DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, Judge

CA06-280

October 25, 2006

WILLIAM THORNSBERRY, d/b/a THORNSBERRY CONSTRUCTION APPELLANT	AN APPEAL FROM POPE COUNTY CIRCUIT COURT [No. CV-98-13]
v.	
EDWIN L. SMITH and NOVA ARENE SMITH, Husband and Wife APPELLEES	HONORABLE JOHN S. PATTERSON, CIRCUIT JUDGE AFFIRMED

Appellant William Thornsberry appeals from the judgment of the Pope County Circuit Court awarding appellees Edwin and Nova Smith $30,390 in damages and $15,000 in attorney's fees.[1] The trial court found that Thornsberry, a contractor, was negligent in the construction of the Smiths' home and that he breached an express warranty. Thornsberry raises three point for reversal. We affirm.

The Smiths were living in Pennsylvania in 1997 and decided to retire to Pope County, Arkansas. They hired Thornsberry to build a house on land they had purchased in 1995 or 1996. Mrs. Smith's sister and brother-in-law lived in the Pope County area and assisted in dealing with Thornsberry during the construction of the home while the Smiths were living

[1]Edwin Smith died prior to the trial of this action.

in Pennsylvania. After moving into the home on March 1, 1997, the Smiths discovered numerous problems with the house.

The Smiths filed suit against Thornsberry on January 14, 1998, alleging breach of the implied warranty of habitability in connection with the construction of the home. They later amended their complaint to include a claim for negligence. Thornsberry denied the material allegations of the complaint.

Jerry Hudlow, the brother-in-law, testified that the Smiths decided to hire Thornsberry due to his friendship with Thornsberry and because Thornsberry submitted the low bid. Hudlow said that he was given power of attorney to assist in the construction and that he acted as the Smiths' "eyes and ears" during the construction process. He said that, before the footings were poured, Thornsberry indicated that there was a problem with the soil but went ahead and poured the footings and advised him that the problem was resolved. Hudlow testified that there were problems with water under the house, with the quality of paint on the interior of the house, and with the siding and brick. Hudlow testified that, as the house neared completion, he talked to Thornsberry about the problems and about whether the Smiths should purchase a commercial warranty. According to Hudlow, Thornsberry stated that he guaranteed the house for one year and that most problems would develop within the first year, so there was no need to purchase a commercial warranty.

Thornsberry testified that he told Jerry Hudlow that he was not a builder per se but that he got houses built. He denied making the statement that he would guarantee the construction for a year but agreed with Hudlow's testimony that, at the end of construction

of the home, he and Hudlow discussed purchasing a commercial warranty. He said that he was not trying to talk Hudlow out of buying the warranty. Thornsberry also said that it would be reasonable for the Smiths to look to him to rectify problems with the construction, including the siding.

At the end of the Smiths' case-in-chief and again at the close of the evidence, Thornsberry moved for a directed verdict on the implied warranty of habitability claim. The court took Thornsberry's motion under advisement. In response, the Smiths moved that the pleadings be amended to conform to the evidence presented and requested that the court award damages for breach of express warranty. Thornsberry objected. The trial court ultimately granted the directed verdict on the implied-warranty claim but allowed the pleadings to be amended to include a claim for breach of express warranty.

The trial court issued a letter opinion in which it found that Thornsberry was negligent and had breached an express warranty in building the house on expansive soil, noting that it was Thornsberry's responsibility to see that the house was built on sound footing. The trial court awarded damages of $30,290, after denying certain claims. The Smiths requested their attorney's fees, and the court awarded a fee of $15,000. Judgment was entered in accordance with the court's ruling, and Thornsberry timely filed his notice of appeal.

Thornsberry raises three points for reversal. Insofar as Thornsberry is appealing the judgment, we summarily affirm the trial court's judgment because he addresses only the express-warranty claim and does not challenge the trial court's alternative finding that he was

guilty of negligence. Our courts have held that, where the trial court based its decision on two independent grounds and appellant challenges only one on appeal, the appellate court will affirm without addressing either. *See Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002); *Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989); *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). However, in order to address the attorney's fee award, we will address the merits of Thornsberry's points.

As his first point, Thornsberry argues that the trial court erred in allowing the amendment to conform the pleadings to the proof after an objection was made. At the close of their case, the Smiths made a motion to conform the pleadings to the proof to include an express-warranty claim. Thornsberry objected to the amendment, but the trial court allowed the amendment. On appeal, Thornsberry argues that this was error because he was denied a fair chance to defend against such a claim.

Arkansas Rule of Civil Procedure 15 governs the amendment of pleadings. Rule 15(b) states in part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion. The court may grant a continuance to enable the objecting party to meet such evidence.

Permitting the introduction of proof on an issue not raised in the pleadings constitutes an implied consent to trial on that issue. *Ison Props., LLC v. Wood*, 85 Ark. App. 443, 156

S.W.3d 742 (2004). We will not reverse a trial court's decision regarding the amendment of pleadings to conform to the evidence in the absence of a manifest abuse of discretion. *Id*. Here, the issue of an express warranty was raised when Jerry Hudlow testified that Thornsberry told him that he (Thornsberry) would stand behind his work for one year. Hudlow said that the statement occurred in a conversation about obtaining a commercial warranty due to problems with the home. Thornsberry did not object to the evidence when offered, nor did he object to testimony concerning the commercial warranty. He discussed the conversation about the commercial warranty and that it would be reasonable for the Smiths to look to him to cure problems with the construction. Such testimony would not be relevant unless the issue of Thornsberry making an express warranty was being considered. Rule 15 vests broad discretion in the trial court to permit amendment to the pleadings, and the exercise of that discretion by the trial court will be sustained unless it is manifestly abused; and one seeking reversal on that ground must show the manifest abuse of discretion. *Hickman v. Kralicek Realty & Constr. Co.*, 84 Ark. App. 61, 129 S.W.3d 317 (2003). We cannot say that the trial court abused its discretion in this regard.

As part of this point, Thornsberry argues that the Smiths should have made the motion to amend at the close of their case so that he could address the issue during his case-in-chief. Rule 15(b) specifically provides that a motion to amend to conform to the proof can be "at any time, even after judgment. . . ." Therefore, the timing of the motion does not point to an abuse of discretion. Accordingly, we affirm on this point.

In his second point, Thornsberry argues that the trial court erred in finding an express warranty. When a case is tried by a circuit court sitting without a jury, our inquiry on appeal is whether the trial court's findings are clearly erroneous, or clearly against the preponderance of the evidence. *Brown v. Blake*, 86 Ark. App. 107, 161 S.W.3d 298 (2004). Recognition must be given to the trial judge's superior opportunity to determine the credibility of the witnesses and the weight to be given to their testimony. *Id*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *McCarley v. Smith*, 81 Ark. App. 438, 105 S.W.3d 387 (2003).

The issue of whether the statement Thornsberry made is an express warranty is for the trier of fact. *See Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). Hudlow testified that Thornsberry made the statement guaranteeing his work, but Thornsberry denied making the statement. Thus, the issue is one of credibility. Disputed facts and determinations of witness credibility are within the province of the fact-finder. *Carson v. Drew County*, 354 Ark. 621, 128 S.W.3d 423 (2003). In light of the deference owed to the trial court, we cannot say that the trial court clearly erred in finding an express warranty.

As part of this point, Thornsberry also argues that there was no consideration to support the express warranty. However, we believe there was consideration in the form of the decision to forego the purchase of a commercial warranty to cover defects in the construction of the house. Consideration is any benefit conferred or agreed to be conferred upon a promisor to which he is not lawfully entitled, or any prejudice suffered or agreed to

be suffered by a promisee other than that in which she is lawfully bound to suffer. *Capel v. Allstate Ins. Co.*, 78 Ark. App. 27, 77 S.W.3d 533 (2002). An agreement not to exercise a legal right is a valid consideration to support a contract. *Brinkley Car Works & Mfg. Co. v. Cook*, 110 Ark. 325, 161 S.W. 1065 (1913); *Lay v. Brown*, 106 Ark. 1, 151 S.W. 1001 (1912). If the Smiths had purchased the commercial warranty, they would have had protection to cover any defects stemming from the construction of the home. However, they elected to forego that right when Thornsberry made the warranty that he would stand behind his work for one year. Therefore, they suffered a detriment when Thornsberry made his promise. This is sufficient consideration for his promise. We affirm on this point.

In his third point, Thornsberry argues that the trial court erred in awarding the Smiths attorney's fees, contending that this was not a contract case in which fees could be awarded. This is the only argument he makes on this point. Because we affirmed on the second point, that there was an express warranty, the basis for Thornsberry's argument fails. Therefore, Thornsberry cannot show an abuse of discretion in awarding the Smiths their fees. We will not reverse in the absence of an abuse of discretion. *Phi Kappa Tau Housing Corp. v. Wengert,* 350 Ark. 335, 86 S.W.3d 856 (2002).

Affirmed.

GRIFFEN and ROAF, JJ., agree.