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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000880-MR

DANIEL J. SHIRLEY; DANIEL C. LAKAMP
AND NEWPORT KEY PROPERTIES, LLC APPELLANTS

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CI-01360

THE ESTATES AT WIEDEMANN MANSION, LLC
AND STEGMAN HOLDINGS, LLC APPELLEES

AND

NO. 2007-CA-001031-MR

THE ESTATES AT WIEDEMANN MANSION, LLC CROSS-APPELLANT

v.

CROSS-APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CI-01360

NEWPORT KEY PROPERTIES, LLC CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; KNOPF,[1] SENIOR JUDGE.

THOMPSON, JUDGE: The appellants, Daniel J. Shirley, Daniel C. Lakamp, and Newport Key Properties, LLC, (NKP) appeal from a judgment entered following a jury verdict in favor of appellees, The Estates at Wiedemann Mansion, LLC (EWM) and Stegman Holdings, LLC.[2] Appellants contend that the trial court's instructions to the jury erroneously stated the law applicable to civil fraud and warrant reversal. Appellee's cross-appeal alleges that they were entitled to a directed verdict because appellants failed to establish the elements of fraud by omission. They further contend that the trial court erroneously admitted the testimony of appellants' expert. We agree with appellees that any errors in the instructions were harmless because appellants failed to demonstrate by clear and convincing evidence that appellees failed to disclose a material fact and, therefore, affirm.

The events leading to the present controversy began in September 2003, when appellants became interested in constructing a home in a new residential development in Newport, Kentucky, owned by EWM. At that time, the site preparation had begun and plans were made to enter the development into the

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[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.
[2] Stegman Holdings, LLC is a holding company owned by Jim Stegman. We refer to Jim Stegman, Jim Stegman Construction, Inc. and Stegman Holdings, LLC as Stegman.

Homebuilders Association Citifest Home Show. The multi-million dollar development was to be located on a hillside adjacent to the historic Wiedemann Mansion and the planned homes would have panoramic views of the Newport Basin, Ohio River, and Cincinnati.

Appellants met with Dale McPherson, the managing member of EWM, to discuss buying a lot and constructing a home on the upper tier. After appellants expressed concern that homes on the lower tier could impede the view from their home constructed on the upper tier, they were assured that only two story homes would be constructed on the lower tier. The Development's unrecorded "Declaration of Codes, Covenants, and Conditions" (declaration) stated:

> No home shall be permitted to block the view of an uphill home above a distance of 30 feet from the curb elevation to the peak of the roof.

Ultimately, the declaration was altered.

The civil engineer and geotechnical engineer concluded that because of the potential for landslide activity, reconstruction of the hillside to accommodate the original twenty-five lots planned was not possible and the development was reduced to thirteen lots. Additionally, the elevation of the lower tier was decreased by twelve feet because of its relocation to the north twenty-five feet. Consequently, the final version of the declaration replaced the unrecorded version shown to appellants when they initially expressed interest in the property. Central to the present controversy, the height restrictions for Lots 12 and 13, which lay

directly in front of appellants' lots, were increased by ten feet permitting the lots to accommodate homes and landscaping forty feet in height. The recorded declaration was filed of record on March 11, 2004.

Subsequently, appellants again met with McPherson and expressed interest in Lot 8 and their desire to have McPherson construct their home. However, because the Development was included in the Citifest Home Show, a lottery was in place to determine which builder could build on each lot. Jim Stegman Construction, Inc. which had first choice of the lots purchased Lot 8. On May 3, 2004, appellants purchased Lot 8 from Stegman Holdings LLC, and, on July 2, 2004, purchased Lot 7 from EWM.

According to appellants' home design, Stegman was contracted to construct a home on Lot 8 and an enclosed pool structure attachment to the residence on Lot 7. Appellants allege that Stegman consistently informed them that the clear panoramic view would not be substantially impeded by the lower tier homes because of the design of their planned home. Further, they contend that prior to their purchase of the lots, neither Stegman nor EWM informed them that the height restrictions of the lower tiered homes had increased in the final recorded declaration. However, the lot closing statement for the purchase of Lot 8 stated that appellants "acknowledge receipt of the Recorded Declaration of Covenants, Conditions, and Restrictions for the Estates of Wiedemann Mansion."

Construction was completed on the home and attached pool enclosure in May 2005. At that time, no homes were built on Lots 12 or 13 and the view was

unobstructed from all four levels of the residence. However, in the summer of 2005, Stegman began building a home on Lot 12 and another construction company began building on Lot 13. When it became apparent to appellants that the homes were going to be three stories high and taller than the thirty-foot height restriction in the initial declaration, the appellants inquired and learned that the recoded declaration had a forty-foot height restriction for the lower tier homes. Appellants later learned that McPherson and Stegman were aware of the change.

Appellants initiated this action against appellees for fraud, negligent misrepresentation and punitive damages. Specifically, appellants alleged at trial that if they had been aware of the increased height restriction that the first floor of their home would have been constructed differently to provide an enhanced view or used as storage. After the property was transferred to NKP, the complaint was amended to add it as a third plaintiff. Subsequently, the complaint was again amended to assert a claim for fraud by omission. The trial court granted summary judgment on the claims for negligent misrepresentation and removed Shirley and Lakamp as plaintiffs because they no longer possessed an interest in the property.

At the pretrial hearing, EWM filed a *Daubert* motion to exclude the testimony of appellants' real estate damages expert, William Bramble, on the basis that his methodology did not meet the *Daubert* standard. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After the motion was denied, appellants renewed the motion at trial which was also denied.

At the close of appellants' case, appellees moved for a directed verdict on the basis that appellants did not prove by clear and convincing evidence that appellees failed to disclose a material fact. Appellees also argued that the market value of the property was not diminished as a result of the alleged non-disclosure. The motions were denied. The case was submitted to the jury which found in favor of appellees.

Appellants contend that the instructions erroneously required them to prove that the failure to disclose the change in the height requirements for the residences on Lots 12 and 13 induced them to purchase Lots 7and 8. Appellants admit that the non-disclosure did not induce them to purchase the lots but induced them to build the residence in accordance with the unrecorded declaration and its requirements that the residences on Lots 12 and 13 be a maximum of thirty feet in height.

Appellees contend that assuming the instructions were erroneous, they were entitled to a directed verdict, thus, there could be no prejudice caused by any alleged error.

The harmless error rule is applicable to appellate review of jury instructions. When the appellate court determines that a party's motion for directed verdict should have been granted and, therefore, there was no issue to be submitted to the jury, any error in the jury instructions was not prejudicial. *Robert F. Simmons & Associates v. Urban Renewal & Community Development Agency of Louisville*, 497 S.W.2d 705 (Ky.App. 1973). In determining whether the alleged

errors in the instructions submitted to the jury in this case warrant reversal, we are guided by two principles, both of which impose a heavy burden upon appellees.

First, it is the general rule that an error in the instructions is grounds for reversal, unless it affirmatively appears that it was not prejudicial. *McKinney v. Heisel*, 947 S.W.2d 32 (Ky. 1997). In *McKinney*, the court reiterated what has been repeatedly stated in Kentucky case law:

> In this jurisdiction it is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial; that an appellee claiming harmless error bears the burden of showing affirmatively that no prejudice resulted from the error. *See also Drury v. Spalding,* Ky., 812 S.W.2d 713, 717 (1991); *Barrett v. Stephany,* Ky., 510 S.W.2d 524 (1974). *Prichard v. Kitchen,* Ky., 242 S.W.2d 988 (1951).

Id. at 35.

If the issue presented is whether the instruction was not prejudicial because the trial court erred when it did not grant a motion for directed verdict, review is subject to the equally pervasive standard of review applicable to a denial of a directed verdict as set forth in *Lewis v. Bledsoe Surface Mining Co.,* 798 S.W.2d 459, 461 (Ky. 1990):

> All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the

evidence so as 'to indicate that it was reached as a result
of passion or prejudice. (Citations omitted.)

Our inquiry is whether appellees were entitled to a directed verdict at the close of appellants' case: If so, any errors in the instructions were harmless.

Fraud by omission consists of four elements each of which must be proven by clear and convincing evidence: (1) a duty to disclose a material fact; (2) a failure to disclose the material fact; (3) the failure induced the plaintiff to act; and (4) resulting damages. *Rivermont Inn, Inc. v. Bass Hotels Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003). "A duty to disclose facts is created only where a confidential or fiduciary relationship between the parties exits, or when a statute imposes such a duty, or when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure." *Id*. citing *Dennis v. Thomson*, 240 Ky. 727, 43 S.W.2d 18 (1931). Because we are convinced that appellants failed to demonstrate that the alleged nondisclosure was material, we do not reach the question of whether the remaining elements were satisfied by the proof presented, including the existence of a duty to disclose or whether the acknowledgement of the recorded declaration precluded the assertion of appellants' claims.

The determination as to whether a fact is material must be examined on a case-by-case basis. In this case, the question is simply whether the increased height restriction for the residences on the lower tier was a fact so substantial and

important that had it been disclosed, appellants would have constructed their residence differently. We can find no evidence to support such a supposition.

Although it is undisputed that the unrecorded declaration shown to appellants and the subsequent recorded declaration differed regarding the height restrictions imposed on the lower tier residences, the elevation of the upper tier property remained identical while the elevation of the lower tier property was decreased twelve feet. Thus, it is factually impossible that the increased height restriction on the lower tier residences caused appellants' view to be diminished. Although the record reveals that appellants' view from the first floor of the residence is partially impeded by the homes constructed on the lower tier, the impediment would have been the same or greater had the original unrecorded declaration been finalized and recorded. Thus, we are compelled to conclude that appellees were entitled to a directed verdict and that any errors in the instructions were harmless.

The judgment of the Campbell Circuit Court is affirmed.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

KNOPF, SENIOR JUDGE, CONCURS IN RESULT.

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