RENDERED: DECEMBER 21, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000005-MR

KENNETH FRYE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE W. DOUGLAS KEMPER, JUDGE
ACTION NO. 05-CI-004178

JACQUELINE E. BROWN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Kenneth Frye has appealed from the order of the Jefferson Circuit Court granting a summary judgment in favor of Jacqueline E. Brown and dismissing Frye's claims. Frye's claims arose from personal injuries and property damage he alleged to have incurred due to secondhand smoke emanating from Brown's condominium unit. We affirm.

In early 2005, Frye purchased a condominium unit from Magnolia Place Condominiums (Magnolia Place) located at 1157 South First Street in Louisville, Kentucky. The building holds four units; Frye purchased Unit 3 on the second floor, while Brown lived directly below Frye in Unit 1. Once he moved into the unit, Frye claimed that he was exposed to second-hand smoke from Brown's unit, caused by an allegedly defective ventilation system between the two units. When he was unable to resolve his dispute, Frye retained an attorney, Charles Fell, Jr., and filed suit on May 13, 2005, in Jefferson Circuit Court against Brown and Magnolia Place. In his complaint, Frye alleged that Brown's unit was "in such a defective condition that smoke from the Unit is contaminating the Unit owned by the Plaintiff." Frye then alleged that the contamination from the smoke injured him and damaged his unit. He demanded both monetary damages and an injunction requiring that the defective condition be repaired. Attorney Fell withdrew a year later, and Kevin M. Adams entered an appearance as counsel for Frey in June 2006.

Frye reached a settlement agreement with Magnolia Place in July 2006 and entered into a release, which provides in pertinent part as follows:

RELEASE OF ALL CLAIMS

> For and in consideration of the payment to me of the sum of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) and other good and valuable consideration, I KENNETH FRYE, being of lawful age, have released and discharged, and by these presents do for myself, my heirs, executors, administrators and assigns, release, acquit and forever discharge MAGNOLIA PLACE CONDOMINIUMS

> COUNCIL OF CO-OWNERS, INC., and NATIONWIDE INSURANCE COMPANY, and any and all other persons, firms and corporations, whether herein named or referred to or not, of and from any and all past, present and future actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, third party actions, suits at law or in equity, including claims or suits for contribution, and/or indemnification, of whatever nature, and all consequential damage on account of, or in any way growing out of any and all know[n] and unknown personal injuries, death or property damage resulting or to result from smoke and odors seeping or penetrating Unit 3 of Magnolia Place Condominiums located at 5311 South First Street in Louisville, Kentucky.

As a result of the settlement, the circuit court dismissed Frye's claim against Magnolia Place as settled on July 25, 2006. The same day, the circuit court allowed Frye to file an amended complaint to allege causes of action against Brown for trespass, nuisance, and constructive eviction. The following month, the circuit court granted Attorney Adams' motion to withdraw and permitted Frye to proceed *pro se*.

In September 2006, Brown filed a motion for summary judgment, arguing that the July 26, 2006, release between Frye and Magnolia Place served to release any claims Frye had against her, as it released "any and all other persons" whether or not they were named in the release. Frye filed a *pro se* motion for summary judgment, which we infer from the record also served as his response to Brown's motion for summary judgment. In the filing, Frye presented arguments related to the infiltration of second-hand smoke, nuisance, and findings of the Surgeon General. The only reference he made to the release was: "Plaintiff did not sign any agreement releasing Defendant Brown for

her negligence and personal injury to the Plaintiff." On December 8, 2006, the circuit court entered an Opinion and Order granting Brown's motion for summary judgment and dismissing Frye's claims, finding that the release precluded Frye's claims against Brown.[1] This appeal followed.[2]

On appeal, Frye raises a single claim of error; namely, that the release at issue does not serve to release Brown, as the address listed on the release is not the correct address. The address of the condominium building in which Brown and Frye lived is 1157 South First Street; however, the address listed in the release is 5311 South First Street. Therefore, Frye asserts that, based upon its language, the release related to claims arising out of property that was not the subject of this litigation and Brown should only be permitted to use the release as to the specific property listed in the release. On the other hand, Brown argues that the typographical error in the release represented a mutual mistake. Such a mistake, she asserts, requires reformation of the release to include the correct address so that it would then represent the intended agreement of the contracting parties.

The entry of a summary judgment is governed by CR 56.03, which provides that such motions should be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Our standard of

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[1] The Opinion and Order also dismissed as moot a Petition for Declaration of Rights filed by Metropolitan Property & Casualty Insurance Company (Civil Action No. 06-CI-0559), seeking a declaration as to whether it owed coverage to Brown under her homeowner's policy.

[2] Frye filed his notice of appeal and prehearing statement *pro se*. During the course of the appeal, attorney Denise Brown entered an appearance for Frye and filed a brief on his behalf.

review is set forth in *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001): "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*."

Based upon our review of the record, we have determined that the issue Frye raises on appeal is not preserved. Frye neither brought the typographical error in the street number to the attention of the circuit court nor asserted that the mistaken language of the release meant that it had no application to Brown. Instead, Frye focused below on the nuisance aspect of secondhand smoke inhalation, first raising the issue of mistake in his appellate brief. The law is clear in this Commonwealth that parties are not permitted to raise new arguments on appeal. *Commonwealth v. Jones*, 217 S.W.3d 190, 199 (Ky. 2006). Furthermore, our review is limited to "only those claims that are preserved by proper objection, . . . and only when the trial court is given the opportunity to rule on the alleged error." *Williams v. Commonwealth*, 233 S.W.3d 206, 211 (Ky.App. 2007). It has been a longstanding rule that a party "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Therefore, Frye's claim that the release does not apply to Brown solely due to the incorrect street number is not properly before this Court.

Even if we were to review this issue, Frye's claim is without merit. We agree with Brown's argument that the mistake in the release was the result of a scrivener's

error and that the release is therefore subject to reformation. *American Jurisprudence* addresses the mistake of a scrivener or draftsman as follows:

> The remedy of reformation is appropriate where, by reason of an unintentional mistake by a scrivener or draftsman, the written agreement does not accurately reflect the intent of the parties. However, before the reformation of a written contract is warranted, it must be shown that the scrivener's product reflects something other than what was understood by both parties. Under the "doctrine of scrivener's error," the mistake of a scrivener in drafting a document may be reformed based upon parol evidence, provided the evidence is clear, precise, convincing and of most satisfactory character that the mistake has occurred and that the mistake does not reflect the intent of the parties.

66 Am.Jur.2d Reformation of Instruments § 19. In *A.H. Thompson Co. v. Security Ins. Co.*, 252 Ky. 427, 67 S.W.2d 493, 495 (1933), the former Court of Appeals addressed mistakes in written instruments, stating:

> An [sic] unilateral mistake is not ground for reforming a written instrument; hence a contract which agrees with the intention of one party, though executed under a mistake by the other, cannot be reformed. . . . Equity, however, will reform such instrument where the mistake is mutual; that is, a mistake reciprocal and common to both parties, as where there has been a meeting of the minds and an agreement actually entered into, but the written instrument does not express the real intention of the parties . . . , or because of a mistake of the draftsman of the instrument where the evidence is clear and convincing showing the mistake[.]

More recently, the Supreme Court addressed this issue in *Abney v. Nationwide Mutual Ins. Co.*, 215 S.W.3d 699, 704 (Ky. 2006):

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. . . . First, it

> must show that the mistake was mutual, not unilateral. . . . Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*." . . . (emphasis in original). Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument." . . .
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> The mistake must be one as to a material fact affecting the agreement and not one of law, which is "an erroneous conclusion respecting the legal effect of known facts." . . . A material fact is one that goes to the root of the matter or the whole substance of the agreement.

The record establishes that the mistake was certainly mutual; the release details the settlement reached in the subject lawsuit, not for another case or relating to a different property. Furthermore, the evidence supporting the error is clear and convincing, as everything documented in the court record, except for the release, lists the correct street number. Finally, Magnolia Place and Frye clearly settled the suit regarding smoke damage at 1157 South First Street, not 5311 South First Street. Frye accepted the monetary settlement and agreed to dismiss Magnolia Place from this particular lawsuit based upon the release. Additionally, this particular mistake was one of material fact, as it was related to the address of the condominium building. Therefore, even if we were to address the merits of Frye's argument, we would not assign any error in the circuit court's judgment.

For the foregoing reasons, the Opinion and Order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denise Brown
Louisville, Kentucky

BRIEF FOR APPELLEE:

Donald Killian Brown
Jeri Barclay Poppe
Louisville, Kentucky