

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001353-MR

FERDINAND A. RABE, III

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 13-CI-02115

JOSEPH C. FROHN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Ferdinand Rabe, III appeals from an order of the Boone Circuit Court which held that his complaint against Joseph Frohn was barred by the applicable statute of limitations. We find no error and affirm.

On April 1, 2012, Appellant hired Appellee, a licensed and certified home inspector, for the purpose of performing a home inspection on a property

Appellant was considering to purchase. The inspection was completed on April 9, 2012. The inspection report stated that the home's roof had been inspected and was in acceptable condition. Appellant then purchased the property.

In September or October 2012, Appellant contacted Appellee and informed him that the roof had begun leaking. Soon thereafter, Appellee returned to the property with a roofing contractor, inspected the roof again, and made repairs to the roof. Appellee personally paid \$1,800 to repair the roof. Appellee then represented to Appellant that the roof was in good condition.

In July of 2013, the roof began leaking again. Appellant tried to contact Appellee by telephone and in writing, but was unsuccessful. On July 21, 2013, Appellant had the property inspected by a third-party contractor to determine the nature of the roof leaks. This contractor indicated that the roof was in a serious state of disrepair and needed to be immediately replaced. Appellant then tried contacting Appellee again, but was again unsuccessful. Appellant then spent over \$14,000 replacing the roof.

On December 19, 2013, Appellant filed his complaint against Appellee. After some discovery, Appellee filed a motion for summary judgment on December 29, 2014, in which he alleged the appropriate statute of limitations would have expired in October of 2013. On August 11, 2015, the trial court entered an order granting summary judgment in favor of Appellee. This appeal followed.

The standard of review on appeal of a summary judgment is 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. . . . “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.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Steelvest*, 807 S.W.2d at 480, *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). 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 his favor. . . .” *Huddleston v. Hughes*, 843 S.W.2d 901, 903 (Ky. App. 1992)[.]

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

Kentucky Revised Statute (KRS) 413.246(1) states:

An action for damages, whether brought in contract or tort, or on any other basis, based on professional services that were rendered or that should have been rendered by a licensed home inspector . . . shall not be brought, commenced, or maintained unless the action is filed within one (1) year of the time that the claimant knew or should have known of a deficient inspection and damages and injuries resulting therefrom.

In the case at hand, the trial court found that Appellant should have filed his complaint no later than in October of 2013. The court reasoned that Appellant was put on notice that the inspection was deficient when the roof first started leaking in September or October of 2012 because Appellee admitted that his inspection of the

roof was deficient and repaired the roof at his own expense. The court held that the one-year statute of limitations began to run at this point.

Appellant argues that when Appellee returned to fix the roof in October of 2012 it constituted a second home inspection; therefore, the statute of limitations did not begin to run until July of 2013 when the roof began leaking again. We do not believe the act of repairing the roof and indicating it is in proper condition constitutes a second home inspection. We agree with the trial court that Appellant knew or should have known that Appellee's home inspection was deficient in October of 2012 at the latest. This means that the statute of limitations in this case would have expired in October of 2013, two months before Appellant filed his complaint.

Appellant also argues that the statute of limitations was tolled by the "continuous representation rule" described in *Harrison v. Valentini*, 184 S.W.3d 521 (Ky. 2006), and *Alagia, Day, Trautwein & Smith v. Broadbent*, 882 S.W.2d 121 (Ky. 1994). We decline to entertain this argument because it was not raised in the trial court. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986)(citation omitted).

For the foregoing reasons, we affirm the judgment of the Boone Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas R. Nienaber
Florence, Kentucky

BRIEF FOR APPELLEE:

R. Kim Vocke
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