

RENDERED: NOVEMBER 23, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000940-MR

BILL L. EDWARDS

APPELLANT

v. APPEAL FROM GARRARD CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 01-CI-00156

RANDALL L. HAMBEL AND
BARBARA O. HAMBEL

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Bill L. Edwards brings this appeal from an April 7, 2003, judgment of the Garrard Circuit Court upon a jury verdict in the amount of \$32,670.00 for violations of the Uniform State Building Code. We affirm.

In May 1997, Edwards purchased a home in the Herrington Haven Subdivision in Garrard County, Kentucky. Edwards performed extensive and substantial renovation upon the

home. Edwards performed virtually all the renovation work himself. It is undisputed that the Uniform State Building Code¹ was in effect and applied to Edwards' renovation work upon the home.

On August 31, 2000, Edwards entered into a real estate sales contract (sales contract) with Randall and Barbara Hambel (the Hambels) for the sale of Edwards' home at a price of \$100,000.00. Following execution of the sales contract, the Hambels hired Bobby Tolson to perform a home inspection. The inspection was performed, and the Hambels received a written inspection report prior to closing. The inspection report did not disclose any major defects. Edwards also provided the Hambels a written list of the renovation work performed by him upon the home. Prior to closing, the Hambels requested that guttering be installed upon the home, and Edwards complied with the request by installing guttering. On September 26, 2000, Edwards executed and delivered a deed of conveyance to the Hambels, thus closing upon the property.

In January 2001, the Hambels started renovating the home and discovered numerous apparent defects in the home: uneven floor, missing window headers, split in the concrete slab, and split in the concrete block walls. A forensic building inspector prepared a report outlining several Building

¹ In this opinion, we will sometimes refer to the Uniform State Building Code as simply the Building Code.

Code violations attributed to the renovation work performed by Edwards.

As a result, the Hambels filed a complaint alleging, *inter alia*, the statutory cause of action under Kentucky Revised Statutes (KRS) 198B.130 for violation of the Uniform State Building Code. The matter went before a jury, and the jury returned a verdict in favor of the Hambels in the sum of \$32,670.00, representing the diminution in the fair market value of the home. The circuit court also awarded the Hambels some \$20,666.18 in costs. This appeal follows.

Edwards' sole allegation of error is that the circuit court committed reversible error by failing to direct a verdict in his favor. Ky. R. Civ. P. (CR) 50.01. A directed verdict is proper if when viewing the evidence most favorable to the nonmoving party, a reasonable juror could only conclude that the moving party was entitled to a verdict. Lee v. Tucker, 365 S.W.2d 849 (Ky. 1963); Morrison v. Trailmobile Trailers Inc., 526 S.W.2d 822 (Ky. 1975). Edwards specifically contends that the sales contract was an "as is" contract; thus, the doctrine of *caveat emptor* applied to the sale of the home. As a result, Edwards argues the Hambels waived the right to pursue an action under KRS 198B.130 for violation of the Building Code.

The relevant sections of the sales contract are as follows:

7. Purchasers have inspected the property and have agreed to take same in its present condition, normal wear and tear excepted. No verbal agreements or representations regarding condition or quality of property not specifically set forth herein shall be binding upon either of the parties, or their agents.

.

WE HAVE READ THIS CONTRACT, UNDERSTAND FULLY THE CONTENTS THEREOF, AND ARE NOT RELYING ON VERBAL STATEMENTS NOT CONTAINED HEREIN. WE FURTHER CERTIFY THAT WE HAVE EXAMINED THE PROPERTY DESCRIBED HEREIN, ARE THOROUGHLY ACQUAINTED WITH ITS CONDITION AND ACCEPT IT AS SUCH. WE HAVE BEEN ADVISED TO OBTAIN SUFFICIENT PROPERTY INSURANCE UPON ACCEPTANCE OF THIS CONTRACT. WE CERTIFY THAT WE HAVE RECEIVED A COPY OF THIS CONTRACT.

From the foregoing, it is clear the sales contract contained what is commonly referred to as an "as is" provision.

Consequently, we are faced with the rather novel question of whether an "as is" provision in a sales contract effectuates a waiver of the statutory right contained in KRS 198B.130 to pursue a private cause of action for violations of the Uniform State Building Code.

When real property is sold subject to an "as is" contractual provision, the purchaser generally takes the real property in its existing condition and the doctrine of *caveat*

emptor is said to apply. Ferguson v. Cussins, 713 S.W.2d 5 (Ky.App. 1986). While an "as is" provision ordinarily operates to extinguish the liability of a vendor for defects in the condition of the real property conveyed, we do not believe the "as is" provision, likewise, operates as a waiver of the purchaser's statutory right contained in KRS 198B.130 to pursue a private cause of action for violation of the Building Code.

The Uniform State Building Code was originally enacted by the General Assembly in 1978. KRS 198B.050. By its expressed language, a primary purpose of the Building Code was to "[p]rotect the public health, safety, and welfare within the state." KRS 198B.050(3)(c). Without question, its provisions were additionally designed to protect the individual home buyer. The Building Code was also promulgated to promote the stated public policy of establishing "uniform standards and requirements for construction." KRS 198B.050(3)(a). Hence, the Building Code protects both the public generally and the individual and also promotes the public policy of implementing uniform construction standards statewide.

A waiver is defined as the intentional and voluntary relinquishment of a known right. Harris Bros. Const. Co. v. Crider, 497 S.W.2d 731 (Ky. 1973). Generally, a legal right may be waived by contract even where such right was statutorily created. 31 C.J.S. Estoppel and Waiver §75 (1996). However, an

exception to this general rule is that an individual may not waive a benefit or right conferred by statute where that statute was enacted for the protection of the public or to serve a public purpose. 31 C.J.S. Estoppel and Waiver §75 (1996). We recognize that a private waiver of such a statutorily created benefit or right would undermine the intent of the legislature in enacting the statute and would further undermine the statute's public goals.

In this case, the Uniform State Building Code was expressly intended to protect the public health, safety, and welfare and to serve the public purpose of instituting uniform construction standards statewide. As the Building Code was intended to protect the public generally and to forward a public policy, we hold that any benefits or rights conferred under the Uniform State Building Code cannot be waived privately by an individual. Accordingly, we are of the opinion that the "as is" provision contained in the sales contract did not effectuate a waiver of the Hambels' right under KRS 198B.130 to pursue a private cause of action for violation of the Building Code. As such, the circuit court did not err by denying Edwards' motion for a directed verdict.

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

MINTON, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

BRIEF FOR APPELLANT:

Johnny O. Bolton
Lancaster, Kentucky

BRIEF FOR APPELLEES:

E. David Marshall
Lexington, Kentucky