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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001683-MR

TYLER SIMS, CHARLYNE SIMS
AND AMANDA SIMS, A MINOR
CHILD BY AND THROUGH HER
PARENTS, TYLER SIMS AND
CHARLYNE SIMS — APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CI-02033

WEYERHAEUSER COMPANY — APPELLEE

AND NO. 2007-CA-001980-MR

TYLER SIMS, CHARLYNE SIMS
AND AMANDA SIMS, A MINOR
CHILD BY AND THROUGH HER
PARENTS, TYLER SIMS AND
CHARLYNE SIMS — APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 06-CI-02033

WILLIAM F. BOSCHEINEN, JR. AND
CAROL D. BOSCHEINEN APPELLEES

OPINION DISMISSING CASE NO. 2007-CA-001683-MR AND
AFFIRMING CASE NO. 2007-CA-001980-MR

** ** ** ** **

BEFORE: CLAYTON, CAPERTON AND DIXON, JUDGES.

CLAYTON, JUDGE: These are two consolidated appeals from the Fayette Circuit Court granting summary judgment to two defendants. Based upon the following, we will dismiss the appeal of the trial court's decision in 2007-CA-001683-MR and will affirm the trial court's decision in 2007-CA-001980-MR.

BACKGROUND INFORMATION

Appellants, Tyler Sims, Charlyne Sims and Amanda Sims (Sims) (a married couple and their minor child), brought this action after purchasing a home from appellees, William and Carol Boscheinen (Boscheinens). After purchasing the Boscheinens' home, the Sims began experiencing health issues which they attributed to the move into their new residence. Specifically, the Sims asserted that they suffered from nausea, diarrhea, pains throughout the body, long term bruising, swelling around the heart, heart palpitations, broken and uncontrollable dilation of blood vessels, hot sensations in their noses and ears, bruising around their eyes, difficulty focusing, rashes, inner ear damage, damage to their sinus cavity, learning disabilities, inability to walk unassisted, inability to sleep on one side due to pain, blindness, difficulty breathing, memory loss, high blood pressure and comas.

The Sims filed suit in Fayette Circuit Court contending that the wood used in the home was manufactured by Weyerhaeuser and was defective in that it contained benzene, heavy metal toxins and chemicals. Their complaint also asserted that the Boscheinens were aware of the air quality within the home and that they did not disclose it and, in fact, fraudulently misrepresented it by concealing the problem. Specifically, the Sims contended that the Boscheinens were aware of the presence of toxic mold, heavy metal toxins and bacteria.

Weyerhaeuser moved the trial court for summary judgment. The trial court granted the motion, finding that:

> There is sufficient authority to support a finding that the single piece of identifiable wood and the Structurewood® manufactured by Weyerhaeuser is not a product for purposes of Kentucky's products liability law.

The trial court also held that the "wood at issue is not a 'good'" and consequently did not fall under the purview of the Uniform Commercial Code. Finally, the trial court held that the claims the Sims brought against Weyerhaeuser failed as there was no privity of contract between the two parties.

The Boscheinens also filed for summary judgment in the trial court. They argued that there was no evidence that they concealed or misrepresented the state of the air quality within the residence. The Sims requested the Boscheinens' medical records. Their objective was to show that the Boscheinens had suffered ill effects due to the air quality in the form of illnesses which the family members had suffered. The Boscheinens eventually tendered their medical records to the trial

court; however, they were not released to the Sims. The court reviewed these records *in camera*. The trial court granted the Boscheinens' motion for summary judgment and based its decision partially upon the lack of illnesses in their medical records which were of a nature where air quality would have been a contributing factor.

The Sims have appealed the granting of both motions by the trial court. As to Weyerhaeuser's motion, they contend that there exists a question of fact regarding the alleged breach of duty and that summary judgment was granted prematurely. Specifically, they argue that discovery had not been completed when the trial court granted the motion.

The Sims contend that the trial court erred in granting summary judgment to the Boscheinens in that it sealed their medical records and yet a significant part of the award of summary judgment upon the sealed medical records. The Sims argue that the records were not privileged and that the trial court erred in sealing them.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, we must determine whether the trial court correctly found "that there [were] no genuine issues as to any material fact and that the moving party [was] entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03.

"[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it

appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Community Trust Bancorp v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B&R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001).

With this standard in mind, we will examine the issues before us.

DISCUSSION

I. Appeal No. 2007-CA-001980-MR – The Boscheinens

We will begin with the Sims contention that the trial court erred in refusing to release the Boscheinens' medical records when it relied upon those records in making its decision regarding the summary judgment motion. While we find the trial court's action to be in error, we find it to be harmless error.

Pursuant to CR 26.02(1) parties are allowed to discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" It is not a defense to the discovery process to contend that the material would be inadmissible. If the material is not privileged, the only question is

whether it is relevant or likely to lead to relevant evidence. *Grange Mut. Ins. Co. v. Trude*, 151 S.W. 3d 803, 811 (Ky. 2004). "The party seeking to prevent discovery should bear the burden of showing the nonrelevance of the material." *Morrow v. Brown, Todd & Heyburn,* 957 S.W.2d 722, 727 (Ky. 1997). KRE 401 provides that:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The Sims contends that the trial court relied on the medical records in making its decision to grant summary judgment. The Boscheinens, on the other hand, contend that the trial court based its decision on the fact that the Sims had inquired about the potential presence of mold and had hired a general inspection done of the home. Also, the Boscheinens assert they had provided an allowance for a mold inspection which the Sims had not had performed. Basically, the Boscheinens contend that instead of relying upon the *in camera* review to grant the motion for summary judgment, the trial court simply did not find anything in the record which would keep it from granting summary judgment. As a result, the Boscheinens argue that the records were neither relevant nor necessary to the trial court in its decision and, as such, were properly excluded as having no probative value.

The Sims cite the case of *Stidham v. Clark*, 74 S.W.3d 719 (Ky. 2002), in support of their argument that medical records are discoverable and not

privileged. The Sims contend that medical records are not privileged unless they are from a psychotherapist. Kentucky Rules of Evidence (KRE) 507(3)(b) provides that:

> . . . A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family. While we acknowledge that the evidence is not privileged, we find that it is not relevant either and, as such, not subject to discovery.

In *Stidham*, 74 S.W.3d 719, the medical records sought by the grand jury were relevant in the case against *Stidham*. There, the Fayette County grand jury asked for the records in a proceeding involving charges of obtaining controlled substances by prescription. *Stidham* was accused of obtaining the drugs by withholding information from one physician regarding the prescriptions he had obtained from other physicians. Clearly, in that action, medical records would be necessary in proving the scheme in which *Stidham* had engaged. Such is not the case in this action. Having made that conclusion however, we believe the medical records could possibly have led to relevant evidence and, consequently, it was error for the trial court to refuse to allow the Sims to peruse them. We also find, however, that the act of excluding the records was harmless as the Sims had not set forth a negligence claim.

"[T]he concealment by a seller of a material defect in property being sold, or the suppression by him of the true conditions respecting the property, so as to withhold from the buyer information he is entitled to, violates good faith, and constitutes [a] deception[.]" (*citing Hall v. Carter,* 324 S.W.2d 410, 412 (Ky. 1959)), *Young v. Vista Homes, Inc.,* 243 S.W.3d 352 (Ky. App. 2007). In this action, the Sims brought suit against the Boscheinens for fraudulent misrepresentation and through concealment of the air quality within the residence.

There are six elements a party must set forth to establish fraud by clear and convincing evidence. They are as follows: "a) material representation, b) which is false, c) known to be false or made recklessly, d) made with inducement to be acted upon, e) acted in reliance thereon and, f) causing injury." *See Young,* 243 S.W.3d 352; *United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999), *citing Wahba v. Don Corlett Motors, Inc.,* 573 S.W.2d 357, 359 (Ky. App. 1978). The Sims argued that the Boscheinens materially misrepresented the indoor air quality of the home. That they knew the air quality was poor and misrepresented this fact to the Sims who relied upon their misrepresentation and were injured by such reliance. The trial court found that the act of the Boscheinens in offering to pay for an inspection for mold and the Sims not having such an inspection performed as well as the Sims's hiring of an inspection of the home was sufficient to support the granting of a motion for summary judgment. We agree. The medical records sought by the Sims would not

have been indicative of fraud by misrepresentation as the Sims could have had the mold inspection performed and any issues regarding it would have been resolved.

The Sims also contend that the trial court committed clear error when it failed to resolve all doubts in their favor in opposition to the motion for summary judgment. The Sims cite to the Pennsylvania case of *Jeffries-Baxter v. Incognito*, 76 Pa. D & C. 4th 68, 2005 WL 2509238 (Phila. Ct. Com. Pl. 2005), in support of their argument. In the *Jeffries-Baxter* case, the Court found that the short time period within which the sellers had resided in the home as well as freshly painted walls created an issue of fact as to whether the sellers misrepresented the mold contamination of the home. In the *Jeffries-Baxter* case as in this one, the purchasers of the home had a general inspection. The case differs from the Sims's action, however, in that the sellers did not offer to pay for a mold inspection. There is also no issue regarding evidence of concealment as in the *Jeffries-Baxter* case and, importantly, there is no indication in this action that the Boscheinens were in a rush to sell the home after having lived in it a short period of time. It is also important to note that the *Jeffries-Baxter* case is not an appellate case, but the decision of a Pennsylvania trial court. Thus, we find the *Jeffries-Baxter* case to be distinguishable from the case before us and not appropriate precedent upon which we would rely.

Next, the Sims contends that summary judgment was granted prematurely as they were not given ample opportunity to complete discovery. A party opposing a motion for summary judgment must be granted an adequate

opportunity to flesh out the relevant facts. *Suter v. Mazyck*, 226 S.W.3d 837 (Ky. App. 2007). The Court further held:

> Whether a summary judgment was prematurely granted must be determined within the context of the individual case. In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties.

*Id.* at 842.

While we agree with the general legal principle set forth by the Sims, we do not agree that the trial court erred in granting summary judgment. The Sims have not shown how further discovery would have brought forth relevant evidence. Instead, they have merely referenced the growth and nature of mold and how waiting for future results could have bolstered their case. They also contend in this argument as well that the medical records of the Boscheinens would have been relevant to their action. As set forth above, we do not find that the medical records should have been turned over to the Sims. We also do not find that the nature of mold claims requires more time for discovery. In this action, the trial court based its decision on sound evidentiary and legal principles.

Finally, the Sims contends that the trial court improperly applied the merger doctrine to a claim of fraud. They argue this is contrary to the holding in *Yaeger v. McLellan*, 177 S.W.3d 807 (Ky. 2005). The Sims assert that the trial court relied on the fact that the Boscheinens had offered them an allowance to

inspect the residence for mold contamination and that the Sims's failure to so inspect for six months, as being fatal to their claim for misrepresentation. The contract between the parties was a Uniform Real Estate Sales and Purchase contract (Contract) and provided that:

> The BUYER has carefully examined the premises and the improvements located thereon, and in making the decision to buy the property, the BUYER is relying wholly and completely upon the BUYER's own judgment and the judgment of the BUYER's inspectors.

Within this Contract, was a specific request by the Sims to conduct a mold inspection. The date in the Contract for the completion of the inspection was October 28, 2004. If there is no ambiguity within the contract, a court may only look to the four corners of that contract for the intent of the parties. *Abney v. Nationwide Mut. Ins. Co*., 215 S.W.3d 699, 703 (Ky. 2006). The Contract herein is clear that the Sims agreed to rely on their inspection. There is no indication that there was a fraudulent misrepresentation by the Boscheinens. Thus, we affirm the trial court's granting of summary judgment in favor of the Boscheinens.

II. Appeal No. 2007-CA-001683-MR – Weyerhaeuser Company

As set forth above, this is a consolidated appeal. The second appeal involves the Weyerhaeuser Company, the manufacturer of some of the wood found in the Sims's residence. The trial court granted summary judgment in favor of Weyerhaeuser, determining that:

> There is sufficient authority to support a finding that the single piece of identifiable wood and the Structurewood® manufactured by Weyerhaeuser is not a

> product for purposes of Kentucky's products liability law. Both the Structurewood® and the lumber identified as being manufactured by Weyerhaeuser are incorporated and completely integrated into the structure of the Sims' house. The lumber and Structurewood®, like the items in the cited cases, are not a moveable component of a complete integrated structure. Removing the wood would completely destroy the skeletal structure of the house.
>
> Therefore, because the lumber and Structurewood® manufactured by Weyerhaeuser is an indivisible component of the house itself, the Court finds as a matter of law that the wood in question herein is not a "product" for purposes of Kentucky products liability law. Thus, Weyerhaeuser is entitled to judgment as a matter of law. Likewise, the Weyerhaeuser wood at issue is not a "good" and thus is not controlled by the Uniform Commercial Code. (Citations omitted).

On appeal, Weyerhaeuser has brought a motion to strike the appellants' brief and dismiss the appeal. Weyerhaeuser argues that the issues raised in the Sims's brief were not the issues identified in their prehearing statement and, consequently, were not properly preserved for review and cannot be considered on appeal.

CR 76.03(8) provides that:

> A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.

In this action, the Sims set forth two issues in their prehearing statement: 1) whether the Kentucky Products Liability Act applies to manufactured lumber products; and 2) whether the UCC applies to manufactured

lumber products. In their brief, however, the Sims contend that the trial court erred in granting summary judgment given the affidavits they submitted in support of their negligence claim and that they were not given an opportunity to fully complete discovery prior to summary judgment being entered. They also acknowledge, however, that prior counsel set forth issues which lack merit in this Commonwealth in their motion for enlargement of time.

The Sims filed a motion for enlargement of time to more fully comply with CR 76.03(8). As set forth above, the rule allows for additional issues upon timely motion when good cause is shown. The Sims contends that the following are good cause:

> (1) Their former counsel was inept in preparing their prehearing statement;
>
> (2) The issues were preserved in the WROA and were accurately cited in their brief to the court;
>
> (3) The acknowledgement in Weyerhauser's own prehearing statement of the trial court's holding on the issue of negligence; and
>
> (4) These issues were raised in Plaintiffs' memorandum contra motion for summary judgment submitted on April 27, 2007 and were preserved in the Fayette Circuit Court's opinion and order rendered July 18, 2007.

In *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008), the Kentucky Supreme Court opined that "the significance of [76.03(8)] is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely

motion." Weyerhaeuser argues that the Sims's motion to amend their prehearing statement is not "timely" in that it completely changes the appellate issues more than a year after the initial appellate statement was filed, after their brief on the issues was filed and after Weyerhaeuser filed its Motion to Strike. We agree.

The notice of appeal was filed in this case by the Sims on August 17, 2007. They thereafter filed their brief more than a year later (on November 5, 2008) after a request for an enlargement of time. After Weyerhaeuser moved to strike their brief on December 10, 2008, the Sims asked for an enlargement of time to amend their prehearing statement on December 23, 2008. We do not find this is timely nor do we find there was good cause shown by the Sims as to why the issues set forth in their prehearing statement dealt with unpreserved issues.

Thus, we will dismiss the Sims's appeal against Weyerhaeuser.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority opinion dismissing the appeal of *Tyler Sims, et al. v. Weyerhaeuser Company*, 2007-CA-001683-MR. However, I dissent on *Tyler Sims, et al. v. William F. Boscheinen, Jr., et ux*., 2007-CA-001980-MR.

In the latter case, the Simses sought discovery of medical records for the purpose of disclosing whether or not the Boscheinens suffered from various

symptoms associated with toxins, either from mold or heavy metals. I believe that the discovery of such information is relevant to the claims made by the Simses that the Boscheinens had, by misrepresentation or omission, committed fraud or negligence by selling a home knowing of the toxins and not disclosing same.

I would reverse and remand to the trial court for further discovery and other appropriate proceedings.

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