

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002047-MR

SCOTT KELLER AND JENNIFER KELLER;
JAMES HAYES AND LINDA HAYES;
CAROLYN KELLER; AND
JOHN W. WOOLDRIDGE

APPELLANTS

v. APPEAL FROM SPENCER CIRCUIT COURT
HONORABLE TOM MCDONALD, JUDGE
ACTION NO. 05-CI-00138

TOM WOODS AND MARLA WOODS

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; ISAAC,¹ SENIOR
JUDGE.

DIXON, JUDGE: Scott and Jennifer Keller, James and Linda Hayes, Carolyn

Keller, and John W. Wooldridge appeal a judgment of the Spencer Circuit Court

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

awarding damages to Tom and Marla Woods on their claims of fraud and professional negligence. We affirm.

In October 2003, Scott Keller and his father-in-law, James Hayes, purchased an undeveloped 28 acre parcel of land in Spencer County, Kentucky, for approximately \$72,000.00 (“the Keller-Hayes property”). The Keller-Hayes property was bounded on the west by Goose Creek, and across the creek, a narrow tract of land, at that time owned by the Cox family, separated the Keller-Hayes property from the public highway, Goose Creek Road. The deed included an acknowledgement by Scott and James that there was no access to the Keller-Hayes property via Goose Creek Road.

In early 2005, Carolyn Keller, a real estate agent (and Scott Keller’s mother), listed the Keller-Hayes property for sale. Appellees responded to the listing and met with Carolyn, Scott, and James at various times to discuss and view the property. The Appellees planned to build a house on the property, and Tom also hoped to use the acreage for hunting. The Appellees asked Carolyn, Scott, and James about accessing the property from Goose Creek Road. They advised the Appellees that the property was accessible from Goose Creek Road, by crossing the Cox tract over a prescriptive easement. Carolyn recommended that the Appellees contact attorney John Wooldridge, who was familiar with the property, for an explanation of the easement.

Tom Woods spoke to Wooldridge on the telephone, and Wooldridge followed up the call with a letter to Tom, stating in part:

Access to the subject property has been by prescription which is across a small tract of property owned by others and through a creek bed and then onto the tract. Please be advised that the records in Spencer County do not indicate a deeded passway and passway is by prescription. Kentucky law does allow access to be obtained this way and your access should be free and undisturbed by the owner of the property over which you will proceed.

Thereafter, the Appellees agreed to purchase the Keller-Hayes property for \$182,000. A few days before closing on the property, survey flags and signs bearing the name "Kevin Hoskins" were posted on the alleged prescriptive easement. At the closing, Carolyn, Scott, and James advised the Appellees they did not know Hoskins, and reassured them regarding use of the prescriptive easement. After purchasing the Keller-Hayes property, the Appellees learned that Hoskins had purchased the Cox property located between Goose Creek Road and Goose Creek, where the easement was purported to exist. Hoskins refused access to the Appellees, and he refused to sell them an easement. Instead, Hoskins advised Appellees he would sell the tract as a whole, approximately 2.5 acres, for \$29,500.00. Appellees ultimately purchased the additional acreage from Hoskins so they could access their property.

In August 2005, the Appellees filed a complaint alleging fraud, realtor malpractice, and legal malpractice. In June 2008, following a 3-day trial, the jury returned a verdict in favor of the Appellees and awarded \$30,113.00 in damages. After the trial court denied their motion for post-judgment relief, Appellants filed this appeal.

In their brief, Appellants disregarded the mandate of CR 76.12(4)(c)(v), which requires the beginning of each argument to include “a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.” *See also Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). “It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). It is not the responsibility of this Court to search the record in support of Appellants’ contentions; consequently, we will “give little credence to the arguments . . . that are not supported by a conforming citation to the record.” *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006).

Appellants first argue that the Appellees failed to adequately prove their damages. The court limited damages to \$30,113.00, the amount spent by the Appellees to obtain the additional parcel for access to the property. Appellants contend the purchase of the additional 2.5 acres increased the overall value of the property; consequently, the damages allowed by the trial court put the Appellees in a better position than if the misrepresentations had not been made about access to the Keller-Hayes tract.

“The measure of damages for fraud is, as a general rule, the actual pecuniary loss sustained. Thus, as a general rule, one injured by the commission of fraud is entitled to recover such damages in a tort action as will compensate him for the loss or injury actually sustained and place him in the same position that he would

have occupied had he not been defrauded.” *Sanford Const. Co. v. S & H Contractors, Inc.*, 443 S.W.2d 227, 239 (Ky. 1969).

In this case, based on the representations made by Appellants, the Appellees purchased the Keller-Hayes property with the expectation that they had a prescriptive easement across the adjacent tract to access their land. It was undisputed that the only means of accessing the Keller-Hayes property was by crossing the strip of land fronting Goose Creek Road. The 2.5 acre tract was long and narrow, located between the creek and highway. Tom testified that the strip of land varied in width between 20 yards at the narrowest and 50 yards at the widest. Tom testified that, after meeting with Hoskins, he felt “stuck” because Hoskins’s selling price was non-negotiable, and Hoskins was unwilling to sell only a portion of the tract to provide access to the Appellees. Tom also stated that, at the time he was dealing with Hoskins, construction had already begun on the Appellees’ home and driveway. Furthermore, as Appellees pointed out during a bench conference regarding the alleged value of Appellees’ purchase, the evidence showed that Scott and James purchased the Keller-Hayes property, without highway access, for \$72,000.00, and they sold it two years later to Appellees, alleging access existed, for \$182,000.00.

As this Court has noted, “One induced by fraudulent representations to enter into a contract is entitled to recover as damages, not only what he actually parted with, but benefits of the bargain.” *Investors Heritage Life Ins. Co. v. Colson*, 717 S.W.2d 840, 842 (Ky. App. 1986). Here, the Appellees spent an additional

\$30,113.00 to obtain something -- access to their property -- which was alleged to have been a benefit of the original bargain. Given the evidence presented in this case, we conclude the Appellees adequately proved the damages they incurred as a result of the fraud perpetrated by Appellants. The testimony indicated the only way Appellees could obtain the access promised by Appellants was by purchasing the land from Hoskins. We believe the trial court correctly instructed the jury on the measure of damages, and Appellants' argument to the contrary is unpersuasive.

Appellants next assert the court erred by refusing to instruct the jury on the Appellees' duty to mitigate their damages. Appellants theorize the Appellees could have postponed the closing for the Keller-Hayes property to investigate Hoskins's sign, or they could have challenged Hoskins regarding the alleged prescriptive easement. We find these arguments unpersuasive.

Tom Woods testified the Appellants assured him that the easement existed, that he should not worry about the signs posted on the property, and that Hoskins's price of \$29,500.00 for the 2.5 acre tract was non-negotiable. Despite their theories, we conclude the Appellants failed to present any specific evidence that the Appellees failed to mitigate their damages; consequently, a mitigation instruction was not warranted. *Morgan v. Scott*, 291 S.W.3d 622, 640 (Ky. 2009).

Appellants next challenge the sufficiency of the evidence on the legal malpractice claim and assert that Wooldridge was entitled to a directed verdict. Appellants emphasize that the only contact between Tom Woods and Wooldridge

was a phone call and a letter. Appellants also point out that the Appellees did not pay for any service rendered by Wooldridge.

“To prevail in a legal malpractice action, a plaintiff is required to prove: 1) that there was an employment relationship with the defendant/attorney; 2) that the attorney neglected his duty to exercise the ordinary care of a reasonably competent attorney acting in the same or similar circumstances; and 3) that the attorney's negligence was the proximate cause of damage to the client.” *Stephens v. Denison*, 64 S.W.3d 297, 298-99 (Ky. App. 2001).

“The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties.” *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1978). Here, there was no contract for legal services between the Appellees and Wooldridge; however, based on the evidence at trial, the jury could reasonably conclude that an implied employment relationship existed. Tom testified that he sought Wooldridge's advice regarding the easement, and Wooldridge offered his opinion over the phone and in a follow-up letter. Tom also testified that he and his wife relied on Wooldridge's opinion when they decided to purchase the Keller-Hayes property. Finally, the Appellees presented expert testimony regarding the professional standard of care under the circumstances. Based upon our review, we believe sufficient evidence existed to present the issue of legal malpractice to the jury; consequently, the court did not err by denying the motion for directed verdict.

Finally, Appellants allege the Appellees failed to comply with pre-trial orders regarding itemization of damages, which prevented Appellants from adequately preparing for trial. Although Appellants did not cite the record regarding this issue, the trial court's post-judgment order states that the Appellants failed to bring this issue to the court's attention prior to trial. It is well settled that a trial court has broad discretion in enforcing its own orders. *Boland-Maloney Lumber Co., Inc. v. Burnett*, 302 S.W.3d 680, 688 (Ky. App. 2009). We simply are not persuaded that the court abused its discretion regarding Appellees' damages.

For the reasons stated herein, we affirm the judgment of the Spencer Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

John W. Wooldridge
Shepherdsville, Kentucky

BRIEF FOR APPELLEES:

C. Thomas Hectus
Louisville, Kentucky