2010 WL 9596928 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

AESTHETICS IN JEWELRY, et al., Appellants/ Cross-Appellees,
v.
Estate of Robinson S. BROWN, Jr., by and through its Co-Executors, J. McCauley Brown and Robinson S. Brown, III, Appellee/ Cross-Appellant.

No. 2009-CA-02135.
September 28, 2010.

Appeal from Jefferson Circuit Court
Honorable Frederic J. Cowan
Action No. 06-CI-05530

Appellee/Cross-Appellant's Reply Brief

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***1 REPLY BRIEF**

The Estate of Robinson Brown, by and through Co-Executors J. McCauley Brown and Robinson S. Brown, III (the “Estate”), submits the following as its Reply in Support of its Cross-Appeal.

In their Combined Brief, Appellants/Cross-Appellees Aesthetics in Jewelry and James Jackson (referred to herein collectively as “Jackson”) focus on the misleading and irrelevant notion of manufacturer's suggested retail price (“MSRP”) to provide the evidentiary support needed to justify the verdict in their favor. When Jackson's prior counsel employed the same tactic at trial, and sought to offer expert testimony equating the value of this jewelry to asking prices of similar jewelry, the trial court correctly excluded the purported evidence, on the grounds that suggested retail prices are not an indicator of value. The record therefore contains no competent evidence to support the representations that Appellant Jackson admits to having made prior to the sale, and upon which he admits that the **elder** Mr. Brown relied. Conversely, a mountain of admissible evidence, much of it proffered by Jackson's own experts, proves that the actual worth or value of the jewels –the real issue in controversy – was far less than the $800,000 for which Jackson brokered the suite, let alone the higher valuation that he attributed to it before the sale. Because all of the evidence contradicts Jackson's representations, the existence and materiality of which he admitted in his Answer, the trial court erred in failing to direct a verdict in the Estate's favor.

Jackson correctly observes that the Estate alleged at Paragraph 10 of its Complaint, and he admitted at Paragraph 6 of his Answer, prior to selling the jewelry, he told Brown “that although the Emerald jewels were worth more than $900,000, Jackson could acquire ***2** them for Brown for only $800,000.” [1] On appeal, however, Jackson has no choice but to continue conflating worth with MSRP, because all of the expert evidence and testimony about actual value –much of it proffered on Jackson's behalf – is adverse to his position. None of Jackson's experts testified about what price a manufacturer might suggest for a similar item. Instead, all of the testimony was confined to assigning actual values, both wholesale and retail. Jackson's Brief faults the Estate for devoting much of its brief to “arguing over the actual value of the jewelry,” [2] but this criticism is unfounded, because that issue alone is what this entire case is and has always been about! [3]

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In addition to being irrelevant, the million-dollar MSRP that Jackson is forced to emphasize on appeal is simply false. Although Jackson's testimony does make reference to a purported MSRP of one million dollars for the jewelry suite, Jackson concedes in response to the trial judge's question that this is not an actual price suggested by the manufacturer, but instead simply a multiplier of the wholesale value, which Jackson himself applied:
Jackson: The MSRP is double what you pay for it.

Judge Cowan: I think they (referring to a juror's question concerning the alleged MSRP) are talking about this particular case.

Jackson: Okay. The closest thing I have is this picture, here, sir.... I was unaware of this at the time. I was ***3** going by what I paid for it which is normal procedure in the industry. [4]

The photograph to which Jackson refers during this testimony shows a marked MSRP of $750,000 for the necklace alone, as Jackson acknowledges. [5] The earrings that accompanied the necklace has no stated MSRP, as Jackson's expert Ray Zajicek acknowledged. [6]

Jackson claims on appeal that the Court must accept as true his testimony that the entire jewelry suite had an MSRP of one million dollars, [7] simply because he said so at some point during his testimony. This testimony, however, is contrary to the remainder of the evidence, including Jackson's own testimonial admission. Jackson admits that the actual manufacturer did not figure into his alleged computation of the MSRP, and that instead he merely doubled the $500,000 that he agreed to pay for the suite (and then only conditionally, subject to Mr. Brown's agreement to pay him far more). This admission is critical, because this categorically discredited $1,000,000 figure, which Jackson admits was his own creation and not that of an actual manufacturer, is the only number in evidence that exceeds or even comes close to the exorbitant $800,000 that Jackson persuaded the **elder** Mr. Brown to pay for the suite. All of the competent evidence confirms that the suite had a wholesale value of approximately $500,000, consistent with Jackson' s handwritten computations upon receipt, [8] ***4** and that a commercially reasonable retail markup would not exceed thirty percent of this amount. [9]

Finally, and most tellingly, both Jackson and Ray Zajicek both admitted at trial that the MSRP on which Jackson now relies as purported evidence of value serves no such function. Zajicek testified that, before sending a photograph of the suite to Jackson for display to Mr. Brown, Zajicek requested that the manufacturer, Krementz, alter the published photograph to delete both any identification of Krementz as the manufacturer and the $750,000 MSRP. [10] Providing stark evidence of his own motivations, Jackson conceded on cross-examination that this deletion facilitated his ability to broker the suite, and that the **elder** Mr. Brown would likely have balked at his asking price had the MSRP not been excised from the photograph:

Q. Would it be fair to say that you knew that Mr. Brown was a sophisticated enough businessman to know that noone buys jewelry at the MSRP; you always buy jewelry, especially at this level, below the MSRP when you are buying it, even at retail. Would it be fair to say that Mr. Brown was sophisticated enough to know that?
A. I would think he would have thought that. [11]

So the MSRP, the only ostensible evidence to which Jackson can now point for the proposition that this sale was commercially reasonable, proves no such thing. And, while the $750,000 MSRP of the necklace alone provides no competent evidence about the suite's value, the above-quoted admission from Jackson proves not only that the $800,000 sale price ***5** was inflated, but also that Jackson knew it to be at the time, and therefore calculated to conceal from Mr. Brown material information that would have prevented the sale!

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CONCLUSION

Jackson succeeded at trial by diverting the jury's attention from the evidence, and by explicitly appealing to the contrast between his own allegedly bleak **financial** condition and the Estate's alleged wealth. The trial court erred in failing to direct a verdict in the Estate's favor on all counts of the Complaint, inasmuch as all of the material elements were either conceded by Jackson or proven by unequivocal evidence. Jackson's appellate argument to the contrary serves only to reinforce the trial court's error, inasmuch as it is predicated entirely upon the concept of manufacturer's suggested retail price, a concept that the trial court correctly and expressly excluded. Aside from Jackson's demonstrably false statements about the alleged MSRP of the jewelry suite, all of the evidence of record proves that the jewelry was never worth what Jackson represented it to be, and that he knew as much at the time of sale. The trial court should have directed a verdict in the Estate's favor, and the Estate respectfully requests that this Court remand the matter with directions that it do so.

Footnotes

1 Appellant/Cross-Appellees' Brief at 9; citing pleadings at TR 3, TR 10.

2 *Id.* at 12.

3 Jackson also tries to distract the Court's attention by asserting that the Estate is claiming that the **elder** Mr. Brown relied on Jackson's post-purchase appraisal as evidence of the jewelry's worth. See Appellant/Cross-Appellees' Brief at 11-12. The Estate has never submitted that Mr. Brown relied upon representations that took place after the sale, and instead merely contends that Jackson's self-serving and inflated appraisal was part of the thoroughly proven scheme to exaggerate the suite's worth for the purpose of generating an excessive one-time brokerage fee.

4 Trial Tape, 07/15/09, testimony of James Jackson, at 11:44:40 - 11:45:06.

5 *Id.* at 11:45:06.

6 Trial Tape, 07/17/09, testimony of Ray Zajicek, at 11:05:46.

7 Appellant/Cross-Appellees' Brief at 9.

8 Estate Trial Exhibit 11, Handwritten Notes.

9 Trial Tape, 07/16/09, testimony of Barry Block, at 10:43:33-10:44:03; *see also* Trial Tape 07/16/09, testimony of Neil Cohen, at 14:21:56-14:21:14.

10 Trial Tape, 07/17/09, testimony of Ray Zajicek, at 10:28:32 - 10:30:47.

11 Trial Tape, 07/15/09, testimony of Jackson, at 11:58:31 - 11:59:34.

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