IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

CONTINENTAL INSURANCE COMPANY, Subrogee of Entertainment Technical Services, Inc.,

Plaintiff/Appellee,

vs.

M. T. GOSSETT,

Defendant/Appellant.

Davidson Circuit No. 92C-970
C.A. No. 01A01-9507-CV-00298

Hon. Barbara N. Haynes, Judge

J. MATTHEW POWERS, Leitner, Warner, Moffitt, Williams, Dooley, Carpenter, & Napolitan, Nashville,
Attorneys for Plaintiff/Appellee

RUDICK J. MURPHY, II, Blackard & Murphy, Nashville,
Attorneys for Defendant/Appellant

AFFIRMED IN PART AND REVERSED IN PART

Opinion Filed:

TOMLIN, Sr. J.

Continental Insurance Company (?plaintiff") as subrogee of Entertainment Technical Services, Inc. (?Entertainment" or ?insured") filed suit in the Circuit Court of Davidson County against M.T. Gossett (?defendant") for damages sustained as a result of defendant's negligence. Following a bench trial, the trial court awarded plaintiff damages in the amount of $11,308.09 plus attorney's fees in the amount of $2,500.00. Defendant presents three issues for review on appeal: (1) whether the evidence preponderates against the judgment of the trial court that plaintiff was entitled to recover damages from defendant; (2) whether the trial court erred in awarding plaintiff attorney's fees; and (3) whether the trial court erred in allowing plaintiff's first witness to remain in court as its representative following his testimony. For the reasons hereinafter stated, we reverse the action of the court in awarding plaintiff attorney fees and otherwise affirm.

In September 1983, Richard Dooley, individually and d/b/a Interstate Theatrical Lighting and Supply (?Interstate"), entered into a written lease agreement with defendant for certain space in a building located at 1203 Church Street in Nashville. Thereafter, Interstate went into possession of the leased premises. Subsequently, Interstate entered into a written sublease for a portion of these premises with Mark McNally, d/b/a Entertainment. This sublease became effective on October 1, 1989.

On or about November 9, 1990 and again on or about December 26, 1990, the roof of defendant's building developed leaks during rainstorms that permitted water to enter the premises and damage Entertainment's personal property. Pursuant to a contract of insurance between plaintiff and Entertainment, plaintiff paid Entertainment the sum of $7,152.38 for the damages Entertainment suffered in November 1990 and the sum of $4,656.09 for Entertainment's damages in December 1990. Thereafter, plaintiff brought this action as subrogee of Entertainment against the defendant alleging negligence because (1) defendant knew or should have known that the roof was in bad repair and failed to warn Entertainment, and (2) defendant negligently repaired the roof, resulting in damage to Entertainment's property.

I. The Judgment of the Trial Court.

Although defendant characterizes his first issue as whether the court erred in giving plaintiff a judgment against him, which, as defendant points out, is substantially broad and fails to comply with T.R.A.P. 27(a)(4), to give defendant the benefit of the doubt we have characterized this issue as whether the evidence preponderates against the judgment of the trial court. Our scope of review on appeal is de novo upon the record of the trial court. Findings of fact by the court below come to this court with a presumption of correctness, and unless we find that

the evidence preponderates against these findings, we must affirm, absent error of law. T.R.A.P. 13(d). Because the trial court made no findings of fact, there is nothing in this record upon which the presumption of correctness contained in T.R.A.P. 13(d) can attach. See Kelly v. Kelly, 679 S.W.2d 458, 460 (Tenn. App. 1984). We will therefore proceed to review the record in this case de novo.

We state at the outset that because this is a judgment from a non-jury trial that appears to hinge on the credibility of witnesses below, it will not be reversed on appeal unless there is clear, concrete, and convincing evidence to the contrary. Tennessee Valley Kaolin Corp. v. Perry, 526 S.W.2d 488, 490 (Tenn. App. 1974).

Before considering the proof surrounding the defective roof and the damage caused by the leaks, we must first deal with the matter of defendant's knowledge of the sublease between Entertainment and Interstate. The original lease between Interstate and defendant contains the following language pertaining to the maintenance of the premises:

> ?Lessee [Interstate] agrees to keep the leased property in good repair at Lessee's cost accepting that Lessor [Gossett] shall be responsible for repair of the roof . . . upon notice of any defect therein by Lessee."

Mark McNally, president of Entertainment, testified that he was a long-time friend of Richard Dooley, who owned and operated Interstate, and that they often worked on the same type of jobs. McNally testified that both he and Dooley discussed the sublease with defendant before they signed it, and that defendant did not express any opposition to Entertainment subleasing the premises. McNally stated that he even showed defendant a copy of the sublease.

McNally testified he redecorated and refurbished the subleased premises

prior to moving in. On or about November 9, 1990, the ceiling in the storage area of the building collapsed during a rainstorm and water leaked in, causing damages to personal property in Entertainment's possession. McNally told defendant about the leak after its occurrence. McNally stated that at the time he subleased from Interstate, he knew there had been leaks in the roof, but not in the parts of the building that he subleased from Interstate. He stated that that was why he leased this particular part of the building.

McNally said that the second loss occurred on or about December 26 of the same year. On that occasion water leaked all over the office where the ceiling had caved in. Computers in the office were also damaged. McNally stated that he had a conversation with defendant after the first loss, and that the defendant assured him that the roof would be fixed. McNally stated that another reason that the defendant should have realized that he was subleasing the building was that he did some personal repair work on some electronics for defendant. McNally stated that the damage he sustained was substantially in excess of his insurance coverage, as he only had minimum coverage, and that he moved out of the premises after the second loss.

Richard Dooley testified that there had been prior leaks over the previous eight years in other places of the building, and that he had complained to defendant, who would kid him about buckets being on the floor to collect the leaking water. Dooley stated that defendant brought in people to repair the roof, but they never stopped the leaks. Dooley also corroborated McNally's testimony to the effect that both talked to the defendant about the sublease between Interstate and Entertainment. Dooley also confirmed that Entertainment hung a sign inside the building indicating their presence there.

Defendant, called by plaintiff as a hostile witness, testified that he thought

McNally was an employee of Interstate. He stated he did not recall seeing Entertainment's sign and did not recall asking McNally to do repair work for him.

When called to testify on his own behalf, defendant denied ever talking to either McNally or Dooley about Interstate subletting any space to Entertainment. He further testified that he never recalled seeing Entertainment's sign in the building. In describing the November 1990 leak, defendant stated there were a few drops of water on McNally's desk and a little on the floor. According to McNally's testimony and the proof of loss statement he filed, the November leak occurred back in the warehouse area, while the leak over the office area occurred in December. Defendant further testified that the December leak was caused when someone working on the roof damaged a vent pipe. On cross examination, defendant modified his story, saying that the vent pipe problem came about as a result of old age. Defendant did not know who repaired the roof or when.

It is also defendant's contention that he is not liable for any damage caused to Entertainment's property by roof leaks by virtue of the following clause that is in the sublease between Interstate and Entertainment. This clause reads as follows:

> The lessor does not warrant the condition of the leased premises in any respect, and his liability for any injury to the lessee, his family, servants, agents, or those claiming under him, or those on the premises by his or her invitation, shall be limited to injuries arising from such defects only as are unknown to him or them and as are actually known to the lessor and wilfully concealed by him. . . . The lessor shall not be required to make any repairs during the term of this lease herein specified.

Defendant seeks to utilize this clause in the sublease for two purposes: (1) to absolve him of any duty to make repairs to the roof, and (2) to demonstrate that he did not ?willfully conceal" any defects in the roof from plaintiff. Both these contentions are without merit. Defendant was not a party to the sublease agreement. The recitals

of the sublease refer to Interstate Lighting as Lessor and Entertainment as Lessee. Defendant is no way mentioned in the sublease agreement. This contention is without merit.

Defendant also contends that because he repaired the roof on the two occasions that the roof leaked, he is immune from liability. Paragraph four of the original lease called for defendant to make repairs to the roof. The record reflects that the roof leaked prior to the first collapse in November 1990. Dooley testified that he had numerous problems with leaks in the building for the previous eight years. McNally testified that he cautioned the defendant about the roof leak problems in other areas of the premises prior to entering into his sublease with Dooley. At trial defendant testified that he had repaired the roof, but he could not produce any proof of repairs actually completed on the roof that had been requested prior to trial by counsel for plaintiff.

Although there are conflicts and discrepancies in the testimony, the trial judge heard and observed the witnesses and their demeanor. The trial judge is best qualified to resolve these conflicts. After reviewing this entire record, we are of the opinion that the evidence is not preponderate against the judgment of the trial court insofar as defendant's liability for the damages suffered by plaintiff.

II. The Trial Court's Award of Attorney's Fees

Defendant contends that trial court erred in awarding attorney's fees to plaintiff in the amount of $2,500.00. Plaintiff contends that defendant acted in bad faith by denying that he knew of the sublease agreement between Interstate and Entertainment, and also by failing to provided any documentation of repairs allegedly made to the roof.

As a general rule, litigants must pay their own attorney fees. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). In Fifth Third Co. v. Mooreland Estates Homeowners Ass'n, 639 S.W.2d 292, 298 (Tenn. App. 1982), this court stated the exceptions to this rule allowed in this state:

> The general rule in Tennessee is that attorneys fees may not be recovered unless provided for by statute or by contact between the parties. There are exceptions to this rule, such as where there are property or funds before the court which have been protected or preserved by a party, and then his counsel fees may be paid out of the property or fund so preserved.

Our supreme court in Corinth Bank & Trust Co. v. Security Nat'l Bank, 252 S.W. 1001, 1006 (Tenn. 1923) stated that ordinarily the litigant cannot collect attorney fees ?however wrongful may have been the suit or however groundless the defense." In our opinion the trial court was in error in awarding plaintiff's attorneys fees. Therefore, we reverse the trial court in this regard.

III. Plaintiff's Courtroom Representative

In accordance with Rule 615 of the Tennessee Rules of Evidence, plaintiff designated Mark McNally as its representative to remain in the courtroom during trial. McNally was also the first witness to testify on behalf of plaintiff and thereafter proceeded to sit at counsel table as plaintiff's representative for the duration of the trial. Defendant contends that he was greatly prejudiced by McNally's presence in the courtroom after he testified. The allowing of witnesses to remain in the courtroom following their testimony lies within the sound discretion of the trial court. See State v. Harris, 839 S.W.2d 54, 68 (Tenn. 1992), cert. denied, 113 S. Ct. 1368 (1993). The trial court's decision in this regard will not be overturned without a showing of an abuse of discretion. State v. Wicks, 729 S.W.2d 283, 286 (Tenn. Crim. App. 1987). The purpose of the exclusionary rule is to prevent testifying witnesses

from altering their testimony after hearing the testimony of prior witnesses. Neil P. Cohen et al., Tennessee Law of Evidence § 615.1, at 326-27 (2d ed. 1990). This is not a concern, however, where the witness has completed his testimony. We are of the opinion that the trial court did not abuse its discretion and thus we find this issue to be without merit.

For the foregoing reasons, the judgment of the trial court awarding the plaintiff attorney's fees is reversed. The judgment of the trial court is in all other respects affirmed. Costs on this cause of appeal are taxed one-half to plaintiff and one-half to defendant, for which execution may issue if necessary.

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TOMLIN, Sr. J.

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CRAWFORD, P.J. (CONCURS)

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HIGHERS, J. (CONCURS)