

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001776-MR

PATRIOT HOMES, INC. AND
HERITAGE AMERICAN HOMES,
A DIVISION OF PATRIOT HOMES

APPELLANTS

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 03-CI-00126

MICHAEL WISE AND PAMELA WISE

APPELLEES

OPINION
AFFIRMING IN PART
VACATING AND REMANDING IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Patriot Homes, Inc., and Heritage American Homes, a division of Patriot Homes, (collectively referred to as Patriot Homes) bring this appeal from an August 12, 2005, judgment of the Ohio Circuit Court awarding Michael and Pamela Wise (collectively referred to as the Wises) \$74,654.00 in

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

compensatory damages for a defective mobile home and \$20,422.50 in attorney's fees. We affirm in part, vacate in part and remand.

In its judgment, the trial court succinctly set forth the facts as follows:

The Defendants are the manufacturer of a 2000 Patriot/Heritage American home purchased by the Plaintiffs through an authorized dealer of the Defendant. The purchase price of the home is \$74,654.00. The additional money financed by the Wises was to pay off the land and for improvements which are not part of the lawsuit. The home was to be moved and set up on the Wises' property as part of the purchase price. This work was to be done by the Defendants' dealer and, under the Manufacturer/Dealer agreement, the move and the installation of the home had to conform to the Defendants' specifications. Prior to completion of the set up[sic], the selling dealer for unexplained reasons was removed from the picture and replaced by another dealer of the Defendants. The Defendants subsequently completed the final setup through an independent contractor, Ken Sales, who testified at the trial that he worked on this home in August/September 2001 and again in the spring of 2002.

The Plaintiffs first notified the Defendant of defects in the home in August 2001. The Defendant accepted responsibility for correcting those defects at that time. The Plaintiffs notified the Defendants of problems with the roof in April 2002 and Defendant provided some shingles in connection with this problem but refused to repair the roof. The Plaintiffs elected to employ a Don Noffsinger to make these repairs. Mr. Noffsinger testified that the repairs he corrected were caused by defects

in the roof. His testimony was not refuted by the Defendants. The Plaintiffs paid Mr. Noffsinger \$3,200 for these repairs.

After the Defendant refused to repair the roof in April 2002, Plaintiffs employed counsel and written notice of defects was sent to the Defendants in May 2002. As the Defendants' requested, a detailed list of defects was sent to them on June 10, 2002. Defendants admitted receipt of this notice. By agreement of the parties, Defendants inspected the home in July 2002. At Defendants' request, the State Fire Marshall was called in and the property was inspected again on August 21, 2002. The State Fire Marshall confirmed defects in the home and directed the Defendants to make the repairs. The Defendants worked on the defects from September 4 to September 11, 2002. After the Defendants completed this work, the State Fire Marshall re-inspected the home and found many of the same defects existed. The Defendants were again directed to repair these defects. There has[sic] been no repairs made by the Defendants after the Fire Marshall's second inspection.

The Wises filed a complaint in the Ohio Circuit Court against Patriot Homes for alleged manufacturing defects in the mobile home. They claimed these defects resulted from Patriot Homes' negligence and constituted breach of the parties' contract and the express warranty given by Patriot Homes. At the conclusion of the Wises' proof at trial, they moved pursuant to Ky. R. Civ. P. (CR) 15 to amend their pleadings to conform to the evidence regarding claims asserted under Kentucky Revised Statutes (KRS) Chapter 367, which the trial court granted.

The action was tried by the court without a jury. CR 52.01. In its judgment, the trial court concluded the Wises had "sustained their burden of proof and [were] entitled to damages both under KRS 367 and for breach of warranty." The court determined the appropriate measure of compensatory damages was \$74,654.00, representing the purchase price of the mobile home, and also awarded \$20,422.50 in attorney fees. This appeal follows.

Under CR 52.01, the findings of fact of the trial court shall not be set aside unless clearly erroneous, and "due regard" shall be given to the court's judgment upon credibility of witnesses. However, issues of law are reviewed *de novo*. Gosney v. Glenn, 163 S.W.3d 894 (Ky.App. 2005). Our review proceeds accordingly.

Patriot Homes argues the trial court improperly concluded that the Wises were entitled to damages for violation of the Mobile Home Sales Act (the Act), Kentucky Revised Statutes (KRS) 367.710-775. Specifically, Patriot Homes maintains the Wises failed to give notice as required by the Act. The notice requirement under the Act is codified in KRS 367.725 and provides:

The owner shall give the manufacturer notice by certified mail, return receipt requested, with a copy to the dealer from whom the mobile home was purchased, within ten (10) days following establishment of the

conditions recited in KRS 367.715 containing an accurate description of the condition or conditions which render the mobile home nonmerchantable and the owner's name and address and his election to exercise the rights provided by KRS 367.745.

We agree with Patriot Homes that this statute is both specific and unambiguous as concerns the notice requirement under the Act. However, in conjunction with this transaction, Patriot Homes entered into an express limited warranty agreement with the Wises that was introduced into evidence at trial. Paragraph 5 of the limited warranty agreement sets forth explicit notice provisions that the Wises were to follow in the event the mobile home had any damage or defect. The warranty also provided that the Wises may have other rights under applicable state law.

Based upon the evidence, the trial court found that Patriot Homes received timely and substantial notice of the alleged defects and problems with the Wises' mobile home. As early as August 2001, Patriot Homes had been contacted by the Wises both in writing and by telephone communication regarding the defects. Given the totality of the circumstances surrounding the defective condition of the mobile home and the terms of the limited warranty agreement regarding the notice of the defects, we believe Patriot Homes waived the notice requirements set forth in KRS 367.725, including that notice of the alleged defects be given by certified mail.

A waiver is the intentional voluntary relinquishment of a known right. Harris Bros. Const. Co. v. Crider, 497 S.W.2d 731 (Ky. 1973.) A legal right may be waived by contract even where such right was statutorily created. 31 C.J.S. Estoppel and Waiver § 75 (1996). A waiver may be either expressed or implied and may also be inferred from the conduct of a party. Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335 (Ky.App. 2001).

The conduct of Patriot Homes in this action can clearly be inferred to constitute a waiver to receive a notice of the alleged defects to the mobile home by certified mail. Patriot Homes was on notice of the alleged defects under both KRS Chapter 367 and the limited warranty. The evidence clearly established that Patriot Homes failed to cure or correct the defects in accordance with the statute or under the limited warranty. To conclude otherwise would result in a manifest injustice for the Wises given that they clearly had established that the mobile home was defective within the first twelve months after delivery in accordance with KRS 367.715.

Having concluded that the trial court did not err in allowing the Wises' claim under the Act, we now address the damages issue raised by Patriot Homes. The trial court awarded damages to the Wises under both KRS Chapter 367 and for breach of warranty, finding that the measure of damages were "virtually

identical." Patriot Homes argues that the Wises were not entitled to any recovery for breach of warranty. We disagree with Patriot Homes and believe the circuit court properly found that the mobile home contained manufactured defects covered by the express warranty. In fact, the evidence clearly disclosed numerous defects with the mobile home that Patriot Homes failed to cure or correct. The Wises' right to assert a warranty claim is in addition to any claims under KRS Chapter 367 as provided for by KRS 367.775. However, we believe the circuit court failed to apply the correct measure of damages for a warranty claim, and that the Wises failed to present sufficient evidence to support an award of damages for their breach of warranty claim.

In a breach of warranty claim, where the buyer has accepted the goods, the proper measure of damages is governed by KRS 355.2-714(2):

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

Under KRS 355.2-714(2), the appropriate measure of damages is the difference between the value of the goods as accepted and the value of the goods as warranted, not the purchase price of the goods. Evidence of the purchase price of the mobile home

looks to the value of the mobile home as warranted and is not sufficient to establish the value of the mobile home as accepted. In fact, no evidence was presented to the trial court to establish the value of the mobile home as accepted in order to determine damages under KRS 355.2-714(2). Accordingly, the Wises were not entitled to breach of warranty damages under KRS under KRS 355.2-714(2).

Having previously concluded that the Wises did properly assert a claim under KRS Chapter 367, the measure of their damages is thus controlled by KRS 367.750. Under this statute, the owner of a mobile home may recover the purchase price paid less any diminution in value due to abuse by the owner or by the actions of a third party. The circuit court awarded the Wises their purchase price in the amount of \$74,654.00, but made no findings regarding the statutory deductions or credits that Patriot Homes may have been entitled to. We thus remand for additional findings on this issue.

We also note that there is a strong policy in this Commonwealth that forbids a double recovery for the same elements of a loss. Hardaway Management Co. v. Southerland, 977 S.W.2d 910 (Ky. 1998). In other words, the Wises are not entitled to recover the purchase price from Patriot Homes and retain the mobile home under KRS 367.750. The circuit court made no findings on this issue either which should also be

addressed on remand in determining the amount of damages due the Wises under the statute.

Patriot Homes' final argument is that the circuit court erred in awarding attorney's fees to the Wises. Having concluded the Wises presented a timely claim under the Mobile Homes Sales Act and there was sufficient evidence to support the court's findings that the mobile home was defective and otherwise nonmerchantable under the Act, we find no error in the award of attorney's fees that is explicitly provided for in KRS 367.750, if the mobile home owner prevails in an action under the statute. In this case, the mobile home owner did prevail in an action under the Act. Accordingly, the award of attorney's fees to the Wises was proper.

For the foregoing reasons, the judgment of the Ohio Circuit Court is affirmed in part, vacated in part, and this cause remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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