

KENNETH CHAMBERS and PEGGY BREEDEN CHAMBERS,
Plaintiffs-Appellants,
vs.
AIRPORT TOYOTA, INC., Defendant-Appellee.

No. 03A01-9306-CV-00225
COURT OF APPEALS OF TENNESSEE, EASTERN SECTION
1994 Tenn. App. LEXIS 60
February 16, 1994, Filed

BLOUNT LAW. HON. W. DALE YOUNG, JUDGE

COUNSEL

A. PHILIP LOMONACO, Knoxville, for Plaintiffs-Appellants.
MARTHA MEARES and WILLIAM B. MARSH, MEARES, MARSH & COWDEN, Maryville, for Defendant-Appellee.

JUDGES

Franks, Goddard, Sanders
AUTHOR: FRANKS

OPINION

Franks, J.

Summary judgment was entered on behalf of the defendant upon the Trial Court's determination that the statute of limitations had run prior to the filing of this action which charged violation of the Tennessee Consumer Protection Act. Plaintiff has appealed.

The complaint was filed on November 13, 1987, and upon trial on January 15, 1991, the Trial Court directed a verdict on behalf of the defendant at the close of the plaintiffs' proof. An appeal ensued to this Court and we vacated the judgment of the Trial Court and remanded for a new trial.

In the Trial Court defendant raised the Statute of Limitations as a defense for the first time upon filing its motion, which resulted in summary judgment for the defendant.

Plaintiffs purchased a 1984 Toyota pick up truck from defendant on November 23, 1985. Plaintiff testified at the first trial that at the time of the purchase one of defendant's salesmen told plaintiff the truck had never been involved in either an accident or a wreck, and further represented there was nothing wrong with the vehicle. Approximately two months following the purchase, plaintiff began experiencing problems with the vehicle. Plaintiffs returned the vehicle to defendant repeatedly for repairs over the course of approximately 11 months, and in December of 1986 plaintiff was advised by one of defendant's mechanics that the truck had been wrecked.

Tennessee Code Annotated Section 47-18-110 states the statute of limitations as to the Tennessee Consumer Protection Act runs from the date of discovery of the defendant's unlawful act or practice. In this action, defendant argues, and the Trial Judge agreed, that plaintiff should have discovered his cause of action upon experiencing difficulty with the vehicle and this action is time barred citing **McCroskey v. Bryant Air Conditioning Co., et al.**, 524 S.W.2d 487 (1975).

In **Prescott v. Adams**, 627 S.W.2d 134 (Tenn. App. 1981), we held that where varying inferences may be drawn from otherwise undisputed facts, the question of when a plaintiff should have discovered a cause of action is a factual issue for the trier of fact.

In **Prescott** the plaintiffs purchased a house from defendants who represented that they had repaired a mud bank behind the house and assured there would be no problems. After moving into the house plaintiffs experienced severe land slides. However, it was more than three years later when the plaintiffs learned that the mud slides were a result of the flooding of a concealed dump beneath the bank. We held that summary judgment was inappropriate as it was in the province of a jury to determine from the various possible inferences when the cause of action accrued.

In this case, reasonable persons could draw differing inferences from the facts as to when plaintiffs' cause of action accrued. There was evidence that the plaintiffs' experienced problems with the truck as early as January 1986, but there is no evidence that plaintiffs' had actual knowledge of the misrepresentation until December of 1986. It is not uncommon for the owners of new vehicles to experience mechanical and other problems with such vehicles shortly after purchase and merely experiencing mechanical problems with a vehicle would not as a matter of law charge the owner with knowledge that such problems arise from the fact that the vehicle had

been wrecked and previously repaired. On this record, it is for the trier of fact to determine whether the plaintiffs reasonably should have known from the problems they were experiencing with their vehicle that the problems were due to the vehicle's having been wrecked and repaired prior to purchase.

It was in the Trial Judge's discretion to permit the defendant to assert the defense of the statute of limitations. However, we vacate the Trial Judge's summary judgment and remand for trial consistent with this opinion.

The costs of the appeal are assessed to appellee.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.(E.S.)

Clifford E. Sanders, Sr.J.

DISPOSITION

VACATED AND REMANDED

MICHAEL BRANDON and PEGGY BRANDON, Plaintiffs/Appellees,
vs.
DENNIS A. WINNETT, d/b/a WINNETT HOME BUILDERS, INC., a
Tennessee Corporation, Defendant/Appellant.

Appeal No. 01A01-9411-CH-00529
COURT OF APPEALS OF TENNESSEE, WESTERN SECTION, AT NASHVILLE
1995 Tenn. App. LEXIS 508
July 28, 1995, FILED

APPEAL FROM THE CHANCERY COURT OF RUTHERFORD COUNTY AT MURFREESBORO,
TENNESSEE. Rutherford Chancery No. 92CV-1035. THE HONORABLE ROBERT E. CORLEW, III,
CHANCELLOR.

COUNSEL

THOMAS D. FROST, Murfreesboro, Tennessee, Attorney for Defendant/Appellant.
JOHN D. DRAKE, Murfreesboro, Tennessee, Attorney for Plaintiffs/Appellees.

JUDGES

ALAN E. HIGHERS, JUDGE. CONCUR: HEWITT P. TOMLIN, JR., PRESIDING JUDGE, W. FRANK
CRAWFORD, JUDGE
AUTHOR: HIGHERS

OPINION

Plaintiffs, Michael and Peggy Brandon, sued defendants Dennis Winnett and Winnett Home Builders, Inc. (hereinafter WHBI) in the Chancery Court for Rutherford County seeking to rescind the purchase of their home sold and constructed by WHBI or in the alternative, damages. Plaintiffs sought relief on four alleged causes of action: breach of the implied warranty of habitability, fraudulent misrepresentation, negligent misrepresentation, and violation of the Tennessee Consumer Protection Act. After a one day bench trial, Chancellor Robert E. Corlew, III dismissed the action against defendant Winnett individually and granted plaintiffs a judgment against defendant WHBI for breach of the implied warranty of habitability, negligent misrepresentation and violation of the Tennessee Consumer Protection Act. Finding the relief of rescission inappropriate, the chancellor awarded plaintiffs \$ 4,420 in actual damages to be doubled in accordance with the Tennessee Consumer Protection Act and awarded plaintiffs \$ 4,780.75 for attorney's fees and litigation expenses.

The facts are as follows: Dennis Winnett is a general contractor and president of WHBI, a corporation engaged in the business of constructing residential buildings. On April 15, 1991, the plaintiffs entered into a contract with defendant WHBI to purchase a newly constructed home in the Bluffview Estates subdivision in Murfreesboro, Tennessee. One week before closing on the home, the plaintiffs noticed a box fan sitting in the doorway leading to the crawl space. The plaintiffs asked Winnett at closing about the fan and the water they noticed under the house. According to plaintiffs, Winnett advised them that the water was construction water and that the fans had been installed to dry out that water.

Winnett first found out about the water underneath the home prior to the sale when an FHA inspector informed him of the problem. The inspector recommended that Winnett install a positive drain to allow the water to drain out from under the house. Before closing, Winnett installed the drain and the house passed inspection. The plaintiffs were never informed of the installation of the positive drain.

The water problem did not go away. In the fall of 1991, Mr. Brandon went under the house to insulate the water pipes and noticed an extensive amount of water pooling under the house. The plaintiffs contacted Winnett who sent a subcontractor to the home on a least two separate occasions to clean out the trenches in the crawl space and to pump out the water. When these efforts did not correct the problem, Winnett contacted a plumber to install a sump pump. The plumber discovered that the positive drain put in before the closing was not installed correctly. Thereafter, in approximately September of 1992, Winnett fixed the positive drain and believed the problem solved.

When the water problem persisted, the plaintiffs, frustrated with Winnett's inability to get the water out from underneath the house, commenced arbitration proceedings. As a result of the arbitration hearing, the parties entered into an agreement whereby Winnett agreed to completely correct the problem within 60 days. Winnett attempted to do this by extending the positive drain and once again clearing out the trenches located under the house. By March of 1993, however, water still pooled underneath the plaintiff's house. The plaintiffs, no longer able to trust Winnett to do the work, refused to allow Winnett any further attempts to remedy the water problem and this action ensued.

As stated earlier, the plaintiffs sued Winnett and WHBI for fraudulent misrepresentation, negligent misrepresentation, breach of implied warranty of habitability and violation of the Tennessee Consumer Protection Act. The plaintiffs requested that they be awarded \$ 74,000 in compensatory damages, trebled in accordance with the Tennessee Consumer Protection Act or, \$ 74,000 in compensatory damages and \$ 250,000 in punitive damages. Alternatively, the plaintiffs requested that the transaction be rescinded and that plaintiffs be awarded their costs for expenses necessarily incurred in the purchase of the house and lot, for interest paid by plaintiffs for amounts borrowed for the purchase of the house, for expenses in moving into and vacating the house and for monies spent by plaintiffs in an effort to mitigate damages.

At trial, Ronald Jones, a geotechnical engineer who specializes in correcting water problems and controlling ground water seepage, testified for the plaintiffs that he inspected the plaintiff's home in November of 1992 and found a considerable amount of water standing around the foundation the house. Although Jones did not know the exact source of the water, he testified that it appeared to be general seepage, a common problem in Middle Tennessee which occurs in about one in ten houses. According to Jones, the most effective way to eliminate the water would be to get it out from under the house instead of trying to stop it from seeping in. Jones recommended a French drain system which he testified he would install for \$ 4,420 and guarantee for ten years. Jones testified that he has utilized this system hundreds of times and has never had a problem with it. Jones also testified that he did not observe nor did he expect to see any general damage to the house as a result of the water accumulation.

Both Mr. and Mrs. Brandon testified at trial that they believed Winnett intentionally deceived them when he told them the water under the house was simply construction water which would disappear in a short time. They also testified that they would not have purchased their home if they had known the extent of the water problem. Mrs. Brandon further testified about other problems associated with the water underneath the house. According to Mrs. Brandon, the house is very humid, water stands in various places around the house, different rooms in the house smell and there is mold around the heating vents and the toilets. Mrs. Brandon testified that every time the water level rises and the mold increases, she and her son get sick with earaches, sinus infections and allergies. She also testified that she missed several days of work trying to solve the problem with the water.

Winnett testified that at the time of closing, he believed the water under the house was construction water, but he did not know for a fact whether that belief was true or not. He based this belief on the fact that there had been a considerable amount of rain while building the plaintiff's house. According to Winnett, he thought the installation of the positive drain solved the water problem. Winnett testified that he has been ready and willing since June of 1993 to implement the French drain system himself or pay another contractor to do it.

At the close of all the proof, the chancellor acknowledged that there were serious problems involved in the case, but also stated that based on all the evidence and the testimony, it appeared that all parties were good people. The chancellor found that the Plaintiffs were entitled to relief for breach of the implied warranty of habitability. He also found that Winnett did not make any false representations, but did make negligent misrepresentations for which Defendant WHBI would be liable. In this area, the court stated:

It does appear that at the time of the closing Mr. Winnett assured Mr. and Mrs. Brandon that, in fact, he had dealt with the problem. And I think his testimony today -- and there is no reason to find that he was not testifying truthfully, I think his testimony today reflects that, in fact, he thought he had solved it. He had put in a positive drain, or at least he thought he had; and he thought based on what he had been told based on what the F.H.A. inspector said, based on what his plumber or his drain man, Mr. Deal, had told him that that would solve the problem. In fact, it didn't.

Mr. Winnett the court finds did tell the Brandon's [sic] this is a temporary problem. This is construction [water] caused by construction. This isn't something that is going to cause you a problem. I think the evidence does show that if the Brandon's [sic] had thought at the time of closing that it was going to be a long standing situation, clearly they wouldn't have purchased the residence under those circumstances. It does appear that they are entitled to relief.

Although the defendant did not commit actual fraud, the chancellor found that the plaintiffs were entitled to relief under the provisions of the Tennessee Consumer Protection Act based on the negligent misrepresentation. The actual damages awarded were \$ 4,420, the cost of installing

the French drain system recommended by plaintiffs' expert. In assessing the plaintiffs' right to treble damages under the Tennessee Consumer Protection Act, the court stated:

The Tennessee Code Annotated Section 47-18-109(A) (4) sets out some criteria that the Court should look to in determining whether additional or further damages should be awarded. That section provides that the Court must look to the competence of the consumer, the nature of the deception or coercion practiced upon the consumer, the damage to the consumer, the good faith of the person bound to have violated the provisions of this part.

Certainly as we consider those aspects it would appear that this is a case where it is a mixed bag if you will. Competence of the consumer. Mr. and Mrs. Brandon are both well educated people, they are both professionals, they are both either certified public accountants or at least accountants. I'm not remembering their testimony in that regard. Perhaps that is not particularly relevant. They both testified in a very professional manner. They are intelligent folks. They are not experts when it comes to engineering, and it appears that perhaps their experience in home buying and selling may candidly be minimum.

I'm not sure that there was testimony as to whether they had bought and sold homes before. The testimony I think was that in this subdivision perhaps these were homes that generally were available to first-time home buyers.

The nature of the deception of coercion practiced, again, the Court has addressed this. It doesn't appear to be an intentional type of situation but rather a negligent misrepresentation. The damage to the consumer, Mrs. Brandon perhaps testified to the greatest length about the problems within the home, the problems that they have gone through, the time lost from work, the odor caused by the ponding water, the testimony of the mold and other problems, and testimony that it is her belief that the illnesses both of herself and minor child have been increased. Certainly the damage factor is clearly there.

The good faith of the person found to have violated the provisions of this part, again there are several factors we have to consider. On the negative side, as far as Mr. Winnett is concerned, he is acknowledged and he has been truthful in his testimony it appears to the Court. He has acknowledged maybe it took him a little longer to get back to Mr. and Mrs. Brandon, maybe the subs didn't work as quickly as he hoped, maybe the weather was the problem, maybe there was some other issues that didn't allow him to respond as timely as he had wished or would wish.

Perhaps there was some other problems as well. The fact the subs did not perform the original work on the positive drain appropriately, the number of difficult problems that have been here. On the positive side of the good faith, Mr. Winnett does appear he has tried, although perhaps he should have better supervised his sub-contractors. He has tried on repeated occasions to fix the problem. Again, perhaps not as timely either before or after the arbitration, but he has tried to do that to get the matter rectified.

Considering these factors then, it does appear that Mr. and Mrs. Brandon are entitled to some additional relief. At the same time it doesn't appear that the full measure of treble damages would be appropriate. What appears properly to the Court is to award double the damages, that is \$ 4,420 twice or \$ 8,840.

The Court also awarded plaintiffs \$ 4,780.75 in attorney's fees and costs pursuant to section 47-18-109(e)(1) of the Tennessee Consumer Protection Act. Both parties have appealed.

I. Fraudulent Misrepresentation

Plaintiffs contend that the trial court erred in failing to find the defendant guilty of fraudulent misrepresentation. In order to prove fraud, the plaintiffs must show that (1) the defendant made

an intentional misrepresentation with regard to a material fact in order to mislead another or obtain an undue advantage over him; (2) the representation was made with knowledge of its falsity and fraudulent intent; (3) the representation was to an existing fact; and (4) the plaintiff reasonably relied upon the representation to his injury. **Haynes v. Cumberland Builders, Inc.**, 546 S.W.2d 228, 232 (Tenn. App. 1976); **Holt v. American Progressive Life Ins.**, 731 S.W.2d 923, 927 (Tenn. App. 1987); **Stacks v. Saunders**, 812 S.W.2d 587, 592 (Tenn. App. 1990); **Godwin Aircraft, Inc. v. Houston**, 851 S.W.2d 816, 821 (Tenn. App. 1992). Whether the plaintiff has proven all the elements of fraud is a question of fact. See **Keith v. Murfreesboro Livestock Market**, 780 S.W.2d 751, 754 (Tenn. App. 1989). Therefore, our review on appeal is de novo with the presumption of correctness unless the preponderance of the evidence is otherwise. T.R.A.P. 13(d).

After listening to Winnett's testimony, the chancellor concluded that Winnett honestly thought he had the water problem solved when he told the plaintiffs that the water underneath the house was construction water which would eventually dissipate. According to the trial court, Winnett did not purposefully misrepresent the water condition with intent to defraud or mislead the plaintiffs. Because the findings of the trial judge with regard to credibility of witnesses is given great weight on appeal, **Linder v. Little**, 490 S.W.2d 717 (Tenn. App. 1972), we conclude that the evidence does not preponderate against the chancellor's determination that Winnett did not make a fraudulent misrepresentation. Therefore we find that the plaintiffs have failed to prove the elements of fraud.

II. Negligent Misrepresentation

Although the chancellor declined to find that Winnett's representations rose to the level of fraud, he did find that Winnett negligently misrepresented the water condition under the plaintiff's house. Defendant WHBI contends that the trial court erred in this finding. We do not agree. Negligent misrepresentation has been defined by Tennessee courts as follows:

One who, in the course of his business, profession, or

employment, or during a transaction in which he had a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon such information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228, 232 (Tenn. App. 1976); **McElroy v. Boise Cascade Corp.**, 632 S.W.2d 127, 130 (Tenn. App. 1982); **Keller v. West-Morr Investors, Ltd.**, 770 S.W.2d 543, 546 (Tenn. App. 1988). Thus, to hold defendant liable for negligent misrepresentation, the plaintiffs must prove that: 1) Winnett supplied false information to the plaintiffs; 2) Winnett did not exercise reasonable care in obtaining or communicating the information; and 3) the plaintiffs justifiably relied on the information. **Merriman v. Smith**, 599 S.W.2d 548, 557 (Tenn. App. 1979).

Defendant argues that Winnett did not supply false information to the plaintiffs when he told them that the water under the house was construction water because that statement was merely an opinion. Defendant also contends that the plaintiffs did not justifiably rely on Winnett's representations because the plaintiffs were aware prior to closing that the water was under the house. We find these arguments without merit.

Winnett clearly told the plaintiffs that the water under the house was construction water which would dissipate in time. He did not qualify this statement by telling the plaintiffs this was merely his opinion or what he believed. Winnett stated his belief as a fact and the plaintiffs interpreted it as such. His statements likewise proved to be false. The water under the plaintiffs' house is clearly not construction water and it clearly did not dissipate. Finally, the plaintiffs' reliance on Winnett's representations was reasonable. Upon seeing the fans in the crawl space door, the plaintiffs asked Winnett about their presence. The plaintiffs, who are not experts in homebuilding, had every right to rely on their contractor's representations that the water was merely construction water. They had no reason to doubt the truth or competency of Winnett's answer and were not negligent in failing to investigate the matter further.

We find that the evidence does not preponderate against the chancellor's finding that the defendants negligently misrepresented the extent of the water problem. Winnett, as the builder of the house, was under an obligation to use due care in determining the nature of the water problem before making representations concerning it. If Winnett did not know the exact nature of the problem, he was under a duty to exercise reasonable care in communicating this uncertainty to the plaintiffs. By stating as a fact his belief that the water was construction water, Winnett:

breached his duty to exercise reasonable care. The statement concerning the water was false and it went to a material fact in the transaction. The plaintiffs' reliance upon this statement were reasonable. Therefore, we affirm the chancellor's finding that Winnett negligently misrepresented the extent of the water problem.

III. Tennessee Consumer Protection Act

Based on the negligent misrepresentation, we agree with the trial court that the defendants violated the Tennessee Consumer Protection Act codified at T.C.A. § 47-18-101 *et. seq.* The Act declares unlawful "unfair or deceptive acts or practices affecting the conduct of any trade or commerce...." T.C.A. § 47-18-104(a). The unfair or deceptive act does not have to be fraudulent or intentional to impose liability under the Act as a matter of law. Negligent misrepresentations which are unfair or deceptive to the consumer can also be deemed violations of the Act. **Smith v Scott Lewis Chevrolet, Inc.**, 843 S.W.2d 9, 13 (Tenn. App. 1992).

IV. Damages

Plaintiffs contend that the trial court erred in failing to rescind the contract for the purchase of the house. We disagree. Rescission of a contract is not looked upon lightly by Tennessee courts and will be granted only in the most demanding circumstances. **Robinson v. Brooks**, 577 S.W.2d 207, 208 (Tenn. App. 1978). As such, "the remedy of rescission is a discretionary matter which should be exercised sparingly...." **James Cable Partners v. Jamestown**, 818 S.W.2d 338, 343 (Tenn. App. 1991). In the present case, the trial court determined that rescission was inappropriate. The court specifically found that there was no actual fraud and that the plaintiffs could be made whole through money damages. Based on these factors, we find that trial court did not abuse its discretion in denying rescission. We affirm the trial court's award of \$ 4,420 in actual damages.

Both parties take issue with the trial court's award of double damages pursuant to the Tennessee Consumer Protection Act. Plaintiffs contend that the trial court erred in failing to award treble damages. Defendant contends that the trial court erred in awarding double damages. We affirm the award of double damages.

T.C.A. § 47-18-109(a)(3) provides that the court may award treble damages if it finds that the unfair or deceptive act was a willful or knowing violation of the Tennessee Consumer Protection Act. In determining whether treble damages should be awarded, the trial court may consider the following factors:

(A) the competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

T.C.A. § 47-18-109(a)(4) (Supp. 1994).

In its final order, the trial court found that due to the negligent misrepresentation, the defendant willfully violated the Tennessee Consumer Protection Act. As set forth above, the chancellor also carefully considered all four factors relevant to a treble damage award. Weighing all these factors, the trial court determined that the plaintiffs were not entitled to treble damages, but were entitled to additional relief. Therefore, the trial court awarded plaintiffs double damages. The evidence does not preponderate against this award.

Finally, with respect to damages, the defendant contends that the trial court erred in awarding plaintiff attorney's fees and litigation costs. Section 47-18-109(e)(1) of the Tennessee Consumer Protection Act provides that "upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs." Due to our affirmance of the trial court's finding that the defendant did violate the Act, we find this issue without merit.

V. Individual Liability of Winnett

As stated earlier, the trial court found that Winnett was, at all times relevant to this action, acting as an officer or agent of the defendant WHBI and therefore should not be held individually liable for the negligent misrepresentations. In **Brungard v. Caprice Records, Inc.**, 608 S.W.2d 585 (Tenn. App. 1980), this court stated:

It is settled law that an agent cannot escape liability for tortious acts, including fraud and misrepresentation, against third persons simply because the agent was acting within the scope of the agency or at the direction of the employer.

Id. at 590. Winnell negligently made the misrepresentation to the plaintiffs that the water under the house was construction water. He is therefore individually liable to the plaintiffs regardless of the liability of defendant WHBI. The judgment of the trial court as to Winnett is reversed, and judgment is rendered against Winnett in the individual action against him.

VI. Breach of Implied Warranty of Habitability

We find it unnecessary to consider defendants' argument that the trial court erred in finding a breach of the implied warranty of habitability as the liability of defendants Winnett and WHBI rests securely on other grounds.

The judgment of the trial court is affirmed in part, reversed in part, and modified. Costs on appeal are taxed to appellant.

HIGHERS, J.

CONCUR:

TOMLIN, P.J., W.S.

CRAWFORD, J.

DISPOSITION

AFFIRMED IN PART, REVERSED IN PART AND MODIFIED.