

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000703-MR

THE FREEMAN CORPORATION,  
A KENTUCKY CORPORATION

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT  
HONORABLE WILLIAM T. JENNINGS, JUDGE  
ACTION NO. 99-CI-00474

EUNICE M. HARPER; AND  
JANICE R. HARPER

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: BARBER, COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Freeman Corporation has appealed from a judgment entered by the Clark Circuit Court on March 6, 2001, which found in favor of Eunice M. and Janice R. Harper and dismissed Freeman's complaint. Having concluded that parol evidence was properly admitted, and that the trial court's decision was not clearly erroneous, we affirm.

On June 9, 1999, Freeman entered into a real estate sales contract with the Harpers to purchase a lot and mobile

home on the corner of Magnolia and Cherry Streets in Winchester, Clark County, Kentucky. The agreed-upon price, including both the lot and the mobile home, was \$25,000.00. The contract stated at numerical paragraph 1 as follows:

1. The purchase price for said property is \$25,000.00, of which amount \$11,000.00 is allocated to the real estate and \$14,000.00 of which is allocated to the mobile home, and of said purchase price the sum of \$500.00 is cash in hand paid to Seller, receipt of which is hereby acknowledged, with the balance of \$24,500.00 being due upon delivery of the deed and the title to the mobile home. Eunice M. Harper and Janice R. Harper warrant to Buyer that they paid \$12,000.00 for said mobile home [emphasis added].

At the bench trial, Scott Hisle, Freeman's chief financial officer, testified that the amounts in the sales contract were based upon a telephone conversation he had with Eunice Harper. According to Hisle, Mr. Harper had informed him that the Harpers had paid \$12,000.00 for the mobile home. Hisle also testified that this information was critical to Freeman in arriving at a price since Freeman planned on reselling the mobile home.

After closing on the transaction, Freeman advertised the sale of the mobile home in The Winchester Sun newspaper. According to Hisle, the offers on the mobile home ranged from Aroughly between \$3,000.00 and \$6,000.00.@ Eventually, Freeman sold the mobile home to one of its employees, Janet Turner, for

\$5,100.00. After completing the sale with Turner, Hisle learned that the Harpers had paid only \$5,000.00 for the mobile home.

While the Harpers freely acknowledged that they paid only \$5,000.00 for the mobile home, they both testified that neither of them had a conversation with Hisle regarding the price they paid for the mobile home. Eunice Harper testified that he had been reluctant to sell the property, but was eventually swayed by Freeman after it promised to convert the property into a park for the public to enjoy. Harper testified that he and his wife insisted on the purchase price of \$25,000.00, and that they were unconcerned as to how the purchase price was allocated.

On November 8, 1999, Freeman filed a complaint against the Harpers alleging that they ~~A~~fraudulently and falsely represented and warranted that the price they paid for the mobile home was \$12,000.00.@ The complaint sought damages in the amount of \$7,000.00, the difference between the alleged represented price paid for the mobile home and its alleged fair market value. For their defense, the Harpers claimed that they were unrepresented by counsel in the transaction, that they had not read the contract before signing it, and that they were unaware of the clause in the contract that stated that they had warranted the purchase price of the mobile home to have been \$12,000.00.

On April 13, 2000, Freeman filed a motion for summary judgment, and on June 8, 2000, that motion was denied. The case then proceeded to trial before the court on September 21, 2000. On March 6, 2001, the Clark Circuit Court entered a judgment in favor of the Harpers.

In its decision the trial court noted the inconsistencies between paragraph 1 and paragraph 8 of the sales contract. Paragraph 8 stated:

Buyer has inspected the property and accepts the property in its present ~~AS IS~~ condition, with no warranties expressed or implied, by Seller. Buyer, in making the decision to buy the property, is relying entirely upon Buyer's own judgment [emphases added].

The trial court noted the parol testimony admitted on behalf of Freeman that paragraph 8 simply provided that Freeman accepted the mobile home with any physical defects and that paragraph 8 was not intended to alter the representation made by the Harpers in paragraph 1 as to their \$12,000.00 purchase price. The trial court concluded that A[t]he proof at trial was insufficient to show fraud or wrongdoing on the part of Defendants.@ The trial court stated that A[a]t best, the evidence was conflicting on several elements of the fraud analysis, and generally was not of a clear and convincing nature.@ The trial court dismissed Freeman's complaint and assessed costs against it. This appeal followed.

The trial court's factual findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.<sup>1</sup> A factual finding is not clearly erroneous if it is supported by substantial evidence.<sup>2</sup> Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.<sup>3</sup> It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.<sup>4</sup>

A party asserting a claim of fraud under Kentucky law must establish the existence of six elements by clear and convincing evidence: (1) a material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon; and (6) causing injury.<sup>5</sup> A[Su]ch proof may be developed by the

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<sup>1</sup>Kentucky Rules of Civil Procedure (CR) 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky.App., 998 S.W.2d 505, 509 (1999).

<sup>2</sup>Owens-Corning Fiberglas Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Uninsured Employers-Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991); Faulkner Drilling Co., Inc. v. Gross, Ky.App., 943 S.W.2d 634, 638 (1997).

<sup>3</sup>Golightly, 976 S.W.2d at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

<sup>4</sup>Garland, 805 S.W.2d at 118.

<sup>5</sup>United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999) (citing Wahba v. Don Corlett Motors, Inc., Ky.App., 573 S.W.2d 357, 359 (1978)).

character of the testimony, the coherency of the entire case as well as the documents, circumstances and facts presented.<sup>6</sup> While generally parol evidence may not be admitted to vary or contradict a written contract, such evidence may be heard to ascertain the true meaning of an ambiguous or uncertain term in the contract.<sup>7</sup>

The trial court found that the apparent warranty made in paragraph 1 of the contract was contradicted by the disclaimer of all warranties and the disclaimer of any reliance on the Harpers' representations found in paragraph 8. Based on this ambiguity, the trial court admitted parol testimony from both sides regarding the meaning of the two clauses. The Harpers testified that they were unrepresented by counsel, that they did not remember making any representation as to the price paid for the mobile home, and that they were certainly not aware of the warranty clause, let alone its legal impact. In testifying on behalf of Freeman, Hisle claimed that the two clauses meant two different things, and that the specific warranty clause in paragraph 1 should control.

The trial court concluded, based on the Harpers' testimony, that a claim for fraud had not been proven by clear

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<sup>6</sup>Id. (citing Trustees of the First Christian Church v. Macht, 228 Ky. 628, 631, 15 S.W.2d 509, 510 (1929)).

<sup>7</sup>Texas Co. v. Bowen, 292 Ky. 676, 678, 167 S.W.2d 822, 823 (1943).

and convincing evidence. Since it is within the province of the trial court to judge the weight and credibility of the testimony, and since its decision is supported by substantial evidence, we will not disturb this judgment on appeal.<sup>8</sup>

For the foregoing reasons, the judgment of the Clark Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William A. Dykeman  
Winchester, Kentucky

BRIEF FOR APPELLEE:

M. Alex Rowady  
Winchester, Kentucky

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<sup>8</sup>CR 52.01.