

IN THE COURT OF APPEALS 04/09/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00834 COA

JOHN WESLEY HILLIARD

APPELLANT

v.

EDSEL HAMPTON

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

THOMAS M. BRAHAN

ATTORNEY FOR APPELLEE:

CARTER DOBBS, JR.

NATURE OF THE CASE: CONTRACT

TRIAL COURT DISPOSITION: VERDICT IN FAVOR OF THE PLAINTIFF IN THE AMOUNT
OF \$8,668.73 PLUS INTEREST AND \$1,000.00 IN ATTORNEY FEES.

BEFORE BRIDGES, P.J., BARBER, AND McMILLIN, JJ.

BARBER, J., FOR THE COURT:

This cases arises from an oral contract entered into by Hilliard, the property owner, and Hampton, a contractor, for the re-modeling of Hilliard's house. The controversy between the parties involves the

issue of the agreed upon contract price. Hilliard claims \$6,500.00 to be the price while Hampton maintains that the agreement was for \$17,000.00. When Hilliard refused to pay Hampton's original claim of \$18,000.00, Hampton filed suit. At the conclusion of a bench trial, judgment was entered in favor of Hampton in the amount of \$8,668.73 with interest, \$1,000.00 in attorney fees and one-half of the court costs. Feeling aggrieved, Hilliard appeals and assigns as error the following issues for our consideration:

I. THE TRIAL COURT'S JUDGMENT WAS BASED UPON FINDINGS OF FACT NOT SUPPORTED BY CREDIBLE EVIDENCE.

II. THE TRIAL JUDGE ERRED IN GRANTING JUDGMENT BASED IN PART UPON QUASI-CONTRACT WHERE AN EXPRESS CONTRACT EXISTED.

III. THE TRIAL COURT GRANTED RELIEF UPON THEORIES OF QUASI-CONTRACT WHERE PLAINTIFF FAILED TO PLEAD SUCH CLAIMS AND WHERE SUCH RELIEF WAS NOT REQUESTED BY EITHER PARTY CONTRARY TO RULE 8(a) AND RULE 9(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

Finding the arguments of the appellee to be more persuasive, we affirm the decision of the trial court.

FACTS

Hilliard and Hampton met at Hilliard's rental house in Amory, Mississippi, in March of 1992, to discuss the possibility of hiring Hampton to renovate the property. They surveyed the property, discussed what was to be done and agreed that Hampton would do the work. They agreed to a price which Hilliard maintains was \$6,500.00.

Hampton, however, filed suit based upon an agreement to do the work for the cost of materials and utilities and the cost of Hampton's labor and that of his co-workers, all totaling \$18,984.81. The parties agreed that whatever the contract price, Hilliard had paid \$5,000.00 at the time the suit was filed.

Just prior to the commencement of the trial, Hampton amended his complaint to reduce his total claim down to \$17,000.00. At trial, Hampton testified that the parties had agreed to a contract price of \$17,000.00. Hampton also stated that the \$17,000.00 was an estimate. At trial, Hampton introduced a collection of bills and receipts which he alleged reflected his expenditures on the house.

Hilliard testified that Hampton had agreed to do the work for \$6,500.00. He further stated that when Hampton was nearing completion he advised Hilliard that he owed him approximately \$18,000.00. Hilliard testified as to repairs which he had to complete after he told Hampton to stop work. Hilliard also alleged that there were some deficiencies in the work done by Hampton. Hilliard introduced the

deposition testimony of Horace Ingram, wherein Ingram stated that Hilliard told him of the \$6,500.00 contract price prior to any work commencing on the house.

At the conclusion of the trial, the judge rendered his opinion which found that the parties' contract was for \$6,500.00 labor plus cost of materials. Judgment was rendered in accordance with that opinion.

ANALYSIS

I. THE TRIAL COURT'S JUDGMENT WAS BASED UPON FINDINGS OF FACT NOT SUPPORTED BY CREDIBLE EVIDENCE.

Hilliard argues that there is an absence of any testimony supporting the trial judge's factual finding that the parties' contract was for \$6,500.00 labor plus material expenses. In support of his argument, Hilliard states that at no time did any person testify that the contract between the parties was for \$6,500.00 labor plus expenses. Hampton was adamant that there was a contract for \$17,000.00. Hilliard was equally adamant that the contract price was "a flat \$6,500.00." Moreover, neither party indicated that there was any question, confusion or mistake on his part when the contract was entered into. Each party alleged that there existed an express contract, they only differed in the contract price.

According to Hilliard, the trial judge's factual findings merely re-wrote the terms of their agreement to place each party where he equitably should have been from the judge's point of view. Because of this, there is no factual basis for his decision.

Hampton argues, however, that he introduced evidence that he spent \$7,163.73 for materials and \$4,749.00 for labor and that he valued his own labor at \$6,750.00. Therefore, the proof offered is clearly substantial evidence that supports the trial court's verdict. We agree. Where the evidence is in sharp dispute and is irreconcilable, the trial judge's findings which are not manifestly wrong will not be disturbed on appeal. *Shipman v. Lovelace*, 58 So. 2d 657, 659 (Miss. 1952). The trial judge's finding of fact is equivalent to a jury's verdict upon conflicting evidence and will not be reversed unless it is manifestly wrong. *Voss v. Stewart*, 420 So. 2d 761, 765 (Miss. 1982).

The trial judge found that the contract between the parties was for \$6,500.00 labor plus material expenses. This judgment was within the discretion of the court, as trier of fact, and is supported by substantial evidence.

II. THE TRIAL JUDGE ERRED IN GRANTING JUDGMENT BASED IN PART UPON QUASI-CONTRACT WHERE AN EXPRESS CONTRACT EXISTED.

Hilliard asserts that in order to reach his conclusions, the trial judge put aside the obvious proof that an express contract existed between the parties (either for \$6,500.00 or \$17,000.00), and he seized upon the theory of quasi-contract to formulate his equitable relief. He then structured his judgment so that Hampton would not lose any out-of-pocket expenses, but he would not profit and Hilliard's gain would be minimal.

We agree with Hilliard that quasi-contracts and unjust enrichment are equitable theories which have application where there is no contract between the parties, and generally, these theories are unavailable where an express contract exists. We, however, do not agree with his contention that the trial judge's opinion was based upon these principles. We find that the decision instead reflects the fact that the trial judge did not fully believe either party's testimony concerning the amount of the oral contract, nor is he required to. During a bench trial, the trial judge has the same right as does the jury to accept or reject part or all of a witness's testimony. *See Voss*, 420 So. 2d at 765; *Green v. Pendergraft*, 179 So. 2d 831, 836 (Miss. 1965).

Hampton alleged in his complaint that the agreement was for an estimated figure. Hilliard, in his answer, alleged a much lower figure. Each side presented proof to bolster their respective positions. The trial court fully believed neither part, and as a jury unquestionably could, found the true contract amount to be less than Hampton claimed but more than Hilliard alleged.

III. THE TRIAL COURT GRANTED RELIEF UPON THEORIES OF QUASI-CONTRACT WHERE PLAINTIFF FAILED TO PLEAD SUCH CLAIMS AND WHERE SUCH RELIEF WAS NOT REQUESTED BY EITHER PARTY CONTRARY TO RULE 8(a) AND RULE 9(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

Hilliard contends that Hampton never alleged in his pleadings that there was a mutual mistake in the formation of his contract with him. Therefore, he is not entitled to relief on a quasi-contractual basis as provided by the court's judgment. For the reasons stated above, we find that relief was not awarded on a theory of quasi-contract. The trial judge found an express contract to have been entered into by the parties, but found that the terms were simply different from that testified to by Hampton and Hilliard. Therefore, this argument is without merit.

THE JUDGMENT OF THE MONROE COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY PENALTIES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.