

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000986-MR

SHELBY L. COMBS;
DENISE D. COMBS

APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 94-CI-00214

RUFUS SMITH;
JANICE LYNNE SMITH

APPELLEES

AND CROSS-APPEAL NO. 2001-CA-001093-MR

RUFUS SMITH;
JANICE LYNNE SMITH

CROSS-APPELLANTS

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 94-CI-00214

SHELBY L. COMBS;
DENISE D. COMBS

CROSS-APPELLEES

OPINION
AFFIRMING ON APPEAL AND CROSS-APPEAL
** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND MILLER¹, JUDGES.

MILLER, JUDGE: Shelby L. Combs and Denise D. Combs bring this appeal from a judgment of the Oldham Circuit Court sitting without jury entered on April 10, 2001. Rufus Smith and Janice Lynn Smith cross-appeal. We affirm on appeal and cross-appeal.

In 1989, the Combses owned a house and acreage located at 2801 Ridgewood Road, LaGrange, Oldham County, Kentucky. On March 7th of that year, they suffered a fire. The fire loss was subsequently repaired at a cost which the Combses claimed to be in the neighborhood of \$60,000.00 to \$70,000.00.

In 1993, the appellees, Rufus Smith and Janice Lynn Smith made an offer to purchase the Combses property. The offer was accepted and the Smiths purchased the residence for \$84,000.00 on May 6, 1993. Apparently at the time of the purchase, the Smiths understood that the fire loss had been totally repaired.

In 1994, a heavy snow fall caused a porch roof to collapse. At this time, it appears the Smiths became disgruntled, thinking that the fire loss had not, in fact, been rectified.

On May 6, 1994, the Smiths filed a complaint in the Oldham Circuit Court alleging breach of warranty and that the

¹This opinion was prepared and concurred in prior to Judge Miller's retirement effective January 1, 2003.

appellants had intentionally, falsely, and with fraud and deceit concealed the condition of the house at the time of purchase. In short, the Smiths claim that they had been led to believe that the house had been completely repaired after the fire loss.² The Smiths sought damages in the amount of \$24,755.00.

A bench trial was held in February and March of 1998 with the court entering judgment for the Smiths in the sum of \$11,000.00. Their claim relating to the septic system was rejected. This appeal followed.

Our review of the findings of fact is under the clearly erroneous rule. Ky. R. Civ. P. (CR) 52.01. The question is not whether we would have found as did the circuit court, but whether the decision of the circuit court is supported by substantial evidence. CR 52.01; see Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). Substantial evidence is that evidence when taken alone or in light of other evidence in the record has sufficient probative value to induce conviction among reasonable persons. See Kentucky State Racing Commission v. Fuller, Ky. 481 S.W.2d 298 (1972).

We initially observe that the doctrine of *caveat emptor* applies to the sale of real property. There is no implied warranty. There is an exception to the rule, however, in the case of the first purchaser of a new home. See Real Estate Marketing, Inc., v. Franz, Ky., 885 S.W.2d 921 (1994); Crawley v. Terhune, Ky., 437 S.W.2d 743 (1969). This being an old home, the

²The complaint also contained a damage claim for a defective sewer system.

success of the Smiths rests upon the breach of an expressed warranty or fraud in concealment. See Ferguson v. Cussins, Ky. App., 713 S.W.2d 5 (1986).

The evidence in this case suggests that the Combses repaired the house after the fire through their own efforts and the efforts of family members. They were well aware of the condition of the house, both before and after the repairs. When asked about the extent of the fire damage, they indicated that the house was in fine condition. In fact, the house was in poor condition. Further, the condition was such that it was not readily apparent to the Combses upon inspection. Acting upon the information furnished by the Smiths, the Combses consummated the transaction.

In support of its judgment, the court made findings as follows:

2. The Court finds that following an 18" snow fall in 1994 that a band board that separated the first and second levels of the house broke along with the supporting 2x4s. The Court finds that a contributing factor was an additional roof that had been built by the Plaintiffs but attached to the band board and under the heavy snow broke away from the house collapsing and also breaking the band board. As a result of the structural problems the kitchen floor dropped and it required extensive repairs totaling \$11,000.00.

3. The Court finds that the knowledge concerning the fire damage and the opportunity to inspect is not a disposition of the Plaintiffs' claim.

4. The Court finds that the primary contractor on the reconstruction and repairs following the fire was the Defendant in the action. The Court considers Shelby Combs to be his own contractor and that he hired his

brother to complete the repair work. The home was constructed in 1989 and the fire occurred in 1990.

. . . .

6. The Court finds that the structural integrity of the band board and also the supporting 2x4s that were placed there were not readily observable by the Defendants and they only became aware of the problems after the failure of the band board and knocking holes in the sheet rock to observe the underlying carpentry work.

7. The Court gives significant weight to witness Elder in regard to the fire damage to the band board. The Court adds significant weight to the fact that the band board was exposed to heat making it brittle and that it could be observed having what was referred to as alligator skin. It is from this evidence that the Court concludes that the band board, although appearing to be sound, actually was unable to sustain the structural burden placed on it and was the primary reason for the failure of the band board under the additional snow weight in 1994.

8. The Court finds therefore, that under this particular claim the materials that were used in the rebuilding and repair following the fire damage were not materials that were free of defects. There is no question that concerning the fact that the work itself was completed in a workmanlike manner. [sic]

9. The Court accepts and enters its findings concerning the costs of repair in regard to the broken band board, and the steps necessary in order to re-level the kitchen floor and to insure that adequate support was placed underneath to prevent its recurring in the future. The Court enters the finding that although the additional roof added by the Defendants in the action was in part a contributing factor, it was not a substantial factor.

Upon the whole of this case, we think there is sufficient evidence to support the findings of the trial court.

We find no merit in the cross-appellants' claim relating to the septic tank.

For the foregoing reasons, the judgment of the Oldham Circuit Court is affirmed on appeal and cross-appeal.

ALL CONCUR.

BRIEFS FOR APPELLANTS/CROSS-
APPELLEES:

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