When a verdict is challenged as being contrary to the evidence, we do not reweigh the evidence or pass on the credibility of witnesses. If the evidence, viewed in the light most favorable to the party prevailing at trial, supports the verdict, we do not intervene to disturb that verdict. See *City of Mission Hills v. Sexton,* 284 Kan. 414, 422, 160 P.3d 812 (2007).

The question on appeal is not whether there was evidence to support Sexton's claims, but whether there was evidence to support the jury's findings *against* Sexton's claims. See *Ray v. Ponca/Universal Holdings, Inc.,* 22 Kan.App.2d 47, 50, 913 P.2d 209 (1995).

When dealing with conflicting evidence and factual disputes, as is the case here, we accept as true the evidence and inferences which support or tend to support the jury's findings and verdict and we disregard conflicting evidence and inferences which could have supported different or contrary findings. See *Calver v. Hinson,* 267 Kan. 369, 375, 982 P.2d 970 (1999).

Under K.S.A. 50-626(b)(2)-(3) of the KCPA, a supplier shall not engage in deceptive acts or practices, including the willful use in a misrepresentation of " exaggeration, falsehood, innuendo or ambiguity as to a material fact," the willful failure to state a material fact, or the willful concealment of a material fact. Such practices are violations regardless of whether the consumer has, in fact, been misled.

" Material fact" is not defined in the statute, but it has been defined in case law as ' " one to which a reasonable person would attach importance in determining his or her choice of action in the transaction involved." ' *York v. InTrustBank, N.A.,* 265 Kan. 271, 290, 962 P.2d 405 (1998).

Here, Sexton argues that Davis Tree misrepresented the price of its services and the amount of work it intended to perform on Sexton's property, that these were material facts, and that misrepresenting them was a violation of the KCPA. The jury found against Sexton as to the claims of " making willful misrepresentation of a material fact" and " willfully concealing a material fact."

Jeff Davis of Davis Tree testified he had given Sexton an invoice for the 2002 job listing the charges at $1,200 per day. Though his testimony does not clearly show whether he repeated that price to Sexton before beginning the 2003 job, it does show he believed the two had discussed price and that he (Davis) believed Sexton knew the price for the 2003 job would be the same-$1,200 per day.

Sexton denied he received or saw the 2002 invoice and denied the 2002 job was priced on a per day basis, but he admitted he had paid the same amount as was

shown on the invoice.

The parties agree the work was intended to include removing two trees and removing an oak tree branch. Sexton testified he did not ask for anything else. Davis testified Sexton also wanted some general trimming and that Sexton came out from time to time and pointed out additional work he wanted done. Clark-a contractor helping Davis Tree on the project-corroborated Sexton made additional requests.

Sexton continued by suggesting there was no need for general trimming because that was what Davis Tree had done the year before.

Frankly, the parties at trial agreed on very little. And to state the testimony of the three witnesses was dramatically conflicting is an understatement.

Considered in the light most favorable to Davis Tree, as we must, the evidence supports the inference that Sexton knew the price, or at least that Jeff Davis believed Sexton knew the price, and the inference Sexton requested additional trimming services. That is sufficient for the jury to find Davis Tree did not willfully conceal or misrepresent the price or scope of the work.

Would the evidence also support contrary inferences? Yes, but that is simply not the question which we are called upon to decide. Further, because there was little evidence on the disputed points other than the testimony of the three witnesses, the jury's decision must have been based heavily on the credibility of the witnesses. And on appeal, we do not reweigh the evidence or facts on the credibility issue. See City of Mission Hills, 284 Kan. at 422, 160 P.3d 812.

Clearly, the jury carefully considered the intent requirement because during deliberations it requested a definition of the word " willful." The word is not statutorily defined in the KCPA, so the trial court, with agreement of counsel, provided the definition of " willful conduct" from PIK Civ. 4th 103.04: " An act performed with a designed purpose or intent on the part of a person to do wrong or to cause an injury to another is a willful act."

The jury's verdict will not be disturbed.

Sexton also claims the trial court erred in finding Davis Tree did not commit unconscionable acts in violation of the KCPA.

Generally, our function is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether those findings are sufficient to support the trial court's conclusions of law. And our appellate review of conclusions of law is unlimited. *Owen Lumber Co. v. Chartrand,* 283 Kan. 911, 915-16, 157 P.3d 1109 (2007).

But because KCPA cases are so fact sensitive, this unlimited review is tempered in KCPA cases: The " determination of unconscionability ultimately depends on the facts in a given case. Thus, to a great extent, the determination is left to the sound discretion of the trial court to be determined on the peculiar circumstances of each case." *State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 249, 62 P.3d 653 (2003).

Sexton's reliance on *DVM Enterprises* for an " unlimited review" standard is misplaced. See *Ed Bozarth Chevrolet, Inc. v. Black,* 32 Kan.App.2d 874, 885, 96 P.3d 272, *rev. denied* 277 Kan. 923 (2003) (observing that *DVM Enterprises* resolved conflicting precedent as to discretion given to trial court). *Ed Bozarth* also applies the usual abuse of discretion standard: Judicial discretion is abused only when no reasonable person would take the view adopted by the trial court. 32 Kan.App.2d at 885, 96 P.3d 272.

And with respect to the trial court's factual findings on this issue, ' " the determination of unconscionability involves not only a review of the written documents but also consideration of the witness testimony as to actions surrounding the transaction. We have long held that the credibility of witnesses will not be reweighed on appeal.' [Citations omitted.]" *DVM Enterprises,* 275 Kan. at 249, 62 P.3d 653.

This rule is of particular importance in the present case because almost all of the evidence in this case is witness testimony.

K.S.A. 50-627 prohibits a supplier from engaging in an unconscionable act in connection with a consumer transaction. And in determining whether an act is unconscionable, K.S.A. 60-627(b) directs the trial court to consider a nonexclusive list of circumstances " which the supplier knew or had reason to know."

At trial, Sexton argued three separate violations of the KCPA under the following provisions of K.S.A. 50-627:

" (b) The unconscionability of an act or practice is a question for the court. In determining whether an act or practice is unconscionable, the court shall consider circumstances of which the supplier knew or had reason to know, such as, but not limited to the following that:

....

(2) when the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers;

(3) the consumer was unable to receive a material benefit from the subject of the transaction;

....

(6) the supplier made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment."

On appeal, Sexton does not address K.S.A. 50-627(b)(6) in his brief. Issues not briefed are deemed abandoned. *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008).

In support of his K.S.A. 60-627(b)(2) claim at trial, Sexton relied primarily on the invoice, claiming it lacked documentation. On appeal, Sexton cites to the difference between the Sexton invoice and the invoices for other Davis Tree customers which differed both in amounts charged and in how specifically the tasks were described. He also claims a significant cost-price disparity or excessive price.

Davis Tree, in response, cites the extensive equipment and complex procedures required to trim the large number of trees on the Sexton property over the claimed 14 1/2 days of work.

Based on the conflicting testimony, the trial judge found and concluded:

" I don't know what the appropriate rate would be but just looking at 1200 a day for three people and the equipment, the Court ... does find that it has not been established by a preponderance of the evidence that the price was grossly exceeding the value of what was being provided."

In essence, the trial court found that Sexton had not sustained his burden of proof. This is a negative finding of fact, which we will not disturb on appeal absent an arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, or prejudice-none of which exists here.

The trial court also found that Davis Tree's failure to prepare specific proposals was " a bad way to run a business," and " more of a poor business that was run by Mr. Davis and not an unconscionable act or an intentional misleading business. Just bad business practices."

The trial court found there were three people working, using numerous machines and at least two of the people were climbing trees with their gear. These findings are supported by the testimony of Davis and Clark. Further, Sexton admitted he saw people working and saw at least some of the equipment.

The trial court's findings with respect to the K.S.A. 50-627(b)(2) claim are supported by the evidence and will not be disturbed.

At trial, in support of this claim that he did not receive a material benefit under 50-627(b)(3), Sexton argued the work Davis Tree claimed to have done was the same as done the previous year and, therefore, unnecessary, or that Davis Tree charged for work not done, and that Sexton did not receive the benefit of the full $17,400 charged. On appeal, Sexton seems to focus on the unnecessary work argument.

The jury did not order Sexton to pay the full $17,400 charged. The jury's verdict against Sexton was for $6,500. That verdict is not challenged on appeal.

Davis Tree pointed out Sexton admitted there were over 60 trees on his property. Forty-six of those trees were big enough they had to be climbed, a complex and dangerous procedure. Davis Tree also cited the project required three workers, a 40-foot bucket lift/cherry picker, a chipper truck, a chipper, a strip guide, various ropes, safety ladders, and chain saws.

Based on the conflicting testimony, the trial court found the 2002 work was to clean up storm damage, that there are " a lot of different kinds of tree trimming that can occur," and that " cleaning up the broken limbs is not necessarily the same thing as clearing out every single dead limb on a tree." The trial court also found there " were services provided [in 2003] that were in addition to what was done in 2002."

The trial court addressed the dispute about the amount of work done only when discussing the 50-627(b)(6) claim, which has been abandoned on appeal.

The evidence to support the trial court's findings is almost completely contained in the conflicting witness testimony, where the credibility of witnesses is left to the finder of fact.

Although Davis agreed some of the same tasks were performed in both 2002 and 2003, he did not agree the jobs were essentially identical. For example, Davis testified they did more the second time. In 2002, the " main emphasis ... was to get the broken stuff resulting from the ice storm. In 2003, they did " finer pruning" and " went up in every tree ... where in 2002 I don't believe we did.... The amount of work done in 2003 was much greater."

In ruling Davis Tree had not committed an unconscionable act, the trial court found there was little evidence to show what the value of the work actually should be, but it considered the evidence of the number of people and amount of equipment involved to conclude $1,200 a day was not excessive and, therefore, not unconscionable.

We cannot say that no reasonable person would agree with that ruling. See *DVM Enterprises*, 275 Kan. at 249, 62 P.3d 653. The trial court's ruling that Sexton received a material benefit will not be disturbed.

Affirmed.