

RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001703-MR

ROY VERNON ROGERS AND
INA RAY ROGERS, Husband
And Wife

APPELLANTS

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 00-CI-00522

DOUG MILLER; DOUG MILLER &
ASSOCIATES REALTY & AUCTION;
AND DAVID F. SNYDER

APPELLEES

AND CROSS-APPEAL NO. 2001-CA-001785-MR

DAVID F. SNYDER

CROSS-APPELLANT

v. CROSS-APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 00-CI-00522

ROY VERNON ROGERS; INA
RAY ROGERS; DOUG MILLER;
AND DOUG MILLER & ASSOCIATES
REALTY & AUCTION

CROSS-APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: MILLER,¹ PAISLEY AND TACKETT, JUDGES.

PAISLEY, JUDGE. This is an appeal and cross appeal from several partial summary judgments entered by the Madison Circuit Court. In the direct appeal, the purchasers in a real estate transaction assert that the trial court erred by granting summary judgments to the sellers' real estate agent and broker after it concluded that they had not breached any duties owed to the purchasers in connection with the drafting of a purchase/sale contract. The sellers' real estate agent, David Snyder, claims in a protective cross appeal that the court erred by finding that the contract was unenforceable under KRS 371.010(6) due to its inadequate description of the portion of the sellers' property which was to be sold. Finding no error, we affirm.

Roy and Ina Ray Rogers negotiated with Vardie and Mildred Hocker for the purchase of 414 acres of the Hockers' 442-acre farm. Because the Hockers wished to retain a portion of the property, they and Snyder walked the property with Roy

¹Senior Status Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Rogers and marked the new boundary lines on a survey sheet. A few days later, the parties met for the purpose of completing the sale. Although the Rogers' real estate agent failed to appear for the meeting, the parties agreed that Snyder would provide and complete the necessary documents. Unfortunately, neither the marked survey nor any other evidence of the new boundary lines was ever incorporated into the contract. Instead, the contract simply stated, "[b]uyer wants property lines to be established in a professional manner." Before the scheduled date of closing the Hockers renounced the contract, alleging that the descriptions of the property to be sold and retained were insufficient under KRS 371.010(6). The Rogers filed this action against the Hockers seeking specific performance of the contract. They alternatively sought damages from Snyder and the broker, alleging that the contract had been negligently drafted. The trial court eventually granted separate motions for summary judgment in favor of each defendant. Although the Rogers settled with the Hockers, they appealed from the summary judgments granted in favor of Snyder and the broker. Snyder in turn filed a protective cross appeal against each of the other parties.

First, the Rogers contend on direct appeal that the trial court erred by finding as a matter of law that the Hockers' real estate agent and broker could not be held liable

to the Rogers for their alleged negligence in drafting the real estate sales contract. We disagree.

Although the Rogers cite authority from other jurisdictions to support their position, we believe this situation is governed by the case of Givan v. Aldemeyer/Stegman/Kaiser, Inc. (ASK Realty), Ky. App., 788 S.W.2d 503 (1990), which explains that

[w]hen a broker acts as an intermediary between a seller and a prospective buyer, a broker is under a duty to deal fairly and honestly with both parties, even in the absence of a principal/agent relationship with them. The broker acting as a subagent with the express permission of another broker who has the listing of the property to be sold is under the same duty as the seller's broker to act in good faith. A broker may be liable for misrepresentation as to the financial standing of his principal.

Givan, 788 S.W.2d at 504 (emphasis added) (citations omitted).

Here, as noted in the trial court's order, the Rogers did not allege that Snyder and the broker were dishonest, that they made misrepresentations, or that they engaged in unfair dealings. Instead the Rogers argue that Snyder negligently drafted the sales contract. However, "[i]n order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff." Lewis v. B & R Corporation, Ky. App., 56

S.W.3d 432, 436-437 (2001) (citations omitted). The Rogers have clearly failed to establish a recognized duty owed to them by Snyder or the broker under current Kentucky law with the result that their claim of negligence in the drafting of the contract must fail.

In addition, we find no merit in the Rogers' argument that Snyder and his broker owed them a duty to draft a valid contract stemming from their alleged status as third-party beneficiaries of the contractual relationship between the Hockers, Snyder, and the broker. According to Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668 (1942), "[i]t must appear, in order that a third person may derive a benefit from a contract between two other parties, that the contract was made and entered into directly or primarily for the benefit of such third person." Long, 160 S.W.2d at 674 (citations omitted). See also, International Brotherhood of Boilermakers v. Holt, Ky., 418 S.W.2d 758 (1967). Clearly, the real estate listing agreement that the Hockers had with Snyder and the broker was for the benefit of those parties, and not for the intended benefit of the Rogers. Therefore, having carefully reviewed the record, we cannot say that the trial court clearly erred by finding that there were no genuine issues as to any material fact. CR 56.03, Steelvest, Inc. v. Scansteel Service Center, Inc., Ky. 807 S.W.2d 476 (1991).

Finally, Snyder raises an issue on cross appeal regarding the contract's description of the property. However, as it is clear that the cross appeal was filed only to protect Snyder's interests in the event the trial court's summary judgments were not affirmed on direct appeal, that issue need not be addressed at this time.

The summary judgments of the Madison Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR Roy Vernon Rogers
and Ina Ray Rogers:

John F. Lackey
Richmond, Kentucky

BRIEF AND ORAL ARGUMENT FOR
David F. Snyder:

Vincent J. Eiden
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