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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000162-MR  
AND  
NO. 2010-CA-002107-MR

SUSAN M. JOST AND KEVIN ALFORD

APPELLANTS

v. APPEALS FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 09-CI-00364

KENNETH R. KNOWLES; NEDA M. KNOWLES;  
AMERICAN BANK AND TRUST COMPANY, INC.;  
AND SOUTHERN TAX SERVICES, LLC

APPELLEES

AND

NO. 2010-CA-002145-MR

KENNETH R. KNOWLES AND  
NEDA M. KNOWLES

CROSS-APPELLANTS

CROSS-APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 09-CI-00364

SUSAN M. JOST; KEVIN ALFORD;  
AMERICAN BANK AND TRUST COMPANY, INC.;  
AND SOUTHERN TAX SERVICES, LLC

CROSS-APPELLEES

OPINION  
AFFIRMING  
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BEFORE: CAPERTON, CLAYTON, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This case involves the resolution of issues in consolidated appeals and a cross-appeal. Susan M. Jost and Kevin Alford appeal the partial summary judgment of the Logan Circuit Court that granted foreclosure on a second mortgage held by Kenneth R. and Neda M. Knowles. And Jost and Alford appeal and Ken and Neda Knowles cross-appeal from the October 6, 2010, judgment of the Logan Circuit Court, confirming a jury verdict, and the November 10, 2010, order denying both parties' post-trial motions. After careful review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a sale and purchase of a historical home and accompanying real estate in Logan County, Kentucky. The home is purported to be approximately two-hundred years old. On December 7, 2007, Kenneth R. and Neda M. Knowles (hereinafter the "Knowleses") sold the property, located at 12345 Bowling Green Road, to Susan M. Jost. Various documents were signed to complete the purchase including the contract, the disclosure statements, acceptance statements, and waiver of inspection.

To finance the purchase, Jost and her husband, Kevin Alford, who has a spousal interest in the property, borrowed money from American Bank and Trust Company, which is also a party to these proceedings. They have been current on all the payments to the bank. Additionally, Jost provided the Knowleses with a

promissory note of \$225,000 for the balance on the purchase, and as a result, they financed a second mortgage for Jost and Alford. Hence, the bank held the first mortgage on the property, and the Knowleses held a second mortgage on the property.

About two years later, the Knowleses claimed that Jost and Alford had not made timely payments on the second mortgage. As a result, on August 10, 2009, the Knowleses initiated a complaint for failure to make payments in Logan Circuit Court. They claimed that, as of July 15, 2009, \$89,500.26 was past-due and owing. In response, Jost and Alford answered the complaint and counterclaimed against the Knowleses. In the counterclaim, Jost and Alford stated that they were falsely and fraudulently induced to enter into the transaction and real estate contract with the Knowleses. They asserted that the Knowleses made representations to them that the Knowleses knew or should have known were false and that they relied upon these material representations. Jost specifically noted, among other issues, that the Knowleses misrepresented the gas utility service to the residence, the plumbing and water supply to the residence, and the issue of termite infestation. Further, she contended that the Knowleses were in breach of an agreement to pay rent and make utility payments for the use of a commercial building on the property.

After answering the counterclaim in September 2009, the Knowleses made a motion for partial summary judgment and an order of sale of the premises. They supported the motion for partial summary judgment by referring to the

language in the promissory note and real estate mortgage. The Knowleses claimed that based on both the note and the second mortgage, Jost and Alford were in default because of nonpayment. Jost responded to the motion for partial summary judgment by declaring that no discovery had taken place, she had received no credit for her counterclaim of unpaid rent and damages, plus she had claims for false and fraudulent inducement.

Notwithstanding Jost and Alford's line of reasoning, on December 22, 2009, the trial court granted the motion for partial summary judgment, ordered the sale of the property, and referred the matter to the Master Commissioner. Additionally, because of the terms of the contract, the trial court awarded the Knowleses attorney fees of \$6,725.58. Jost appealed the order to the Court of Appeals on January 20, 2010, and in order to supersede the judgment, she paid the clerk \$105,000.

On September 20, 2010, a jury trial began on the remaining issues, including the counterclaim for fraud, unpaid rent, and disputed ownership of furniture. Regarding the issue of furniture, the Knowleses claimed that certain furniture, itemized in Plaintiff's Exhibit 1, remained in the home but was supposed to be returned to them. Jost and Alford contended that the furniture was part of the sale and that they should retain it. It was their contention that the furniture listed in Plaintiff's Exhibit Number 1, as well as the furniture listed in Defendant's Exhibit Number 2, belonged to them.

The jury found for Jost and Alford on some of the fraud claims and awarded compensatory damages of \$70,491 and punitive damages of \$10,000. Regarding the furniture, the jury determined that Jost and Alford should retain the furniture with no compensation to the Knowleses. On October 6, 2010, a judgment pursuant to the verdict was entered. After both parties submitted post-judgment motions, the trial court, on November 10, 2010, denied Jost's motion for attorney fees and the Knowleses' motion for a new trial. Both parties appeal from the jury verdict and the trial court's denial of the post-judgment motions.

### ISSUES

Although the facts are relatively uncomplicated in this case, the issues on appeal and cross-appeal are numerous and somewhat convoluted. Therefore, before addressing the issues individually, we will delineate them.

Jost and Alford frame the issues as follows: First, the trial court erred when it granted the Knowleses' motion for summary judgment on the note and mortgage, since there was a pending counterclaim for fraud. Next, following the jury trial, the trial court committed error or abused its discretion when it failed to award Jost and Alford attorney fees since they were clearly the prevailing party under the jury's verdict and the court's judgment. And, the trial court committed error in its failure or refusal to properly instruct the jury on the claims of inconvenience and suffering that arose from the fraud that was committed upon the

purchasers, Jost and Alford. Lastly, they argue that the trial court properly permitted the issue of the written waivers and acceptances to go to the jury.

Whereas the Knowleses frame the issues as follows: The trial court was correct in granting the Knowleses' summary judgment on the note and mortgage. Second, the trial court was correct in its refusal to award both Jost and the Knowleses their attorney fees since neither party was the prevailing party pursuant to the jury's verdict and the court's judgment. In addition, the trial court was correct in its refusal to instruct the jury about Jost and Alford's claims of inconvenience and suffering that they claimed to have incurred as a result of claimed deficiencies in the home after its purchase. The trial court, however, erred when it failed to instruct the jury that Jost and Alford were required to exercise ordinary care in inspecting the property upon purchase. Further, the trial court abused its discretion in refusing to grant the Knowleses a new trial based upon Jost and Alford's use of improper evidence during the trial. And, the trial court erred in its refusal to grant a directed verdict to the Knowleses in light of the waivers and acceptances signed by Jost and Alford when they purchased the home. Finally, the trial court erred when it failed to delineate between the two parties' different furniture listings, which allowed Jost and Alford to acquire \$51,000 in furniture at no cost. We will address the issues in the order listed.

1. Partial summary judgment

Initially, we address the propriety of the trial court's grant of partial summary judgment. On appeal, the standard of review for an appellate court on a

trial court's grant of a motion for "summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. Further, "[t]he trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), citing *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-482 (Ky. 1991). And, "since 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." *Lewis*, 56 S.W.3d at 436.

When the complaint was filed, Jost had not made timely payments for over a year on the second mortgage held by the Knowleses. Consequently, the Knowleses contend that Jost was in default on the payments on the second mortgage and, thus, foreclosure was appropriate. Jost and Alford counter that the court erred in granting summary judgment because valid issues of material fact were raised by the counterclaim and virtually no discovery had been conducted at the time the partial summary judgment was granted.

A mortgage is a contract between the borrower and lender subject to the rules of interpretation applicable to contracts. When the language is clear and

free from ambiguity, “it needs no construction and will be performed or enforced in accordance with its express terms.” See *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 836 (Ky. App. 2000), quoting *Exparte Walker’s Ex’r*, 253 Ky. 111, 68 S.W.2d 745 (Ky. 1933). Jost and Alford have not argued that any ambiguity existed in either the mortgage or the promissory note. While they highlight the Knowleses’ failure to make timely rental payments, language about the Knowleses’ arrangement to pay rent is not included in the promissory note or the mortgage but is found in the “real estate purchase contract and deposit receipt.”

Rather, based on *Hanson v. American Nat.’l Bank & Trust Co.*, 865 S.W.2d 302 (Ky. 1993), *overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 495 (Ky. 2002), Jost and Alford maintain that it was their right to choose the remedy for a claim of fraud and misrepresentation.

They cite the following language:

This is a tort action for compensatory and punitive damages for fraud and misrepresentation. This Court has held in *Kentucky Electric Development Co.’s Receiver v. Head*, 252 Ky. 656, 68 S.W.2d 1 (1934), where a fraud has been perpetrated to induce a party to enter into a contract, the injured party may elect to affirm the contract and recover damages in tort for the fraud or disaffirm the contract and recover the consideration with which he has parted. *Bryant v. Troutman*, Ky., 287 S.W.2d 918 (1956).

At the conclusion of the evidence Hanson chose the remedy to pursue. Since Hanson affirmed the contract, the trial judge directed a verdict on the contract documents for the Bank in the amount of the debts



evidenced by the notes, interest and legal fees. The trial court submitted to the jury only the tort claim and instructed the jury accordingly, permitting the jury to assess damage, if any, for fraud.

*Hanson* at 306-07. Based on the fact that the Court said “[a]t the conclusion of the evidence Hanson chose the remedy to pursue[,]” Jost and Alford maintain that they could choose the remedy for their counterclaim at the conclusion of the evidence. But we believe that the critical meaning of the cited language is that parties maintaining a breach of contract may either affirm the contract and recover damages for the injury or disaffirm the contract and recover their consideration. At no time, during this litigation have Jost and Alford stated that they wanted to disaffirm the contract or that they did not owe the debt.

The basic purpose of contract damages is to compensate the injured party. *AIK Selective Self-Ins. Fund v. Minton*, 192 S.W.3d 415, 418 (Ky. 2006.) And the measure of damages for breach of contract is “that sum which will put the injured party into the same position he would have been in had the contract been performed.” *Perkins Motors, Inc. v. Autotruck Federal Credit Union*, 607 S.W.2d 429, 430 (Ky. App. 1980). Jost and Alford breached the mortgage contract and, thus, the Knowleses were entitled to these payments. Moreover, the *Hanson* case was a tort action for compensatory and punitive damages for fraud and misrepresentation similar to the Jost and Alford counterclaim. The filing of the counterclaim did not change the fact that they owed money to the Knowleses.

Undoubtedly, Jost and Alford were in default on the note and the mortgage. Therefore, since the debt was uncontroverted and the contract unambiguous, the trial court did not err when it granted partial summary judgment on the foreclosure. Ultimately, Jost and Alford prevailed on their counterclaim for fraud and were awarded damages. Additionally, the parties at trial agreed to Jost and Alford's claims for rent and utilities from the Knowleses for the use of a commercial building.

Jost and Alford argue that summary judgment was otherwise inappropriate because they were not afforded an adequate opportunity to conduct discovery beforehand. The record, however, refutes this contention. Jost and Alford were in default on the mortgage. Additional discovery would not have made any difference on this issue. Hence, we conclude that the trial court did not err in its grant of partial summary judgment.

## 2. Attorney fees

Jost and Alford maintain that under the following language of the contract, they are entitled to attorney fees and costs because they were the prevailing parties at trial:

If any litigation is instituted with respect to enforcement of the terms of this contract, the prevailing party shall be entitled to recover all costs incurred, including but not limited to, reasonable attorney's fees and court costs.

Accordingly, they contend that the trial court abused its discretion in denying their post-judgment motion for attorney fees. In contrast, the Knowleses believe that

neither party prevailed and, thus, neither is entitled to attorney fees. Relying on CR 54.04, they posit not only that neither party prevailed but also that the trial court has the discretion to determine who bears the cost of attorney fees.

With regard to attorney fees, the general rule in Kentucky is that, “with the exception of a specific contractual provision allowing for recovery of attorneys’ fees or a fee-shifting statute . . . each party assumes responsibility for his or her own attorneys’ fees[.]” *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005), citing *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991). In this case, however, specific contractual language exists as to the responsibility for attorney fees so that the analysis is more complicated.

According to CR 54.04(1), “[i]n the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court.” Under the plain language of this rule, significant discretion is clearly afforded the trial judge. Given the protracted and complicated nature of this litigation and its result, the trial court did not abuse its discretion in denying attorney fees to both parties. Plainly, under the circumstances, the trial court did not abuse its discretion in denying an award of attorney fees under the authority of CR 54.04. Moreover, a perusal of the verdict forms supports that no error occurred in such an order.

### 3. Jury instructions

The parties each present arguments alleging that the trial court erred in instructing the jury. Jost and Alford maintain that the trial court erred when it

did not instruct the jury about the claims of inconvenience and suffering that arose from their claim of fraud. And the Knowleses, besides disagreeing with Jost and Alford's allegation regarding the trial court's error in failing to instruct on damages for inconvenience, claim that the trial court erred when it did not instruct the jury that Jost and Alford were required to exercise ordinary care in inspecting the purchased property.

Before addressing the parties' claims about improper jury instructions, it is necessary to address the appellate standard of review in reviewing jury instructions. "Alleged errors regarding jury instructions are considered questions of law that we examine under a de novo standard of review." *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006)). The purpose of jury instructions is to give direction to the jury in their deliberations so that the members are able to arrive at a correct verdict. Thus, "[i]f the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury." *Ballback's Adm'r v. Boland-Maloney Lumber Co.*, 306 Ky. 647, 652-53, 208 S.W.2d 940, 943 (1948). Here, our first task is to ascertain whether the trial court's decision to not allow a jury instruction concerning damages arising from inconvenience was prejudicial.

Jost and Alford claim that the trial court erred when it did not instruct the jury about their claim for inconvenience and suffering as a result of fraud. They assert evidence was presented at trial demonstrating that they fraudulently

relied on the Knowleses' representation about the effectiveness of the gas line. As a result of this reliance, they suffered without adequate heat during the first winter. Jost and Alford opine that had the jury been so instructed, it would have awarded them this damage.

It is well established that a party is entitled to have his or her theory of the case submitted to the jury if evidence exists to sustain it. Hence, when there is any substantial evidence to support it, "a party litigant is entitled to have an instruction given based on his [or her] theory of the case[.]" *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 359 (Ky. App. 2007), citing *Black Motor Co. v. Howard*, 277 Ky. 638, 126 S.W.2d 1092, 1096 (1939). Here, the jury received a pro-forma and legally sound instruction on fraud. Moreover, the trial court instructed the jury to award an amount no greater than \$182,598.08. The damages were described as follows:

If you found for Alford and Jost, in Instruction No. 6, you will determine from the evidence and award Alford and Jost a sum of money that will fairly compensate them for the reasonable costs of the work and materials necessary for repair, but not exceeding the difference between the fair market value of the real estate at the time of the sale considering as true all of the facts as represented by the Knowles and the actual fair market value of the entire property as of the date of sale considering any material facts about the property withheld or misrepresented by the Knowles.

Our extensive review of the trial tapes and the record lead us to the conclusion that the damages incurred from the fraud were adequately described to the jury by Jury Instruction No. 7, and the trial court committed no error in not instructing the jury

as to damages for inconvenience. Finally, any error in the instructions was harmless because the instructions given adequately allowed for damages from the fraudulent misrepresentation.

Next, we address the Knowleses' claim that the trial court erred when it did not instruct the jury that Jost and Alford were required to exercise ordinary care in inspecting the purchased property. Citing Instruction No. 6, the Knowleses observe that nothing in the instructions sets out any details about Jost and Alford's duties and responsibilities in purchasing the property. Jost and Alford respond that this issue is being raised for the first time on appeal, which is not permitted, and that the instruction itself is legally representative of the elements of fraud.

Pursuant to CR 51(3), the time to object to jury instructions is prior to the court instructing the jury:

No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Moreover, as observed in *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973), "if the appellants were not satisfied with any phase or portion of the instructions the time to speak was before they were given to the jury." A review of the record shows that the Knowleses did not object to the proffered jury instructions or tender different jury instructions. Hence, the error was not preserved for our review under CR 51(3).

#### 4. Denial of Motion for a New Trial because of the use of Improper

##### Evidence at Trial

As an appellate court, we review the trial court's denial of the new trial motion for an abuse of discretion and will only reverse if there is clear error. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). The Knowleses declare that they were entitled to a new trial due to Jost and Alford's use of a listing document that represented the property and items of personalty. According to the Knowleses, the listing was prepared prior to the involvement of Jost and her realtor. They maintain that the sale was not premised upon this listing document, and the use of it inflamed the jury against them.

The document in question was listed in Jost and Alford's pretrial compliance. Yet, the Knowleses did not object to it at either the pretrial conference or the trial. The document was not a surprise because it was prepared by the Knowleses. Furthermore, the jury heard contradictory testimony from the realtor and the Knowleses about her use of the document. The Knowleses have not established that the trial court erred in allowing this document to be used at trial or that it caused undue prejudice against them. The trial court did not abuse its discretion in denying this motion for a new trial.

#### 5. Denial of a Directed Verdict because of written Waivers and Acceptances

The Knowleses maintain that they are entitled to a directed verdict based on the waivers and acceptances signed by Jost at the time of the home's sale.

They contend that the real estate agent, Cathy Sims, wanted to make a commission and that Jost and Alford were in a hurry to purchase the home. They reason that because the realtor and the purchasers were in a hurry, they chose not to exercise reasonable due diligence in inspecting the home. The Knowleses bolster this argument by referencing the “final acceptance and waiver” document signed on December 7, 2007, by all the parties. Consequently, since Jost and Alford signed a waiver document, they were not stopped from inspecting the property, and nothing was concealed, the Knowleses believe that they are entitled to a directed verdict.

In response, Jost and Alford argue that the concealment of a material defect in property or the suppression of the true condition of property to withhold from the buyer information that he or she is entitled to contravenes good faith and constitutes deception. *Hall v. Carter*, 324 S.W.2d 410, 412 (Ky. 1959).

The standard of review of a denial of a motion for directed verdict is as follows:

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. 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.



*Brooks v. Lexington–Fayette Urban County Housing Auth.*, 132 S.W.3d 790, 797–98 (Ky. 2004) (internal quotation marks and citations omitted).

In fact, as noted in *Bryant v. Troutman*, 287 S.W.2d 918, 919 (Ky. 1956),

[e]ven though the false representations relate to matters covered by a warranty in the contract, if the purchaser was induced to enter into the contract in reliance upon the false representations, he may maintain an action for rescission, or he may accept the contract and sue for damages suffered on account of the fraud or deceit.

Thus, we decide that the evidence provided about the Knowleses’ representations or lack of candor about certain conditions in the home would permit a jury to reasonably find, regardless of the signed waiver, that Jost and Alford believed that the house was without major defects. Hence, the trial court properly denied the motion for a directed verdict notwithstanding the waiver document.

#### 6. Furniture

The Knowleses maintain that the trial court erred when it did not separate the two different listings of furniture. They contend that the trial court’s failure to do so resulted in Jost and Alford’s acquiring \$51,000 furniture at no cost. Our review of the record indicates that if confusion existed over the two separate listings of furniture, the correction should have been made during trial. The responsibility to do so rested with trial counsel.

In the end, the determination about the furniture’s ownership rested with the finder of fact. It is well established in this Commonwealth that the fact-

finder is best arranged to determine the credibility of witnesses and their testimony. *Commonwealth v. Smith*, 5 S.W.3d 126 (Ky. 1999). A review of the record shows that substantial evidence supported the jury's findings. And in fact the jury found for the Knowleses and awarded them \$6,540 for furniture. In short, this issue was properly presented to the jury, and the jury - as the finder of fact - has properly rendered its verdict on this contested issue. No error was committed.

The judgments of the Logan Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS AND  
CROSS-APPELLEES SUSAN M.  
JOST AND KEVIN ALFORD:

Matthew J. Baker  
Bowling Green, Kentucky

BRIEF FOR APPELLEES AND  
CROSS-APPELLANTS KENNETH  
R. KNOWLES AND NEDA M.  
KNOWLES:

Fred G. Greene  
Russellville, Kentucky

NO BRIEFS FILED FOR  
APPELLEES AND CROSS-  
APPELLEES AMERICAN BANK  
AND TRUST COMPANY, INC.,  
AND SOUTHERN TAX SERVICES,  
LLC.