

RENDERED: MAY 16, 2003; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2001-CA-002496-MR

MICHAEL B. STUCK;  
LEISA D. STUCK

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NO. 00-CI-00333

BARBARA KIDWELL

APPELLEE

OPINION  
VACATING

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BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.<sup>1</sup>  
POTTER, SPECIAL JUDGE: Claiming that they had been sold a house with a defective septic system, Michael B. and Leisa D. Stuck sued Barbara Kidwell, the seller, in Fayette Circuit Court. The Circuit Court subsequently granted summary judgment in favor of the seller, Kidwell, and dismissed the action. Because there are genuine issues of material fact and Kidwell was not entitled to judgment as a matter of law, we vacate and remand.

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<sup>1</sup>Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

The basic facts are not in dispute. In August of 1997 the Stucks purchased a home from Kidwell. In violation of the building code the septic tank for the home was located beneath the concrete slab floor of an addition made to the original dwelling. A trap door located under the carpet in a closet in the garage of the house provided access to the septic tank. At the time of the sale, as required by KRS 324.360 and 201 KAR 11:350, Kidwell gave the Stucks a document entitled "Seller Disclosure of Property Condition" in which she represented that she was not "aware of any problems affecting" the "Sewage/Septic" system. Before closing the sale the Stucks had the house inspected, but the inspector did not discover the location of the Septic tank. Shortly after the closing a neighbor told Mr. Stuck that the septic tank was under the house with access through the garage. Mr. Stuck called Kidwell but took no further action. Two years later, when a disagreeable smell caused the Stucks to employ a septic service, they were told that the tank was under the house with a pit of raw sewage beneath the trap door in the garage closet.

On January 26, 2000, the Stucks filed a complaint against Kidwell in Fayette Circuit Court seeking a judgment against Kidwell equal to the diminution in the fair market value of the dwelling or the cost to repair the defective septic system and other expenses. On August 14, 2001, Kidwell filed a

motion for summary judgment. On November 2, 2001, the trial court entered an order granting Kidwell's motion for summary judgment. This appeal followed.

The Stucks contend that the trial court erred by granting Kidwell's motion for summary judgment. A summary judgment dismissing an action is a drastic remedy. It should be granted only where "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ky. R. Civ. Pro. 56.03.

"The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Consequently, summary judgment must be granted [o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in this favor . . ."

Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996)

(citations omitted).

In the instant case these rules require that Kidwell must establish that the Stucks will be unable to produce any evidence from which a jury, viewing the evidence in the light most favorable to them, could reasonably find in their favor.

The Circuit Court did not specify, nor do the rules

require it to specify, the grounds upon which it granted summary judgment. However, since the burden was on the seller, Kidwell, to show that the buyers, the Stucks, could not prevail under any theory, the summary dismissal must be set aside if the buyers had a possible claim under any theory.

One basis upon which the buyers sought recovery was the classic claim of fraud. The briefs before this court and the trial court suggest several grounds the trial court could have used as a basis for granting summary judgment on this claim.

First is the possibility that there was no evidence that Kidwell knew her representation about the septic system was false or that she intended it to deceive the Stucks. As for her knowledge, Kidwell testified at her deposition that although she was aware of the hidden access, she was unaware of the actual location of the tank. However, a jury would not be required to accept this testimony. The Stucks tendered an affidavit from a neighbor, Anthony May,<sup>2</sup> stating that four years before the sale Kidwell had shown him the carpet covered access point and told him that the tank was under house. If the neighbor were to testify at trial consistent with the affidavit, a jury could find that Kidwell knew of the condition. In addition, the

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<sup>2</sup> May is not the neighbor who had alerted the Stucks to the problem right after the sale.

person who had serviced the septic system while Kidwell owned the house knew of the condition, and a jury could infer that it would be logical that he advised the owner.

Assuming that a jury found that Kidwell intentionally misrepresented the condition of the septic system, they could find that it was done with the intention of misleading the Stucks. First, a jury could find that the very nature of the situation, i.e., a significant fact misrepresented on a disclosure form to be given to the buyers, compels such an inference. In addition there was other evidence. After the Stucks purchased the home and the neighbor had alerted them to the location of the tank, Mr. Stuck called Kidwell and asked her directly about its location. Mr. Stuck testified that Kidwell stated that the tank was in the yard. This direct misrepresentation could allow a jury to find that earlier, less specific, representations were done to influence the Stucks.

A last possible basis for the summary judgment on the fraud claim is that the defect was not a latent defect and that the Stucks should have discovered it in their inspection of the house. This is also a jury issue. The inspector, presumably a professional, hired by the Stucks did not find it. The access point that would have led one to question the tank's location was located underneath the carpet of a closet in the garage. The record does not disclose what, if anything, was stored in

the closet around the time of the sale. A jury could find that this made the defect latent.

While a jury would not be obligated to find in the Stucks favor, Kidwell has not established the nonexistence for this possibility. A jury could find that Kidwell made a material representation which she knew to be false for the purpose of inducing the Stucks to buy the house and that they relied on that misrepresentation to their detriment. In such case, the Stucks would prevail at trial. Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357 (1978). For this reason the Circuit Court erroneously granted summary judgment, and the judgment of the Circuit Court is reversed.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

R. Grant Stephens  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Michael Troutman  
Lexington, Kentucky