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OPINION OF OCTOBER 23, 2009, WITHDRAWN

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000564-MR

JOSEPH L. AND JULIE L. HARDESTY

APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 05-CI-006517

SCOT-BILT HOMES, INC. AND
KENNETH S. BURNS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND CLAYTON, JUDGES.

COMBS, CHIEF JUDGE: Joseph and Julie Hardesty (the Hardestys) appeal a jury verdict in favor of residential homebuilder, Scot-Bilt Homes, Inc., and its owner, Kenneth Burns (collectively “Burns”), and the denial of their motions for a

directed verdict and a judgment notwithstanding the verdict by the Jefferson Circuit Court. After our review of the record, we reverse the judgment of the Jefferson Circuit Court.

In 1996, the Hardestys undertook construction of a house on a lot that they owned in Jefferson County. They contacted Kenneth Burns, owner of Scot-Bilt Homes, Inc. The Hardestys provided Burns with a floor plan sketch along with a picture of a house from the magazine *Southern Living*. It was only a rough sketch showing a suggested floor plan but providing no construction details.

Burns told the Hardestys that he knew a draftsman, Joe Dowdle, whom Burns had used to prepare and to formalize other plans. Burns explained that Dowdle could prepare the plans and that he could then submit a bid based on Dowdle's specs. Although Dowdle had worked Burns two to six times per year as a draftsman, he was not licensed as an architect or engineer.

Dowdle prepared the site plan and billed Burns for his work. However, the Hardestys contracted directly with Dowdle to prepare plans and specifications for the house. Burns then submitted a bid, and the Hardestys entered into a contract with him in 1997 for construction of the house. The contract provided that Burns would construct the house in accordance with the local building code, which provides as follows at § 6.03:

Builder shall furnish the labor and materials required for the erection of a new residence building on the above-described property in accordance with the signed plans, specifications, and local building codes.

Burns signed the building permit on behalf of Scot-Built Homes. That permit required him to comply with the “1995 CABO¹ Code.”

Construction lasted eight months and was completed in July 1998. After the Hardestys moved into the house, they began to notice construction defects. At trial, the Hardestys brought numerous defects to the attention of the jury: structural defects, such as structural cracks in the brick and drywall; humps in the floors; raised floors which prevented doors from swinging; a crown which developed in the floor in the first-floor hallway; separation of hardwood flooring; and a large crack which developed in the basement floor.

Many other problems became manifest. The Hardestys alleged that the floor joists were inadequate to support the weight of the house in violation of the building code. They noted movement of the foundation by approximately two inches as evidenced by structural cracking in the walls and brick veneer as well as the large crack in the basement floor. There was a chimney leak in the master bedroom and a second roof leak in the rear of the house. The porch, railing, and balusters began rotting within one year and had completely rotted away within four years of construction. The rear deck had sunk approximately three inches. They discovered a break in the main water line entering the house due placement of a large rock over the water line. They also experienced HVAC (heating, ventilating

¹ CABO: Council of American Building Officials. This organization is an internationally recognized source providing administrative guidance and technical standards for all aspects and phases of residential construction.

and air conditioning) problems, which they attributed to Burns's installation of defective coils.

The Hardestys brought some of these problems to the attention of Burns within the first few years after construction. Although Burns told them that the house was undergoing normal settling, he did install precautionary structural support. Every expert who testified at trial agreed that the floor joists were insufficient and that they violated the building code as to weight-bearing capacity.

Although the Hardesty's continued to report a myriad of construction problems, Burns finally told them to quit calling him. He ceased making repairs. Roughly seven years after the construction of their house, the Hardestys brought a breach of contract claim against Burns for defective construction based on the numerous defects, the violations of building code, and the breach of the implied warranty of habitability.

At trial, the Hardestys testified and presented testimony from Ralph Wirth, their home inspector and an expert in building code; James Carter, a structural engineer; and Steve Thompson, a contractor who testified about the cost of repair necessary to correct the alleged defects. Burns presented his own testimony -- both as a fact witness and as a homebuilder -- together with that of his experts: James Roggenkamp, a structural engineer; Louis Kaufman; an expert in foundation stabilization; Dr. Joseph Hagerty, a licensed geotechnical engineer; and John Sillman, a masonry expert.

As to structural defects, Burns testified that he repeatedly told the Hardestys that the settling of the house was normal. As noted above, testimony was presented that Burns eventually told the Hardestys not to call him any more about the defects and that he refused to perform any structural repairs. However, Burns testified that after meeting with the Hardestys' licensed structural engineer a few years after construction was completed, he installed precautionary structural supports.

As to whether the floor joists were inadequate to support the load imposed by the house, all three experts (including Burns's own expert, James Roggenkamp) agreed that the installation of floor joists in the house violated the building code because they were insufficient to support the load imposed by the house. They were either the wrong size or they were not positioned properly to support the floors of the house – specific violations of the building code.

The first witness to testify for the Hardestys, Ralph Wirth, was a home inspector who was an expert in the building code. Wirth testified that the joists were inadequate and that this defect caused uneven floors, high spots, and undulations in the floors throughout the house. Next, James Carter, a structural engineer for the Hardestys, testified that there was excessive stress in the joists between the first and second floors. Carter stated that this defect violated section 3.01 of the building code providing that “buildings and structures, and all parts, thereof, shall be constructed to support safely all loads, including dead loads.”

Last, James Roggenkamp, a structural engineer for Burns, agreed with Wirth and Carter that the first-floor joist violated the building code but disagreed that the second-floor joists were inadequate. However, the Hardestys brought out on cross-examination that Roggenkamp's opinion was based on a certain number of floor joists and that the number which served as a basis for his opinion was incorrect.

Burns testified that the floor joists had been designed by Dowdle except for the second-floor joists, which were designed by Burns's subcontractor, K&I Lumber. Burns testified that during the installation of the joists, he modified the plans submitted by Dowdle and narrowed the distance between the first-floor joists to strengthen the floor. Roggenkamp testified that the narrowing of the floor joists lessened any structural concerns that may have been hidden in the design plans.

With respect to the third issue concerning the foundation of the house, testimony showed that the downhill side of the house had moved relative to the uphill side of the house, resulting in structural damage. This movement was revealed by structural cracking in the walls and brick veneer and a large crack in the basement floor. However, the cause of the movement was disputed. Both of the Hardestys' experts, Carter and Wirth, and Burns's foundation stabilization expert, Louis Kaufman, testified that the house needed foundation stabilization. Wirth testified that the house continued to move as evidenced by re-opening of patches in the bricks veneer. His calculation was that the house had moved two

inches in the southwest corner, resulting in violations of sections 3.01 and 4.01 of the building code and requiring Burns to place the house on adequate soil rather than on expansive, compressive, or shifting soil. In addition, Carter testified that the movement was likely due to compression of the soils on the downhill side of the house, which was a bearing-capacity failure. Wirth and Carter recommended foundation piers be installed to stabilize the house.

Burns presented two foundation experts, Louis Kaufman and Dr. Joseph Hagerty. Kaufman, the expert in foundation stabilization, agreed that the house needed to have stabilizing piers installed. Dr. Hagerty agreed that the house had moved a couple of inches but disagreed that stabilization piers were now necessary. He testified that the settling had ended and that stabilization piers were no longer necessary. In commenting on Burns's testimony that he had enlarged the foundation footers on the downhill side of the home, Dr. Hagerty testified that this action would minimize potential settling and would not cause additional settling. The cracks that Dr. Hagerty observed indicated that the downhill end of the house had moved relative to the uphill end. He did not agree that the movement resulted from the soil because it was not expansive, compressive, or shifting -- but from differential settlement of the house resting on top of the soil. Dr. Hagerty explained that the home shifted because of the location of the house on the site and the corresponding pre-construction loading of the soil, known as differential settlement.

As to the chimney leak in the master bedroom, testimony established that Burns had attempted to repair the leak by replacing the roof flashing around the exterior of the chimney. However, flashing did not stop the leak. Wirth testified that any entry of water into a habitable living area of the house is a building code violation. Wirth testified that the water was entering through the brick veneer of the chimney itself and not through the seam where Burns had reapplied the flashing. Wirth testified that Burns had not properly constructed the chimney and that his attempted repairs did not address or correct the problem. Instead, according to Wirth, wall flashing should have been installed **behind** the brick to direct water to “weep” holes so that the water would exit the wall cavity above the roof level. The chimney leak violated sections 703.1² and 703.7³ of the building code. Thompson also testified that the chimney was not properly flashed.

Burns testified that he had attempted to repair the roof and that he was unaware that the roof was still leaking. Burns also presented testimony of John Sillman, an expert in masonry. Sillman testified that upon his inspection of the leak, he saw water stains on the attic floor in the area of the chimney and that the leak needed to be fixed.

With respect to the second roof leak in the rear of the house, testimony was presented that the leak occurred within the first four years of construction. However, Burns presented evidence in the form of a roof repair

²Section 703.1 requires that exterior walls to be installed to provide a barrier against weather.

³ Section 703.7 requires flashing behind the brick and weep holes to allow water to exit the brick.

invoice that the repair to the roof occurred eight years after the home was built.

Burns also testified that he was unaware of any continuing issues with the roof.

As to the rotted porch, railing, and balusters, the Hardestys testified that the porch railing and balusters around the top and the bottom porch had begun to rot within the first year after construction was completed. The Hardestys testified that they were painted in the spring and fall. Wirth testified that Burns used the wrong materials for the balusters and railing as demonstrated by the fact that the materials rotted within the first three to four years after construction.

Burns testified that the porch rotted “way prematurely” and attributed this deterioration to a lack of maintenance. He also testified that he had warned the Hardestys that their selected porch materials were not ideal materials for porch construction and that they would require above-average maintenance.

As to claim that the rear deck sank about three inches, Wirth testified that the sinking was to Burn’s failure to provide an adequate foundation for the steps. Burns testified that the deck was nine years of age and that this type of settlement is normal. Further, Burns testified that he was not made aware of the problem and that he had not provided the lot on which the house was built.

Next, the Hardestys testified that they discovered that a large rock was placed over the water line entering the house, causing the water line to break. The Hardestys presumed that the rock was placed there when Burns back-filled around the house. Wirth testified that large rocks should not be placed in fill near the main water line. Burns testified that this damage occurred eight years after the house

was built, that the line was broken from rock settlement, and that Burns was not notified of the issue.

As to the Hardestys' final issue, the HVAC problems, the Hardestys presented evidence that Burns installed defective coils in the HVAC system. Burns presented evidence in the form of an invoice that the coils were replaced after eight years due to "very dirty condenser coils."

At the close of each party's case in chief, the Hardestys moved for a directed verdict, which the trial court denied. After hearing all the testimony, the jury returned a unanimous verdict in favor of Burns. The Hardestys then moved the court for a judgment notwithstanding the verdict (JNOV) based on the Hardestys' claims that Burns violated the Kentucky building code with respect to the floor joists and chimney leak and that there was insufficient evidence to sustain a verdict for Burns.

In denying the motion, the trial court stated that while the jury heard evidence regarding the code violations and the design of the house, Burns did not design the house -- nor did he hire and pay the designer. (However, according to plaintiff's exhibit 19 and as noted earlier in this opinion, Dowdle had prepared the **site** plan drawings for the house and submitted his invoice for payment to Burns.) The trial court concluded that the jury heard sufficient evidence on these issues. Further, the trial court determined that: (1) Burns had offered proof sufficient to support the jury verdict, thus rebutting the allegation of a code violation arising from the foundation's being placed on inadequate soil; and (2) the Hardestys'

claim that Burns failed to rebut liability for problems with the roof, porch, deck, HVAC, and water line did not merit a directed verdict as Burns presented evidence (albeit not the best evidence or the most evidence) sufficient to sustain the jury's verdict. Therefore, the court concluded that the Hardestys were not entitled to a JNOV.

It is from the denial of the Hardestys' directed verdict motions and motion for JNOV that they now appeal.

The Hardestys present eight arguments on appeal in support of their contention that the trial court erred in denying their motion for a directed verdict and their subsequent motion for JNOV. At the outset, the Hardestys argue that courts recognize special protection for homeowners in the construction of a house through the implied warranty of habitability with respect to the structural integrity of home construction.

Based upon Kentucky's implied warranty of habitability, the Hardestys contend that they were entitled to a directed verdict on their structural claims. Second, they assert that the undisputed building code violations entitled them to judgment as a matter of law. Third, they argue that Burns cannot avoid liability for his building code violations and other construction defects by blaming an unlicensed draftsman whom he recommended and paid. Fourth, the Hardestys claim that the fact that the plans were approved by the building code office does not relieve Burns of his responsibility for failure to comply with the building code resulting in violations. Fifth, the Hardestys assert that the evidence was

insufficient to sustain a verdict for Burns with respect to the foundation claim.

Sixth, the Hardestys state that there was insufficient evidence to sustain a verdict in favor of Burns on the Hardestys' chimney leak, porch, roof leak, deck, water line leak, and HVAC claims. Seventh, the Hardestys argue that the jury ignored the court's instructions. Finally, the Hardestys assert that the court erroneously admitted evidence prejudicial to the Hardestys concerning Mr. Hardesty's position as a construction attorney at a large firm.

Burns disagrees and disputes at length each of the Hardestys' claimed errors. After a review of the arguments presented by the parties, the voluminous record and applicable law, we reverse the trial court. Although there was evidence presented to support Burns, it was simply **inadequate substantively** to support the verdict of the jury in this case. We are persuaded that the Hardestys were entitled to a JNOV.

Our role as an appellate court is to determine whether a trial court erred in declining to grant a motion for a directed verdict or a JNOV. *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459 (Ky.1990) and *Commonwealth Dept. of Highways v. Enoch*, 23 S.W.2d 633 (Ky. 1975). In our analysis, we must bear in mind that:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it

is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky.App.1985)

This Court is not at liberty to make credibility determinations or determine the weight which should be given to the evidence as these are the functions of the trier of fact. *Lewis* at 462. “Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts.” *Gibbs v. Wickersham*, 133 S.W.3d 494, 495-96 (Ky.App.2004). The denial of a motion for a JNOV should only be reversed on appeal when it is shown that the verdict was so palpably or flagrantly against the evidence as to indicate that the jury reached the verdict as a result of passion or prejudice. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998).

During *voir dire*, the Hardestys’ counsel informed the jury that Mr. Hardesty was a partner at the “large” law firm of Stites and Harbison and that Mrs. Hardesty was an attorney with the Jefferson County Attorney’s office. Over the Hardestys’ objection, the jury also learned that Mr. Hardesty is a member of the construction group in his firm. The Hardestys believe that the jury was tainted from the outset to their detriment. Although we agree that this evidence was wholly inadmissible on relevancy grounds, its erroneous admission would not suffice alone to warrant a reversal. We shall not speculate on the subjective impact

of such information. Therefore, our inquiry will focus solely on the substantiality of the evidence presented and the pertinent law.

The Hardestys argue that courts recognize special protection for homeowners in construction of a house through the implied warranty of habitability with respect to the structural integrity of home construction. They rely on *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2d 921, 925 (Ky.1994), in which the Kentucky Supreme Court addressed the construction of a new residence and held as follows:

[I]n *Crawley v. Terhune*, [437 S.W.2d 743, 745 (Ky. 1969)] this Court held as a matter of law “that in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials.”

In rebuttal, Burns cites *U.S. v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61 (1918), in which the United States Supreme Court held that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.” There is a major distinction between defects in plans and specifications *versus* a clear violation of a building code provision.

In the case before us, Burns argues that he took the plans furnished by Dowdle, that Dowdle had been hired by the Hardestys, and that he essentially was absolved from any liability for defects by shifting all accountability to Dowdle.

However, in signing his contract with the Hardestys, Burns assumed full responsibility to comply with the building code. In addition to case law, Kentucky Revised Statute(s) (KRS) 198b.130 directly provides for compensation (including recovery of attorneys' fees) for damages occurring as a result of building code violations.

Three claims were direct violations of the building code. Experts testified for both sides as to these defects with some degree of contradiction but with unanimous agreement on one salient point: the building code was clearly implicated. To recapitulate, those defects were the following:

(1) structural instability caused by improper installation of floor joists in violation of section 3.01. Burns admitted to altering Dowdle's plans, not consulting with any other design professional, and not notifying the Hardestys of the alteration.

(2) instability of the foundation causing cracking of the walls, the brick veneer, and the basement floor implicating section 4.01 of the code. While testimony as to the cause was conflicting, there was no question that a code violation was involved.

(3) the chimney leak attributable to inadequate flashing implicating section 703.7 of the code. No one contradicted the testimony of the Hardestys' expert Ralph Wirth, that "any time water enters a habitable living area of the house, it is a building code violation."

The claim as to the rotting porches was not addressed by an expert witness. However, the only testimony disputing Burns's liability was that of Burns himself, who shifted responsibility to the Hardestys for "improper maintenance." The Hardestys offered their counter-testimony, verifying that the balusters and railings had been painted in the spring and fall. Nonetheless, the rotting began within the first year following construction with the eventual collapse of the entire upper porch.

Four more claims were presented. No expert testimony was heard, and Burns provided **no evidence** to explain these defects: the second roof leak, the sinking of the rear deck by three inches, the water line leak, and the defective coils in the HVAC.

Appellate restraint dictates that we grant great deference to a jury verdict and the discretion of a trial court. However, we have indeed reversed jury verdicts when the evidence was lacking in sufficiency to sustain a verdict. *Shreve v. Biggerstaff*, 777 S.W.2d 616 (Ky. App. 1989). After our review of the records, we are persuaded that the evidence was so compelling against Burns that no reasonable jury could have returned a verdict in his favor. The verdict was truly puzzling in light of the scant evidence offered to absolve Burns of liability. In an abundance of caution, the trial court allowed this case to proceed to a jury rather than entering a directed verdict. However, after the jury failed to return a verdict in compliance with the evidence, we conclude that the trial court erred in not granting a JNOV.

Our Kentucky Supreme Court has recognized the sacrosanct duty of a home builder to construct a house in workmanlike fashion. It is a duty singled out from all other commercial transactions and elevated to a special status of protection to homeowners. In *Real Estate Marketing, Inc. v. Franz*, 885 S.W.2nd 921 (Ky. 1994), Kentucky adopted an implied warranty of habitability regarding home building:

There is an implied warrant that in its major structural features, the dwelling was constructed in a workmanlike manner and using suitable materials. *Crawley* elevates the builder's failure to so construct the dwelling to the status of a **legally compensable wrong as a matter of law even though it is not a matter of contract.**

Id. at 925 citing *Crawley v. Terhune*, 437 S.W.2d 743, 745 (Ky.App. 1969).

(Emphasis added.)

In the case before us, law, contract, and the building code all come together to compel a different outcome in the construction of the Hardestys' house. In their petition for rehearing, the Hardestys argue that *Culbertson v. Ashland Cement & Construction Co.*, 144 Ky. 614, 139 S.W. 792 (1911), a ninety-eight-year-old case holding a builder liable for defects only when he provides the plans, clearly has been superseded by the more expansive rulings in favor of homeowners clearly set forth in *Crawley, supra* and *Franz, supra*. As correctly noted in the petition for rehearing, *Culbertson* involved construction of a sidewalk rather than a habitation and would arguably be distinguishable on that basis alone – separate and apart from the heightened protection now being afforded to homeowners. *Franz*

has expressed this public policy trend so forcefully as to expand the implied protection beyond a builder and homeowner in privity with one another to subsequent purchases of a house if the defects involve building code violations.

In the recent case of *Miller v. Hutson*, 281 S.W.3d 791 (Ky. 2009), the Supreme Court of Kentucky removed from a homebuilder any protection based on the doctrine of *caveat emptor*, announcing that no buyer should have to be wary in dealing with the person entrusted with the construction of his home:

The purchase of a newly built home is, for almost every Kentuckian, the most significant financial decision they will make, and it is the fulfillment of a significant part of the American dream. For the past forty years, since the decision of our predecessor Court in *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969), we have consistently held that the doctrine of *caveat emptor* does not protect the builder of a new residence from the damages suffered as a result of defective construction by the purchaser of the new residence.

Id. at 796 (Concurring Opinion of Justices Venters and Scott.)

Accordingly, we reverse the judgment of the Jefferson Circuit Court and remand this case for a trial on the issue of damages.

CLAYTON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

CAPERTON, JUDGE, DISSENTING: There is little doubt that the home of the Hardestys is fraught with problems. However, on appeal, our review of a trial court's denial of a JNOV is limited to a determination of whether the

verdict of the jury was so palpably or flagrantly against the evidence as to indicate that passion or prejudice influenced the jury.

In the case before our Court, the jury heard the evidence, determined and resolved the conflicts, and rendered a verdict. A review of the record reveals no passion or prejudice that could have influenced the jury to render an improper verdict. Thus, the decision attained by the jury and embodied in the verdict must necessarily have been based on the evidence presented at trial. Assigning weight to the evidence is the purpose and function of the jury; thus, I would affirm.

BRIEFS FOR APPELLANTS:

David B. Ratterman
Angela R. Stephens
Louisville, Kentucky

**ORAL ARGUMENT FOR
APPELLANTS:**

David Ratterman
Louisville, Kentucky

BRIEF FOR APPELLEES:

Gerald L. Stovall
Brian A. Veeneman
Louisville, Kentucky

**ORAL ARGUMENT FOR
APPELLEES:**

Brian Veeneman
Gerald Stovall
Louisville, Kentucky