NO. COA10-1401
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

LAURA GARLAND FLANARY,
Plaintiff,

v. Johnston County
No. 08 CVS 1812

ROBERT LEE WILKERSON, SR. and
WINCER ADAMS BEST,
Defendants.

Appeal by defendants from judgment entered 16 June 2010 by Judge James G. Bell in Johnston County Superior Court. Heard in the Court of Appeals 11 May 2011.

Stewart and Schmidlin, PLLC, by Marcia Kaye Stewart, for plaintiff-appellee.

Woodruff & Fortner, by Gordon C. Woodruff, and Reece & Reece, by Mary McCullers Reece, for defendant-appellant Robert Lee Wilkerson, Sr. and Tommy W. Jarrett for defendant-appellant Wincer Adams Best.

BRYANT, Judge.

Where the trial court's jury instruction on reasonable reliance was prejudicial, defendants were deprived of a fair trial. We, therefore, grant defendants a new trial.

Facts and Procedural History

On 9 May 2003, Robert Lee Wilkerson, Sr., and Wincer Adams Best (collectively "defendants") purchased a home at 210 East Parker Street in Smithfield, North Carolina for $99,000.00. Defendants leased the property to various tenants until they sold the home to Laura Garland Flanary ("plaintiff") in September 2006 for $133,000.00. On 15 August 2006, prior to purchasing the home, plaintiff and her real estate agent, Elizabeth Nieves (Nieves) drove to the home to view it for the first time. Defendant Wilkerson approached plaintiff and Nieves, introducing himself as a neighbor and co-owner of the home. The three discussed various aspects of the sixty-nine year old home.

Plaintiff testified to the following: defendant Wilkerson informed plaintiff the roof was only four years old and was still under warranty; Defendant Wilkerson told plaintiff that the plumbing had been updated and windows replaced. Further, defendant Wilkerson relayed to plaintiff that the electrical system had been updated, the gas logs were in working condition, and the gas logs had been used by the previous tenant.

Defendant Wilkerson testified that he was not aware of how old the roof was and denied that he told plaintiff the roof was four years old and still under warranty. Defendant Wilkerson

denied discussing the plumbing in the home or telling plaintiff it had been updated. Defendant Wilkerson did, however, admit that he told plaintiff there had been a water leak in the bathroom above the kitchen which had been repaired. Defendant Wilkerson denied telling plaintiff that the windows had been replaced. Defendant Wilkerson testified to informing plaintiff that the breaker box had been replaced, but denied telling plaintiff the electrical system had been updated. Finally, defendant Wilkerson denied knowing or telling plaintiff that the gas logs were in working condition.

Plaintiff purchased the home after rejecting the right to have an inspection of the property. In fact, plaintiff, on 28 August 2006, signed the "Offer to Purchase and Contract" that provided the buyer with the "option of inspecting, or obtaining at Buyer's expense inspections, to determine the condition of the Property." The "Offer to Purchase and Contract" also contained a provision stating that "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Plaintiff wanted defendants to provide a one-year warranty for the house, but defendants refused, and the contract was amended to state "seller not responsible for repairs."

After plaintiff moved into the house, she first noticed that the utility bills were very high. Plaintiff testified that when the gas technician came out to the house he notified her that the gas logs had cracked in half, had been glued, and were not functioning properly. Plaintiff was also concerned about the plumbing in the upstairs bathroom. Plaintiff testified that "[b]y the third shower, I was wading in water up to my knees . . . ." In addition, plaintiff testified that by the third week every faucet in the home was leaking. Plaintiff also had problems with the windows in the home, stating that most had been painted shut. Plaintiff noticed cracks forming in the sheetrock walls in several rooms of the home within the first five months of moving in. Finally, plaintiff discovered from defendant Best that the foundation to the home was cracked.

On 16 May 2008, plaintiff filed a complaint against defendants alleging breach of contract, rescission of contract, negligent misrepresentation, fraud, and unfair and deceptive trade practices. On 16 June 2010, the trial court entered a corrected judgment acknowledging, in pertinent part: the determination of the jury that defendants were partners; that defendants committed fraud against plaintiff; and, that plaintiff was entitled to recover $200,000.00 together with pre-

judgment interest and $390,000.00 together with post-judgment interest in damages, as well as $66,126.78 for costs and attorneys' fees. The trial court found defendants "willfully engaged in an unfair and deceptive act or practice" entitling plaintiff to treble damages. The trial court also denied defendants' motions for Judgment Notwithstanding the Verdict (JNOV) and a New Trial and awarded attorney's fees to plaintiff. From this order, defendants file separate appeals.

On appeal, defendants present the following common issues: whether the trial court erred (I) by denying the motions for directed verdict and JNOV and (II) by denying defendants' motion for a new trial. Defendant Best separately argues (III) that the trial court erred in finding that defendants had "willfully engaged in an unfair and deceptive act or practice, and there was an unwarranted refusal by the [d]efendants to fully resolve the matter constituting the basis of the instant suit." Defendant Wilkerson separately contends that (IV) the trial court erred by ordering defendants to pay attorney's fees.

Reasonable Reliance Instruction

Because we grant defendants a new trial due to a prejudicial jury instruction regarding reasonable reliance, we address only one other issue brought forth on appeal.

However, before reaching the ultimate question regarding the propriety of the jury instruction, we must first discern the concept of reasonable reliance within the context of the facts of this case. Here, the jury was instructed to first determine whether defendants committed fraud against plaintiff and, if so, what amount the plaintiff was entitled to recover from the defendants as damages for fraud.

The elements of actionable fraud are well established: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Isbey v. Cooper Cos.*, 103 N.C. App. 774, 776, 407 S.E.2d 254, 256 (1991) (citation omitted). However, "reliance on alleged false representations must be reasonable. Reliance is not reasonable if a plaintiff fails to make any independent investigation, or if plaintiff is informed of the true condition of the property[.] The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *State*

Props. v. Ray, 155 N.C. App. 65, 72-73, 574 S.E.2d 180, 186 (2002) (internal citations omitted). With respect to a purchase of property, reliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: "(1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations." *MacFadden v. Louf*, 182 N.C. App. 745, 747-48, 643 S.E.2d 432, 434 (2007) (citation and quotation marks omitted).

"Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine." *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965). "The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest." *Calloway v. Wyatt*, 246 N.C. 129, 134-35, 97 S.E.2d 881, 886 (1957). "Before purchasing

property, it is incumbent upon buyers to take reasonable steps to protect their own interest." *Hearne v. Statesville Lodge No. 687*, 143 N.C. App. 560, 562, 546 S.E.2d 414, 415 (2001) (citation omitted). However,

> even if there is no duty to disclose information, if a seller does speak then he must make a full and fair disclosure of the matters he discloses. In replying to claims that a false representation was not justifiably or reasonably relied upon, our Supreme Court has stated that "[t]he law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract[.]

Phelps-Dickson Builders, L.L.C., v. Amerimann Partners, 172 N.C. App. 427, 438, 617 S.E.2d 664, 671 (2005) (citations omitted).

The evidence presented at trial and in light most favorable to plaintiff tended to show the following: On 15 August 2006, plaintiff was looking at the home with her realtor, Nieves, when defendant Wilkerson walked over from his home next door. Plaintiff asked him questions about the house. When asked about the condition of the roof, defendant Wilkerson replied that it was four years old and still under warranty. Plaintiff then asked about whether the plumbing had been updated and defendant Wilkerson showed her the updated plumbing in a "back room and

the kitchen" but informed her that the "upstairs and . . . the other bathroom" were not updated. Defendant Wilkerson said the electrical wiring throughout the house had been updated and "explained that he had worked on the home for years and he knew every square inch of it." Plaintiff asked about the windows and defendant Wilkerson informed her that they had been replaced with storm windows.

Defendant Wilkerson conceded that he told plaintiff she "probably would not need an inspection." However, plaintiff's real estate agent, Nieves, advised plaintiff that she should have a complete inspection of the house. In August 2006, defendants and plaintiff signed a Residential Property Disclosure Statement that stated the following:

> Purchaser(s) acknowledge receipt of a copy of this disclosure statement; that they have examined it before signing; that they understand that this is not a warranty by owner or owner's agent; that it is not a substitute for any inspections they may wish to obtain; and that the representations are made by the owner and not the owner's agent(s) or subagent(s). Purchaser(s) are encouraged to obtain their own inspection from a licensed home inspector or other professional.

Further, the Offer to Purchase and Contract provided that "[the] [b]uyer shall have the option of inspecting, or obtaining at

Buyer's expense inspections, to determine the condition of the Property" and that "CLOSING SHALL CONSTITUTE ACCEPTANCE OF THE PROPERTY IN ITS THEN EXISTING CONDITION UNLESS PROVISION IS OTHERWISE MADE IN WRITING." Plaintiff then opted out of having a home inspection completed.

At trial, defendants twice objected to the trial court's instruction on reasonable reliance: defendants first objected, prior to the trial court giving the instructions, and again objected after the jurors retired for deliberations. Defendants argue the trial court erred by denying their motion for a new trial[1] when the trial court improperly instructed the jury on reasonable reliance. Defendants contend the reasonable reliance instruction given by the trial court reversed or negated the burden of proof which must remain on plaintiff. We agree.

> A trial court's ruling on a motion for a new trial under Rule 59 is usually subject to an abuse of discretion standard. A trial court may be reversed for abuse of discretion only upon a showing that its actions are

[1] Defendants argued their motion should be granted for the following reasons: (1) manifest disregard by the jury of the instructions of the court; (2) excessive damages appearing to have been given under the influence of passion or prejudice; (3) insufficiency of the evidence to justify the verdict; (4) the verdict is contrary to law; and (5) errors in law occurring at trial and objected to by defendants. N.C. Gen. Stat. § 1A-1, Rule 59(a)(5)-(8) (2009). (R 165)

"manifestly unsupported by reason."

Davis v. Davis, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (internal citations and quotation marks omitted). "[W]here the motion involves a question of law or legal inference, our standard of review is *de novo*." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 371, 649 S.E.2d 14, 25 (2007). "Where errors of law were committed, . . . the trial court is required to grant a new trial." *Young v. Lica*, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003) (citation omitted).

"[I]n reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988). It is well-established that every litigant "is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of properly instructed jury. This right can neither be denied nor abridged." *Upchurch v. Hudson Funeral Home, Inc.*, 263 N.C. 560, 567, 140 S.E.2d 17, 22 (1965). Accordingly,

> [t]he slightest intimation from the judge as to the weight, importance or effect of the evidence has great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial.

Id.

In the case before us, the trial court instructed the jury regarding reasonable reliance, as follows:

> In an arm's length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud. Even where a plaintiff's reliance is unreasonable, in close cases, sellers who intentionally and falsely represent material facts so as to induce a party to action should not be permitted to say in effect, "You ought not to have trusted me. *If you had not been so gullible, ignorant or negligent, I could not have deceived you.*"

(emphasis added). This portion of the trial court's instruction on reasonable reliance was improper.

By its instructions, the trial court told the jury that what the trial court perceived as defendant's act of fraud overrode any unreasonable reliance on the part of plaintiff. These instructions had the effect of shifting or negating the burden of proof which remains on plaintiff. In essence, the trial court's instruction stated that because the instant case was a "close case," it condoned a purchaser's failure to obtain an inspection of the property if there are any alleged misrepresentations, rather than a balancing of the precautions of a purchaser against the misrepresentations of the seller.

Our Court has held that "[c]ourts must cautiously balance the conflicting policies of suppressing fraud on one hand and discouraging neglect and inattention towards one's obligations on the other." *Northwestern Bank v. Roseman,* 81 N.C. App. 228, 234, 344 S.E.2d 120, 124 (1986) (citation omitted). "A plaintiff who, aware, has made a bad bargain should not be allowed to disown it; no more should a fraudulent defendant be permitted to wriggle out on the theory that his deceit inspired confidence in a credulous plaintiff." *Johnson*, 263 N.C. at 758, 140 S.E.2d at 314.

We note with approval the suggested instruction on reasonable reliance set forth by defendant Best in her brief:

> If you, the jurors, find from the evidence and by its greater weight that this is a close case and if you further find from the evidence and by its greater weight that the sellers intentionally and falsely misrepresented material facts to the plaintiff so as to induce her to forego the inspection, then, in that event, you may otherwise excuse her reliance, even if unreasonable.

The suggested instruction is more balanced, allowing a jury to determine whether a plaintiff has shown reasonable reliance or fraud sufficient to overcome unreasonable reliance, as opposed to an instruction containing derogatory comments that are not a

part of the evidence at trial, and have the effect of shifting the burden of proof.

Therefore, for the foregoing reasons, we hold that the trial court's jury instruction regarding reasonable reliance was improper and resulted in such prejudice to defendants as to deny them a fair trial. We award defendants a new trial.

Partnership Instruction

Because this issue is likely to arise upon retrial, we review defendants' argument that the trial court erred by giving to the jury, an incomplete and inaccurate instruction on partnership.

The trial court gave the following jury instruction on partnership:

> There has been some evidence from the defendants in this case . . . that the defendants . . . were partners. So I instruct you that should you find the defendants . . . shared or were associated with one another in some action or endeavor, or [that defendants] were associated with one another as principles [sic] or contributors of capital in a business or a joint venture, you should find that [defendants] were partners. If you do not so find, you should find that [defendants] were not partners. The burden of proof to that issue lies with the plaintiff.

Defendants rely on our reasoning in *Hardesty v. Ferrell*, 44 N.C. App. 354, 260 S.E.2d 925 (1979), granting the defendant a

new trial when the trial court gave an inadequate instruction on partnership. In *Hardesty*, the plaintiff alleged that he and the defendant entered into a partnership agreement. The defendant on the other hand denied that he and the plaintiff ever agreed to or formed a partnership. *Id.* The trial court in *Hardesty* gave the following instructions:

> Now, members of the jury, I instruct you that a partnership is an association of two or more persons to carry on as co-owners a business for profit. A partnership may be formed by an oral agreement. However, it is necessary that both parties mutually agree to the formation of the partnership. In this case the plaintiff must satisfy you by the greater weight of the evidence that the plaintiff . . . and the defendant . . . mutually agreed to form a partnership and that they did so and operated [the business] as a partnership.

Id. at 356, 260 S.E.2d at 927. The *Hardesty* Court found that:

> The definition given is correct as far as it goes but it is inadequate. It is the duty of the judge to declare and explain the law arising on the evidence given in the case then being tried. He must also apply the law to the various factual situations presented by the conflicting evidence. The court should have, among other things, given the jury the benefit of the applicable statutory rules for determining the existence of a partnership that are set out in G.S. 59-37.

Hardesty, 44 N.C. App. at 357, 260 S.E.2d at 927.

The charge in the case *sub judice* also failed to set forth the statutory rules under N.C.G.S. § 59-37. The Uniform Partnership Act presents the statutory guidelines for determining the existence of a partnership under N.C.G.S. § 59-37, which states the following:

> (1) Except as provided by G.S. 59-46 persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:
>
> a. As a debt by installments or otherwise,
>
> b. As wages of an employee or rent to a landlord.
>
> c. As an annuity to a widow or representative of a deceased partner,
>
> d. As interest on a loan, though the amount of payment vary with the profits

> of the business,
>
> e. As the consideration for the sale of a goodwill of a business or other property by installments or otherwise.

N.C.G.S. § 59-37 (2009). "[T]he judge 'shall declare and explain the law arising on the evidence given in the case.' The trial court is not required, however, to read to the jury technical statutory language." *Tuttle v.* Tuttle, 38 N.C. App. 651, 656, 248 S.E.2d 896, 900 (1978) (citation omitted).

We note that it is well established that

> [t]o make a partnership, two or more persons should combine their 'property, effects, labor or skill' in a common business or venture, and under an agreement to share the profits and losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.

Rothrock v. Naylor, 223 N.C. 782, 786, 28 S.E.2d 572, 575 (1944) (citation omitted). "[I]n order to constitute a partnership it is necessary that there should be something more than the joint ownership of property; . . . that, before there can be a partnership, there must be an agreement for community of profits and loss[.]" *Gorham v. Cotton*, 174 N.C. 780, 783, 94 S.E. 450, 452 (1917).

In the instant case, the trial court instructed the jury that if they found defendants to be "associated with one another as principles [sic] or contributors of capital in a business or joint venture," they should find that a partnership existed. While this portion of the instruction was correct as a matter of law, the instruction as a whole was fatally incomplete based on *Hardesty*. Because the trial court failed to instruct the jury that there needed to be evidence of an agreement to share profits and losses in equal or specified portions, thereby constituting each member as an agent of the other member, the instructions on the law applicable to the formation of partnerships was inadequate. *Hardesty*, 44 N.C. App. at 356-57, 260 S.E.2d at 926-27.

New Trial.

Judge MCCULLOUGH concurs.

Judge HUNTER, Robert C. concurs in a separate opinion.

Report per rule 30(e).

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ROBERT LEE WILKERSON, SR. and
WINCER ADAMS BEST,
Defendant.

HUNTER, Robert C., Judge concurs.

I concur with the majority that defendants are entitled to a new trial due to the prejudicial effect of the jury instruction on reasonable reliance and the jury instruction on the existence of a partnership. I feel compelled, however, to highlight aspects of this case that I find troubling.

As the majority notes, "[j]ust where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine." *Johnson*, 263 N.C. at 758, 140 S.E.2d at 314. However, I have difficulty concluding that the issue of plaintiff's reliance was a matter for the jury and not unreasonable as a matter of law. *See Ray*, 155 N.C. App. at 73, 574 S.E.2d at 186 ("The reasonableness of a party's reliance is

a question for the jury, unless the facts are so clear that they support only one conclusion.").

The house that is the subject of this suit was 69 years old at the time plaintiff purchased it, "as is," for $133,000.00. Defendants purchased the house for $99,000.00 only three years earlier. When plaintiff requested defendants purchase a home warranty for her benefit, defendants declined to do so. Yet, despite being urged by her real estate agent to have the house inspected, despite the cautionary language in the contract and disclosure statement, and despite the readily discoverable nature of the conditions of which plaintiff complains, plaintiff opted not to have the house inspected. Consequently, she was awarded over $650,000 in damages and attorneys' fees in addition to retaining ownership of the house. I also have concerns as to the sufficiency of plaintiff's evidence to support the amount of damages awarded, and that the amount may have been influenced by passion or prejudice.

I concede that I am bound by *Johnson* to concur with the majority. However, where "[t]he policy of the court is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest," *Calloway*, 246 N.C. at 135, 97 S.E.2d at 886, I am concerned that being unable to conclude plaintiff's reliance was unreasonable as a matter of

law could encourage other home buyers to forego reasonable steps to protect their own interests.