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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2008

2060962

Jimmie Marie Franklin

v.

Genevieve A. Etheridge

**Appeal from Jefferson Circuit Court
(CV-04-4449)**

On Return to Remand

MOORE, Judge.

Jimmie Marie Franklin, the mortgagee of a 1986 mortgage ("the mortgage") executed by the late Willie T. Etheridge, Sr., appealed from a judgment of the Jefferson Circuit Court

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in an action brought by Genevieve A. Etheridge ("Etheridge"), the current mortgagor, to ascertain the remaining balance owed on the mortgage. We remanded this cause for 21 days "for the trial court to determine with certainty the outstanding balance of the indebtedness owed by Etheridge on the mortgage." Franklin v. Etheridge, [Ms. 2060962, July 18, 2008] ___ So. 2d ___, ___ (Ala. Civ. App. 2008) ("Franklin I").¹ On remand, the trial court amended its February 12, 2007, judgment to state that the mortgage balance is "\$32,433.99 plus \$1,976.28 ad valorem taxes paid by Franklin." Based on the trial court's judgment on remand, we reverse and remand.

Franklin argues that the trial court's judgment is unsupported by the evidence. Specifically, Franklin argues that the trial court based its determination of the outstanding mortgage balance on expert testimony that was based on assumptions that were not supported by the evidence. Franklin also argues that the trial court should have excluded the testimony of Etheridge's expert because, Franklin says,

¹The procedural history of this case is set forth in Franklin I.

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his opinion was based on facts not in evidence. We find the second issue dispositive of this case.

"This Court has repeatedly held: '[A]n expert witness may give opinion testimony based upon either facts of which he has personal knowledge or facts which are assumed in a hypothetical question.... In either event, "the facts known to the expert or hypothe[sized] must be facts in evidence." Hagler v. Gilliland, 292 Ala. 262, 265, 292 So. 2d 647 (1974).' Welch v. Houston County Hosp. Bd., 502 So. 2d 340, 345 (Ala. 1987) (quoting Thompson v. Jarrell, 460 So. 2d 148, 150 (Ala. 1984))."

Golden v. Stein, 670 So. 2d 904, 907 (Ala. 1995).

Van Gravlee, a certified public accountant, testified that he had calculated the outstanding mortgage balance four times based on four different sets of assumptions. In its judgment, the trial court adopted one of Gravlee's calculations as to the outstanding mortgage balance. Therefore, we must determine if that particular calculation ("Gravlee's calculation") was based on assumptions that are supported by facts in evidence. See Golden, 670 So. 2d at 907.

Gravlee testified that his calculation was based on an assumption (1) that Franklin and Etheridge were parties to a 20-year mortgage dated February 5, 1986, in the principal amount of \$110,000, with an interest rate of 12% per annum and

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monthly payments of \$1,211.19; (2) that all monthly payments had been made through August 1995; (3) that no payments had been made from September 1995 until October 3, 1997; (4) that Etheridge had paid Franklin \$21,000 on October 3, 1997; and (5) that all monthly payments had been made from November 1997 through the time of the trial. Gravlee testified that, based on those assumptions, the outstanding mortgage balance as of November 3, 2006, was \$32,433.99, plus some accrued interest.

At trial, there was undisputed evidence indicating that Franklin and Etheridge were parties to a 20-year mortgage dated February 5, 1986, in the principal amount of \$110,000, with an interest rate of 12% per annum and monthly payments of \$1,211.19. Etheridge introduced a letter dated September 11, 1997, that Franklin had written to Etheridge stating that Franklin's records showed that Etheridge had missed 25 payments: 2 in 1993, 3 in 1994, 4 in 1995, 7 in 1996, and 9 in 1997. However, at trial, Franklin introduced records indicating that Etheridge had missed payments before 1993 but that she had failed to note those in the September 11, 1997, letter. Etheridge did not present any other evidence regarding which payments had been made before 1997. The

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testimony was undisputed that a payment of \$21,000 was made on October 3, 1997. Etheridge testified that she had made the payments from November 1997 through the time of the trial; Franklin, however, contradicted that testimony.

Based on the evidence presented at trial, we conclude: (1) that Gravlee's assumption that Franklin and Etheridge were parties to a 20-year mortgage dated February 5, 1986, in the principal amount of \$110,000, with an interest rate of 12% per annum and monthly payments of \$1,211.19 was supported by the facts in evidence; (2) that Gravlee's assumption that all monthly payments had been made through August 1995 was unsupported by the facts in evidence; (3) that Gravlee's assumption that no payments had been made from September 1995 until October 3, 1997, was unsupported by the facts in evidence; (4) that Gravlee's assumption that Etheridge had paid Franklin \$21,000 on October 3, 1997, was supported by the facts in evidence; and (5) that Gravlee's assumption that all monthly payments had been made from November 1997 through the time of the trial was based on facts, albeit disputed, in evidence.

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Because Gravlee's calculation was not based solely on facts in evidence, see Golden, supra, we conclude that the trial court should have excluded that testimony. Because the trial court relied on that testimony, we must reverse the trial court's judgment and remand this cause to the trial court for a new trial.

REVERSED AND REMANDED.

Thompson, P.J., and Pittman, Bryan, and Thomas, JJ.,
concur.