

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001960-MR

THOMAS GRIFFITHS AND
DENISE GRIFFITHS

APPELLANTS

v. APPEAL FROM HART CIRCUIT COURT
HONORABLE LARRY D. RAIKES, JUDGE
ACTION NO. 96-CI-00135

PIONEER BANK; DAYMON
C. DAY; AND PEGGY DAY

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE. Thomas and Denise Griffiths have appealed from a judgment of the Hart Circuit Court awarding them damages against Pioneer Bank for negligent misrepresentation in connection with their purchase of a supermarket store. Finding no error, we affirm.

In May-June 1995, the Griffithses negotiated with the Days for the purchase of a small supermarket that the Days had owned since 1987. During the negotiations, Daymon Day represented that the store generated profits of approximately

\$40,000, and suggested that the Griffithses speak with Randall Dennison, the President of Pioneer Bank, as a reference. The Griffithses did not review the Days' tax returns or financial statements. Tom and Denise Griffiths met with Dennison separately on two different occasions during which they allege that he vouched for Daymon Day's credibility, supported the representation as to the supermarket's profitability, and indicated the realty and building alone were worth approximately \$100,000. At the time of these conversations, the Griffithses were depository customers of Pioneer Bank.

On June 26, 1995, the Griffithses contracted to purchase the supermarket from the Days for \$250,000, paying \$119,000 in cash and assuming an obligation to pay the Days \$131,000 evidenced by two promissory notes. In connection with the purchase, the Griffithses procured a loan from Pioneer Bank for \$69,400, with the Bank receiving a primary mortgage lien and security agreement and the Days a secondary mortgage lien and security agreement.

After the Griffithses failed to make timely payments on the obligation to the Days, the Days filed a complaint in July 1996, for judgment on the debt and foreclosure on the property. Pioneer Bank was joined by virtue of its first mortgage. The Griffithses filed an answer and counterclaim against the Days for fraudulent misrepresentation and fraudulent or negligent concealment, and requested compensatory and punitive damages. They alleged the Days made false representations concerning the profitability of the supermarket, the value of the equipment, and

the costs of the business. In August 1996, Pioneer Bank filed an answer and cross-claim against the Griffithses for payment on their loan and mortgage lien. In March 1997, the Griffithses filed a counterclaim seeking punitive damages against Pioneer Bank for fraudulent misrepresentation, breach of duty of good faith, wrongful interference with contract, and conflict of interest.

In June 1997, the Griffithses and Days executed a settlement agreement and release of claims whereby the Griffithses deeded the supermarket back to the Days with cancellation of the debt obligation to the Days, but reserving their rights against Pioneer Bank. The Days also agreed to pay the Griffithses an amount equal to 50% of any reduction the Griffithses were able to secure from Pioneer Bank on the bank's first mortgage loan. On July 15, 1997, the trial court entered an agreed order of dismissal of the Griffithses' claims against the Days. In September 1997, the Days procured a loan from Pioneer Bank and paid off the original note and mortgage of the Griffithses to Pioneer Bank.

After a two-day bench trial, the circuit court entered its findings of fact, conclusions of law, and judgment on May 7, 1999. The court found Pioneer Bank liable for negligent misrepresentation and awarded the Griffithses a judgment for \$57,754. The court held that Dennison owed a fiduciary duty to the Griffithses as customers and potential borrowers from the Bank. The court accepted the Griffithses' testimony concerning Dennison's alleged statements supporting Daymon Day's credibility

and the profitability of the supermarket. The evidence revealed that the Days had had losses in all but one year between 1990 and 1995, that being \$95 in 1990. While the court found some of Dennison's statements to be false and misleading, it further found that Dennison did not act intentionally, but rather was merely negligent by not reviewing the Days' financial statements before speaking with the Griffithses. However, the court also held that the Griffithses were contributorily negligent for also not conducting a more thorough evaluation of the store and the Days' tax records. It found that the negligent conduct of both parties was a substantial factor in causing the Griffithses' damages and apportioned fault 50% to the Days, 30% to the Griffithses, and 20% to Pioneer Bank. The court included as damages, \$250,000 for the purchase price of the supermarket, \$36,835 for operating losses between July 1995 and October 1996 (when the Griffithses closed the store), and \$1,937 in closing costs. The court denied the Griffithses' demand for future expected lost profits and punitive damages under KRS 411.184(2). It also awarded Pioneer Bank judgment on its cross-claim against the Griffithses on their promissory note with the Bank.

Following the judgment, Pioneer Bank moved to amend and reduce the damages award based on the elimination of the Griffithses' \$131,000 purchase price debt to the Days through their settlement and payment or assumption of the Griffithses' \$69,400 obligation to the bank by the Days. In July 1999, the court dismissed the Bank's claim on the promissory note based on the stipulation that the debt had been satisfied by the Days, but

reserved ruling on allowing the Bank credit for the reductions in the Griffithses' obligations. After conducting a hearing, the court entered an amended judgment on July 22, 1999, reducing the damages award by crediting the reduction of the Griffithses' debt obligations associated with the \$250,000 purchase price by \$181,400, leaving a total adjusted damages figure of \$88,372 and a final award of \$17,674, applying the 20% fault assessment against the Bank.

In July 1999, the Griffithses filed a CR 59.05 motion to amend or vacate the amended judgment. In January 2000, they filed a motion to enforce the Settlement Agreement with the Days and an amended counterclaim calling for payment by the Days of an amount equal to 50% of the reduction in the Griffithses obligation to Pioneer Bank calculated as \$34,700. On July 14, 2000, the court denied the CR 59.05 motion and dismissed the amended counterclaim stating the Griffithses were not entitled to recovery under the terms of the Settlement Agreement. This appeal followed.

The Griffithses raise numerous issues involving the award of damages against Pioneer Bank and the Days. First, they object to the apportionment of damages. They assert that because their claims were based on contract, fraud, and breach of fiduciary duty, a comparative fault analysis should not apply. They also state that Dennison had a higher duty of care and assumed the entire responsibility for damages based on his fiduciary duty to the Griffithses.

The trial court found Pioneer Bank liable under a negligent misrepresentation theory. Negligent misrepresentation has been recognized generally in Kentucky, see Morton v. Bank of the Bluegrass and Trust Co., Ky. App., 18 S.W.3d 353 (1999); Seigle v. Jasper, Ky. App., 867 S.W.2d 476, 482-83 (1993) (citing Restatement (Second) of Torts § 552), and specifically with the sale of a business. See, e.g., Patel v. Patel, Ky. App., 706 S.W.2d 3 (1986); Meyers v. Monroe, 312 Ky. 110, 226 S.W.2d 782 (1950).

As with other types of negligence actions, the contributory negligence of the party relying on the misstatements is relevant to the analysis. See, e.g., Patel, supra; Restatement (Second) of Torts § 552A.

A party must exercise ordinary care in deciding whether to enter into a contract. See Hanson v. American Nat'l Bank & Trust Co., Ky., 865 S.W.2d 302, 307-08 (1993) (involving intentional fraudulent misrepresentations). KRS 411.182 unambiguously calls for apportionment of liability involving multiple parties "in all tort actions." Negligent misrepresentation is a tort action involving a duty of care. Consequently, the trial court correctly applied KRS 411.182 by apportioning liability among the parties.

The Griffithses also object to the trial court's assessment of liability percentages. They allege the trial court incorrectly assigned to them a higher degree of fault than the Bank.

When a case is tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ." CR 52.01. See also Lawson v. Loid, Ky. 896 S.W.2d 1, 3 (1995). A factual finding is not clearly erroneous if it is supported by substantial evidence, which is defined as evidence of substance and relevant consequence sufficient to induce conviction in the mind of a reasonable person. Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000). The apportionment of fault is a question of fact for the jury or fact-finder. See KRS 411.182(2); Hilen v. Hays, Ky., 673 S.W.2d 713, 720 (1984).

In this case, the trial court found that the Griffithses did not exercise due diligence in failing to request a review of the Days' tax returns. Both of the Griffithses were well-educated persons and Denise Griffiths had over 15 years experience in the food service industry. The Griffithses reviewed only a few financial documents related to the supermarket provided by Daymon Day. Dennison also made several disclaimers during his discussions with the Griffithses. We cannot say the percentage-of-fault findings were clearly erroneous.

The Griffithses argue the trial court should have included \$400,000 in lost expected future profits. This claim is based solely on Daymon Day's representation that the supermarket generated \$40,000 per year in profits. Generally, damages for

fraud are based on actual pecuniary loss. See Stahl v. St. Elizabeth Medical Ctr., Ky. App., 948 S.W.2d 419, 423 (1997) (citing Johnson v. Cormney, Ky. App., 596 S.W.2d 23 (1979)). With respect to fraud inducing a party to enter a contract, the defrauded party may enforce the contract or reject the contract and recover actual pecuniary losses.

"The rule is that where fraud has been committed in obtaining a contract it may be taken advantage of either by an affirmance of the contract and recovery of damages on account of the fraud or by a rescission of the contract." If the buyer elects to rescind the contract, he is entitled to "a recovery of the thing parted with as the consideration."

Patel, 706 S.W.2d at 5 (citations omitted). Losses for benefit of the bargain typically are not available for negligent misrepresentation, which does not involve intent or bad faith. See, e.g., Restatement (Second) of Torts § 552B(2). As the trial court noted, there was no evidence the supermarket had been profitable in the past or would become profitable in the future. The Griffithses' settlement with the Days effectively rescinded the contract, so they were not entitled to the benefit of the bargain or any expected lost profits.

The Griffithses also contend the trial court erred by reducing the damages award by \$200,400 for the \$131,000 debt elimination on the two promissory notes to the Days and the \$69,400 promissory note to the Bank. They contend Pioneer Bank should not have benefitted by credits for these amounts because it continued to pursue collection on its note throughout the trial. As discussed above, damages for negligent

misrepresentation are limited to actual pecuniary loss. The trial court initially included the debt on the three notes as part of the \$250,000 purchase price for the supermarket. Regardless of when the Bank eventually acknowledged satisfaction of the debt on its note, the Griffithses have been relieved of their obligations on these three notes and any recovery from the Bank for those debts would constitute double recovery. The collateral source rule raised by the Griffithses in support of their position simply is inapplicable to this situation.

The Griffithses also contend they were entitled to punitive damages. Under KRS 411.184, punitive damages are available upon a showing by clear and convincing evidence that the defendant acted with oppression, fraud or malice. However, "fraud" is defined as intentional misrepresentation, deceit or concealment of a material fact. KRS 411.184(1)(b). The trial court found no oppression, malice or intentional fraud, only negligent conduct by Dennison. This finding was supported by substantial evidence and was not clearly erroneous. Moreover, this Court has held that punitive damages are not available in a cause of action based on negligent misrepresentation. Morton, 18 S.W.3d at 358.

Finally, the Griffithses argue they were entitled to receive \$34,700 under the Settlement Agreement with the Days. It states in pertinent part in Section 2(D):

The Days promise and agree to pay to the Griffiths [sic], an amount equal to fifty percent of any reduction the Griffiths [sic] are able to secure from Pioneer Bank, either by negotiation or judgment, on Pioneer Bank's

first mortgage on the real estate upon which
the supermarket is located

The trial court held that the Days were not obligated to pay the Griffithses under this provision because the Days remained obligated to satisfy the amount of the mortgage note originally between the Bank and the Griffithses. The Days assert that the intent of the provision was to reimburse the Griffithses for half of any reduction or elimination of the Griffithses' obligation to the Bank that they procured by their own actions and indirectly to the benefit of the Days, who reassumed ownership of the supermarket under the settlement. The Days paid off the Griffithses' note in September 1997 with funds received in a loan from the Bank. The release of the Griffithses for their debt to the Bank was due solely to conduct by the Days. The Griffithses have not shown any action by them resulting in a reduction of the original debt obligation. The trial court did not err in holding this provision in the Settlement Agreement did not apply.

The judgment of the Hart Circuit Court is affirmed.

ALL CONCUR.

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