

RENDERED: APRIL 4, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2011-CA-001910-MR

HUGO MARNATTI AND MARION MARNATTI

APPELLANTS

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 11-CI-00240

HORNE ENGINEERING, INC.; JOHN HORNE;  
CHRISTOPHER HORNE; HEARTHSIDE, INC.;  
JOSEPH MCMILLEN; BARI MCMILLEN;  
AND DAVID MCMILLEN

APPELLEES

AND

NO. 2011-CA-001911-MR

CHRIS S. OTTO AND STACIE H. OTTO

APPELLANTS

v. APPEAL FROM JESSAMINE CIRCUIT COURT  
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CHRISTOPHER HORNE; HEARTHSIDE, INC.;  
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APPELLEES

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MOORE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This action comes before us as an appeal from the Jessamine Circuit Court's entry of an order dismissing the action on the pleadings. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Appellants Hugo and Marion Marnatti and Chris S. and Stacie H. Otto are the owners of two homes on adjacent lots in the Barkley Woods Subdivision in Jessamine County, Kentucky. The Marnattis' and the Ottos' homes were on property originally developed by the Appellees Joseph McMillen, Bari McMillen, David McMillen, Horne Engineering, Inc., John Horne, Christopher Horne and Hearthside, Inc. Hearthside is owned by the McMillen Appellees. Horne Engineering (owned by the Horne Appellees) provided the surveying, inspecting, and analyzing of the real property as part of a contract with Hearthside.

The Appellants moved into their homes in 2008 and, in September of 2009, their homes flooded to a depth of approximately twenty-seven inches. In the spring of 2009, their homes flooded again. The Marnattis contacted Horne Engineering to determine whether the flooding of their basement was an isolated incident and what to do about it.

In September of 2010, Horne Engineering prepared a report entitled “Sinkhole Flood Routing and Hydraulic Calculations.” The Appellants contend that this report explained that the Appellants’ homes would flood during a two-year storm event, i.e., 3.1 inches in a 24-hour period, and that the floor elevations of the Appellants’ basements were constructed lower than the drainage provided.

The Appellants filed suit in Jessamine Circuit Court asserting that:

1. The Appellees had a duty to design the development using commonly accepted engineering practices with regard to the health, safety, and welfare of the public, as well as to the builders and owners of the property for which they designed, and to meet the requirements of the subdivision regulations of Jessamine County-City of Wilmore;
2. Appellees conduct failed to meet that standard and such failure constitutes, at a minimum, negligence;
3. The developer, Appellees, conduct was fraudulent or grossly negligent as they sold home sites that they knew were unsuitable for construction due to a history of flooding;
4. The Appellants have alleged violations of the Jessamine County-City of Wilmore subdivision regulations and the Kentucky Residential Code (KRC); and
5. Moreover, appellants have alleged violations of KRS 198B.130 which also provides a statutory cause of action.

The trial court dismissed the action, against the named Appellees only, on the pleadings holding that:

The court finds, based upon the record that, assuming all facts in favor of the Plaintiffs, neither developer nor

engineer [has] a duty, by contract or tort, to design subdivision lots to ensure dry basements, nor was there an expressed or implied warranty for same.

The Appellants then brought this appeal.

#### STANDARD OF REVIEW

The granting of a motion to dismiss is proper when “it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). Our review of the granting of a motion to dismiss is *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky. 2000). We, therefore, review the trial court’s decision for errors of law.

#### DISCUSSION

The Appellants first assert that the Appellees owed them a duty under KRS 198B.130 and the Jessamine County Subdivision Regulations. KRS 198B.130 provides, in relevant part, as follows:

Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this chapter or the Uniform State Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation.

Of course, the above right to remedy is based upon the finding of a violation. The Appellees, however, argue that the Kentucky Building Code regulates the construction, altering, or remodeling of buildings. They contend that they were

not, in any way, responsible for the building of the Appellants' homes. Instead, they assert that Charles A. Withers was the builder of the Marnattis' home and that True Kentucky Homes, LLC and Geoff Brewer were the builders of the Ottos' home. These builders were and continue to be parties in the action in Jessamine Circuit Court.

In the Adoption Information of the Kentucky Building Code 2007, it sets forth that it "is a uniform statewide mandatory building code and applies to all buildings to be constructed, altered or remodeled with the exception of farm dwellings or farm buildings and manufactured houses." 2007 Kentucky Building Code at ii.

Section 5.304 of the Jessamine County-City of Wilmore Subdivision Regulations provides that:

The sub-divider shall be responsible for adequate and safe disposal of all surface water in the sub-division and shall provide for that purpose a drainage system including the necessary detention/retention basins, open ditches, pipes, culverts, inter-sectional drains, drop inlets, bridges, etc. such that the peak rate of post-development discharge shall not exceed peak rate of pre-development discharge.

The Appellants argue that this regulation imparts a duty to the Appellees, as developers, to safely dispose of all surface water for the entirety of the subdivision, not just a portion in which they own property. We do not, however, interpret the above regulation as the Appellants do.

While there is an issue regarding the drainage of water specific to these two homes, it is only with large amounts of rainfall in a short period of time. This issue is best addressed by the builder of the home rather than the subdivision developer. Legal authority for this Section 5.304 does not put the burden of the flooding of a specific home on the subdivider. It only sets forth that the subdivider provide a drainage system. There is no indication that the subdivider of the home could remedy the issues with water in homes constructed on the property. Thus, we hold the trial court did not err in finding there was no legal duty under either the Kentucky Revised Statutes or the Jessamine County-City of Wilmore Subdivision Regulations on the part of either of the Appellees.

The Appellants next assert that the Appellees had a duty of care to design the Barkley Woods Subdivision and its lots with adequate drainage to avoid flooding homes constructed within the subdivision. A negligence claim requires a duty on the part of the defendant to the plaintiff, breach of the duty, and causation between the breach and any injury to the plaintiff. *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). The trial court found that the Appellees did not owe a duty to the Appellants. We agree.

In *Grayson Fraternal Order of Eagles, Aerie No. 3738, Inc. v. Claywell*, 736 S.W.2d 328 (Ky. 1987), the Kentucky Supreme Court held that in Kentucky, “the rule is that every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.” The Appellants argue that it is foreseeable that the failure of a subdivider to determine whether a property will

flood and that the flood will cause damages to the homeowner. Consequently, they contend there was a jury question regarding the negligence of the Appellees.

While it is true that there must be ordinary care in the building or constructing of homes, as stated earlier, there is no duty owed by the developer of the subdivision to the homeowner based upon the construction of the home. There are no Kentucky cases which deal with this issue; however, other jurisdictions have. In *Jones v. Whitt*, 676 So.2d 313, 315 (Ala. Civ. App. 1995), the Alabama Court of Appeals held that the developer of property did not have a duty to a subsequent purchaser of property for deficient drainage on the property. The court went on to hold that the developer of real property had no duty to oversee the construction of homes on the property by builders or construction companies. We agree with this holding.

In the present case, there is no duty under Kentucky statutory law, the building codes, or case law which would indicate that a developer of real property has a duty to the owner of a home subsequently constructed upon the property by a contractor or builder. Thus, we affirm the decision of the trial court.

NICKELL, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

J. Brent Austin  
Lexington, Kentucky

BRIEF FOR APPELLEE:

John E. Reynolds  
Robert L. Gullette, Jr.  
Nicholasville, Kentucky

