

GRI 402 Supplement

Legal Case Studies





Ann Taylor Realtors, Inc. v. Sporup

Court of Appeals of Tennessee, at Jackson

October 15, 2010, Session; December 3, 2010, Filed

No. W2010-00188-COA-R3-CV

Reporter

2010 Tenn. App. LEXIS 755; 2010 WL 4939967

ANN TAYLOR <u>**REALTORS**</u>, INC. v. JOHN N. SPORUP, ET AL.

Prior History: [*1] <u>Tenn. R. App. P. 3</u> Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded. Direct Appeal from the Circuit Court for Shelby County. No. CT-002422-02. Donna M. Fields, Judge.

Disposition: Judgment of the Circuit Court Affirmed and Remanded.

Core Terms

promissory note, buyer, licensee, terms, defer, listing agreement, trial court, duties, breach of fiduciary duty, contingent, parties, individual capacity, fiduciary duty, realty company, referral, exclusive listing, car wash, negotiation, defaulted, issues

Case Summary

Procedural Posture

Appellee lender filed an action to recover an unpaid commission for the sale of real property under the terms of a promissory note. Appellants, a husband and a wife, co-owners of a corporation, counterclaimed for breach of fiduciary duty. The Circuit Court for Shelby County, Tennessee, entered judgment for the lender. Appellants sought review.

Overview

The lender, through its agent, entered into an exclusive listing agreement with the husband for the sale of real property. The lender secured a buyer and agreed to defer the unpaid portion of the commission. Appellants executed a promissory note in their individual capacities in favor of the lender. The buyer defaulted on the purchase money mortgage, which prompted appellants

to withhold payments under the promissory note. The agent's fiduciary duties were governed by <u>Tenn. Code Ann.</u> §§ 62-13-403 and 62-13-404 (2009). After reviewing the record, the court found the agent did not agree to make the lender's commission contingent upon the receipt of the buyer's payments, did not agree to instruct the closing attorney to include such a provision in the promissory note, did not mislead appellants as to the contents of the promissory note, and did not secretly or inappropriately induce appellants to sign the promissory note in their individual capacities. The record supported a finding that the agent acted honestly, loyally, and in good faith in dealing with appellants. There was no breach of a fiduciary duty.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1 One cardinal principle of appellate practice is that a party who fails to raise an issue in a trial court waives its right to raise that issue on appeal.

Civil Procedure > Appeals > Appellate Briefs

HN2 The failure to make appropriate references to the record and to cite relevant authority in the argument section of a brief as required by <u>Tenn. R. App. P.</u> <u>27(a)(7)</u> constitutes a waiver of the issue.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 An appellate court reviews a trial court's findings of fact de novo upon the record, according a presumption of correctness to the findings unless a preponderance of the evidence is to the contrary. <u>Tenn. R. App. P. 13(d)</u>.

The appellate court will not reevaluate the determinations of a trial court based on an assessment of credibility unless clear and convincing evidence is to the contrary. The appellate court reviews the record de novo where the trial court has not made a specific finding of fact. No presumption of correctness attaches to a trial court's conclusions of law. <u>Tenn. R. App. P.</u> 13(d).

Torts > Intentional Torts > Breach of Fiduciary Duty > Elements

HN4 An action for breach of fiduciary duty sounds in tort. In order to recover for breach of fiduciary duty, a plaintiff must establish: (1) a fiduciary relationship, (2) breach of the resulting fiduciary duty, and (3) injury to the plaintiff or benefit to the defendant as a result of that breach.

Real Property Law > Brokers > Brokerage Agreements

HN5 The negotiation and execution of an exclusive listing agreement between a real estate licensee and a seller of property establishes an agency relationship. <u>Tenn. Code Ann. § 62-13-401</u> (2009).

Real Property Law > Brokers > Fiduciary Responsibilities

HN6 See Tenn. Code Ann. § 62-13-404 (2009).

Real Property Law > Brokers > Fiduciary Responsibilities

HN7 See Tenn. Code Ann. § 62-13-403 (2009).

Real Property Law > Brokers > Fiduciary Responsibilities

HN8 The duties set forth in <u>Tenn. Code Ann. §§ 62-13-403</u> and <u>62-13-404</u> (2009) supersede any fiduciary or common law duties that a real estate licensee previously owed under Tennessee law. <u>Tenn. Code Ann. § 62-13-402</u> (2009).

Real Property Law > Brokers > Right to Commissions

HN9 A real estate broker is entitled to his commission when he procures a purchaser who is acceptable to the seller and who is ready, willing and able to buy on the seller's terms.

Counsel: Thomas D. Yeaglin, Memphis, Tennessee, for the appellants, John N. Sporup and Dyanne A. Sporup.

William M. Jeter, Memphis, Tennessee, for the appellee, Ann Taylor *Realtors*, Inc.

Judges: DAVID R. FARMER, J., delivered the opinion of the Court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Opinion by: DAVID R. FARMER

Opinion

This is an action to enforce a promissory note. The plaintiff/appellee, a realty company, entered into an exclusive listing agreement with John Sporup for the sale of real property. The listing agreement provided for an eight percent commission in cash on the sale of the property. The realty company secured a buyer, the sale closed, and it received a portion of the commission owed. As an accommodation to the client, however, the realty company agreed to defer the unpaid portion of the commission. Mr. Sporup and his wife, co-owners of the corporation selling the property, signed a promissory note in their individual capacities providing for [*2] payment of the deferred commission in monthly installments with a balloon payment due at the end of three years. After the buyer defaulted, the Sporups declined to honor the terms of the promissory note, maintaining that payment of the remaining commission was conditioned on their receipt of the buyer's payments. The realty company filed this action to recover the unpaid commission, pre-judgment interest, and attorney's fees under the terms of the promissory note. The Sporups counterclaimed. The trial court awarded the realty company a judgment in the amount of \$85,327.82 after a bench trial. Because the Sporups have not established a breach of fiduciary duty entitling them to an offsetting award of damages, we affirm.

OPINION

I. Background and Procedural History

The plaintiff/appellee, Ann Taylor <u>Realtors</u>, Inc. ("Lender"), is a realty company located in Shelby County, Tennessee. ¹ Lender employs Ann Taylor ("1 <u>Realtor"</u>), a licensed real estate agent with twenty-five

¹ The promissory note describes Ann Taylor *Realtors*, Inc., as "Lender;" we will accordingly employ the terminology of the note in our discussion of the issues herein. We further note that the record contains a motion to substitute Ann Taylor as the real party in interest. The appellee asserts that this motion was granted, but there is no order to this effect in this record. The court's final order, on the other hand, grants judgment to Ann Taylor *Realtors*, Inc., demonstrating [*4] to this Court that the motion was denied.

years of experience in the residential and commercial real estate industry. The defendants/appellants, John and Dyanne Sporup, are former co-owners of Sparkle Auto/Truck Care Centre, Inc. ("Sparkle"), which at all times material [*3] to this lawsuit owned and operated a car wash under the same name at 3581 Hickory Hill Road in Memphis, Tennessee. John Sporup entered into an exclusive listing agreement in his name only for the sale of the Hickory Hill property on January 13, 2001, agreeing to pay Lender an eight percent commission in cash at closing if a buyer willing and able to purchase the property was obtained or if a sale occurred within the listing period and any extensions or renewals thereto. The listing agreement, which was twice extended, further provided that Mr. Sporup was responsible for all costs for collection and/or litigation, including a reasonable attorney's fee, if he failed or refused to pay any sum due to Lender under the agreement.

Lender's agent, *Realtor*, obtained a buyer willing and able to purchase the property, and the sale closed after negotiations on the terms and financing of the sale. As an accommodation to Mr. Sporup, Realtor agreed to accept a partial payment of the commission at closing and defer the remainder—\$45,500—for payment over a three-year period. Realtor recorded the terms of the deferral arrangement, as dictated by Mr. Sporup, into a handwritten agreement that Realtor and Mr. Sporup signed. The terms later became the substance of a promissory note that the Sporups signed in their individual capacities at closing. The Sporups agreed in the promissory note to pay a principal sum of \$45,500 with interest in 36 equal monthly installments amortized over 60 months beginning July 1, 2001, plus a final installment of the balance of the principal and interest thereon on June 1, 2004. According to *Realtor*, everyone was happy with the terms of the agreement at closing. The situation changed, however, when the buyer defaulted on the purchase money mortgage used to finance the underlying sale, prompting the Sporups to withhold payment of the commission owed.

Lender [*5] filed this action to recover the unpaid commission under the terms of the promissory note. The Sporups filed an answer and counterclaim averring that Lender's agent agreed payments of the commission would cease if the buyer breached the purchase money agreement. The Sporups alleged that Lender's agent promised she would have the closing attorney include a contingency provision in the promissory note, assured Mr. Sporup that commission payments would terminate if the buyer defaulted, induced the Sporups to enter into

the agreement on this basis, failed to include the contingency provision in the promissory note, but withheld this information from the Sporups at closing. The Sporups further alleged, *inter alia*, that throughout the parties' dealings *Realtor* withheld information about the buyer's questionable financial position, deliberately or negligently *misrepresented* the buyer's financial position, deliberately or negligently *misrepresented* the terms of the promissory note, failed to exercise reasonable skill and care, failed to obey the instructions of the Sporups, engaged in self-dealing, and violated a duty of loyalty owed to the Sporups. Lender denied these allegations and litigation [*6] ensued.

On May 15, 2007, the Shelby County Circuit Court issued an oral ruling in favor of Lender after a bench trial, which it later incorporated into a final judgment. 2 The court concluded that Lender was entitled to a judgment against the Sporups for the principal sum of \$45,500 plus interest and attorney's fees pursuant to the terms of the promissory note. The court further concluded that the Sporups failed to carry the burden of proof necessary to prevail on their counterclaim. The court consequently ordered the Sporups to pay Lender a total judgment of \$85,327.82, which encompassed an award of attorney's fees in the amount of \$7,474.20 and an award of pre-judgment interest in the amount of \$32,352.62. The Sporups filed a motion to alter or amend the judgment or in the alternative for a new trial, which the court denied. The Sporups timely appealed.

II. Issue Presented

The sole issue before this Court, as we perceive it, is whether Lender or its agent committed a breach of fiduciary duty entitling the Sporups to damages. The Sporups presented additional issues in their brief, but either did not raise these issues before the trial court or did not provide an argument supported by authority explaining why they should prevail on appeal. These issues are therefore waived. See <u>Tenn. R. App. P. 27(a)(7)</u>; <u>Tenn. Ct. App. R. 6(a)</u>, (b); <u>Waters v. Farr, 291 S.W.3d 873</u>, 918 (Tenn. 2009) (citations omitted) (HN1 "One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal."); <u>Bean v. Bean</u>,

² The court's order incorporates by reference the oral findings of fact and conclusions of law issued at the conclusion of trial; however, the trial transcript does not include the court's oral ruling. This Court noted the absence of the court's ruling in a show cause order, but the appellants did not provide a copy of said ruling in [*7] the supplemented materials.

40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000) (citations omitted) ("Courts have routinely held that **HN2** the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by <u>Rule 27(a)(7)</u> constitutes a waiver of the issue.").

III. Standard of Review

HN3 This Court reviews a trial court's findings of fact de novo upon the record, according a presumption of correctness to the findings unless [*8] a preponderance of the evidence is to the contrary. Tenn. R. App. P. 13(d), In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002) (citation omitted). This Court will not reevaluate the determinations of a trial court based on an assessment of credibility unless clear and convincing evidence is to the contrary. *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005) (citation omitted). This Court reviews the record de novo where the trial court has not made a specific finding of fact. In re Valentine, 79 S.W.3d at 546 (citation omitted). No presumption of correctness attaches to a trial court's conclusions of law. Tenn. R. App. P. 13(d); Bowden v. Ward, 27 S.W.3d 913, 916 (Tenn. 2000) (citation omitted).

IV. Analysis

The Sporups argue on appeal that Realtor committed breaches of fiduciary duty when she (1) instructed the closing attorney to draft a promissory note that is "much more in favor" of Lender, ignoring Mr. Sporup's instruction to make payment of the remaining commission contingent on the buyer's payments; and (2) secretly structured the promissory note to make the Sporups individually liable for the deferred commission. HN4 An action for breach of fiduciary duty sounds in tort. ARC LifeMed, Inc. v. AMC-Tennessee, Inc., 183 S.W.3d 1, 24 (Tenn. Ct. App. 2005) [*9] (citing Mike v. Po Group, Inc., 937 S.W.2d 790, 795 (Tenn. 1996)). In order to recover for breach of fiduciary duty, a plaintiff must establish: (1) a fiduciary relationship, (2) breach of the resulting fiduciary duty, and (3) injury to the plaintiff or benefit to the defendant as a result of that breach. 37 C.J.S. Fraud § 15 (2008).

There is no dispute whether <u>Realtor</u> was in a fiduciary relationship with Mr. Sporup. <u>HN5</u> The negotiation and execution of an exclusive listing agreement between a real estate licensee and a seller of property establishes an agency relationship. <u>Tenn. Code Ann. § 62-13-401</u> (2009). The establishment of this relationship imposes the following fiduciary duties:

- **HN6** (1) Obey all lawful instructions of the client when the instructions are within the scope of the agency agreement between licensee and licensee's client;
- (2) Be loyal to the interests of the client. A licensee must place the interests of the client before all others in negotiation of a transaction and in other activities, except where the loyalty duty would violate licensee's duties to a customer under § 62-13-402 or a licensee's duties to another client in a dual agency; and
- (3)(A) Unless the following duties [*10] are specifically and individually waived, in writing by a client, a licensee shall assist the client by:
- (i) Scheduling all property showings on behalf of the client;
- (ii) Receiving all offers and counter offers and forwarding them promptly to the client;
- (iii) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the licensee's expertise; and
- (iv) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.
- (B) Upon waiver of any of the duties in subdivision (3)(A), a consumer shall be advised in writing by the consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of the duties in subdivision (3)(A).

Tenn. Code Ann. § 62-13-404 (2009). Lender, through its agent, entered into an exclusive listing agreement with Mr. Sporup, thereby giving rise to a fiduciary relationship under Tennessee statutory law.

Lender's agent also owed certain fiduciary duties to Mrs. Sporup to the extent Mrs. Sporup was a party to the underlying real estate transaction. *HN7 Tennessee Code Annotated section 62-13-403* [*11] provides that a real estate licensee owes all parties to the underlying real estate transaction the following duties, except where otherwise provided by statute:

(1) Diligently exercise reasonable skill and care in

providing services to all parties to the transaction;

- (2) Disclose to each party to the transaction any adverse facts of which the licensee has actual notice or knowledge;
- (3) Maintain for each party to a transaction the confidentiality of any information obtained by a licensee prior to disclosure to all parties of a written agency or subagency agreement entered into by the licensee to represent either or both of the parties in a transaction. This duty of confidentiality extends to any information that the party would reasonably expect to be held in confidence, except for information that the party has authorized for disclosure, information required to be disclosed under this part and information otherwise required to be disclosed pursuant to this chapter. This duty survives both the subsequent establishment of an agency relationship and the closing of the transaction;
- (4) Provide services to each party to the transaction with honesty and good faith;
- (5) Disclose to each party [*12] to the transaction timely and accurate information regarding market conditions that might affect the transaction only when the information is available through public records and when the information is requested by a party.
- (6) Timely account for trust fund deposits and all other property received from any party to the transaction; and
- (7)(A) Not engage in self-dealing nor act on behalf of licensee's immediate family or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of the interest and the timely written consent of all parties to the transaction; and
- (B) Not recommend to any party to the transaction the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees to provide real estate services under this chapter, without timely disclosing to the party who receives the referral the licensee's interest in the referral or the fact that a referral fee may be received.

Tenn. Code Ann. § 62-13-403 (2009). HN8 The duties set forth [*13] in sections 62-13-403 and -404 of the Code supersede any fiduciary or common law duties that a real estate licensee previously owed under Tennessee law. Tenn. Code Ann. § 62-13-402 (2009).

The question here is whether the Sporups have established a breach of fiduciary duty. In order to conclude that Realtor committed a breach of fiduciary duty, this Court would necessarily have to resolve several significant factual disputes in the Sporups' favor. We, however, conclude that the trial court's decision to enter judgment in favor of Lender amounted to an implied rejection of the Sporups' testimony on the issues in dispute and an implied finding of credibility in favor of Realtor. Importantly, the record supports a finding that Realtor did not agree to make Lender's commission contingent upon the receipt of the buyer's payments, did not agree to instruct the closing attorney to include such a provision in the promissory note, did not mislead the Sporups as to the contents of the promissory note, and did not secretly or inappropriately induce the Sporups to sign the promissory note in their individual capacities.

Realtor readily acknowledged at trial that she agreed to defer Lender's commission [*14] as a favor to Mr. Sporup but steadfastly denied offering to make the deferred commission contingent upon the buyer's payments. *Realtor's* testimony is supported by the plain language of two separate agreements that Mr. Sporup signed in his individual capacity. The first, a handwritten agreement, contains terms that Mr. Sporup dictated to Realtor deferring a portion of Lender's commission. The second, the promissory note, incorporates those terms into a formal written agreement that both Mr. Sporup and his wife signed. Mr. Sporup had two opportunities to express his dissatisfaction with the deferral agreement; in each instance, he expressly approved the arrangement without a single notation signifying an intention to the contrary. Mr. Sporup would have this Court believe that, despite being an experienced businessman: (1) he disagreed with the original handwritten agreement concerning the commission but did not make any written notations because he trusted Realtor to include the contingency agreement as promised, and (2) he did not read the promissory note before signing it at closing because he was "comfortable with the fact that the agreement was written up properly, as I had asked [*15] [Ms.] Taylor to have it written." The evidence, however, supports the trial court's implicit rejection of Mr. Sporup's testimony on this issue in favor of *Realtor's*. It also supports a conclusion that the promissory note accurately reflected the agreement

between the parties concerning the deferral of Lender's commission. We therefore decline to find a breach of fiduciary duty on this basis.

We disagree with the suggestion that Lender unfairly agreed to defer its commission under the facts of this case. We start with the recognition that Lender did not owe Mr. Sporup a duty to defer the commission due at closing under the terms of the listing agreement. Rather, Lender agreed to defer the commission as a favor to Mr. Sporup. Lender, however, was not obligated to offer further concessions to the Sporups, and the promissory note was not unfair simply because it did not require Lender to share in the misfortune of the buyer's default. ³ The duty of Lender under the terms of the exclusive listing agreement was to provide a willing and able buyer, not to ensure that the buyer fulfilled the terms of the resulting contractual agreement. See Parks v. Morris, 914 S.W.2d 545, 548 (Tenn. Ct. App. 1995) [*16] (citing Cheatham v. Yarbrough, 90 Tenn. 77, 15 S.W. 1076 (1891)) (HN9 "A real estate broker is entitled to his commission when he procures a purchaser who is acceptable to the seller and who is ready, willing and able to buy on the seller's terms."). The record shows that Lender's agent fulfilled that duty in this case: Realtor diligently sought a buyer for the car wash, helped facilitate negotiations between the buyer and the Sporups, and even agreed to defer a commission already earned under the listing agreement as a favor to Mr. Sporup. We are unaware of any prohibition against making payment of a real estate commission contingent upon the seller's receipt of payment in the underlying real estate transaction. A real estate agent, however, is not obligated to offer such terms and does not commit a breach of fiduciary duty by withholding such an offer.

³We note that the testimony indicates the buyer had a nervous breakdown during the first week of operation at the car wash and decided to back out of the investment. This breakdown purportedly occurred as the result of his dissatisfaction with the car wash's equipment and discontent with the performance of its employees, which was clearly beyond <u>Realtor's</u> [*17] control. There is no evidence demonstrating that financial instability played a role in his default, that <u>Realtor misrepresented</u> the buyer's financial position, or that <u>Realtor had</u> any reason to predict the buyer's subsequent behavior. Rather, the only evidence in the record addressing the buyer's financial position indicates that he had good credit, operated a successful car wash in California, had sufficient funds in the bank to pursue the purchase, and struggled initially to obtain financing for the sale only because Sparkle's car wash showed

very little to no profit on a yearly basis.

We likewise disagree with the contention that *Realtor* inappropriately or secretly directed the closing attorney to prepare a promissory note making the Sporups individually liable on the deferred commission. First, the original listing agreement was between Lender and John Sporup individually as the purported owner of the Hickory Hill property. Mr. Sporup did not sign the listing agreement in his capacity as President/Treasure of Sparkle, and *Realtor* testified that she believed she was representing John Sporup as owner of the car wash, not the corporate entity, under the terms of the listing [*18] Thus, the agreement. promissory appropriately included Mr. Sporup as a signatory in his individual capacity. Mrs. Sporup, on the other hand, was a co-owner of Sparkle who benefitted from the sale of the property and the deferral of Lender's commission. She could have objected to her inclusion as a signatory to the promissory note or simply declined to sign in her personal capacity if she was unsatisfied with the arrangement. She did not. Although the sales agreements were drafted appropriately to effect the transfer of assets to the buyer from Sparkle as the actual owner of the car wash and attendant property, it was entirely reasonable that Lender obtained a promissory note securing its deferred commission from the Sporups in their individual capacities, especially where Sparkle owned no assets beyond those being transferred to the buyer. 4 We therefore conclude that the Sporups did not establish a breach 4 of fiduciary duty for the reasons presented in their brief. In our view, the record supports the implicit conclusion of the trial court that *Realtor* acted honestly, loyally, and in good faith when dealing with the Sporups from the initiation of the relationship between Lender and Mr. [*19] Sporup to the closing of the sale between Sparkle and the buyer. Limiting our review to the arguments presented in the Sporups' brief, we conclude that the decision of the trial court must be affirmed.

V. Conclusion

For the foregoing reasons, we affirm the decision of the trial court. Costs of this appeal are taxed to the

⁴We note that the closing documents the Sporups signed in their capacities as officers of Sparkle concerned the underlying real estate transaction, while the promissory note concerned the payment of Lender's commission due under a separate agreement. The fact that these documents were submitted for the signature of the Sporups in one sitting is not predatory or dishonest where the commission was otherwise due in cash at closing under the terms of the listing agreement.

appellants, John N. Sporup and Dyanne A. Sporup, and DAVID R. FARMER, JUDGE their surety for which execution may issue if necessary.

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Bevans v. Burgess

Court of Appeals of Tennessee, at Nashville

February 13, 2012, Session; March 19, 2012, Filed

No. M2011-02080-COA-R3-CV

Reporter

2012 Tenn. App. LEXIS 177; 2012 WL 952097

CASEY E. BEVANS v. RHONDA BURGESS ET AL.

Prior History: [*1] <u>Tenn. R. App. P. 3</u> Appeal as of Right; Judgment of the Chancery Court Affirmed. Appeal from the Chancery Court for Wilson County. No. 10C191. Charles K. Smith, Chancellor.

Disposition: Judgment of the Chancery Court Affirmed.

Core Terms

short sale, addendum, summary judgment, purchase and sale agreement, real estate agent, provisions, parties, counteroffer, enforceable, seller's

Case Summary

Overview

In plaintiff's action seeking specific enforcement of a purchase and sale contract, a trial court did not err in granting summary judgment to defendants because there was no meeting of the minds concerning what short sale provisions were intended to be included in the contract, and, as such, there was no enforceable contract.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1 Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. <u>Tenn. R. Civ. P. 56.04</u>.

Civil Procedure > Appeals > Summary Judgment

Review > Standards of Review

Evidence > ... > Presumptions > Particular Presumptions > Regularity

HN2 Summary judgments do not enjoy a presumption of correctness on appeal.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 In reviewing a summary judgment, an appellate court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. Appellate courts consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. When reviewing the evidence, the appellate court must determine whether factual disputes exist. If a factual dispute exists, the appellate court must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN4 For purposes of a motion for summary judgment, to shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or show that the nonmoving party cannot prove an essential element of the claim at trial.

Contracts Law > Contract Interpretation > Intent

HN5 In interpreting a contract, a court seeks to ascertain the intent of the parties from the language of the contract; in so doing, a court must apply to those words their usual, natural, and ordinary meaning.

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Contract Interpretation > General Overview

HN6 Provisions incorporated by reference in a contract need not be separately signed or appended to the contract to become part of the contract. In such an instance, both writings—the main contract and the incorporated provisions—should be construed together.

Business & Corporate Compliance > ... > Contracts
Law > Contract Conditions & Provisions > Conditions
Precedent

HN7 A conditional contract is a contract where the obligation to perform is dependent upon the happening of some contingency or condition (often referred to as a condition precedent) which is expressly stated in the contract.

Counsel: James David Nave, Nashville, Tennessee, for the appellant, Casey E. Bevans.

Teresa Reall Ricks, Nashville, Tennessee, for the appellees, Rhonda Burgess and Southern Living Realty Partners.

Rebecca A. Martin a/k/a Rebecca Casner, Mt. Juliet, Tennessee, Pro se.

Billy Adkins, Mt. Juliet, Tennessee, Pro se.

Virginia Adkins, Mt. Juliet, Tennessee, Pro se.

Judges: ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Opinion by: ANDY D. BENNETT

Opinion

Prospective buyer who signed real estate sales contract sued seller, seller's real estate agent and broker, and the actual buyers for breach of contract, violation of the Tennessee Consumer Protection Act, and specific performance. The trial court granted summary judgment in favor of the defendants on the ground that there was no enforceable contract. We affirm.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Rebecca Martin owned real property on Anthony Branch Drive in Mount Juliet, Tennessee. In 2010, she [*2] listed the property for sale with real estate agent Rhonda Burgess of Southern Living Realty Partners for a price of \$159,900.

On April 17, 2010, Casey Bevans, through her real estate agent, Pam G. Salas, made an offer to buy the property for \$147,300. The offer was made on a nine-page "purchase and sale agreement" form copyrighted by the Tennessee Association of *Realtors*. The agreement was made contingent on Bevans's ability to obtain an FHA loan for 97% of the purchase price. Moreover, section 17 of the agreement provides that the following "exhibits and/or addenda attached hereto, listed below, or referenced herein are made a part of this Agreement: FHA addendum, Buyers Agency Disclosure, Short Sale addendum." An FHA loan addendum (signed by Bevans) was attached to Bevans's offer, but there was no short sale addendum attached.

On April 24, 2010, Martin rejected Bevans's initial offer but made a counteroffer to sell the property for \$151,000. Martin's counteroffer, on a form copyrighted by the Tennessee Association of *Realtors*, provides in pertinent part as follows:

The undersigned agree to and accept the Purchase and Sale Agreement with an offer date of 04/17/10 for the purchase of [*3] real property commonly known as: 427 Anthony Branch Drive, Mount Juliet, TN 37122.

With the following exceptions:

Sales price to be \$151,000.

Sale is still subject to lender/3rd party approval.

Metal shelves in the garage do not remain with the property. Metal shelves in garage to be removed prior to closing along with personal property in the house.

ALL OTHER TERMS AND CONDITIONS OF THE ORIGINAL ATTACHED PURCHASE AND SALE

AGREEMENT ARE ACCEPTABLE TO THE UNDERSIGNED. ALL TERMS AND CONDITIONS PROPOSED IN PREVIOUS COUNTER OFFERS, IF ANY, ARE NOT INCLUDED IN THIS COUNTER OFFER UNLESS RESTATED HEREIN.

Martin sent back the original purchase and sale agreement with initialed changes regarding the purchase price and the metal shelves; she indicated that she accepted Bevans's offer "subject to the attached Counter Offer(s)." She also signed and returned the FHA loan addendum. The same day, April 24, 2010, Bevans indicated her acceptance of the counteroffer and signed the counteroffer form.

On April 30, 2010, Burgess notified Salas that the \$151,000 purchase price would not generate sufficient funds to pay the seller's expenses and real estate commissions. On May 4, 2010, Martin submitted another [*4] counteroffer at a sale price of \$159,900.

Bevans filed suit against Burgess, Southern Living Realty Partners, and Martin on May 14, 2010, seeking specific performance of the contract and asserting causes of action for breach of contract and violation of the Tennessee Consumer Protection Act. In conjunction with the complaint, Bevans filed a notice of lien lis pendens regarding the subject property. In July 2010, Bevans filed an amended complaint adding Billy and Virginia Adkins as defendants. According to the amended complaint, Martin sold the property to the Adkinses on May 15, 2010.

The Adkinses filed a motion for summary judgment on February 10, 2011; Burgess and Southern Living filed a motion for summary judgment on February 17, 2011. Burgess and Southern Living submitted a supporting affidavit of Rhonda Burgess, which includes the following pertinent statements:

The "Purchase and Sale Agreement" contract which [Bevans's] real estate agent utilized in this case is the standard Purchase and Sale Agreement provided to *Realtors* in Tennessee by the Tennessee Association of *Realtors*. The standard "Short Sale Addendum" form provided to *Realtors* in Tennessee by the Tennessee Association [*5] of *Realtors* is attached hereto as Exhibit A.

The "Short Sale Addendum" which was specifically incorporating into [Bevans's] offer, by Bevans' own real estate agent, is the standard TAR form "Short Sale Addendum" attached hereto as Exhibit A. Bevans nor her real estate agent provided or referred to any short sale addendum other than the

standard TAR form which is used with the standard TAR Purchase and Sale Agreement utilized by Bevans' real estate agent.

The TAR short sale agreement contains the following pertinent provision: "This Purchase and Sale Agreement is also contingent upon . . . the final written agreement of all of the Third Party Creditor(s)¹ to accept a payoff which is less than the balance due on the mortgage(s) and/or lien(s) after payment of seller's expenses and real estate commissions."

In an order entered on July 29, 2011, the trial court granted both motions for summary judgment and dismissed all of the plaintiff's claims. The court determined that the plaintiff "has not produced and cannot produce *evidence* of [*6] specific facts to establish the existence of a valid enforceable contract for the sale of real property . . . or even a genuine issue of material fact as to the validity and enforceability of said contract." Bevans appeals.

STANDARD OF REVIEW

HN1 Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. HN2 Summary judgments do not enjoy a presumption of correctness on appeal. BellSouth Adver. & Publ'g Co. v. Johnson, 100 S.W.3d 202, 205 (Tenn. 2003). HN3 In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. Hunter v. Brown, 955 S.W.2d 49, 50 (Tenn.1997). We consider the evidence in the light most favorable to the nonmoving party and resolve all inferences in that party's favor. Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and [*7] whether the disputed fact creates a genuine issue for trial. Id.; Rutherford v. Polar Tank Trailer, Inc., 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). HN4 To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at

¹ The short sale addendum previously states that the seller's lender(s) and/or lien creditor(s) shall be referred to collectively as "Third Party Creditor(s)."

trial." <u>Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8-9</u> (Tenn. 2008).

ANALYSIS

Bevans asserts that the trial court erred in granting summary judgment in favor of the defendants because there are genuine issues of material fact as to whether the parties entered into a contract, whether the contract incorporated the terms of the TAR short sale addendum, and, if so, whether any contingencies of the short sale agreement were not satisfied.

To shift the burden of production to Bevans, the defendants had to negate an essential element of her breach of contract claim or show that she could not prove an essential element of the claim at trial. <u>Hannan</u>, <u>270 S.W.3d at 8-9</u>. The defendants argue that they negated the existence of an enforceable contract, and we agree.

HN5 In interpreting a contract, we seek to [*8] ascertain the intent of the parties from the language of the contract; in so doing, we must apply to those words their usual, natural, and ordinary meaning. Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co., 160 S.W.3d 521, 526 (Tenn. 2005). The purchase and sale agreement expressly incorporates the terms of a short sale agreement. Bevans argues that, since there was no short sale agreement attached and the parties did not sign a short sale addendum, the short sale addendum did not become a part of the contract. However, HN6 provisions incorporated by reference in a contract need not be separately signed or appended to the contract to become part of the contract. See Staubach Retail, 160 S.W.3d at 525; McCall v. Towne Square, Inc., 503

<u>S.W.2d 180, 183 (Tenn. 1973)</u>. In such an instance, both writings—the main contract and the incorporated provisions—should be construed together. <u>Staubach</u> Retail, 160 S.W.3d at 525.

It is clear from the terms of the contract that the parties intended to include short sale provisions. The contract is HN7 a conditional contract-a contract "where the obligation to perform is dependent upon the happening of some contingency or condition (often referred to as [*9] a condition precedent) which is expressly stated in the contract." Pate v. C & S of Tenn., Inc., M2000-02283-COA-R3-CV, 2001 Tenn. App. LEXIS 388, 2001 WL 575567, at *3 (Tenn. Ct. App. May 30, 2001). The question then becomes what short sale provisions were intended. As Bevans made her offer on a TAR purchase and sale agreement, the defendants assert that the standard TAR short sale addendum was part of their contract, and they have submitted a supporting affidavit. Bevans disagrees but has not presented any alternative to the TAR short sale provisions. Without a meeting of the minds concerning the short sale provisions, there is no enforceable contract. See Inscoe v. Kemper, M1999-00741-COA-R3-CV, 2000 Tenn. App. LEXIS 736, 2000 WL 1657844, at *3 (Tenn. Ct. App. Nov. 6, 2000).

We find no error in the trial court's decision to grant the defendants' motion for summary judgment.

CONCLUSION

We affirm the decision of the trial court. Costs of appeal are assessed against the appellant, Casey E. Bevans, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE

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Crumpton v. Grissom

Court of Appeals of Tennessee, at Knoxville

September 16, 2013, Session; December 23, 2013, Filed

No. E2013-00218-COA-R3-CV

Reporter

2013 Tenn. App. LEXIS 825; 2013 WL 6835154

REID R. CRUMPTON v. PATRICIA G. GRISSOM, ET AL.

Prior History: [*1] <u>Tenn. R. App. P. 3</u> Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded. Appeal from the Chancery Court for Knox County. No. 175161-2. Michael W. Moyers, Chancellor.

Disposition: Judgment of the Chancery Court Reversed; Case Remanded.

Core Terms

Broker, Managing, licensee, Affiliate, duties, summary judgment, parties, granting summary judgment, provides, referral, real estate services, real estate, regulations, non-moving, supervise, Disclose

Case Summary

Overview

HOLDINGS: [1]-*Tenn. Code Ann.* § 62-13-101 et seq. created a duty on the part of a managing broker, and she failed to show that she met the standard of care sufficient to satisfy her duty; [2]-The Tennessee General Assembly did not intend to impose strict *liability* on managing brokers in cases such as the present one; [3]-Given the record before it, the appellate court was unable to determine the standard of care required of the managing broker in order to satisfy her statutory duty; [4]-The buyer alleged that the managing broker breached her duty to him, and the managing broker produced no evidence showing that she met the standard of care required of a managing broker and, therefore, satisfied her statutory duty.

Outcome

The judgment was reversed, and the case was remanded.

LexisNexis® Headnotes

Real Property Law > Brokers > Discipline, Licensing & Regulation

Real Property Law > Brokers > Fiduciary Responsibilities

HN1 <u>Tenn. Code Ann. § 62-13-101 et seq.</u> creates a duty on the part of a managing broker.

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN2 When a case was filed prior to July 1, 2011, the Court of Appeals of Tennessee applies the standard of review for summary judgment cases as set out by Tennessee Supreme Court as follows. The scope of review of a grant of summary judgment is well established. Because an appellate court's inquiry involves a question of law, no presumption of correctness attaches to the judgment, and an appellate court's task is to review the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been satisfied.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Evidence > Burdens of Proof > Allocation

HN3 A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Tenn. R. Civ. P. 56.04*. The party seeking the summary judgment has the ultimate burden of persuasion that there are no disputed, material facts creating a genuine issue for trial. and that he is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4 If a summary judgment motion is properly supported, the burden to establish a genuine issue of material fact shifts to the non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. Conclusory assertions are not sufficient to shift the burden to the non-moving party. Tennessee does not apply the federal standard for summary judgment. The standard established in the McCarley decision sets out, in the words of one authority, a reasonable, predictable summary judgment jurisprudence for Tennessee.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > Inferences & Presumptions > Inferences

HN5 In deciding a motion for summary judgment, courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN6 A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion. In making that assessment, a court

must discard all countervailing evidence.

Real Property Law > Brokers > Brokerage Agreements

HN7 See Tenn. Code Ann. § 62-13-406 (2009).

Real Property Law > Brokers > Brokerage Agreements

Real Property Law > Brokers > Fiduciary Responsibilities

HN8 In the Konop decision, the Court of Appeals of Tennessee discussed Tenn. Code Ann. 62-13-406 and managing and affiliate brokers. A managing broker's duty to the purchasers was to ensure that the affiliate broker hired by the seller complies with all appropriate laws, rules and regulations. Tenn. Code Ann. § 62-13-406(b) provides that the duty of a managing broker whose affiliated licensee provides real estate services in a real estate transaction is to ensure that all licensees affiliated with or employed by the broker conduct business in accordance with appropriate laws, rules and regulations. A managing or principal broker must fulfill her obligation to ensure that all licensees that she employs carry out their responsibilities ethically and in accordance with the law, but the principal broker does not have a specific duty to either the buyer or the seller. When a managing broker is not involved in or did not otherwise provide real estate services in the transaction, he is not obligated under Tenn. Code Ann. § 62-13-403 to disclose his knowledge, if any, of adverse facts.

Real Property Law > Brokers > Fiduciary Responsibilities

HN9 <u>Tenn. Code Ann. § 62-13-403</u> sets out duties that brokers owe to all parties in a real estate transaction, and <u>Tenn. Code Ann. § 62-13-404</u> sets out duties owed to the broker's own client.

Real Property Law > Brokers > Fiduciary Responsibilities

HN10 See Tenn. Code Ann. § 62-3-404 (2009).

Real Property Law > Brokers > Fiduciary Responsibilities

HN11 The plain and unambiguous language of <u>Tenn.</u> <u>Code Ann.</u> § 62-13-406 provides that a managing broker has the responsibility to ensure that all licensees affiliated with or employed by the broker conduct business in accordance with appropriate laws, rules and regulations. <u>Tenn. Code Ann.</u> § 62-13-406(b) (2009). Other sections of <u>Tenn. Code Ann.</u> § 62-13-101 et seq. further delineate the duties owed.

Counsel: Shannon M. Holland, Knoxville, Tennessee,

for the appellant, Reid R. Crumpton.

Ellis A. "Sandy" Sharp, Jon M. Cope, and Zachary B. Tenry, Knoxville, Tennessee, for the appellee, Mary Bea Corbitt.

Judges: D. MICHAEL SWINEY, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., P.J., and THOMAS R. FRIERSON, II, J., joined.

Opinion by: D. MICHAEL SWINEY

Opinion

Reid R. Crumpton ("Plaintiff") sued Patricia G. Grissom ("Affiliate Broker"), Ashley Carpenter, and Mary Bea Corbitt ("Managing Broker") in connection with a real estate sales contract for real property containing both a house and a business. The Managing Broker filed a motion for summary judgment asserting, in part, that she was not personally involved in Plaintiff's purchase of the real property at issue and had no knowledge of the details of the transaction, and, therefore, could not be held liable for the actions of the Affiliate Broker. After a hearing, the Trial Court entered an order granting the [*2] Managing Broker summary judgment and making its judgment final pursuant to Tenn. R. Civ. P. 54.02. Plaintiff appeals the grant of summary judgment to the Managing Broker. We find and hold that HN1 Tenn. Code Ann. §§ 62-13-101, et seq. creates a duty on the part of the Managing Broker, and that the Managing Broker failed to show that she met the standard of care sufficient to satisfy her duty. We, therefore, reverse the grant of summary judgment to the Managing Broker, and remand this case for further proceedings.

OPINION

Background

In October of 2004, Plaintiff entered into a real estate sales contract with Patsy and Kelly Beeler for Plaintiff to purchase from the Beelers real property in Knoxville, Tennessee containing a house and a business ("Kelly Tire Transaction"). The Affiliate Broker worked with Plaintiff on this transaction. At that time, the Affiliate Broker worked for Heath Shuler Real Estate, LLC under the supervision of the Managing Broker.

¹ We discuss the facts merely to give context to our resolution of this appeal with the understanding that some of these facts have not yet been proven.

At some point after the closing of the Kelly Tire Transaction, Plaintiff discovered that [*3] a five year non-compete clause in an addendum to the real estate sales contract was not contained in all copies of the contract signed by the parties. Plaintiff sued the Affiliate Broker, the Managing Broker, and Ashley Carpenter, whom Plaintiff asserted was the Affiliate Broker's supervising agent, alleging, as pertinent to this appeal, that the Affiliate Broker had made <u>misrepresentations</u> with regard to the addendum and that the defendants had breached duties owed to Plaintiff pursuant to <u>Tenn. Code Ann. §§ 62-13-101, et seq.</u>

The Managing Broker filed a motion for summary judgment supported, in part, by her affidavit in which she stated, in pertinent part:

- 2. At all relevant times to the above litigation, I was the managing broker for Heath Shuler Real Estate.
- 3. Patricia Grissom, [sic] was an independent contractor <u>realtor</u> affiliated with the Heath Shuler Real Estate at all relevant times.
- 4. At no point did I act as an agent or provide real estate services to [Plaintiff] in regards to the Kelly Tire transaction.
- 5. I was not aware, at any relevant time, of the general substance or the details of the Kelly Tire contract entered into by [Plaintiff].
- 6. I was not personally involved in [*4] [Plaintiff's] purchase of the Kelly Tire business.
- 7. My duties as managing broker at Heath Shuler Real Estate did not include involvement in the day-to-day activities or review of the routine contracts of independent contractor <u>realtors</u> affiliated with the brokerage.

After a hearing the Trial Court entered its order on December 13, 2012 granting the Managing Broker summary judgment after finding and holding that it was undisputed that the Managing Broker had no knowledge of the substance or details of the Kelly Tire Transaction, and that "neither Tennessee statutes nor Tennessee case law suggests that managing brokers' duty to supervise their affiliates can create *liability* on the part of the managing broker where the managing broker has no direct involvement with or knowledge of the transaction . . .," and, therefore, the Managing Broker could not be held liable in this case. The Trial Court certified its December 13, 2012 order as final pursuant

to <u>Tenn. R. Civ. P. 54.02</u>. Plaintiff appeals the grant of summary judgment to the Managing Broker to this Court.

Discussion

Although Plaintiff raises multiple issues on appeal, the dispositive issue is whether the Trial Court erred in granting [*5] summary judgment to the Managing Broker. *HN2* Because this case was filed prior to July 1, 2011, we apply the standard of review for summary judgment cases as set out by our Supreme Court as follows:

The scope of review of a grant of summary judgment is well established. Because our inquiry involves a question of law, no presumption of correctness attaches to the judgment, and our task is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. <u>Hunter v. Brown</u>, 955 S.W.2d 49, 50-51 (Tenn. 1997); Cowden v. Sovran Bank/Cent. S., 816 S.W.2d 741, 744 (Tenn. 1991).

HN3 A summary judgment may be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993). The party seeking the summary judgment has the ultimate burden of persuasion "that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." Id. at 215. HN4 If that motion is properly supported, the burden to establish a genuine issue of material fact shifts to the [*6] non-moving party. In order to shift the burden, the movant must either affirmatively negate an essential element of the nonmovant's claim or demonstrate that the nonmoving party cannot establish an essential element of his case. Id. at 215 n.5, Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8-9 (Tenn. 2008). "[C]onclusory assertion[s]" are not sufficient to shift the burden to the non-moving party. Byrd, 847 S.W.2d at 215; see also Blanchard v. Kellum, 975 S.W.2d 522, 525 (Tenn. 1998). Our state does not apply the federal standard for summary judgment. The standard established in McCarley v. West Quality Food Service, 960 S.W.2d 585, 588 (Tenn. 1998), sets out, in the words of one authority, "a reasonable, predictable summary judgment jurisprudence for our state." Judy M. Cornett, The Legacy of Byrd v.

Hall: Gossiping About Summary Judgment in Tennessee, 69 Tenn. L. Rev. 175, 220 (2001).

HN5 Courts must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn. 1997). HN6 A grant of summary judgment is appropriate only when the facts and the reasonable inferences from those facts would permit a reasonable [*7] person to reach only one conclusion. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000). In making that assessment, this Court must discard all countervailing evidence. Byrd, 847 S.W.2d at 210-11. Recently, this Court confirmed these principles in Hannan.

Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 363-64 (Tenn. 2009).

As pertinent to this appeal, <u>Tenn. Code Ann.</u> § 62-13-406 provides:

HN7 62-13-406. Designated broker — Managing broker. — (a) A licensee entering into a written agreement to represent any party in the buying, selling, exchanging, renting or leasing of real estate may be appointed as the designated and individual agent of this party by the licensee's managing broker, to the exclusion of all other licensees employed by or affiliated with the managing broker. A managing broker providing services under this chapter shall not be considered a dual agent if any individual licensee so appointed as designated agent in a transaction, by specific appointment or by written company policy, does not represent interests of any other party to the same transaction.

- (b) The use of a designated agency does not abolish or diminish the managing broker's contractual rights to [*8] any listing or advertising agreement between the firm and a property owner, nor does this section lessen the managing broker's responsibilities to ensure that all licensees affiliated with or employed by the broker conduct business in accordance with appropriate laws, rules and regulations.
- (c) There shall be no imputation of knowledge or information among or between clients, the managing broker and any designated agent or agents in a designated agency situation.

Tenn. Code Ann. § 62-13-406 (2009).

HN8 In Konop v. Henry, this Court discussed <u>Tenn.</u> <u>Code Ann. 62-13-406</u> and managing and affiliate brokers stating:

As noted earlier, Jason Jent was an affiliate broker hired by the sellers to list their properties for sale; as such, he was required to be supervised by a managing broker who, in this case, was David Jent. See Tenn. Code Ann. § 62-13-406(b). David Jent's duty to the purchasers was to ensure that Jason Jent complied with all appropriate laws, rules and regulations. See Tenn. Code Ann. § 62-13-406(b) (the duty of a managing broker whose affiliated licensee provides real estate services in a real estate transaction is to ensure that all licensees affiliated with or employed by the broker [*9] conduct business in accordance with appropriate laws, rules and regulations); see also Tenn. Op. Att'y Gen. No. 96-015, 1996 Tenn. AG LEXIS 15, 1996 WL 66988, at *2 (1996) ("The managing or principal broker must fulfill her obligation to ensure that all licensees that she employs carry out their responsibilities ethically and in accordance with the law[,] but the principal broker does not have a specific duty to either the buyer or the seller."). Inasmuch as David Jent was not involved in or did not otherwise provide real estate services in the transactions, he was not obligated under Tenn. Code Ann. § 62-13-403 to disclose his knowledge, if any, of adverse facts.

Konop v. Henry, No. M2010-00037-COA-R3-CV, 2010 Tenn. App. LEXIS 526, at **22-23 (Tenn. Ct. App. Aug. 18, 2010), no appl. perm. appeal filed.

In *Konop*, this Court was addressing a situation wherein "under <u>Tenn. Code Ann.</u> § 62-13-403, Mr. Jent was obligated to disclose adverse facts of which he had actual notice or knowledge to the purchasers as parties to the transaction." <u>Id. at *19</u>. In the case now before us, the scope of the duty alleged to have been breached is less clear. In addition to the duty contained in <u>Tenn. Code Ann.</u> § 62-13-406 quoted [*10] above, we note that **HN9** <u>Tenn. Code Ann.</u> § 62-13-403 sets out duties that brokers owe to all parties in a real estate transaction, and <u>Tenn. Code Ann.</u> § 62-13-404 sets out duties owed to the broker's own client.²

In pertinent part, <u>Tenn. Code Ann.</u> § 62-13-403 provides:

- HN10 62-13-403. Duty owed to all parties. A licensee who provides real estate services in a real estate transaction shall owe all parties to the transaction the following duties, except as provided otherwise by § 62-13-405, in addition to other duties specifically set forth in this chapter or the rules of the commission:
- (1) Diligently exercise reasonable skill and care in providing services to all parties to the transaction;
- (2) Disclose to each party to the transaction any adverse facts of which the licensee has actual notice or knowledge;
- (3) Maintain for each party to a transaction the confidentiality of any information obtained by a licensee prior to disclosure to all parties of a written agency or subagency agreement entered into [*11] by the licensee to represent either or both of the parties in a transaction. . . .
- (4) Provide services to each party to the transaction with honesty and good faith;
- (5) Disclose to each party to the transaction timely and accurate information regarding market conditions that might affect the transaction only when the information is available through public records and when the information is requested by a party. [sic]
- (6) Timely account for trust fund deposits and all other property received from any party to the transaction; and
- (7)(A) Not engage in self-dealing nor act on behalf of licensee's immediate family or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of the interest and the timely written consent of all parties to the transaction; and
- (B) Not recommend to any party to the transaction the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees to provide real estate services under this chapter, without timely [*12] disclosing to the party who receives the referral the licensee's interest in

² We need not, and do not, address all of the potential duties pursuant to <u>Tenn. Code Ann. §§ 62-13-101</u>, <u>et seq.</u>, but instead discuss only two specific sections of the statute to illustrate the point.

the referral or the fact that a referral fee may be received.

Tenn. Code Ann. § 62-13-403 (2009).

Duties owed to a client by a broker are addressed in *Tenn. Code Ann.* § 62-13-404, which provides:

62-13-404. Duty owed to licensee's client. — Any licensee who acts as an agent in a transaction regulated by this chapter owes to the licensee's client in that transaction the following duties, to:

- (1) Obey all lawful instructions of the client when the instructions are within the scope of the agency agreement between licensee and licensee's client;
- (2) Be loyal to the interests of the client. A licensee must place the interests of the client before all others in negotiation of a transaction and in other activities, except where the loyalty duty would violate licensee's duties to a customer under § 62-13-402 or a licensee's duties to another client in a dual agency; and
- (3)(A) Unless the following duties are specifically and individually waived, in writing by a client, a licensee shall assist the client by:
- (i) Scheduling all property showings on behalf of the client:
- (ii) Receiving all offers and counter offers and forwarding [*13] them promptly to the client;
- (iii) Answering any questions that the client may have in negotiation of a successful purchase agreement within the scope of the licensee's expertise; and
- (iv) Advising the client as to whatever forms, procedures and steps are needed after execution of the purchase agreement for a successful closing of the transaction.
- (B) Upon waiver of any of the duties in subdivision (3)(A), a consumer shall be advised in writing by the consumer's agent that the consumer may not expect or seek assistance from any other licensees in the transaction for the performance of the duties in subdivision (3)(A).

Tenn. Code Ann. § 62-13-404 (2009).

In its Memorandum and Order incorporated into its

December 13, 2012 Order by reference the Trial Court noted that if it accepted Plaintiff's argument that "the *misrepresentations* and negligence [alleged by Plaintiff] against the affiliate brokers are attributable to the [Managing Broker] pursuant to her duty to supervise the affiliates," the result "would be tantamount to creating strict *liability* for managing brokers for the negligent or intentional torts of their affiliates." We agree with the Trial Court that our General Assembly did [*14] not intend to impose strict liability on managing brokers in cases such as this. On the other hand, we cannot agree with the outcome which would result if we were to hold that by simply and purposefully remaining ignorant of the substance and details of the affiliate broker's transactions, a managing broker could completely escape her statutory duty and any liability. Clearly, neither of these two scenarios is what our General Assembly intended when it enacted Tenn. Code Ann. § 62-13-406. In short, the Managing Broker's liability, if any, does not arise solely from the Affiliate Broker's action but instead arises from a breach of her own statutory duty. Our holding gives effect to all relevant parts of these statutes as enacted by our General Assembly.

HN11 The plain and unambiguous language of <u>Tenn.</u> Code Ann. § 62-13-406 provides that a managing broker has the responsibility "to ensure that all licensees affiliated with or employed by the broker conduct business in accordance with appropriate laws, rules and regulations." <u>Tenn. Code Ann. § 62-13-406(b)</u> (2009). Other sections of <u>Tenn. Code Ann. §§ 62-13-101, et seq.</u> further delineate the duties owed. Thus, the Managing Broker did owe Plaintiff [*15] a duty pursuant to <u>Tenn. Code Ann. §§ 62-13-101, et seq.</u> Given the record now before us, however, we are unable to determine the standard of care required of the Managing Broker in order to satisfy her statutory duty.³

Plaintiff alleged that the Managing Broker breached her duty to Plaintiff. The Managing Broker produced no evidence showing that she met the standard of care required of a managing broker and, therefore, satisfied her statutory duty. As such, the Managing Broker failed to negate any essential element of Plaintiff's claim, and,

³We note that Plaintiff alleges in his Complaint that the Affiliate Broker represented both him and the sellers in the Kelly Tire transaction. We are unable to determine, given the record now before us, whether the situation in this case involved a dual agency. The answer to this question would, of course, affect the scope of the duty required by both the Affiliate Broker and the Managing Broker.

therefore, was not entitled to summary judgment. We reverse the grant of summary judgment to the Managing Broker and remand this case to the Trial Court for further proceedings consistent with this Opinion.

Conclusion

The judgment of the Trial Court is reversed, [*16] and this cause is remanded to the Trial Court for further proceedings consistent with our Opinion and for collection of the costs below. The costs on appeal are assessed against the appellee, Mary Bea Corbitt.

D. MICHAEL SWINEY, JUDGE

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Kantz v. Bell

Court of Appeals of Tennessee, at Nashville May 22, 2014, Session; August 15, 2014, Filed No. M2013-00582-COA-R3-CV

Reporter

2014 Tenn. App. LEXIS 494; 2014 WL 4058823

WILLIAM E. KANTZ, JR. v. HERMAN C. BELL ET AL.

Prior History: <u>Tenn. R. App. P. 3</u>[*1] Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Davidson County. No. 12C3256 Carol Soloman, Judge.

Disposition: Judgment of the Circuit Court Affirmed.

Core Terms

Seller, breach of contract, trial court, amended complaint, damages, tortious interference, closing date, buyer, conspiracy, amend, second amended complaint, anticipatory breach of contract, days, injunction, Contracts, motions, issues, motion to dismiss, temporary, conveyed, requires, futile

Case Summary

Overview

HOLDINGS: [1]-A buyer failed to sufficiently plead a breach of contract claim against a seller of real property because the buyer did not allege facts sufficient to establish an agreement that time was of the essence as it pertained to the closing date, and the contract did not establish what would happen if the property did not close on the respective closing date; [2]-The buyer's claim for tortious interference with a contract failed because the buyer could not establish the contract was breached; [3]-The trial court did not abuse its discretion in denying the buyer's motion for leave to amend, *Tenn. R. Civ. P. 15.01*, because the proposed amendment would be futile; [4]-The buyer's claim for anticipatory breach of contract was waived.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1 A <u>Tenn. R. Civ. P. 12.02(6)</u> motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a <u>Rule 12.02(6)</u> motion to dismiss is determined by an examination of the pleadings alone. By filing a motion to dismiss the defendant admits the truth of all of the relevant and material allegations contained in the complaint, but asserts that the allegations fail to establish a cause of action.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > ... > Presumptions > Particular Presumptions > Regularity

HN2 When a complaint is challenged by a <u>Tenn. R. Civ. P. 12.02(6)</u> motion, the complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. Making such a determination is a question of law. An appellate court's review of a trial court's determinations on issues of law is de novo, with no presumption of correctness.

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN3 A claim for breach of contract requires: (1) the existence of an enforceable contract; (2) nonperformance amounting to a breach of the contract; and (3) damages caused by the breach of the contract.

Business & Corporate Compliance > ... > Contracts

Law > Breach > Material Breach

Real Property Law > ... > Contracts of Sale > Period Between Execution & Closing > Time of Performance

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Express Conditions > Time is of the Essence

HN4 Ordinarily, the inability of a party to close a real estate sales contract on a particular date is not considered to be a material breach of the contract since the general rule is that time is not of the essence in a real estate sales contract, unless otherwise specified in the contract.

Torts > ... > Contracts > Intentional Interference > Elements

HN5 A claim for tortious interference with a contract requires the plaintiff to prove the following seven elements: (1) a legal contract existed; (2) the defendant had knowledge of the existence of the contract; (3) the defendant had an intent to induce the breach of the contract; (4) the defendant acted maliciously; (5) the contract was breached; (6) the act complained of is the proximate cause of the breach; and (7) the plaintiff suffered damages due to the breach.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN6 The grant or denial of a motion to amend a pleading is within the sound discretion of the trial court. Tenn. R. Civ. P. 15.01. Although permission to amend should be liberally granted, the decision will not be reversed unless abuse of discretion has been shown.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7 Factors a trial court should consider when deciding whether to allow amendments include undue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN8 A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes

an injustice to the party complaining.

Civil Procedure > Appeals > Appellate Briefs

HN9 <u>Tenn. R. App. P. 27(a)(4)</u> expressly states that the brief of the appellant shall contain, under appropriate headings, a statement of the issues presented for review.

Counsel: James D. R. Roberts, Jr. and Janet L. Layman, Nashville, Tennessee, for the appellant, William E. Kantz, Jr. Irrevocable Trust.

Andre P. Johnson, Nashville, Tennessee, for the appellee, Herman C. Bell.

Mark A. Polk, Murfreesboro, Tennessee, for the appellee, Scott Findlay.

Judges: FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which and RICHARD H. DINKINS, J.J., joined.

Opinion by: FRANK G. CLEMENT, JR.

Opinion

This dispute concerns a contract for the sale of real property. Believing the seller was impairing the buyer's ability to close on time in order to sell the property under contract to someone else, the buyer filed this action to enjoin the seller from transferring the property to another and to require the seller to provide documentation necessary to close. The buyer also asserted claims for specific performance of the contract, breach of contract, and conspiracy against the seller, as well as claims for tortious interference with the contract and conspiracy against another defendant. [*2] The trial court found that the seller's discussions with another potential buyer were merely to have a "back-up plan" in the event the buyer did not close; nevertheless, the court granted injunctive relief by extending the deadline to close the sale by thirty days and enjoined the seller from selling the property to another in the interim. One week later, the sale closed. The plaintiff then amended its complaint to limit its claims to breach of contract against the seller, and tortious interference with a contract and conspiracy against the seller and the party alleged to have tortiously interfered with the contract. The defendants filed motions to dismiss for failure to state claims for which relief could be granted pursuant to Tenn. R. Civ. P. 12.02(6). The trial court found that the seller did not breach the contract because the

property was conveyed to the plaintiff pursuant to the terms of the contract and the delay in closing was not a breach of the contract. The court dismissed all other claims but for the conspiracy claims and declared the order a final appealable judgment pursuant to <u>Tenn. R. Civ. P. 54.02</u>. The plaintiff appealed. Finding no error, we affirm.

OPINION

The William E. Kantz, Jr. Irrevocable Trust ("Plaintiff") [*3] entered into a Contract for the Sale of Real Estate ("the Contract") on April 13, 2012, to purchase real estate from Herman C. Bell ("Seller").

After entering into the Contract with Seller, but prior to the closing, Plaintiff engaged in negotiations with Scott Findlay whereby Findlay and Plaintiff would jointly develop the property in consideration of Findlay providing additional capital. Over the next few days, Plaintiff also approached Quincy McKnight, who had experience in arranging financing, seeking his assistance to procure a loan for Findlay. In the interim, Plaintiff presented an Assignment of Contract for the Purchase of Real Estate to Findlay and advised Findlay of the damages they would incur if the rapidly approaching closing date of August 1, 2012, was missed. Findlay responded that he would not enter into the assignment until after his loan was approved; Findlay never obtained approval of a loan and no written agreement was executed between Plaintiff and Findlay.

On July 21, 2012, Seller and Plaintiff amended the contract to extend the closing date to August 20, 2012, in exchange for an additional down payment of \$5,000. Around the same time, McKnight and Findlay ceased [*4] communicating with Plaintiff after which Plaintiff became suspicious that Findlay was tortiously interfering with Plaintiff's contract to purchase the property at issue with the goal of purchasing it for himself.

On August 10, 2012, Plaintiff was informed that the "plat" had been approved by the Davidson County Planning Commission, but could not become final until signed by Seller, and that Plaintiff could not complete his financing without the finalization of the "plat." Thereafter, Plaintiff's repeated attempts to contact Seller were to no avail and, on August 14, 2012, the closing attorney, who had been selected by Seller, notified Plaintiff that Seller had decided to "sell to someone else."

On the following day, August 15, 2012, Plaintiff

commenced this action by filing a Request for a Temporary Restraining Order and Complaint for Specific Performance Breach of Contract, Unjust Enrichment, Tortious Interference with a Contract, and Conspiracy ("Original Complaint"), against Seller and Findlay (collectively "Defendants").

Following a hearing on August 17, 2012, concerning the application for a restraining order, the trial court found that Plaintiff was prepared to close, however, it could not close until Seller signed certain documents that were necessary to obtain financing and convey good title.² As for the alleged breach of contract and tortious interference with a contract, the court's order additionally provided:

Based upon information given to [Seller] by Mr. McKnight, [Seller] believed that . . . [Plaintiff] would not be able to close at the time required by the contract. As a "back up plan," Mr. McKnight facilitated an agreement between [Seller] and [Mr. Findlay] to purchase the property on the same terms as the contract into which [Seller] and [Plaintiff] had previously entered.

Based upon these and other facts cited by the trial court, the court granted a temporary injunction upon the following terms:

- a. The date for closing between [Plaintiff] and [Seller] is extended through September 13, 2012;
- b. Until that time, [Seller] is prohibited from selling, gifting, or otherwise conveying by any [*6] means the property . . . to any other person or entity, including but not limited to Mr. Scott Findlay; and,
- c. [Seller] is compelled to obtain and produce the documents necessary for conveying good title to [Plaintiff] not later than September 13, 2012.

The closing on the sale of the property occurred on

¹ McKnight was also a defendant but he soon filed a Chapter 13 petition for bankruptcy, and Plaintiff voluntarily dismissed all of his claims against McKnight. An order [*5] dismissing McKnight from the lawsuit was entered on August 28, 2013, and he is not a party to this appeal.

²These documents included obtaining a TennCare Release from the State of Tennessee; an Inheritance Tax Clearance form from the Tennessee Department of Revenue for Seller's deceased parents, co-owners of the property; and notarized Affidavits of Heirship regarding his status as the heir at law for each of his deceased parents.

August 29, 2012.³ After acquiring the property, Plaintiff filed an Amended Complaint for Breach of Contract, Tortious Interference with a Contract, and Conspiracy ("First Amended Complaint") on September 13, 2012. Plaintiff asserted, *inter alia*, that due to Seller's delay and the interference of Findlay and McKnight, Plaintiff suffered damages in excess of \$190,000. Specifically, the breach of contract claim reads:

33. [Plaintiff] fulfilled each and every part of its requirements under the Contracts;

35. [Plaintiff] has been damaged by its reliance on the Contracts; [*7]

- 37. [Plaintiff] purchased the property for the purpose of constructing a duplex on the same and expected to realize a new profit of \$240,000.00;
- 38. As a result of the breach and interference with the Contracts, [Plaintiff] lost \$190,000.00 in profits when [it] was unable to develop the property with a partner.
- 39. [Plaintiff] is entitled to damages in the amount of \$190,000.00, plus reasonable attorneys fees and costs[.]

Seller and Findlay responded by filing motions to dismiss the First Amended Complaint pursuant to *Tenn*. R. Civ. P. 12.02(6); Findlay, alternatively, moved for a more definite statement. After a hearing on these motions, the trial court found that Seller did not breach his contract with Plaintiff as he conveyed the property to Plaintiff pursuant to the contract but for missing the closing date. Further, the court found Plaintiff's claim that it could not obtain financing due to Seller's failure to sign the "plat" was not a breach of contract. The court also concluded that the tortious interference claim must fail due to the court's finding that Seller had not breached the underlying contract. The court entered a [*8] final order on December 14, 2012, dismissing Plaintiffs claims against all Defendants for breach of contract and tortious interference with a contract.4

Subsequently, Plaintiff filed two motions: (1) a Motion Under Rule 59 to Alter or Amend the trial court's December 14, 2012 judgment⁵ and (2) a Motion for Leave to File Second Amended Complaint. In these motions, Plaintiff alleged, inter alia, that an anticipatory breach of the contract, which it contends was proven by the court's temporary injunction order forcing Seller to perform, entitled Plaintiff to a remedy of its actual damages. Defendants opposed both motions insisting the property was transferred pursuant to the contract and Plaintiff's claim of an anticipatory breach of contract was being raised for the first time. Defendants contended a claim for anticipatory breach of contract requires different elements necessary to establish a prima facie case and should have been pled specifically in the complaint.

The trial court denied both of Plaintiff's motions finding that the proposed Second Amended Complaint was so similar to the First Amended Complaint that to allow the proposed amendment would be futile. The trial court then dismissed all claims against Defendants, with the exception of the conspiracy claim.⁶ It is from this order Plaintiff appeals.

Plaintiff presents two issues for our review. Plaintiff contends the trial court erred in dismissing pursuant to *Tenn. R. Civ. P. 12.02(6)* for failure to state a claim upon which relief can be granted the claims asserted in his First Amended Complaint for breach of contract and tortious interference with a contract. Plaintiff also contends the court erred in denying its motion for leave to file a Second Amended Complaint.

ANALYSIS

In its first issue, Plaintiff challenges the propriety of granting Defendants' <u>Rule 12.02(6)</u> motion to dismiss for failure to state claims upon which relief can be granted. The standards by which Tennessee courts are to assess a <u>Rule 12.02(6)</u> motion to dismiss are well established. <u>HN1</u> "A <u>Rule 12.02(6)</u> motion challenges only the [*10] legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." <u>Webb v. Nashville Area Habitat for Humanity, Inc.</u>, 346 S.W.3d

claim for conspiracy against Mr. Findlay.

³ An order dissolving the temporary injunction was entered on September 20, 2012.

⁴The court did not dismiss the conspiracy claims against Defendants; in regards to Mr. Findlay's motion, the court required Plaintiff to provide a more definite statement of his

⁵ The <u>Rule 59.04</u> Motion to [*9] Alter or Amend was denied by the trial court; the Trust does not appeal that ruling.

⁶ Pursuant to <u>Tenn. R. Civ. P. 54.02</u>, the trial court designated the order as final and appealable.

422, 426 (Tenn. 2011). "The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone." *Id.* By filing a motion to dismiss the defendant "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* (citations omitted).

HN2 When a complaint is challenged by a Rule 12.02(6) motion, the complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. Doe v. Sundquist, 2 S.W.3d 919, 922 (Tenn. 1999) (citing Riggs v. Burson, 941 S.W.2d 44, 47 (Tenn. 1997)). Making such a determination is a question of law. Our review of a trial court's determinations on issues of law is de novo, with no presumption of correctness. Id. (citing Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997)).

I.BREACH OF CONTRACT

HN3 A claim for breach of contract requires "(1) the existence of an enforceable contract. (2)nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." C & W Asset Acquisition, LLC v. Oggs, 230 S.W.3d 671, 676-77 (Tenn. Ct. App. 2007). The existence of an enforceable contract is undisputed; thus, the issue before review is whether there our was nonperformance [*11] amounting to a breach of the contract and, if so, whether damages were caused by the breach.

The First Amended Complaint, which is the complaint at issue as it pertains to Plaintiff's claim of breach of contract against Seller, states in pertinent part:

- 29. On August 29, 2012, the sale of property closed.
- 30. However, because of [Seller's] delay and the other defendants' interference with the sale, [Plaintiff] suffered damages in excess of \$190,000.00.

33. Plaintiff fulfilled each and every part of its requirements under the Contracts;

39. [Plaintiff] is entitled to damages in the amount of

\$190,000.00, plus reasonable attorneys fees and costs[.]

The foregoing reveals that Plaintiff's claim for breach of contract against Seller is based on the factual allegations that Seller's delay in closing caused Plaintiff to suffer damages of \$190,000. The trial court acknowledged the allegation that Seller caused delays but found, as a matter of law, that the alleged delays caused by Seller did not constitute a breach of the contract. We agree with this ruling because, HN4 "[o]rdinarily, the inability of a party to close a real estate sales contract on a particular date is not considered to be a material breach [*12] of the contract since the general rule is that time is not of the essence in a real estate sales contract, unless otherwise specified in the contract." Lewis v. Muchmore, 26 S.W.3d 632, 639 (Tenn. Ct. App. 2000) (quoting Crye-Leike Realtors, Inc., v. Hay, No. 02A01-9104-CV-00057, 1991 Tenn. App. LEXIS 790, 1991 WL 192493, at *3 (Tenn. Ct. App. Oct. 1, 1991); also see Thompson v. Menefee, 6 Tenn. App. 118, 128 (Tenn. Ct. App. 1927).

Neither the Original Contract nor the amended contract, which are incorporated in the First Amended Complaint, state that "time is of the essence." Moreover, the mere statement in the First Amended Complaint that Plaintiff suffered damages because of Seller's delay is not sufficient to constitute a factual allegation that time was of the essence. To the contrary, the facts alleged in the complaints reflect that two extensions to the closing date were agreed upon. The Original Contract provided that the closing date would be "on or before thirty (30) days from the completion date of the due diligence period." The Original Contract stated: "Buyer will begin its due diligence review of the Property upon the signatures to this agreement and shall have thirty (30) business days from the execution of this agreement to conduct investigations of the Property." On May 21, 2012, handwritten amendments were made to the Original Contract which extended the due diligence review period from 30 days to 60 days, which in turn [*13] would extend the closing date. Another extension to the closing date was made at the request of Plaintiff on July 21, 2012. Plaintiff's First Amended Complaint states that "[i]n exchange for an additional \$5,000.00 payment, [Seller] extended the time in which Plaintiff had to close to August 20, 2012." Thus, Plaintiff's own allegations reveal that it sought

⁷ According to Plaintiff, these changes were necessitated by "rock issues"; "moving of a sewer line"; and designation of the property as a "reserve lot."

extensions to the closing; thus, an early closing could not have been of the essence to Plaintiff.

Moreover, not only did the contracts fail to state that time was of the essence in regard to the various closing dates the parties agreed upon, none of the contracts established what would happen if the property failed to close on the respective closing date, a fact this court found significant in Tatum v. Worsham, No. 03A01-9507-CH-00219, 1996 Tenn. App. LEXIS 127, 1996 WL 87453, *2 (Tenn. Ct. App. Mar. 1, 1996). In Tatum, the seller insisted that time was of the essence, that the buyers breached the land sales contract by being unable to close on a specified date, and that the contract had expired on that date. Id. The buyers countered by suing the seller for [*14] performance of their contract. The chancellor found that time was not specifically made of the essence by the terms of the agreement, and although the agreement provided a date for closing, it did not specify what would happen if the sale was not closed by that date, and granted the buyers' specific performance of the contract, awarded the buyers monetary damages, and ordered that a closing take place. Id. We affirmed. Id.

The mere fact the closing occurred after the agreed upon closing date does not constitute a breach of the contract for "the inability of a party to close a real estate sales contract on a particular date is not considered to be a material breach of the contract since the general rule is that time is not of the essence in a real estate sales contract, unless otherwise specified in the contract." Crye-Leike Realtors, Inc., 1991 Tenn. App. LEXIS 790, 1991 WL 192493, at *3; Thompson v. Menefee, 6 Tenn. App. at 128 (Tenn. Ct. App. 1927). Moreover, Plaintiff's First Amended Complaint provides little more than averments showing that Plaintiff wants relief and it believes it is entitled to relief due to a mere nine day delay in closing. Without alleging facts sufficient to establish an agreement that time was of the essence as it pertained to the August 20 closing date, the complaint failed to state [*15] a claim for breach of contract upon which relief could be granted. We, therefore, affirm the dismissal of this claim pursuant to Tenn. R. Civ. P. 12.02(6).

II. TORTIOUS INTERFERENCE WITH A CONTRACT

HN5 A claim for tortious interference with a contract requires the plaintiff to prove the following seven elements: (1) a legal contract existed; (2) the defendant had knowledge of the existence of the contract; (3) the defendant had an intent to induce the breach of the

contract; (4) the defendant acted maliciously; (5) the contract was breached; (6) the act complained of is the proximate cause of the breach; and (7) the plaintiff suffered damages due to the breach. <u>Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 359 (Tenn. Ct. App. 1999)</u> (citing <u>Dynamic Motel Management, Inc. v. Erwin, 528 S.W.2d 819, 822 (Tenn. Ct. App. 1975))</u> (emphasis added).

Plaintiff's breach of contract claim has been dismissed. Therefore, Plaintiff can not establish one of the essential elements of a claim for tortious interference with a contract, that being the element that the contract was breached. Accordingly, we affirm the trial court's dismissal of this claim under <u>Tenn. R. Civ. P. 12.02(6)</u>.

III. MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

After the trial court dismissed all of the claims Plaintiff asserted in its First Amended Complaint but for the conspiracy claim, Plaintiff filed a motion for leave to file [*16] a Second Amended Complaint. The trial court denied Plaintiff's motion stating, "the Second Amended Complaint, filed contemporaneously with this motion, was so similar to the First Amended Complaint that to allow the proposed amendment would be futile."

HN6 The grant or denial of a motion to amend a pleading is within the sound discretion of the trial court. See Tenn. R. Civ. Proc. 15.01; Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 375 (Tenn. 2007). Although permission to amend should be liberally granted, the decision "will not be reversed unless abuse of discretion has been shown." Cumulus Broadcasting, Inc. 226 S.W.3d at 366. HN7 Factors the trial court should consider when deciding whether to allow amendments include "[u]ndue delay in filing; lack of notice to the opposing party; bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." Id. HN8 "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Having reviewed the proposed Second Amended Complaint we find that it contains no substantive changes from the First Amended Complaint; thus, as the trial court found, granting [*17] leave to amend the complaint would have been futile.

Accordingly, we find the trial court did not abuse its discretion in denying the motion for leave to amend as the proposed amendment would be futile. Therefore, we affirm the decision of the trial court.

IV. ANTICIPATORY BREACH OF CONTRACT

Although not identified as an issue in its brief, Plaintiff contends at various points within its brief that it asserted a claim for anticipatory breach of contract.⁸ Plaintiff further asserts it is entitled to pursue such a claim for the damages it suffered as a result of Seller's anticipatory repudiation of the contract. We have determined that such a claim was not timely or properly asserted in the trial court; thus, it was waived. We have also concluded that the claim would be without merit if not waived.

Plaintiff did not assert a claim for anticipatory breach in the Original Complaint. After the parties closed on the contract, Plaintiff was granted leave to file the First Amended Complaint and, again, Plaintiff did not assert a claim for anticipatory breach. Thereafter, Defendants filed motions to dismiss and all of Plaintiff's breach of contract claims were dismissed upon, inter alia, findings that Seller did not breach the contract because Plaintiff purchased the property pursuant to the terms of the contract and the delay in the closing did not constitute a breach of contract. After all of its contract claims were dismissed, Plaintiff filed a Motion to Alter or Amend Judgment in which it attempted to assert, for the first time, a claim for anticipatory breach. The motion was denied. Additionally, Plaintiffs motion to file a second amended complaint was denied, and we found no error with the denial of the motions.

We acknowledge Plaintiff's contention that he is entitled to pursue a claim for anticipatory breach of contract due to the grant of a temporary injunction that prevented Seller from selling the property to another for a period of thirty days; however, [*19] we find no merit to this contention. The trial court did not, however, find Seller's conversations with other possible buyers actionable or evidence of any intention by Seller to avoid closing;

instead, the court found the discussions were no more than a desire to have a "back up plan" in the event Plaintiff could not close. Thus, the trial court's ruling on the injunction does not support Plaintiff's phantom claim of anticipatory breach of contract.

The foregoing considered, we find no merit to this nonissue.

In Conclusion

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, William E. Kantz, Jr. Irrevocable Trust.

FRANK G. CLEMENT, JR., JUDGE

⁸ Plaintiff, which is the appellant, did not expressly identify this as an "issue" in its brief. *HN9 Tenn. R. App. P. 27(a)(4)* expressly states that the brief of the appellant shall contain, under appropriate headings, "A statement of the issues presented for review." Plaintiff only identified two issues under the heading "Issues" in its brief. Accordingly, Plaintiff failed to comply with the rule; nevertheless, we elected to [*18] address the "non-issue."

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Lapinsky v. Cook

Court of Appeals of Tennessee, at Knoxville

April 20, 2016, Session; September 26, 2016, Filed

No. E2015-00735-COA-R3-CV

Reporter

2016 Tenn. App. LEXIS 711

KIMBERLY E. LAPINSKY v. JANICE E. COOK, ET AL.

Prior History: <u>Tenn. R. App. P. 3</u> [*1] Appeal as of Right; Judgment of the Chancery Court Affirmed Case Remanded. Appeal from the Chancery Court for Sevier County. No. 14-1-005. Telford E. Forgety, Jr., Chancellor.

Disposition: Judgment of the Chancery Court Affirmed Case Remanded.

Core Terms

final inspection, inspection, repairs, trial court, roof, summary judgment, replaced, buyer, shingles, summary judgment motion, conspiracy, noticed, parties, discovery, flashings, paint, real estate agent, sellers, window, material fact, walked, caulk, intentional *misrepresentation*, entitled to summary judgment, present condition, supported motion, attorney's fees, issues, moving party, nonmoving

Case Summary

Overview

HOLDINGS: [1]-Summary judgment was properly granted in favor of the real estate agent on the breach of contract claim, as there was no contract between the buyer and the agent; [2]-Summary judgment was properly granted in favor of the sellers on the breach of contract claim, as the buyer could not claim the repairs to be done pursuant to the contract were not done after having agreed via the final inspection form that any repairs and replacements had been made to her satisfaction; [3]-Summary judgment was properly granted in favor of the sellers on the claim for intentional *misrepresentation*, as the buyer and her husband said that they saw for themselves prior to closing that the repairs had not been done and thus, the buyer could not have reasonably relief upon any reprsentations made by

the sellers; [4]-The buyer's "feelings" were ar insufficient basis to support a conspiracy claim.

Outcome

Affirmed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court
Decisions > Preservation for Review

HN1 Issues must be included in the Statement of Issues Presented for Review required by <u>Tenn. R. App. P. 27(a)(4)</u>. An issue not included is not properly before the court of appeals.

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN2 Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. <u>Tenn. R. Civ. P. 56.04</u>. An appellate court reviews a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. In doing so, the appellate court makes a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3 In Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary

judgment stage is insufficient to establish the nonmoving party's claim or defense.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN4 A moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, <u>Tenn. R. Civ. P. 56.03</u> requires the moving party to support its motion with a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial. Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN5 When a motion for summary judgment is made, any party opposing summary judgment party must file a response to each fact set forth by the nonmovant in the manner provided in Tenn. R. Civ. P. 56.03. When a motion for summary judgment is made and supported as provided in Rule 56, to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but must respond, and by affidavits or one of the other means provided in Tennessee 56, set forth specific facts at the summary judgment stage showing that there is a genuine issue for trial. Tenn. R. Civ. P. 56.06. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Rule 56.07.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN6 After adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. <u>Tenn. R. Civ. P.</u> 56.04, 56.06. The focus is on the evidence the

nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Contracts Law > Contract Interpretation

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN7 In resolving a dispute concerning contract interpretation, the court's task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. A determination of the intention of the parties is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide. The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. The parties' intent is presumed to be that specifically expressed in the body of the contract. In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy.

Contracts Law > Contract Interpretation

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem

Civil Procedure > Appeals > Standards of Review

HN8 An appellate court's initial task in construing a contract, as is a trial court's, is to determine whether the language of the contract is ambiguous. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. A contract is ambiguous only when its meaning is uncertain and may fairly be understood in more than one way. If the contract is found to be ambiguous, the appellate court then applies established rules of construction to determine the intent of the parties. Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact.

Contracts Law > Contract Interpretation

Contracts Law > Defenses > Fraud & Misrepresentation

HN9 It is not the role of an appellate court to make a different contract than that executed by the parties. In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought to be harsh or unjust.

Torts > ... > Fraud & <u>Misrepresentation</u> > Actual Fraud > Elements

HN10 To recover for intentional <u>misrepresentation</u>, a plaintiff must prove: (1) that the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that the defendant either knew that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN11 The elements of a cause of action for civil conspiracy are: (1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury. Conspiracy claims must be pled with some degree of specificity. Conclusory allegations, however, unsupported by material facts will not be sufficient to state such a claim.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12 In the context of a sale of real property, real estate agents and brokers selling houses "in the course of the real estate trade" are covered by the Tennessee Consumer Protection Act. However, the Act does not apply to sellers who are not in the business of selling property as owners or brokers and, therefore, persons making an isolated sale of their home are not covered.

Civil Procedure > Judgments > Summary Judgment

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Pretrial Matters > Continuances

HN13 Where a party seeks to continue a motion for summary judgment pursuant to <u>Tenn. R. Civ. P. 56.07</u>, an appellate court reviews the trial court's refusal to grant a continuance for an abuse of discretion.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN14 Where there is the slightest possibility that the party opposing a motion for summary judgment has been denied an opportunity to file affidavits, take discovery depositions or amend, by disposition of motion for summary judgment without 30 day interval following filing of motion, it will be necessary to remand case to cure such error. One method of defeating a properly supported motion for summary judgment is through a request for more discovery: Nonmoving parties may deflect a summary judgment motion challenging their ability to prove an essential element of their case by (1) pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) rehabilitating evidence challenged by the moving party, (3) producing additional evidence that creates a material factual dispute, or (4) submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. The interest in full discovery, however, must be balanced against the purpose of summary judgment: to provide a quick, inexpensive way to conclude cases when there exists no dispute regarding the material facts. Indeed, the philosophy of summary judgment is to avoid a needless trial in a case where, although the pleadings may indicate disputes over factual issues, facts outside the pleadings show that there is no genuine issue as to any material fact.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN15 A trial court's decision to deny additional time for discovery, in order for the non-moving party to meet summary judgment, must be viewed in the context of the issues being tried and the posture of the case at the time the request for discovery is made. Accordingly, a trial court only errs in refusing to grant additional time for discovery prior to the hearing on a motion for summary judgment when the non-moving party can show that the requested discovery would have assisted the non-moving party in responding to the moving party's motion for summary judgment.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

HN16 An appellate court reviews a trial court's decision with regard to whether to award attorney's fees pursuant to <u>Tenn. Code Ann.</u> § 47-18-109(e)(2) for abuse of discretion.

Counsel: Douglas E. Taylor, Seymour, Tennessee, for the appellant, Kimberly E. Lapinsky.

Chris W. McCarty, W. Paul Whitt, and Mikel A. Towe, Knoxville, Tennessee; and Catherine B. Sandifer, Pigeon Forge, Tennessee, for the appellee, Janice E. Cook.

David M. Tilson, Morristown, Tennessee; and Mary Pamela Huddleston, Pigeon Forge, Tennessee, for the appellee, Kevin D. Cook.

Jon G. Roach, Knoxville, Tennessee, for the appellee, Brenda Brewster.

Judges: D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J.W.S. and JOHN W. MCCLARTY, J., joined.

Opinion by: D. MICHAEL SWINEY

Opinion

Kimberly E. Lapinsky ("Plaintiff") appeals the order of the Chancery Court for Sevier County ("the Trial Court") granting summary judgment to Janice E. Cook, Kevin D. Cook ("the Cooks") and Brenda Brewster ("Brewster") in this lawsuit that arose from the sale of a house by the Cooks to Plaintiff. Plaintiff raises issues on appeal with regard to whether the Trial Court erred in granting [*2] summary judgment and whether the Trial Court erred in failing to allow Plaintiff to conduct additional discovery prior to ruling on the motions for summary judgment. The Cooks raise an issue regarding whether the Trial Court erred in denying their motion for attorney's fees pursuant to Tenn. Code Ann. § 47-18-109. We find and hold that the Trial Court did not abuse its discretion in refusing to allow further discovery, that the defendants made properly supported motions for summary judgment, and that Plaintiff failed to show that there is a genuine disputed issue of material fact. As the Cooks and Brewster made properly supported motions for summary judgment and are entitled to summary

judgment, we affirm the grants of summary judgment. We further find and hold that the Trial Court did not abuse its discretion in denying the motion for attorney's fees.

OPINION

Background

In May of 2013, Plaintiff and the Cooks entered into a Purchase and Sale Agreement ("the Contract") for Plaintiff to purchase from the Cooks real property containing a house located at 1998 Tranquility Lane ("the House") in Sevier County, Tennessee. Brewster was the real estate agent for the Cooks in connection with the sale of the House. The Contract [*3] stated, in pertinent part:

8. Inspections.

* * *

E. Waiver of All Inspections. THIS BOX MUST BE CHECKED TO BE PART OF THIS AGREEMENT.

Buyer, having been advised of the benefits of inspections, waives any and all Inspection Rights under this Paragraph 8 (including but not limited to the Wood Destroying Insect Inspection Report).

Inspection. Final Buyer and/or his inspectors/representatives shall have the right to conduct a final inspection of Property no later than 1 days prior to the Closing Date only to confirm Property is in the same or better condition as it was on the Binding Agreement Date, normal wear and tear excepted, and to determine that all repairs/replacements agreed to during the Resolution Period, if any, have been completed. Property shall remain in such condition until Closing at Seller's expense. Closing of this sale constitutes acceptance of Property in its condition as of the time of Closing, unless otherwise noted in writing.

* * *

- **18. Special Stipulations.** The following Special Stipulations, if conflicting with any preceding paragraph, shall control:
- 1. Contract is contingent upon the buyers [sic] house in Commerce TWP, Michigan closing on or before June 10, 2013.

- 2. [*4] Seller to give the buyer first-right of refusal to purchase on sellers [sic] lot on Tranquility Bend-Lot 14. (Right next door to this house).
- 3. Seller to repair/replace/paint fix:
- a. Fix/paint white trim that is peeling on the driveway side.
- b. Re-flash/repair bow window in the office (water stains on ceiling)-as there is water intrusion
- c. Repair/replace the roof shingles where needed.
- 4. Wood-destroying insect inspection will stay with the contract until completed.

Plaintiff checked the box for the "Waiver of All Inspections," waiving the inspection rights and responsibilities provided for under paragraph eight of the Contract.

The closing on the House occurred on June 14, 2013. In connection with the closing, Plaintiff executed a Buyer's Final Inspection form ("Final Inspection Form") on June 14, 2013. The Final Inspection Form stated, in pertinent part:

We, the Buyers, and/or our inspectors and/or our representatives,

* * *

Have made the final inspection of the Property and confirm it to be in the same or better condition as it was on the Binding Agreement Date, normal wear and tear excepted, and all repairs and replacements, if any, have been made to our satisfaction, and we agree [*5] to accept the Property in its present condition.

* * *

This Buyer's Final Inspection is made a part of the Purchase and Sale Agreement as if quoted therein verbatim. Should the terms of this Buyer's Final Inspection conflict with the terms of the Purchase and Sale Agreement or other documents executed prior to or simulantous to the execution of this Buyer's Final Inspection, the terms of this Buyer's Final Inspection shall control, and the conflicting terms are hereby considered deleted and expressly

waived by both Seller and Buyer. In all other respects, the Purchase and Sale Agreement shall remain in full force and effect.

The sale closed, and Plaintiff took possession of the House. In January of 2014, Plaintiff sued the Cooks, Brewster, and Tennessee Farmers Mutual Insurance Companies ("Farmers Insurance") alleging claims for, among other things, breach of contract, intentional misrepresentation, conspiracy, and violation of the Tennessee Consumer Protection Act of 1977. Plaintiff alleged that she discovered after the closing that the House had not been repaired as agreed in the Contract, that defects and damages had been hidden which allegedly eventually caused more damage to the [*6] House, and that the Cooks and Brewster had made misrepresentations with regard to the septic permit and the septic system. Brewster answered the complaint. Farmers Insurance answered the complaint, filed a counter claim against Plaintiff, and filed a crossclaim against the Cooks. The Cooks answered the complaint and each filed a cross-claim against Brewster.

The Cooks filed a joint motion for summary judgment supported by, among other things, the affidavit of Janice Cook, which stated, in pertinent part:

- 4. I was a homeowner making the isolated sale of my residence in connection with the Agreement and the sale of the Property to [Plaintiff].
- 5. I was not engaged as a real estate agent or broker selling houses in the course of the real estate trade, nor was I otherwise engaged in business or commercial activity with respect to the Agreement and the sale of the Property to [Plaintiff].

* * *

- 7. I was never involved in any conspiracy with anyone regarding the sale of the Property.
- 8. In connection with the sale of the Property, the parties to the Agreement executed a "Buyer's Final Inspection" form ("Final Inspection Form") on June 14, 2013.

Kevin Cook filed a similar affidavit that stated, [*7] in pertinent part:

- 4. I was a homeowner making the isolated sale of my residence in connection with the Agreement and the sale of the Property to [Plaintiff].
- 5. I was not engaged as a real estate agent or

broker selling houses in the course of the real estate trade, nor was I otherwise engaged in business or commercial activity with respect to the Agreement and the sale of the Property to [Plaintiff].

* * *

7. I was never involved in any conspiracy with anyone regarding the sale of the Property.

Brewster also filed a motion for summary judgment.

Plaintiff was deposed. During her deposition, Plaintiff testified that she closed on the sale of the House voluntarily and of her own free will. When asked what she did to inspect the House prior to closing, Plaintiff stated:

We went to the home. We made an appointment to get in and inspect the house and the damages, and I couldn't tell you the date. And my husband inspected the full house and we made the conditions with--Phil Derosia was with us at the time.

And upon being done for the final purchase of the house, we required the conditions of the roof, the water damage to the inside of the home, and the flashings on the side of the home to be installed [*8] properly because there was water instrusion into the home.

Phil Derosia was Plaintiff's real estate agent in connection with Plaintiff's purchase of the House.

Plaintiff testified that she did not hire a contractor or inspector to inspect the House because her husband is a licensed general contractor in Michigan, and he inspected the House. Plaintiff testified that her husband has been a builder for approximately 35 years. Plaintiff accompanied her husband when he inspected the House.

When asked what her husband did to inspect the House, Plaintiff stated:

Well, he went through basically everything. He went up on the roof. He went on the ladder to the sides and the flashings. He inspected the brick. He inspected the basement. He inspected the insulation, the wiring, the water lines in the--I mean, he inspected everything. . . . Inside and out. . . . If it was visible, absolutely, he would--if it was visible, yeah, I guess you could say he saw it.

Plaintiff agreed that she relied upon her husband's inspection.

Plaintiff testified that her husband was with her for the final inspection on the day of closing. She stated: "We didn't get really to have a final inspection that day." When asked why [*9] she did not get to have a final inspection, Plaintiff stated:

Our real estate agent, Phil Derosia, kept contacting the Cooks' real estate agent, Brenda Brewster, to get us in for final inspection on the home. Finally, we got a phone call that told us that we should have made an appointment previous to that, but, yeah, they would let us in for final inspection, which was approximately, and I'm not going to quote myself, it was about 45 minutes before closing at the Smoky Mountain Title.

And, so, my husband, who did not have a ladder to get up on it at this point to do final inspection, so we thought that at our closing we'd be able to question Ms. Brewster and the Cooks of the work that was supposed to be--have been done to the house, but they were not there.

Plaintiff was asked if she could have set a different closing date in the Contract, and she stated:

No. . . . I had to have it June 14, 2013. . . . Because my home was still up in Michigan, our home was being sold--had been sold in Michigan. So it was on a time frame of us traveling back down here and the closing up in Michigan to be able to close on this home down here.

Planitiff agreed that this was not a circumstance forced upon [*10] her by the Cooks. Plaintiff was asked if she could have moved the closing date in the Contract back to give more time for inspection, and she stated:

No, I wouldn't.... Well, at the closing that we had set up, we made explicit travel arrangements to come down here for the closing of--[the House]... And with my health issues and whatever, there was time frames that I could be down here this many certain days and then get back to Michigan for the pack up and whatever of our home because, then, we were moving our--our closing--...

Plaintiff was asked about the work that was to have been done to the House pursuant to the Contract. Plaintiff admitted that pursuant to the Contract, the only things the Cooks were to have repaired/replaced/painted/fixed were the three things listed in the Contract as:

Seller to repair/replace/paint fix:

- a. Fix/paint white trim that is peeling on the driveway side.
- b. Re-flash/repair bow window in the office (water stains on ceiling)-as there is water intrusion
- c. Repair/replace the roof shingles where needed.

Plaintiff explained that the flashing that was supposed to be repaired pursuant to the Contract was located "off the office" and "off the master [*11] bedroom" on the bay windows. Plaintiff admitted that both of these spots were on the exterior of the House and could be seen from the exterior of the House.

Plaintiff was questioned about the provision in the Contract requiring the Cooks to fix/paint white trim that is peeling on the driveway side, and she stated that this trim was located on the "peak of the house," and also was on the exterior of the House. Plaintiff admitted that she would not have needed access to the interior of the house to see that trim.

Plaintiff was asked who came up with the contingency in the Contract to repair/replace the roof shingles where needed, and she stated that her husband did. Plaintiff was asked if her husband believed that there were roof shingles that needed to be repaired or replaced, and she stated:

Pretty much the whole roof because there wasthere was, you know, spots of the roof that had been covered over, and so there were shingles that were missing. We decided that we would take care of the gutters ourself. This is all requested through our <u>realtor</u>, Phil and Darlene Derosia.

Plaintiff agreed that missing shingles could be seen from the ground elevation outside the House, and that they did [*12] not need access to the interior of the House to see them.

Plaintiff was asked what she contended was done to conceal problems with the roof, and she stated:

There was tar and caulk put into holes on the roof. You got to go--I'm going by hearsay with my husband, so I don't know the specifics. But there was shingle, what he called shingle dust put over it to kind of cover up those tarred areas.

The caulking that was done, the flashing was not done. What was done was big tubes of caulk thrown in behind the flashings and down the flashings, and tar and caulk thrown into where shingles should have been on the roof.

Plaintiff admitted that these things were visible when her husband got on the roof after closing.

Plaintiff admitted that she closed on the Property knowing that the Contract contained a clause that stated: "Closing of this sale constitutes acceptance of Property in its condition as of the time of Closing, unless otherwise noted in writing." Plaintiff also admitted that she understood that she needed to conduct an inspection of the House prior to closing. She further admitted that she received the Disclaimer Notice that warned that failure to inspect meant accepting the House 'as [*13] is.'

Plaintiff admitted that she voluntarily executed the Contract and that she was under no duress to sign. She also admitted that she signed the Tennessee Residential Property Condition Disclosure voluntarily and that she knew what she was signing. Plaintiff further admitted that she signed the Additional Required Residential Disclosures voluntarily. Plaintiff admitted she waived a home protection plan for the House and that she signed the Final Inspection Form accepting the House in its present condition.

Plaintiff stated: "I did close on it of my own free will with the exception of being able to speak to the Cooks and the real estate agent about the work that was supposed to be performed on the home for final inspection." She further stated: [*14]

[A]t that closing with the attorney that was present and not being able to get the full final inspection, the question was raised from me to him, not knowing Tennessee laws as far as purchase and selling of homes, I said we weren't allowed a full inspection, you know, the timing of a full inspection, and I'm signing this pretty much under duress because I want to know if the repairs were done

and completed.

My reply that I got back was that they did sign off, the Cooks, that the repairs were done and completed. And I said, "Well, I'm kind of stuck not being able to do the full inspection." And he says, "Well, you'll have a year warranty on it."

Plaintiff could not recall the name of the attorney who was at the closing. She stated, "he was the closer for Smoky Mountain Title."

Plaintiff admitted that all of the conversations with the Cooks went through her <u>realtor</u> to their <u>realtor</u>, Brewster. Plaintiff admitted that she never had any conversations directly with Brewster. Plaintiff also admitted that the Cooks never told her she had a warranty, and no one on behalf of the Cooks told Plaintiff that she had a warranty.

Plaintiff testified that she started seeing problems with the House "immediately." [*15] She stated:

It was the roof, the water seepage in through our bedroom, water seepage into the, what we call the bunker room where the water heater is down in the basement. Quite a few different things. I don't remember them all. The main thing was the roof and the flashings on the home.

Plaintiff testified about a sudden storm, which occurred in September of 2013, after she had closed and taken possesion of the House. She stated:

And all of a sudden, a storm hit, and as we were-came up from the basement, rain was pouring in between what we call the breakfast nook and the kitchen area of the home, and water seepage, you know, the ceilings were wet. It was just water everything. But that was the main spot that it was just, you could see it just pouring into the house.

Plaintiff was questioned about her claim for conspiracy, and she stated:

So I feel because of the divorce between Mr. Cook and Ms. Cook, that they needed their money immediately and that's why it was not disclosed properly to me. . . . Well, they are also friends. . . . That's my personal feeling, and the fact that Brenda Brewster and Ms. Cook are very good friends, and that Ms. Brewster's son was staying in the home out of [*16] his mouth.

Plaintiff admitted that she has no personal knowledge of any agreement between the Cooks and Brewster to engage in a conspiracy. When asked if she knew of anyone who had knowledge of the existence of the alleged conspiracy, Plaintiff stated:

As a conspiracy between them, no, but wordings of sorts that--that Ms. Cook was very well aware of the damages to the house by filing the claim and that she is friends with Brenda Brewster, so, obviously, Ms. Brewster had to know of the damages before that house was sold.

When asked if the Cooks were real estate agents or brokers, Plaintiff admitted that the House was the Cooks's residence and that she had no idea what their employment was.

Plaintiff's husband¹ also was deposed. Plaintiff's husband testified that they looked at other houses prior to looking at the House. He stated: "When we pulled up to Tranquility Lane, she was thrilled. I just kind of got out, semi out of the car and I looked at it. She was thrilled. I said, "Buy it." That's all I said." He testified about his initial inspection of the House stating:

I don't remember exactly what day. What I do remember is I inspected the house. It was approximately four hours and I went [*17] through every inch of it. . . . It's the average time. . . . Depending on the size of the home. But a three bedroom home with that kind of square footage, yes. . . . Whatever I do in the construction field and in the inspection field, I'm meticulous at it. I look at stuff that might not even be there, but I still look.

When asked to state what he found when he inspected the House, Plaintiff's husband testified:

Starting from the exterior, I saw two shingles missing. I saw torn shingles. I saw gutters hanging off the soffits, away from the soffits. I saw mortar damage around the field stone. I saw deck posts split. I saw damage to the garage door. I saw flashings over the bay windows incorrectly installed and caulked.

I saw missing screens for a window. I saw a ripped screen for a window. I saw the back of the garage that was not finished brick. I saw paint missing on the fascia of the garage side of the home.

I saw wood boring--at first I thought it was carpenter

¹ Plaintiff's husband was not a party to the purchase of the House and holds no interest in the House. As such, he is not a party to this suit.

ants, but Phil Derosia said it was wood-boring bees drilling into the deck posts of the [*18] deck on the garage side.

I located the well. I measured from the well to the area described as the septic field. . . . There was a piece of paper that showed a survey of the septic field, the location of the tank and how the field was trenched and laid. . . . I believe [that paper] was provided by Derosia.

* * *

When I walked in, the first thing I noticed was the interior of the house was not painted, it was just drywall primer. That was the first thing I noticed. It was never painted.

As I walked through the home, I noticed scratches into the hardwood appearing to be from a dog or something clawed, or maybe furniture pulled across it, but pretty well scratched up, both in the living room, the hallway and the master bedroom.

I noticed an enormous amount of light switches that was kind of odd. I noticed water damage in what they called an office room. I noticed the normal cracks where corner bead of drywall would come away from the corner. . . . That would indicate a person that wasn't a professional drywaller. . . . It's sloppy work.

* * *

I noticed in--I don't know if--I guess they refer to it as a breakfast nook, I call it the tower room, that the door in the tower room appeared to be--the [*19] frame was split and broken. It didn't lock properly whatsoever.

I noticed the back door, which was wood, weathered extremely from the outside and the frame of the inside where it locked, the frame was split.

Not anything visible as far as screw or nail pops from the drywall installation visible from the floor. I saw a lot of paint runs or I should say primer runs. . . . That's just sloppy painting.

* * *

I noticed a very foul smell in the fireplace such as a dead animal.

As I went upstairs, I saw that the floor of the bathroom upstairs was linoleum, unheard of. . . . [A]ny kind of humidity from shower or dampness will lift linoleum up off a quarter of an inch of plywood. . . . I didn't see a problem, but I saw eventually a problem if the bathroom was going to be used. . . . I saw that the venting of the main floor bathroom and the upstairs bathroom was out of square. I noticed that the light on the upstairs bathroom above the bathtub was off center.

* * *

Well, I also did notice upstairs that the electrical box was not sufficient to, again, Michigan Code or U.S. Code. I was not aware that at that time Tennessee followed something called the International Code.

I also noticed that in the upstairs [*20] that there was no egress windows, it was just regular windows. . . . For fire safety . . . a fireman with an oxygen tank must be able to go through that window without any obstruction whatsoever. . . . That is a Michigan code.

* * *

The basement then--... the only thing I saw was open insulation, totally against the Environmental Protection Agency Code. That's like breathing death, automatic cancer.

I noticed wetness on the block wall by the window by the walk-out doors. I noticed that there was no control valves whatsoever for the Sillcocks for the outside. I noticed that there was no cleanout whatsoever inside the basement for the septic system.

And, of course, still thinking about how the septic field was laid, being on a 45-degree pitch plus, I looked into the electrical box, the circuit breakers, looking for a pump thinking that maybe there was a pump installed to pump up the sewage up to it, but there was not.

The bathroom in the basement appeared to be never, never used whatsoever.

The utility room--the only think that I did notice is looking at the lower Sillcock, to drain that water heater, the seal was still on the Sillcock, which told me that the water heater was never cleaned-drained [*21] or cleaned.

I also noticed that electrical wires from the electrical box stretching across, which would include 110 and 220 lines, were just hanging from the ceiling unshielded.

I believe that's about it.

Plaintiff's husband testified that he told Plaintiff and her <u>realtor</u> "there is water damage in the house." He also stated:

There was water damage in the, what they call the business room. There was slight water damage appears, slight water damage starting in the master bedroom at the windows.

I said--I stated that the flashings around both bay windows were incorrectly installed and one of them replaced. And I went as far as sent them, when I got back to Michigan, the right way to install flashing for bay windows.

* * *

And I told [Mr. Derosia] specifically I wanted all shingles replaced. . . . All shingles. . . . Yes, on garage and home.

Plaintiff's husband agreed that he had stated that he wanted a total re-roofing.

Plaintiff's husband testified that he and Plaintiff obtained permission to place a trailer at the House two days before closing, but were told they could not "unload it because technically it wasn't our property."

Plaintiff's husband was questioned about the final inspection, and [*22] he testified:

We were asking for final inspection. That was communicated to Phil Derosia, which was being communicated to Brenda Brewster, and continuously asking and asking. This was right after the trailer was dropped off, so that was two days before closing.

The day before closing, it was the same, continuously asking for final inspection with no reply from Brenda Brewster, continually, continuously.

And then on the day of closing, we waited at the property for Phil Derosia while my wife was still in conversation by cell phone to get permission for final inspection from Brenda Brewster and still nothing. Phil Derosia did arrive at the house. Still hadn't had permission for final inspection. And something, like, 30 to 40 minutes before closing, he finally got permission.

Plaintiff's husband testified that at that point the sale of the house in Michigan had closed, and: "Money was already wired." He stated:

All I said--all I said was, "I don't have enough time to do a final inspection." I kept saying that. I walked through the home. Never had a chance to unload the trailer to get on the roof because there was a ladder in that trailer.

And, again, 30 to 40 minutes. So I walked through the [*23] home and I looked--

* * *

I walked through the home. I walked into the room known as the business room. I looked--. . . . And all was--the only thing that was done is the ceiling was just primed over. . . . Well, whoever took a roller, stuck it in primer and rolled over the spot of where the -- the spots across the ceiling where the water was. . . . I walked outside. I walked down the front porch. I leaned over the railing to look at the flashings. Nothing was done except caulked. They were not replaced. . . . I came off the porch. I walked to the street at the end of the driveway and I looked off at the roof. I saw a few shingles replaced that were miscolored. . . . They didn't match. . . . I walked around to the bay window side of the home and I stepped back and just looked and, again, I just saw caulk, an enormous amount of caulk around the flashings.

I went from there around through the back and I approached the garage. Nothing was done to the garage shingles whatsoever.

* * *

I came to my wife and Phil Derosia and they kept telling me what---"we got to go, you got to go to closing, you got to go to closing." I said, "Nothing was really done. They just painted over the water spots, they [*24] didn't do anything with the flashing except caulked them, and just replaced a couple of shingles." And it was said, "Well, at closing, you can discuss

that with Brenda Brewster and the Cooks at closing, plus you have one year if there is a problem."

When asked who told them they had one year if there was a problem, Plaintiff's husband stated: "I believe Phil Derosia said that." Plaintiff's husband did not hear any discussion about postponing or extending the closing.

Plaintiff's husband admitted that they found some bricks allegedly hidden in the woods on the day of his initial inspection. He also admitted that he observed prior to the closing that the House did not have a new roof and that the garage did not have a new roof and that he pointed these facts out to his wife. Plaintiff's husband admitted he did not get on the roof when he did the first inspection of the House. He stated that he based his demand for a new roof on the fact that he could see missing shingles, torn shingles, and curled shingles, and "water leakage inside the home" without getting on the roof.

Plaintiff's husband was asked if there was pressure for Plaintiff to close on the House, and he stated:

It was--there [*25] was pressure to close. I don't know exactly where it comes. I know it wasn't pressure from my wife, but it seemed like there was pressure to close. . . . I can't indicate who, what, where because, again, I was very frustrated, upset, especially after the effort I made of stating what should have been replaced.

Plaintiff's husband testified that the Cooks and Brewster were not at the closing. He stated that he, Plaintiff, Phil Derosia, and a gentleman from the title company were the only persons present at the closing. Plaintiff's husband admitted that it was "[f]air to say" that if there was pressure to close it came from Phil Derosia or the gentleman from the title company. When questioned about the 90-day window to close and the fact that the house in Michigan had already sold, Plaintiff's husband stated: "We weren't desperate to purchase a home. . . . I mean, we could have leased something, we could have just went to a hotel and stayed until we found one."

After a hearing, the Trial Court entered its order on March 25, 2015, granting summary judgment to the Cooks and Brewster after finding and holding, *inter alia*:

First of all, with respect to the--to the contract claims against the seller, [*26] we've got claims of--of defects in the house that the buyers bought. If you look at the contract, which is undisputed in the record under paragraph eight entitled inspections: "The parties hereto agree that in the event"--well, I'm--bottom line of it is, contract specifically provides that the buyers had the right to inspect. It goes further: "The parties hereto agree that in the event buyer shall elect a contract with a third party inspector to obtain a, quote, home inspection, unquote, as defined by Tennessee law, said inspection shall be conducted by a licensed home inspector." The buyer had the right to hire a licensed home inspector, but--but she didn't have to.

The contract goes on: "However nothing in this shall preclude buyer paragraph conducting any inspections on his/her own behalf, nor shall it preclude buyer from retaining a qualified, and if required by law, licensed professional to conduct inspection of particular system." So the buyer had the absolute right under the contract for 30 days prior to closing to inspect for herself, to hire third party inspectors, to inspect to her--to her satisfaciton, and she didn't do it, the last sentence of paragraph eight, or to [*27] the extent she didn't get inspected, it's her own fault and not that of the buyers' [sic].

And in the last sentence of paragraph eight: "In the event buyer fails to timely make such inspections and respond within said time frame as described herein, the buyer shall have forfeited any rights provided under this paragraph eight, and in such case shall accept the property in its current condition, wear and tear, accept it [sic]. That's one provision, but that's not the only provision.

When you--when you get to the buyers' final inspection form, which was executed on the date of the closing, 6/14/2013: "We the buyers, and/or our inspectors and/or our representatives." And she checked the box: "Have made the final inspection of the property and confirm it to be the same--in the same or better condition as it was on the binding agreement date, normal wear and tear accepted [sic] repairs and and all

replacements, if any, have been made to our satisfaction, and we agree to accept the property in its present condition."

Now, the plaintiff here argues that, look, we only--we only were allowed to do our final inspection 30 minutes before the closing. Taking that as absolutely true, it doesn't change [*28] the result here because they had the absolute right under the contract to inspect themselves or to hire third party inspectors for a full period of 30 days. The fact that the plaintiff was from Michigan and was trying to sell her own home in Michigan doesn't get her off the hook for having responsibility to--to--and the right and the responsibility to go ahead and inspect anytime within that 30 day period. Was it perhaps inconvenient? I'm sure it was. I'm sure it would have been, but, again, that is a matter that falls upon the plaintiffs' shoulders, not the defendants/sellers.

With respect to the -- the claims of -- of fraud here, the Court is constrained to hold that--that the sellers--and by the way, the real estate agent are entitled to summary judgment on the claims of fraud simply because there--there is no--there was no--that there's no genuine issue of material fact with respect to reasonable reliance on the part of the plaintiff. And the point there is that--and the Court has referred to some--some case law and there's a plethora of it that holds that generally speaking in an arm's length transaction, one party cannot hold the other liable for--for fraud if the information upon [*29] which the fraud claim is based was equally as available to one as it was to the other, even if it is an actual fraudulent statement or a negligent fraudulent statement or a nondisclosure, a simple nondisclosure, which may also amount to fraud in certain circumstances, but the point is either, under either of those theories.

For a plaintiff to hold a defendant liable for fraud, he's got to be able to show that I reasonably relied upon either the outright fraudulent statement, the negligent fraudulent statement or the--or the nondisclosure. And in-in Tennessee law where there is the opportunity to have discovered the fraud, whatever species of fraud it was, where there was the opportunity to discover it, then--and

you didn't discover it, then you cannot hold the other side liable for--for fraud. In other words, you've got to exercise due diligence yourself, and if you do not exercise due diligence to discover that which is there to be discovered, then you cannot have reasonably relied upon fraud even if it in fact existed before you failed to exercise due diligence.

Here--here there is no issue of fact there. There were two inspections. One immediately before the closing but--but one [*30] previous that--that was without question some four hours long and without question by the--the plaintiff's own husband, who himself is a general contractor out of--out of Michigan, and the big--the big thing here about the--about the roof and about the shingles on the roof is should they have been replaced, or was there some fraud, some nondisclosure, some covering up, assuming that there was some fraud disclosure, some covering up, and for purpose of this motion I assume that there was.

Nevertheless, was there reasonable reliance? Another reason the Court concludes that there was not. Reasonable reliance is it's undisputed that the plaintiff's own husband told her, look, that whole roof needs to be-needs to be replaced-that whole roof needs to be replaced. Well, how can you reasonably rely on anything-assuming you could otherwise reasonbly rely-how can you reasonably rely on anything thereafter when your own husband, a contractor, said, look, that whole roof needs to be replaced, in the Court's opinion you can't.

You come back to--we come back to--there is also a--a--a theory here of--of conspiracy and the--there is--the record here just contains no evidence that there was any conspiracy [*31] extent [sic] in this case at all, then so the Court holds that the--the defendants had demonstrated that the plaintiffs' proof is insufficient to--to sustain a claim on the--on the conspiracy theory.

* *

Finally--well, not finally, next to finally I should say, the duress claim, there is just, once again, is no evidence in the record of duress by theduress by the--the defendants here or any of

them. There was pressure--there was pressure, but not from the defendants really upon the plaintiffs. So, once again, the Court holds that--that the defendants have demonstrated that--that the plaintiff simply has insufficient evidence to sustain a duress claim.

Last thing, the TCPA, with respect to the--the sellers, homeowners, the Cooks, the evidence here is clear that this was an isolated sale of a--of a home by the homeowners themselves, and we know since Gansevoort versus Russell, was it, Gansevoort versus sombody, 20 odd years ago, that--that the TCPA does not apply to an isolated sale of a piece of real property by the owner of the property himself. That is to say somebody that is not in the business of selling real property, and so the plaintiffs-rather, the defendants could. The sellers [*32] are entitled to summary judgment with respect to the TCPA claim.

Now, the--the TCPA claim against Ms. Brewster--Ms. Brewster, while generally she is subject to the TCPA, they are just--the-the evidence is undisputed here that there is just no--there just was no deceptive trade or practice that--that Ms. Brewster engaged.

After the Trial Court granted them summary judgment, the Cooks and Brewster moved for attorney's fees pursuant to Tenn. Code Ann. § 47-18-109(e)(2) of the Tennessee Consumer Protection Act of 1977. The Trial Court denied the motions finding and holding that it was a close question as to the Cooks because Plaintiff may not have known when she filed suit if the Cooks were subject to the Tennessee Consumer Protection Act of 1977, and, therefore, the Trial Court would not find the claim against the Cooks to be frivolous. The Trial Court further found and held that while Brewster was subject to the Tennessee Consumer Protection Act of 1977 as a real estate agent, the fact that Brewster prevailed on her motion for summary judgment did not necessarily make Plaintiff's claims frivolous.

Plaintiff and Farmers Insurance voluntarily dismissed their claims against each other. Plaintiff appeals to this Court.

Discussion [*33]

Although not stated exactly as such, Plaintiff raises

two issues on appeal: 1) whether the Trial Court erred in granting the Cooks and Brewster summary judgment; and, 2) whether the Trial Court erred in refusing to allow Plaintiff to conduct additional discovery before ruling on the motions for summary judgment. The Cooks raise an issue with regard to whether the Trial Court erred in denying their motion for attorney's fees pursuant to <u>Tenn. Code Ann. § 47-18-109(e)(2)</u>².

We first consider whether the Trial Court erred in granting the Cooks and Brewster summary judgment. As our Supreme Court has instructed:

HN2 Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any [*34] material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997); see also Abshure v. Methodist Healthcare-Memphis Hosps., 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. Estate of Brown, 402 S.W.3d 193, 198 (Tenn. 2013) (citing Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 471 (Tenn. 2012)).

* * *

HN3 [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by

² Brewster failed to raise this as an issue on appeal. Although Brewster mentions her demand for attorney's fees in the conclusion section of her brief, she failed to include this issue in her statement of the issues raised on appeal. "Courts have consistently held that *HN1* issues must be included in the Statement of Issues Presented for Review required by *Tennessee Rules of Appellate Procedure 27(a)(4)*. An issue not included is not properly before the Court of Appeals." *Hawkins v. Hart, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001)*.

demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. We reiterate that HN4 a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported [*35] by a specific citation to the record." Id. HN5 When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56. "set forth specific facts" at the summary judgment stage "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S. Ct. *1348.* The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, HN6 after adequate time for discovery has been provided, summary judgment should granted if the nonmoving [*36] party's evidence at the summary judgment stage is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04. 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced,

despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Cntr. of Memphis, MPLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015).

Plaintiff's complaint alleged claims for breach of contract, intentional <u>misrepresentation</u>, conspiracy, and violation of the Tennessee Consumer Protection Act of 1977. We will consider each of these claims in turn.

Considering Plaintiff's claim for breach of contract first, we note that with regard to Brewster, Plaintiff admitted that she had no contract whatsoever with Brewster. As Plaintiff had no contract with Brewster, it follows that Plaintiff cannot prove a breach of contract claim against Brewster. Brewster made a properly supported motion for summary judgment demonstrating that Plaintiff's evidence was insufficient to establish her claim for breach of contract, and Brewster was entitled to summary judgment on this claim as granted by the Trial Court.

With regard to the Cooks, Plaintiff alleged that the Cooks were [*37] in breach of contract for failing to fulfill the three contingencies contained in the Contract, *i.e.*, "Fix/paint white trim . . . ," "Reflash/repair bow window in the office (water stains on ceiling)-as there is water intrusion," and "Repair/replace the roof shingles where needed." Plaintiff, however, signed the Final Inspection Form, which stated that she, or her representatives had:

made the final inspection of the Property and confirm it to be in the same or better condition as it was on the Binding Agreement Date, normal wear and tear excepted, and all repairs and replacements, if any, have been made to our satisfaction, and we agree to accept the Property in its present condition.

Plaintiff testified that she executed the Final Inspection Form voluntarily and of her own free will. The Final Inspection Form provided that upon execution it became a part of the Contract "as if quoted therein verbatim." The Final Inspection Form clearly and unambiguously provides that the House was "in the same or better condition" than it was on the date that the Contract was executed, that any repairs or replacements had been made to Plaintiff's satisfaction, and that Plaintiff agreed to

accept the [*38] House "in its present condition."

As this Court explained in *Quebecor Printing Corp. v. L & B Mfg. Co.*:

HN7 In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc., 78 S.W.3d 885, 889-90 (Tenn. 2002)(citing Guiliano v. Cleo, Inc., 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." Planters Gin Co., 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, Corbin on Contracts, § 24.30 (rev. ed. 1998)); Doe v. HCA Health Servs. of Tenn., Inc., 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. Planters Gin Co., 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." Id. (quoting 17 Am.Jur.2d, Contracts, § 245).

HN8 This Court's initial task in construing [*39] the [contract] at issue, as was the Trial Court's, is to determine whether the language of the contract is ambiguous. Planters Gin Co., 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. Id. A contract is ambiguous only when its meaning is uncertain and may fairly be understood in more than one way. Id. (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. Id. Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. Id.

* * *

HN9 It is not the role of this Court "to make a different contract than that executed by the parties." Posner v. Posner, No. 02A01-9710-CV-00249, 1997 Tenn. App. LEXIS 930, at *6, 1997 WL 796216, at *2-3 (Tenn. Ct. App. Dec. 30, 1997), no appl. perm. appeal filed. See also, e.g., Central Drug Store v. Adams, 184 Tenn. 541, 201 S.W.2d 682 (1947). "In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought to be harsh or unjust." Tenpenny v. Tenpenny, No. 01-A-01-9406-CV-00296, 1995 Tenn. App. LEXIS 105, at *15, 1995 WL 70571, at *6 (Tenn. Ct. App. Feb. 22, 1995), appl. perm. appeal denied July 3, 1995.

<u>Quebecor Printing Corp. v. L & B Mfg. Co., 209</u> S.W.3d 565, 578-81 (Tenn. Ct. App. 2006).

Plaintiff cannot now claim that the repairs to be done pursuant to the Contract were not done because Plaintiff agreed via the Final Inspection Form that any repairs or replacements had been [*40] made to her satisfaction. Plaintiff attempts to utilize parol evidence to vary the terms of the Contract. As the Contract is clear and unambiguous, Plaintiff cannot use parole evidence to vary the clear and unambiguous written terms of the Contract. Given all this, the Cooks made a properly supported motion for summary judgment that Plaintiff's evidence was demonstrating insufficient to establish her claim for breach of contract, and the Cooks were entitled to summary judgment on this claim as granted by the Trial Court.

With regard to Plaintiff's claim for intentional *misrepresentation*, Plaintiff alleged that the Cooks failed to repair the House as agreed in the Contract, that the Cooks and Brewster covered over and hid defects and damages, and that the Cooks and Brewster *misrepresented* facts about the septic permit and the septic system. In her brief on appeal, Plaintiff alleged that the Cooks and Brewster represented to her that the repairs pursuant to the Contract had been done and that Plaintiff relied upon these representations and proceeded to close on the House and take possession.

Our Supreme Court has instructed as to the elements which must be proven in order to prevail on [*41] a claim for intentional *misrepresentation* stating:

Our current common-law claim for intentional misrepresentation is the successor to the common-law action for deceit. First Nat'l Bank of Louisville v. Brooks Farms, 821 S.W.2d 925, 927 (Tenn. 1991). In fact, "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" are different names for the same cause of action. Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 904 n.1 (Tenn. 1999). In this opinion, we will refer to the cause of action as a claim for intentional misrepresentation, and, in order to avoid confusion, we suggest that this term should be used exclusively henceforth. See Rogers v. Louisville Land Co., 367 S.W.3d 196, 205 (Tenn. 2012) (noting that "intentional infliction of emotional distress" and "outrageous conduct" were different names for the same tort and stating that the tort should be referred "intentional infliction of emotional to as distress").

HN10 To recover intentional for misrepresentation, a plaintiff must prove: (1) that the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that either knew the defendant that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that [*42] the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation. Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d at 311 (quoting Metropolitan Gov't of Nashville & Davidson Cnty. v. McKinney, 852 S.W.2d 233, 237 (Tenn. Ct. App. 1992)); see also 8 Tennessee Practice: Tennessee Pattern Jury Instructions—Civil § 8.36, at 357 (11th ed. 2011).

Hodge v. Craig, 382 S.W.3d 325, 342-43 (Tenn. 2012) (footnotes omitted). Thus, in order to prevail

on her claim, Plaintiff must prove that she reasonably relied upon a representation made by the Cooks and Brewster.

As discussed more fully above, Plaintiff executed the Final Inspection Form in connection with the closing, which stated that Plaintiff had made a final inspection and found the House to be in the same or better condition than it had been when the Contract first was executed, that all repairs or replacements had been made to Plaintiff's satisfaction, and that Plaintiff accepted the House in its present condition. As the Contract that Plaintiff voluntarily and of her own free will executed stated that the repairs had been made to Plaintiff's satisfaction and that Plaintiff was accepting the House in its present condition, Plaintiff cannot have reasonably relied upon any representations made by the Cooks or Brewster with regard to repairs.

Furthermore, [*43] we note that even though Plaintiff signed the Final Inspection Form stating that she did do a final inspection, she complains that she was not allowed a full and final inspection of the House. Both Plaintiff and her husband testified, however, that they could tell from the final inspection that they did do on the day of closing that the repairs Plaintiff and her husband had expected would be done had not been done. Plaintiff testified that areas which were to have been repaired pursuant to the Contract could be seen from the exterior of the House and that they could see that the expected repairs had not been done. Plaintiff's husband testified that he told Plaintiff that "Nothing was really done. They just painted over the water spots, they didn't do anything with the flashing except caulked them, and just replaced a couple of shingles." Thus, Plaintiff and her husband saw for themselves prior to closing that repairs had not been done. As such, Plaintiff cannot have resonably relied upon any representations made by the Cooks and Brewster that repairs had been done because Plaintiff knew otherwise. The Cooks and Brewster made properly supported motions for summary judgment negating [*44] an essential element of Plaintiff's claim for intentional *misrepresentation*. The Cooks and Brewster were entitled to summary judgment on this claim as granted by the Trial Court.

Turning now to Plaintiff's claim for conspiracy, we note that this Court explained in *Kincaid v. SouthTrust Bank*:

HN11 The elements of a cause of action for civil conspiracy are: (1) a common design between two or more persons, (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) resulting injury. Morgan v. Brush Wellman, Inc., 165 F.Supp.2d 704, 720 (E.D. Tenn. 2001). Conspiracy claims must be pled with some degree of specificity. McGee v. Best, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002) (citing Haynes v. Harris, No. 01A01-9810-CV-00518, 1999 Tenn. App. LEXIS 310, 1999 WL 317946, at *2 (Tenn. Ct. App. 1999)) (citations omitted). Conclusory allegations, however, unsupported by material facts will not be sufficient to state such a claim. Id.

Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 38 (Tenn. Ct. App. 2006).

Plaintiff testified that she had no evidence whatsoever to support her claim for conspiracy other than her vague 'feelings' due to the fact that the Cooks and Brewster allegedly were friends. This feeling alone is simply and completely insufficient to sustain a claim for conspiracy. The Cooks and Brewster made properly supported motions for summary judgment demonstrating that Plaintiff's evidence was insufficient [*45] to establish her claim for conspiracy, and the Cooks and Brewster were entitled to summary judgment on this claim as granted by the Trial Court.

We next consider Plaintiff's claim of violation of the Tennessee Consumer Protection Act of 1977 ("TCPA").

With regard to the TCPA, our Supreme Court has explained:

HN12 In the context of a sale of real property, real estate agents and brokers selling houses "in the course of the real estate trade" are covered by the Tennessee Consumer Protection Act. Ganzevoort v. Russell, 949 S.W.2d [293] at 297 [(Tenn. 1997)]. However, we have also held that the Act does not apply to "sellers [who are] not in the business of selling property as owners or brokers" and, therefore, that "persons making an isolated sale of their home are not covered." Ganzevoort v. Russell, 949 S.W.2d at 298.

Fayne v. Vincent, 301 S.W.3d 162, 173 (Tenn. 2009). Given this, the TCPA does not apply to the Cooks who were involved in the isolated sale of their residence. The Cooks made a properly summary iudament supported motion for demonstrating that Plaintiff's evidence was insufficient to establish her claim for violation of the TCPA, and the Cooks were entitled to summary judgment on this claim as granted by the Trial Court.

Brewster, however, as a professional real estate agent was subject to the TCPA. As pertinent, <u>Tenn.</u> <u>Code Ann. § 47-18-109</u> of the TCPA provides: [*46]

Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice described in § 47-18-104(b) and declared to be unlawful by this part, may bring an action individually to recover actual damages.

Tenn. Code Ann. §47-18-109(a)(1) 2013.

The Trial Court found that Plaintiff had not alleged any unfair or deceptive act by Brewster. Plaintiff herself testified that she never had any conversation whatsoever with Brewster. Brewster made a properly supported motion for summary judgment demonstrating that Plaintiff's evidence was insufficient to establish her claim for violation of the TCPA, and Brewster was entitled to summary judgment on this claim as granted by the Trial Court.

We next consider whether the Trial Court erred in refusing to allow Plaintiff to conduct additional discovery before ruling on the motions for summary judgment. Initially, Plaintiff did not file a response to the motions for summary judgment, but instead filed a motion to continue the hearing on the motions for summary judgment. Plaintiff sought the continuance to allow her [*47] to take the deposition of a representative of Farmers Insurance. Allegedly, Farmers Insurance was the insurance carrier for the Cooks when the Cooks owned the House, and the Cooks had made a claim for hail damage to the roof of the House a few years prior to Plaintiff and the Cooks entering into the Contract. The Trial Court denied Plaintiff the opportunity to conduct additional discovery, but did grant Plaintiff an additional thirty

days to respond to the motions for summary judgment.

HN13 "Where, as here, a party seeks to continue a motion for summary judgment pursuant to <u>Tennessee Rule of Civil Procedure 56.07</u>, we review the trial court's refusal to grant a continuance for an abuse of discretion." <u>Regions Fin. Corp. v. Marsh USA, Inc., 310 S.W.3d 382, 401 (Tenn. Ct. App. 2009)</u>. This Court has explained:

Indeed, our Supreme Court has stated:

HN14 Where there is [the] slightest possibility that [the] party opposing [a] motion for summary judgment has been denied [an] opportunity to file affidavits, take discovery depositions or amend, by disposition of motion for summary judgment without 30 day interval following filing of motion, it will be necessary to remand case to cure such error.

<u>Craven v. Lawson, 534 S.W.2d 653 (Tenn. 1976)</u>. Further, this Court has stated that one method of defeating a properly supported motion for summary judgment is through a request [*48] for more discovery:

[Nonmoving] parties may deflect a summary judgment motion challenging their ability to prove an essential element of their case by (1) pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) rehabilitating evidence challenged by the moving party, (3) producing additional evidence that creates a material factual dispute, or (4) submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional time for discovery. Rains v. Bend of the River, 124 S.W.3d 580, 587-88 (Tenn. Ct. App. 2003) (citing Staples v. CBL & Assoc., Inc., 15 S.W.3d 83, 88-89 (Tenn. 2000); McCarley v. West Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998)).

Regions Financial Corp. v. Marsh USA, Inc., 310 S.W.3d 382, 401 (Tenn. Ct. App. 2009) (emphasis added). The interest in full discovery, however, must be balanced against the purpose of summary judgment: "[to] provide[] a quick, inexpensive way to conclude cases when there exists no dispute regarding the material facts." Hannan v. Alltel Publishing Co., 270 S.W.3d 1, 13 (Tenn. 2008). Indeed, "[t]he philosophy of summary judgment is to avoid a needless trial in a case

where, although the pleadings may indicate disputes over factual issues, facts outside the pleadings if known would clearly show that there is 'no genuine issue as to any material fact.'" <u>Id. at 12</u> (quoting Donald F. Paine, Recent Developments in Tennessee Procedure: The New Tennessee Rules of Civil Procedure, 37 Tenn. L. Rev. 501, 516 (1970)).

* * *

[T]his Court has previously held that **HN15** a trial court's decision to deny additional time [*49] for discovery, in order for the non-moving party to meet summary judgment, "must be viewed in the context of the issues being tried and the posture of the case at the time the request for discovery is made." Regions, 310 S.W.3d at 401 (citing Price v. Mercury Supply Co., 682 S.W.2d 924, 935 (Tenn. Ct. App. 1984)). Accordingly, a trial court only errs in refusing to grant additional time for discovery prior to the hearing on a motion for summary judgment when the non-moving party can show that "the requested discovery would have assisted [the nonmoving party] in responding to [the moving party's] motion for summary judgment." Regions, 310 S.W.3d at 401 (citing Simmons v. State Farm Gen. Ins. Co., No. W2003-02643-COA-R3-CV, 2004 Tenn. App. LEXIS 802, 2004 WL 2715341, at *5 (Tenn. Ct. App. Nov. 24, <u>2004)</u>).

Cardiac Anesthesia Servs., PLLC v. Jones, 385 S.W.3d 530, 536-38 (Tenn. Ct. App. 2012).

In the case now before us, the requested discovery, i.e., the deposition of a representative of Farmers Insurance, would not have assisted Plaintiff in responding to the motions for summary judgment. Any information that could have been gleaned with regard to a claim made by the Cooks to Farmers Insurance with regard to the roof of the House prior to Plaintiff and the Cooks entering into the Contract would have had no relevance whatsoever to whether Plaintiff could prove her claims against the Cooks and Brewster, as discussed fully above. Although Plaintiff knew that there were problems [*50] with the roof prior to closing, as discussed more fully above, Plaintiff signed the Final Inspection Form accepting the House in its present condition and did so with the full knowledge that the repairs had not been done. As such, anything that Farmers Insurance knew about the roof of the House and its condition some years prior to Plaintiff and the Cooks entering into the Contract was immaterial to the issues at hand. Since the requested additional discovery would not have assisted Plaintiff in responding to the

motions for summary judgment, we find no error in the Trial Court's denial of Plaintiff's motion.

Finally, we consider the issue raised by the Cooks regarding whether the Trial Court erred in denying their motion for attorney's fees pursuant to <u>Tenn. Code Ann.</u> § 47-18-109(e)(2), which provides:

In any private action commeced under this section, upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable attorney's fees and costs.

Tenn. Code Ann. § 47-18-109(e)(2) (2013). HN16 We review a trial court's decision with regard to whether to award attorney's fees pursuant [*51] to Tenn. Code Ann. § 47-18-109(e)(2) for abuse of discretion. Wagner v. Fleming, 139 S.W.3d 295, 304 (Tenn. Ct. App. 2004).

In the instant case, the Trial Court found that it was a close question as to whether Plaintiff's TCPA claim against the Cooks was frivolous. The Trial Court found this to be so because even though the Cooks were not subject to the TCPA, Plaintiff may not have known this when she filed her suit and may have needed to conduct discovery in order to determine if the Cooks

were merely homeowners involved in an isolated sale of their residence, or not. We agree that this was a close question because the case had reached only the summary judgment stage when the Trial Court made its ruling with regard to Plaintiff's TCPA claims. If the case had progressed to trial, and Plaintiff had continued to pursue her TCPA claim against the Cooks after learning that they were homeowners involved in an isolated sale of their residence and, therefore, not subject to the TCPA, the determination of whether Plaintiff's claim could be considered frivolous may well have had a different outcome. Such, however, is not the situation in the case now before us. Given the posture of the case now before us, we cannot find that the Trial Court abused its discretion when it refused to hold [*52] Plaintiff's TCPA claim against the Cooks to be frivolous and, therefore, refused to award the Cooks attorney's fees pursuant to Tenn. Code Ann. § 47-18-109(e)(2).

Given all of the above, we affirm the Trial Court's March 25, 2015 order.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the appellant, Kimberly E. Lapinsky, and her surety.

D. MICHAEL SWINEY, CHIEF JUDGE

End of Document

Morgan Dev., LLC v. Morrow

Court of Appeals of Tennessee, at Knoxville

November 9, 2010, Session; February 23, 2011, Filed

No. E2010-00610-COA-R3-CV

Reporter

2011 Tenn. App. LEXIS 81; 2011 WL 662948

MORGAN DEVELOPMENT, LLC, ET AL. v. RAYMOND W. MORROW, ET AL.

Subsequent History: Appeal denied by <u>Morgan Dev., LLC v. Morrow, 2011 Tenn. LEXIS 649 (Tenn., July 14, 2011)</u>

Prior History: [*1] <u>Tenn. R. App. P. 3</u> Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded. Appeal from the Circuit Court for Roane County. No. 13484. Russell Simmons, Jr., Judge.

Disposition: Judgment of the Circuit Court Affirmed; Case Remanded.

Core Terms

Buyers, Seller, Brokers, summary judgment, representations, rights, title search, disclaimer, trial court, verify, moving party, <u>misrepresentation</u>, boundaries, genuine issue of material fact, summary judgment motion, nonmoving, parties

Case Summary

Procedural Posture

Plaintiff-appellant prospective buyer (Buyer) sued defendant-appellee real estate brokers (Brokers), seller, and property owner for negligent business representation and fraud. The Circuit Court for Roane County (Tennessee) granted Brokers' motion for summary judgment and dismissed the claims against the remaining defendants. Buyer appealed.

Overview

The real estate transaction failed to close because the seller never acquired rights in the property. Buyers argued, inter alia, that Brokers had knowledge of the seller's lack of rights in the property, which created a genuine issue of material fact for a factfinder to resolve.

Therefore, Buyers argued that the trial court erred when it granted Brokers' motion for summary judgment in light of this unresolved issue. The court of appeals disagreed. Brokers' motion for summary judgment affirmatively negated essential elements of Buyers' claims of negligent *misrepresentation* and fraud. Through a deposition and an affidavit, Brokers demonstrated that they had no knowledge of the seller's deficient rights in the Property. By showing a lack of knowledge on their part, Brokers made a properly supported motion for summary judgment triggering Buyers' burden to produce evidence of specific facts establishing that issues of material fact existed. Buyers offered an affidavit that a broker made a representation about the seller's rights in the property, but, the affidavit did not show why that representation was actionable under a theory of negligent *misrepresentation* or fraud.

Outcome

The judgment was affirmed and the case was remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1 In reviewing a trial court's grant of a motion for summary judgment, an appellate court must determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Its inquiry involves only a question of law with no presumption of correctness attached to the trial court's judgment. Under <u>Tenn. R. Civ. P. 56.04</u>, summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Civil Procedure > ... > Summary Judgment > Evidentiary

Considerations > Absence of Essential Element

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN2 In Tennessee, the moving party who does not bear the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. A conclusory assertion is not enough to shift the burden. It is not enough for the moving party to cast doubt on a party's ability to prove an element at trial.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN3 A properly supported motion for summary judgment demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. If the moving party fails to make a properly supported motion, the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered, and the motion for summary judgment fails. If the moving party makes a properly supported motion, then the non-moving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Contracts Law > Contract Interpretation > Intent

HN4 The interpretation of a contract is a matter of law requiring de novo review on appeal. When the language of a contract is plain and unambiguous, courts determine the parties' intention from the four corners of the contract, interpreting and enforcing the contract as written. If the language is clear and unambiguous, the literal interpretation of the language controls the outcome of the contract disputes. Appellate courts construe all provisions of a contract in harmony with each other, if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a single contract.

Torts > ... > Fraud & <u>Misrepresentation</u> > Negligent <u>Misrepresentation</u> > Elements

HN5 In cases involving claims of negligent business representations, a plaintiff must establish: One who, in the course of his business, profession or employment, or in any other transaction in which he has 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 the information if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Torts > ... > Fraud & <u>Misrepresentation</u> > Actual Fraud > Elements

HN6 In actions for fraud, a plaintiff must prove four elements: (1) an intentional <u>misrepresentation</u> of a material fact; (2) knowledge of the representation's falsity; (3) an injury caused by reasonable reliance on the representation; and (4) the <u>misrepresentation</u> involves a past or existing fact. In fraud cases, nondisclosure can be actionable when a duty to disclose exists and the undisclosed information is material.

Counsel: Raymond E. Lacy and Anya R. East, Knoxville, Tennessee, for the appellants, Morgan Development, LLC and Del Morgan.

Bill W. Petty and Anne Greer, Knoxville, Tennessee, for the appellees, Realty Executives Associates, George Dykeman, and Steve Fogarty d/b/a Realty Executives Associates, Northshore Office.

Johnny V. Dunaway, LaFollette, Tennessee, for the appellee, Raymond W. Morrow. ¹

Charles D. Mounger, Jr., Pro se appellee. ²

Judges: JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Opinion by: JOHN W. McCLARTY

Opinion

This appeal involves a failed real estate transaction.

¹ Mr. Morrow did not file a brief for this appeal.

² Mr. Mounger also did not file a brief for this appeal.

Real estate brokers and Raymond Morrow ("Seller") entered into an agreement to show an unlisted property. Seller did not own the property, but he claimed to have the property under contract with the owner. After the brokers showed the property [*2] to Development and Del Morgan ("Buyers"), Buyers and Seller entered into an agreement for the sale of the property. The transaction was never completed because Seller could not deliver marketable title. Buyers initiated a lawsuit against the brokers along with Seller and the owners of the property, alleging negligent business representation and fraud. The brokers moved for summary judgment. The trial court granted summary judgment and dismissed Buyers' suit against the brokers because the purchase agreement included a disclaimer. Buyers appeal. We affirm.

OPINION

I. FACTUAL BACKGROUND

At issue in this matter is a parcel of land consisting of 1, 242 acres ("the Property") in Roane County, Tennessee. On January 1, 2005, Seller entered into an Agreement To Show Unlisted Property ("UPA") with George "Chip" Dykeman, who worked as a real estate broker for Realty Executives Associates, Inc. ("REA"). Mr. Dykeman worked as an independent contractor from REA's Northshore Office where Steve Fogarty served as the managing broker (collectively, "Brokers").

By signing the UPA, Seller represented that he "presently has title to the Property or has full authority to enter into the Agreement." According [*3] to Brokers, Seller met with Mr. Dykeman on several occasions about locating investors for the Property. In those meetings, Seller claimed that he and Eagle Rock Properties, Inc. ("Eagle Rock") had the Property under contract with the owner, Charles D. Mounger, Jr.

Pursuant to the UPA, Mr. Dykeman showed the Property to Buyers ³. After viewing the Property, Buyers and Seller executed a Lot/Land Purchase Sale Agreement ("PSA") on February 18, 2005. Seller made repeated representations that he had a contract to purchase the Property, and Mr. Dykeman believed that Seller had the authority to sell the Property. Based on these representations, Buyers agreed to enter the PSA. The actual record owner of the Property was Katherine N. Mounger. Unbeknownst to Buyers and Brokers,

³ Mr. Morgan is sole member and chief **[*4]** manager of Morgan Development, LLC.

Charles Mounger was not the sole owner of the Property; Ms. Mounger passed away leaving the Property to three heirs including Charles Mounger. Buyers claim that they could not ascertain Seller's interest in the Property by independent means and that they relied on Seller's and Brokers' representations. Buyers claim that they intended to market the Property immediately after the sale. ⁴

The transaction failed to close because Seller never acquired rights in the Property. Thus, Seller could not deliver marketable title for the Property. Thereafter, Buyers filed a suit against Seller, Eagle Rock, REA, Mr. Dykeman, Mr. Fogarty, Charles D. Mounger, Jr., E. Jay Mounger, Katherine Mounger Lasater, and the Estate of Katherine Mounger ("Mounger Estate"). 5 Buyers alleged negligent misrepresentation and fraud against Brokers, Seller, and Eagle Rock. Brokers then filed a motion for summary judgment for which a hearing was held in September 2008. After hearing the evidence, the trial court granted summary judgment in favor of Brokers and dismissed Buyers' claims. The trial court later dismissed the claims, without prejudice, against the remaining defendants, Seller and Eagle Rock. With the entry of dismissal against Seller and Eagle Rock, there was a final and appealable judgment and Buyers' appeal ensued. On appeal, Buyers challenged the trial court's grant of summary judgment in favor of Brokers.

II. ISSUE

We consolidate and restate the issues raised by Buyers, as follows:

Whether the trial court erred in granting summary judgment in favor of Brokers.

III. STANDARD OF REVIEW

HN1 In reviewing a trial court's grant of a motion for

⁴ From the record, it is unclear how the Buyers intended to market the Property if the transaction were completed.

⁵ E. Jay Mounger, Katherine Mounger [*5] Lasater, and the Mounger Estate (collectively, "Mounger Defendants") filed a motion to dismiss Buyers' claims, alleging that the complaint failed to state a cause of action. Additionally, in the motion to dismiss, they noted that in a separate lawsuit involving Seller, Eagle Rock, and the Mounger Defendants, the trial court held that Seller had no contractual relationship concerning the Property. Soon thereafter, Buyers filed a voluntary non-suit, and the trial court dismissed the Mounger Defendants by order of voluntary non-suit.

summary judgment, this court must determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000). Our inquiry involves only a question of law with no presumption of correctness attached to the trial court's judgment. Id. Under Tenn. R. Civ. P. 56.04, "[s]ummary judgment is appropriate when the moving party can show that there is no genuine issue of material fact [*6] and that it is entitled to judgment as a matter of law." Hannan v. Alltel Publ'g, 270 S.W.3d 1, 5 (Tenn. 2008) (citing Tenn. R. Civ. P. 56.04; Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993)). HN2 In Tennessee, the moving party who does not bear the burden of proof at trial must either:

- (1) affirmatively negate an essential element of the nonmoving party's claim; or
- (2) show that the nonmoving party cannot prove an essential element of the claim at trial.

Hannan, 270 S.W.3d at 9. A "conclusory assertion" is not enough to shift the burden. <u>Id. at 5</u> (quoting <u>Byrd, 847 S.W.2d at 215</u>). It is not enough for the moving party to "cast doubt on a party's ability to prove an element at trial." <u>Hannan, 270 S.W.3d at 8</u>.

Therefore, HN3 a properly supported motion for summary judgment demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. See Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 83 (Tenn. 2008); see also Staples, 15 S.W.3d at 88; McCarley v. W. Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998). If the moving party fails to make a properly supported motion, the non-movant's burden to produce either supporting affidavits [*7] or discovery materials is not triggered, and the motion for summary judgment fails. See Martin, 271 S.W.3d at 83. If the moving party makes a properly supported motion, then the nonmoving party is required to produce evidence of specific facts establishing that genuine issues of material fact exist. Id. at 84 (supporting citations omitted).

IV. DISCUSSION

Buyers challenge the trial court's grant of summary judgment in favor of Brokers. Buyers contend that Brokers had knowledge of Seller's lack of rights in the Property thereby creating a genuine issue of material fact for a factfinder to resolve. Buyers argue that summary judgment was inappropriate in light of this unresolved issue.

The trial court granted the motion for summary judgment because Brokers "had no knowledge that [Seller] did not have the authority to sell the subject property. . . ." The trial court also found that Buyers signed the PSA that included "a disclaimer relating to the <u>realtors</u>' obligation to the buyer and the seller." As a result, the trial court dismissed Buyers' claims against REA, Mr. Dykeman, and Mr. Fogarty.

The disclaimer that the trial court noted is contained in Paragraph Seven of the PSA. Paragraph Seven [*8] provides:

Disclaimer. It is understood and agreed that the real firms estate and real estate licensee(s) representing or assisting the Seller or the Buyer are not parties to their Agreement and do not have or *liability* assume for the performance nonperformance of Seller or Buyer. Buyer and Seller agree that the Brokers shall not be responsible for any of the following, but not limited to, those matters which could have been revealed through a survey, flood certification, title search or inspection of the Property; for the necessity or cost of any repairs to the Property, any portion thereof, or any item therein; for the necessity or cost of any repairs to the Property; for hazardous or toxic materials; for the tax or legal consequences of this transaction; for the availability, capability, and/or cost of utilities, sewer, septic, or community amenities; for applicable boundaries of school districts or other school information. . .if any of these matters or any matters are of concern to them, they shall seek independent expert advice relative thereon.

HN4 The interpretation of a contract is a matter of law requiring de novo review on appeal. Guiliano v. Cleo, Inc., 995 S.W.2d 88, 95 (Tenn. 1999). [*9] When the language of a contract is plain and unambiguous, courts "determine the parties' intention from the four corners of the contract, interpreting and enforcing [the contract] as written." Union Realty Co. v. Family Dollar Stores of Tenn., Inc., 255 S.W.3d 586, 591 (Tenn. Ct. App. 2007) (citing Int'l Flight Ctr. v. City of Murfreesboro, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000)). If the language is clear and unambiguous, "the literal interpretation of the language controls the outcome of the contract disputes." Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 890 (Tenn. 2002). We construe all provisions of a contract in harmony with each other, "if such construction can be reasonably made, so as to avoid repugnancy between the several provisions of a

single contract." <u>Rainey v. Stansell, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992).</u>

Applying those principles to the contract at issue in this case, the language of the PSA is clear and unambiguous. Under the PSA, Brokers assumed no obligations relating to the title search. The disclaimer provision outlines that Brokers were not required to ensure the performance of either party to the However, Buyers contend transaction. [*10] that Brokers' duty to verify title was separate and independent from Brokers' duty to verify the existence of a valid contract establishing Seller's rights in the Property. While conceding that Brokers did not have a duty to verify the Property's title, Buyers assert that Mr. Dykeman, as a real estate agent, had a duty of due care when making representations regarding Seller's rights in the Property. They claim that Seller's rights in the Property were not a fact readily ascertainable by a prospective buyer. Buyers cite Haynes v. Cumberland Builders, Inc., 546 S.W.2d 228 (Tenn. Ct. App. 1976) in support of their contention. In Haynes, this court held that a real estate agent for the defendant builder was "under an obligation to use due care in learning what the actual boundaries of the property were before he made representations concerning those boundaries." 546 S.W.2d at 232. Similarly, Buyers argue that Brokers were under a duty of due care because a title search would not have revealed Seller's relationship with the Property. We disagree.

We reject the argument advanced by Buyers for two key reasons. First, for Buyers' argument to prevail, we would have to adopt a narrow reading [*11] of the PSA's disclaimer provision. The disclaimer provision exempts Brokers from *liability* for the nonperformance of a party and those "matters which could have been revealed" through a title search. Here, while a title search would not have revealed Seller's rights in the Property, Buyers entered this agreement based on Seller's promise to perform the delivery of marketable title. By signing the PSA, Buyers agreed to rely on Seller's promise to perform and accepted that Brokers would not be responsible for Seller's failure to perform. Further, because a title search would have revealed the true owner was not Seller, Buyers took a gamble by accepting the terms of the PSA with the knowledge that a title search would not verify Seller's interest in the Property. Under the PSA, Brokers were under no legal obligation to verify the title or Seller's interest in the title. The disclaimer provision of the PSA evidences Brokers' intent to insulate themselves from liability and places the responsibility of exercising due diligence on the

parties to the transaction. To adopt Buyers' position requires this court to ignore the clear language of the PSA.

Second, Buyers' reliance on Haynes is misplaced. [*12] In that case, the real estate agent made representations concerning the boundaries of the property without first learning the actual boundaries. 546 S.W.2d at 232. The agent worked on behalf of the defendant contractor, who mistakenly placed the boundary line, and this court held that the defendant contractor was liable for the agent's negligent misrepresentations. Id. The facts of the instant case are distinguishable from Haynes. Unlike Haynes, Buyers signed the PSA which included a disclaimer of Brokers' obligation to verify certain characteristics of the Property including the boundaries and the title. Further, the Haynes court found that it was reasonable for buyers to rely on the agent's representations. Id. Here, Buyers' concession that a title search would not verify Seller's rights in the Property begs the question of whether it was reasonable to rely on the representations that Seller held rights to the Property. A title search verifies ownership and uncovers any defects with a property's title. The PSA's disclaimer provides that Brokers were not responsible for uncovering any defects concerning the Property's title through a title search. Therefore, it follows that Buyer's [*13] reliance on Brokers' alleged representations about the title, including Seller's rights in the Property, was not justifiable. By acknowledging that Brokers were not under any duty to uncover the problems with the title, Buyers implicitly admit that any reliance on those unsupported representations was not iustifiable.

HN5 In cases involving claims of negligent business representations, a plaintiff must establish:

One who, in the course of his business, profession or employment, or in any other transaction in which he has 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 the information if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977); see also Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997). HN6 In actions for fraud, a plaintiff must prove four elements: (1) an intentional misrepresentation of a material fact; (2) knowledge of the representation's

falsity; (3) an injury caused by reasonable reliance on the representation; and (4) the *misrepresentation* [*14] involves a past or existing fact. *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank, 835 S.W.2d 25, 28 (Tenn. Ct. App. 1992)* (citation omitted). In fraud cases, nondisclosure can be actionable when a duty to disclose exists and the undisclosed information is material. *Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992)*.

In the instant case, Brokers' motion for summary judgment affirmatively negated essential elements of Buyers' claims of negligent *misrepresentation* and fraud. Through Mr. Dykeman's deposition and Mr. Fogarty's affidavit, Brokers demonstrated that they had no knowledge of Seller's deficient rights in the Property. In his deposition, Mr. Dykeman testified that he met with Seller several times about the Property. Mr. Dykeman explained that he "was told Mr. Mounger was the owner of the [P]roperty and Butch Morrow [Seller] and Eagle Rock had the [P]roperty tied up under contract." Mr. Dykeman further stated that he "did not know anything about the Mounger's estate or any other interests in the [P]roperty." Mr. Fogarty also provided through his affidavit that he was unaware of the details of the transaction. Mr. Fogarty averred:

That I had no specific knowledge [*15] of the transaction between Mr. Morrow [Seller] and Mr. Morgan until sometime, probably late March or early April of 2005. Chip Dykeman came to me relaying that [Seller] was not returning his calls and he was having difficult contacting Morrow, and asked me for advice.

As the managing broker for the REA office, Mr. Fogarty handled administrative duties such as ensuring that all brokers maintained licensure and complied with

statutory requirements. Thus, Mr. Fogarty had no involvement in "the specific day-to-day activities of the Independent Contractor Real Estate Agents" like Mr. Dykeman.

By showing a lack of knowledge on the part of Mr. Dykeman and Mr. Fogarty, Brokers made a properly supported motion for summary judgment thereby triggering Buyers' burden to produce evidence of specific facts establishing that issues of material fact exist. Buyers offered the affidavit of Mr. Morgan in their Response to Brokers' Motion for Summary Judgment. Although Mr. Morgan's affidavit provided that Mr. Dykeman made a representation about Seller's rights in the Property, his affidavit failed to show why that representation was actionable under a theory of negligent *misrepresentation* or fraud.

Viewing [*16] the facts in the light most favorable to Buyers, the non-movant, we find that summary judgment was appropriate in this case. The trial court properly granted summary judgment in favor of Brokers because Buyers failed to produce proof highlighting facts that establish the elements of either claim. There is an absence of specific facts that demonstrate genuine issues of material fact relating to Brokers' duty and knowledge of Seller's deficient rights in the Property. Accordingly, we affirm.

V. CONCLUSION

The trial court's grant of summary judgment is affirmed. Costs of this appeal are taxed to the appellants, Morgan Development, LLC and Del Morgan. This case is remanded, pursuant to applicable law, for collection of costs assessed below.

JOHN W. McCLARTY, JUDGE

End of Document



Results for: Realtor liability for misrepresentation

Cases

Ann Taylor Realtors, Inc. v. Sporup, 2010 Tenn. App. LEXIS 755

Overview: Appellants were liable for the remainder of a realty company's commission for the sale of real property under a promissory note they signed in their individual capacities as they failed to show that the company's agent breached a fiduciary duty she owed to appellants under Tenn. Code Ann. §§ 62-13-403 and 62-13-404.

... to Lender under the agreement. Lender 's agent, **Realtor** , obtained a buyer willing and able to purchase the property, ...

... financing of the sale. As an accommodation to Mr. Sporup, **Realtor** agreed to accept a partial payment of the commission at ...

... closing and defer the remainder—\$45,500—for payment over a three-year period. **Realtor** recorded the terms of the deferral arrangement, as dictated by Mr. Sporup, into a handwritten agreement that **Realtor** and Mr. Sporup signed. The terms later became the substance ...

... principal and interest thereon on June 1, 2004. According to **Realtor**, everyone was happy with the terms of the agreement at ...

... with the performance of its employees, which was clearly beyond **Realtor**'s control. There is no evidence demonstrating that financial instability played a role in his default, that **Realtor misrepresented** the buyer's financial position, or that **Realtor** had any reason to predict the buyer's subsequent behavior. Rather, ...

... alleged, inter alia , that throughout the parties' dealings **Realtor** withheld information about the buyer's questionable financial position, deliberately or negligently **misrepresented** the buyer's financial position, deliberately or negligently ...

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2010-12-03

Overview: A trial court did not err in declining to dismiss buyers' claim under the statute of limitations for damages to real property in Tenn. Code Ann. § 28-3-105 since the gravamen of the action was breach of contract. The buyers sought damages for the sellers' failure to provide a piece of property connected to the city sewer as stated in the contract.

... Buyers filed this suit against Sellers and Sellers' **realtor** on September 4, 2008, alleging causes of action for fraudulent **misrepresentation** and violation of the Tennessee Consumer Protection Act ...

... later permitted to add a cause of action for negligent misrepresentation. The

Jurisdiction Tennessee

Court
Appeals Middle
Grand Division

Date 2011-12-08

realtor reached an agreement with Buyers through mediation, and Buyers dismissed their claims against the **realtor**. At a bench trial in January 2011, Mr. Mize testified ...

- ... city sewer. Buyers filed this suit against Sellers and Sellers' **realtor** on September 4, 2008, alleging causes of action for fraudulent **misrepresentation** and violation of the Tennessee Consumer Protection Act ...
- ... later permitted to add a cause of action for negligent **misrepresentation**. The **realtor** reached an agreement with Buyers through mediation, and Buyers dismissed their claims against the **realtor**....
- \dots versus those on sewer." Ms. Consulo, who was also a **realtor**, testified that she and her husband always thought the property \dots
- ... not carry their burden of proof as to the negligent **misrepresentation** claim but that they did prove that Sellers breached their ...

3. Gentry v. Bailey, 2012 Tenn. App. LEXIS 129

Overview: Successor chancellor's order modifying prior order under Tenn. R. Civ. P. 60.01 to reflect that new trial was granted as to compensatory damages was granted was affirmed as prior order expressly granted new trial, and denial of motion as to reasonable reliance was more consistent with granting new trial than with granting directed verdict.

... the builder of the complex ("the Builder"); Gina Sakich, the **realtor** who handled the transaction ("the **Realtor**"); and Realty Center of Chattanooga, Inc., the agency for which the **Realtor** worked ("the Agency"). Before the trial court entered judgment on ...

... because it did not deal with the claims against the **Realtor** and the Agency. The March 10, 2010, order purports to ...

- ... LLC) Renewed Motion for Directed Verdict." The only motion the **Realtor** and the Agency filed was limited to the punitive damage ...
- ... a directed verdict for lack of proof of damages, the **Realtor** and the Agency should also be entitled to a defense ...
- ... March 10 order did not on its face grant the **Realtor** and the Agent a dismissal. Thus, the March 10 order ...
- ... misrepresented her condominium as a two bedroom unit when it was ...
- ... jury found that all defendants, with the exception of the **Realtor**, were guilty of intentional **misrepresentation** and it awarded punitive damages of \$10,000 each against the ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2012-02-27

Cato v. Batts, 2011 Tenn. App. LEXIS 73

Overview: The female seller did not intentionally misrepresent the conditions of the home but instead forgot about the existence of the I-beams. As for the male seller, there was nothing indicating that he made any intentional or fraudulent misrepresentations due to his dementia and lack of mental capacity

Jurisdiction Tennessee

Court

to knowingly make a false representation.

Appeals Middle Grand Division

Date 2011-02-17

... of home filed this action against the sellers for negligent **misrepresentation** and fraudulent **misrepresentation** for the failure to disclose defects in the home. The ...

- ... court found for the purchasers on their claim of negligent **misrepresentation** but denied their claim of fraudulent **misrepresentation** and their request for rescission. Purchasers appealed contending the trial court erred by not finding fraudulent **misrepresentation** and partially denying their motion to alter or amend the ...
- ... property." HN2 The essential elements of the torts of negligent **misrepresentation** and that of intentional or fraudulent **misrepresentation** are substantially different. To sustain a cause of action for "negligent" **misrepresentation**, the plaintiff must establish by a preponderance of the evidence ...
- ... the information. To sustain a cause of action for negligent **misrepresentation**, the plaintiff must establish by a preponderance of the evidence ...
- ... information; and the plaintiff justifiably relied on the information. Negligent **misrepresentation** occurs when a defendant, acting in the course of her ...
- ... the defendant. The essential elements of the torts of negligent misrepresentation and that of intentional or fraudulent misrepresentation are substantially different. To sustain a cause of action for "negligent" misrepresentation:...

5.

SecurAmerica Bus. Credit v. Schledwitz, 2014 Tenn. App. LEXIS 178

Overview: A trial court's ruling with respect to civil conspiracy against a lender and company was vacated as the trial court had made no findings as to the essential elements of the predicate tort, i.e., a Tennessee Consumer Protection Act claim. a remand was also appropriate on the claim that the lender breached the duty of good faith and fair dealing.

- ... of relevant information about the representation, any concealment of the **misrepresentation**, any opportunity to discover the **misrepresentation**, which party initiated the transaction, and the specificity of the **misrepresentation**. Whether a person's reliance on a representation is reasonable generally ...
- ... not otherwise have acted. Fraud occurs when a person intentionally **misrepresents** a material fact or intentionally produces a false impression in ...
- ... elements of a claim for fraud include: (1) an intentional **misrepresentation** of an existing material fact, (2) knowledge of the representation's ...
- ... falsity, and (3) injury caused by reasonable reliance on the **misrepresentation**. The essence of fraud is deception. In its most general ...
- ... of relevant information about the representation, any concealment of the **misrepresentation**, any opportunity to discover the **misrepresentation**, which party initiated the transaction, and the specificity of the **misrepresentation**.

Jurisdiction Tennessee

Court
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Date 2014-03-28

See, e.g., id .; accord ...

- ... the Guarantor or any other guarantor with respect to the **Liabilities** (including, without limitation, all defenses based on suretyship or impairment ...
- ... that the Company may assert to the repayment of the **Liabilities**, including, without limitation, failure of consideration, breach of warranty, fraud, ...

6. Whalen v. Bourgeois, 2014 Tenn. App. LEXIS 377

Overview: It was not error to award compensatory and punitive damages against a seller for common law contract interference for seizing a warranty deed after closing because (1) he barred the buyers' conveyance of a trust deed to secure their promissory note with lenders, and (2) a finding that he acted intentionally and egregiously was sufficient.

... result. A person acts fraudulently when (1) the person intentionally **misrepresents** an existing, material fact or produces a false impression, in ...

 \dots at the plaintiff's expense." Id . (quoting Crye-Leike **Realtors** , 1998 Tenn. App. LEXIS 641, 1998 WL 651623 at \dots

- ... "intentional"). A person acts fraudulently when (1) the person intentionally **misrepresents** an existing, material fact or produces a false impression, in ...
- ... legal action before it was initiated. HN14 Once a defendant's **liability** for punitive damages has been established, a trial court must ...
- ... determine the appropriate amount of punitive damages. Once a defendant's **liability** for punitive damages has been established, as in this case, ...
- ... (2001). It is unlawful for any person, by inducement, persuasion, **misrepresentation**, or other means, to induce or procure the breach or ...
- ... (Tenn. Ct. App. Sept. 30, 2004) (quoting Crye-Leike **Realtors**, Inc. v. WDM, Inc., No. 02A01-9711-CH-00287, 1998 Tenn. ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2014-06-27

7. A Land v. Dixon, 2013 Tenn. App. LEXIS 764

Overview: The trial court did not err in granting auctioneers partial summary judgment on purchasers' misrepresentation claims because it was duty bound by the law of the case doctrine to follow the disposition of the court of appeals on the purchasers' first appeal. The court of appeals had ruled that the purchasers were precluded from seeking recovery.

- ... not err in granting auctioneers partial summary judgment on purchasers' **misrepresentation** claims because it was duty bound by the law of ...
- ... not err in granting auctioneers partial summary judgment on purchasers' **misrepresentation** claims because it was duty bound by the law of ...
- ... appeals held that the purchasers were aware of every alleged **misrepresentation** prior to closing on the contract and were precluded from seeking recovery based on the **misrepresentation**; [3]-Therefore, the trial court

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2013-11-25

correctly granted auctioneers' motion in limine to exclude evidence of alleged **misrepresentations** they made prior to the auction of a tract of ...

... or argument that [d]efendants misleadingly described the property, misrepresented the ownership of the property, misrepresented the circumstances under which the property was being auctioned, and misrepresented the status of a portion of the property affected by ...

... of the property with full knowledge of the alleged **misrepresentations** and of the truth regarding the property, Plaintiffs cannot show the required causative link between the **misrepresentations** and their alleged injury . Land I , 2005 Tenn. ...

Overview: A finding that the landlord misrepresented that the roof was repairable when the landlord knew it could not be repaired, and that the landlord had a duty under the lease to repair the roof, was improper. The landlord did not have an obligation to repair or replace the roof in the absence of an express agreement in the lease to do so.

... unless the promise to "talk about... it" amounts to a **misrepresentation** as found by the trial court, the Landlord is not ...

... caused by the leaky roof. We now move to the "misrepresentation" issue. The trial court found that the Landlord "misrepresented the roof as being repairable by agreeing to discuss repairing ...

... told that it needed to be replaced. Ms. So commissioned **realtor** Charles Dotson to sell the building. She told the **realtor** that the roof had numerous leaks, that it would be ...

... for fraud, deceit, failure to disclose or negligent or innocent **misrepresentations** is detrimental reliance on a false premise. The reliance must ...

... for fraud, deceit, failure to disclose or negligent or innocent **misrepresentations** is detrimental reliance on a false premise." McNeil v. ...

... she knew that the roof was not repairable. The [Landlord] **misrepresented** the roof as being repairable by agreeing to discuss repairing ...

... it would "talk about" repairing the roof, the landlord **misrepresented** that the roof was repairable when the landlord knew it ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2011-09-27

9. Crumpton v. Grissom, 2013 Tenn. App. LEXIS 825

Overview: In a case involving a real estate sales contract, a trial court's entry of summary judgment in favor of a managing broker was reversed, and the case was remanded since, on the record before it, the appellate court was unable to determine the standard of care required of the managing broker in order to satisfy her statutory duty.

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2013-12-23

... Court noted that if it accepted Plaintiff's argument that "the **misrepresentations** and negligence [alleged by Plaintiff] against the affiliate brokers are ...

- ... the affiliates," the result "would be tantamount to creating strict **liability** for managing brokers for the negligent or intentional torts of ...
- ... our General Assembly did not intend to impose strict **liability** on managing brokers in cases such as this. On the ...
- ... managing broker could completely escape her statutory duty and any **liability** . Clearly, neither of these two scenarios is what our General ...
- ... the affiliates," the result "would be tantamount to creating strict **liability** for managing brokers for the negligent or intentional torts of ...
- ... our General Assembly did not intend to impose strict **liability** on managing brokers in cases such as this. On the ...
- ... managing broker could completely escape her statutory duty and any **liability** . Clearly, neither of these two scenarios is what our General ...

10.



Davis v. McGuigan, 325 S.W.3d 149

Overview: Real estate appraiser's opinion of the value of a home for which borrowers sought a construction loan could provide the basis for a fraudulent misrepresentation claim by the borrowers against the appraiser, although the appraiser was hired by the lender and his opinion was given to the lender with a disclaimer.

- ... The maker of a fraudulent **misrepresentation** is subject to **liability** for pecuniary loss to another who acts in justifiable reliance upon it if the **misrepresentation**, although not made directly to the other, is made to ...
- ... type of transaction involved. The maker of a fraudulent **misrepresentation** is subject to **liability** for pecuniary loss to another who acts in justifiable reliance upon it if the **misrepresentation**, although not made directly to the other, is made to ...
- ... states in its entirety, HN18 The maker of a fraudulent **misrepresentation** is subject to **liability** for pecuniary loss to another who acts in justifiable reliance upon it if the **misrepresentation**, although not made directly to the other, is made to ...
- ... type of transaction involved. The maker of a fraudulent **misrepresentation** is subject to **liability** for pecuniary loss to another who acts in justifiable reliance upon it if the **misrepresentation**, although not made directly to the other, is made to ...

Jurisdiction

Tennessee

Court Supreme Court

Date 2010-10-26

11.

Abshure v. Methodist Healthcare-Memphis Hosps., 325 S.W.3d 98

Overview: Patient's previously alleged vicarious liability claim against a hospital could proceed even though the patient's direct claims against the

Jurisdiction Tennessee hospital's emergency room doctor became barred by the operation of Tenn. R. Civ. P. 41.01(2) and by the expiration of the savings statute, Tenn. Code Ann. § 28-1-105(a).

Court Supreme Court

Date 2010-10-20

- ... procedural limitation on the patient's ability to pursue a vicarious **liability** claim against a principal was triggered only if the patient ...
- ... attempted to amend her complaint to add a new vicarious **liability** claim against a principal after its claims against the agent ...
- ... this case because the patient had initially filed a vicarious **liability** claim against the principal, and that claim remained pending. The ...
- ... not prevent the patient from pursuing her timely filed vicarious **liability** claim against the hospital. The court reversed the judgment of ...
- ... of Appeals affirming the summary judgment dismissing the patient's vicarious **liability** claims against the hospital. The court remanded the case to ...
- ... (Tenn. 2008) . III . Methodist Hospital 's **liability** to the Abshures, if in fact Methodist Hospital can be found liable to the Abshures, rests on vicarious **liability** claims. Accordingly, as a threshold issue, we will address the ...
- ... conclusion that the Abshures had not sufficiently pleaded their vicarious **liability** claim. While the Abshures' complaint falls short of a textbook example of a vicarious **liability** claim, we agree with the Court of Appeals' conclusion that ...

Ensureus, LLC v. Oliver, 2015 Tenn. App. LEXIS 707

Overview: Purchaser of an insurance agency failed to prove that the seller breached the parties' asset purchase agreement because the seller's failure to have all of the file boxes shredded did not constitute a material breach of the agreement and the purchaser did not suffer damages as a result of the seller's decision to store, rather than shred, files.

- ... Tenn. Ct. App. 1992))) . HN9 Negligent **misrepresentation** involves the negligent supply, by a business or professional individual, ...
- ... for the guidance of others in their business transactions. Negligent **misrepresentation** has been described thusly: One who, in the course of ...
- ... guidance of others in their business transactions, is subject to **liability** for pecuniary loss caused to them by their justifiable reliance ...
- ... or communicating the information. As with a claim for intentional misrepresentation, a plaintiff seeking to recover for another's alleged negligent misrepresentation must prove he or she was justified in relying on the information negligently provided. Negligent misrepresentation involves the negligent supply, by a business or professional individual, ...
- ... of an insurance agency proved either breach of contract or **misrepresentation** by the seller of the insurance agency. HOLDINGS: [1]-The purchaser ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2015-08-31

... seven years old; [2]-The purchaser failed to prove the seller's **liability** for either intentional or negligent **misrepresentation** concerning the value of the insurance agency; [3]-The late seller's ...

... misrepresentation . However, Mr. Oliver testified that he had not written a ...

Overview: The trial court properly granted Brokers' motion for summary judgment because the materials supporting the motion negated essential elements of Buyers' claims of negligent misrepresentation and fraud and Buyers' opposition materials, although showing a misrepresentation on the part of a broker, did not show why that representation was actionable.

... the PSA's disclaimer provision. The disclaimer provision exempts Brokers from **liability** for the nonperformance of a party and those "matters which ...

- ... of the PSA evidences Brokers' intent to insulate themselves from **liability** and places the responsibility of exercising due diligence on the ...
- ... fraud, a plaintiff must prove four elements: (1) an intentional **misrepresentation** of a material fact; (2) knowledge of the representation's falsity; ...
- ... caused by reasonable reliance on the representation; and (4) the **misrepresentation** involves a past or existing fact. In fraud cases, nondisclosure ...
- ... fraud, a plaintiff must prove four elements: (1) an intentional **misrepresentation** of a material fact; (2) knowledge of the representation's falsity; ...
- ... caused by reasonable reliance on the representation; and (4) the **misrepresentation** ...
- ... the motion negated essential elements of Buyers' claims of negligent **misrepresentation** and fraud and Buyers' opposition materials, although showing a **misrepresentation** on the part of a broker, did not show why ...

Jurisdiction Tennessee

Court Appeals Eastern Grand Division

Date 2011-02-23

14. Lapinsky v. Cook, 2016 Tenn. App. LEXIS 711

Overview: Summary judgment was properly granted in favor of sellers on breach of contract claim, as buyer could not claim repairs to be done pursuant to contract were not done after having agreed via final inspection form that repairs and replacements had been made to her satisfaction. Buyer's "feelings" were insufficient basis to support conspiracy claim.

... 927 (Tenn. 1991) . In fact, "intentional **misrepresentation**," "fraudulent **misrepresentation**," and "fraud" are different names for the same cause of ...

... all of the conversations with the Cooks went through her **realtor** to their **realtor**, Brewster. Plaintiff admitted that she never had any conversations

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2016-09-26

directly ...

- ... Plaintiff's complaint alleged claims for breach of contract, intentional **misrepresentation** , conspiracy, and violation of the Tennessee Consumer Protection ...
- ... House , and that the Cooks and Brewster had made **misrepresentations** with regard to the septic permit and the septic system. ...
- ... in order to prevail on a claim for intentional **misrepresentation** stating: Our current common-law claim for intentional **misrepresentation** is the successor to the common-law action for deceit. ...
- ... To recover for intentional **misrepresentation**, a plaintiff must prove: (1) that the defendant made a ...
- ... as a result of the representation. To recover for intentional **misrepresentation**, a plaintiff must prove: (1) that the defendant made a ...

McPherson v. William E. George, Inc., 2010 Tenn. App. LEXIS 276

Overview: In this breach of contract action, the grant of summary judgment in favor of plaintiff seller was affirmed; because defendant purchaser did not argue in the trial court that either the auctioneer or the seller fraudulently induced the purchaser's execution of the sales agreement, the purchaser could not avail itself of this argument on appeal.

... its truth or recklessly; (5) plaintiff reasonably relied on the **misrepresented** material fact; and (6) plaintiff suffered damages as a result of the **misrepresentation** . a claim of fraudulent inducement requires a plaintiff to show ...

- ... its truth or recklessly; (5) plaintiff reasonably relied on the **misrepresented** material fact; and (6) plaintiff suffered damages as a result of the **misrepresentation**. ...
- ... its truth or recklessly; (5) plaintiff reasonably relied on the **misrepresented** material fact; and (6) plaintiff suffered damages as a result of the **misrepresentation** . a claim of fraudulent inducement requires a plaintiff to show ...
- ... its truth or recklessly; (5) plaintiff reasonably relied on the **misrepresented** material fact; and (6) plaintiff suffered damages as a result of the **misrepresentation**. Biancheri, 2009 Tenn. App. LEXIS 274, 2009 WL ...
- ... Mrs. George's real estate commission as promised constituted a material **misrepresentation** designed to fraudulently induce Buyer into placing a bid on the subject property. Because of Roebuck 's **misrepresentation**, Buyer argues, Buyer's failure to close under the sales agreement ...

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2010-04-20

Wickham v. Sovereign Homes, LLC, 2012 Tenn. App. LEXIS 669

Overview: Trial court erred in granting summary judgment to seller on buyer's claim under Tenn. Code Ann. §§ 47-18-104 and 47-108-109 because genuine

Jurisdiction Tennessee issue of material fact existed as to whether seller's failure to disclose earlier substantial repairs to home's foundation and alleged concealment of those repairs constituted deceptive or unfair act.

... to a defendant in an action under the TCPA. Accordingly, **misrepresentations** may be actionable under the TCPA that would not be ...

- ... deceptive to consumers. Thus, the TCPA is not limited to **misrepresentations** that are fraudulent or willful. A consumer may recover under ...
- ... answered in December 2008. Sovereign Homes denied any **liability** or wrong-doing, and asserted the comparative fault of the seller ...
- ... in an action under the TCPA. Id . Accordingly, **misrepresentations** may be actionable under the TCPA that would not be ...
- \dots the foundation, and that the nature of the coating was **misrepresented** . Upon review of the record, we note that Mr. Goodman's \dots
- ... against Sovereign Homes; Prudential Collins-Maury, Inc., **Realtors** (" PCM "); and Jeff Goodman (Mr. Goodman; collectively, "Defendants") in ...
- ... of Defendants' acts and omissions. Mr. Wickham asserted claims for **misrepresentation**; fraudulent concealment; breach of contract; breach of express warranty; breach ...

Court

Appeals
Western Grand
Division

Date 2012-09-25

17. Mitchell v. Morris, 2016 Tenn. App. LEXIS 178

Overview: While a daughter had a power of attorney authorizing her sue on her father's behalf or reinvest his funds, as she simply refused to take timely action in order to protect her father from embarrassment, the trial court properly granted summary judgment to an insurer and its agent in a daughter's action under Tenn. Code Ann. § 47-18-101.

- ... fraud, a plaintiff must show the following: (1) an intentional **misrepresentation** with regard to a material fact; (2) knowledge of the ...
- ... truth or falsity); (3) the plaintiff reasonably relied on the **misrepresentation** and suffered damage; and (4) the **misrepresentation** relates to an existing or past fact, or, if the claim is based on promissory fraud, the **misrepresentation** must embody a promise of future action without the present ...
- ... a plaintiff must show the following: (1) an intentional **misrepresentation** with regard to a material fact; (2) knowledge of the ...
- ... truth or falsity); (3) the plaintiff reasonably relied on the **misrepresentation** and suffered damage; and (4) the **misrepresentation** relates to an existing or past fact, or, if the claim is based on promissory fraud, the **misrepresentation** "must embody a promise of future action without the present ...
- ... of a 12 percent rate of return as the intentional **misrepresentation** at issue. Having concluded that Decedent's statement that Mr. Morris ...
- ... in granting summary judgment on the promissory fraud claim. Negligent

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2016-03-09

misrepresentation HN20 Persons asserting a negligent **misrepresentation** claim must establish: One, who, in the course of his ...

18. A Hunt v. Veropele Nashville I, LLC, 2015 Tenn. App. LEXIS 666

Overview: The tenant breached the lease by vacating the property without justification, based upon an unreasonable ultimatum, before the landlord could submit plans and before there could be an official determination regarding the property; dismissal of the tenant's claim under Tenn. Code Ann. § 47-18-104(b)(12) was proper.

... Rather, intentional **misrepresentation** is an element of fraud. However, the two are often ...

... there is not a separate cause of action for intentional **misrepresentation**, and intentional **misrepresentation** is an element of a cause of action for fraud ...

... rather than an independent cause of action. The terms "intentional misrepresentation," "fraudulent misrepresentation," and "fraud" are synonymous. There is not a separate cause of action for intentional misrepresentation in ...

... statements to [VeroPele] upon which [VeroPele] relied," and dismissed VeroPele's **misrepresentation** claims. HN9 In order to establish a prima facie case for either negligent or fraudulent **misrepresentation**, a plaintiff must show detrimental reliance on a false premise. In the context of a negligent **misrepresentation** claim, the plaintiff must show the defendant did not exercise

... exercise reasonable care in obtaining or communicating the information; fraudulent **misrepresentation** requires proof that the defendant made the false representation knowingly ...

... knowingly or recklessly. A key element in both types of **misrepresentation** claims is that the plaintiff justifiably relied on the information. ...

... establish a prima facie case for either negligent or fraudulent **misrepresentation**, a plaintiff must show "...

Jurisdiction Tennessee

CourtAppeals Middle Grand Division

Date 2015-08-18

Overview: A finding against the builders in a construction action was proper because the builders acted in violation of Tenn. Code Ann. § 47-18-104(b)(7) by representing that the goods and services were of a particular standard, while they were not, and in violation of § 47-18-104(b)(27) by engaging in deceptive acts and practices.

... not necessarily required to be knowing or intentional, and negligent **misrepresentations** may be found to be violations of the Act. ...

... yet been completed. Despite this problem, the Teagues and their **realtor** , assured the Campbells that everything would be finished shortly after ...

Jurisdiction Tennessee

Court Appeals Western Grand Division

Date 2010-03-31

- ... not necessarily required to be knowing or intentional, and negligent **misrepresentations** may be found to be violations of the TCPA. A ...
- ... App.1992); Jeff Mueller, New Home Construction **Liability**, Tenn. B.J., May 2007, at 18, 20)). A deceptive ...

^{20.} A Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214

Overview: Former employee was awarded the damages requested in her complaint because, under her employment contract, she was entitled to notice prior to the termination of her employment becoming effective and to her salary for a period of time after termination, but the employer breached the contract by not providing the required notice to the employee.

 \dots of the contract controls the dispute, Maggart v. Almany Realtors , Inc. , $\,259$ S.W.3d 700 , $\,704\,$ \dots

- ... excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), **misrepresentation**, or other misconduct of an adverse party; (3) the judgment ...
- ... adjudicates fewer than all the claims or the rights and **liabilities** of fewer than all the parties is not enforceable or ...
- ... contract was reasonably disputed on the grounds of arson and **misrepresentation**); Performance Systems, Inc. v. First American Nat. Bank...

Jurisdiction Tennessee

Court Appeals Western Grand Division

Date 2015-07-22

21. A Brown v. Brown, 2012 Tenn. App. LEXIS 237

Overview: Trial court properly found that material change in circumstances warranting modification of custody and naming husband as primary residential parent was in children's best interest, Tenn. Code Ann. § 36-6-101(a)(2), because wife sought to move children out-of-state, but children had always lived in Tennessee and expressed desire to remain there.

- ... either party is found to have concealed any property, materially **misrepresented** the value of any property, or otherwise defrauded the other ...
- \dots years by which to bring a claim for fraud or **misrepresentation** . In Wife 's petition to the trial court, she \dots
- ... the sale of these homes would go first toward any **realtor** fees and costs associated with the sale of the homes, ...
- ... alleging Husband's **misrepresentation** of the value of his business. Although Rule ...
- ... brought under this rule on the basis of fraud or **misrepresentation** be brought no later than one year from the date ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2012-04-13

Overview: A land developer's naming in lot sales contracts of an exclusive builder for uniformity was not by itself an unfair or deceptive act, and summary judgment for the developer on Tennessee Consumer Protection Act claims by lot purchasers after the builder abandoned the project was affirmed because the purchasers were not forced to buy the lot.

- \dots Usonia . The court thus dismissed the claim of negligent **misrepresentation** , and all other claims of negligence. The Court found that \dots
- ... the following reasons: 1) Avalon did not negligently **misrepresent** Usonia 's ability to construct plaintiffs' home. 2) There ...
- ... The Court found that Avalon did not negligently **misrepresent** Usonia 's ability to construct plaintiffs' home, because Avalon ...
- ... 1 Assuming arguendo Sherron Burleson, the **realtor**, was deemed to be an agent of Avalon, ...

Jurisdiction

Tennessee

Court

Appeals
Eastern Grand
Division

Date

2011-02-24

^{23.} Sisco & Close Props. v. C & E P'ship, 2012 Tenn. App. LEXIS 918

Overview: In this breach of contract action, the judgment finding that the seller failed to prove the fair market value of the real property at the time of breach was affirmed because there was nothing in the evidence to suggest that one individual's testimony was based on anything other than mere conjecture.

- ... Close . C&E asserted claims of intentional **misrepresentation**, fraud in the inducement to contract, negligent **misrepresentation**, frustration of purpose, negligence, unjust enrichment, promissory estoppel and detrimental ...
- ... 9, 2008. The standard "Tennessee Association of **Realtors** F10 Lot Land Purchase and Sale Agreement" ("the agreement" or ...
- ... estoppel; unclean hands; mutual mistake; unilateral mistake; intentional or negligent **misrepresentation**; and anticipatory breach. C&E counterclaimed, asserting that Sisco ...
- ... that there was an outstanding offer or the matter was **misrepresented** by Jim Sisco." Following a hearing on October 29, 2010, ...

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

Date

2012-12-28

Woods v. Lowrey, 2013 Tenn. App. LEXIS 453

Overview: Because the garage at issue complied with the restrictive covenants, as amended, the trial court's grant of summary judgment to the real estate agents placed the buyers in exactly the same position they bargained for and thought they were in at the time of closing.

... to the restrictive covenants, and that the defendants concealed and **misrepresented** this "fact." Mr. Lowrey, FAVA, Cindy Walker, and Crye-Leike

Jurisdiction Tennessee

Court

Appeals
Eastern Grand
Division

Date

2013-07-15

- \dots for the appellees, Cindy Walker, individually and dba Crye-Leike **Realtors** , Inc. REO Division; Crye-Leike, Inc. ; and \dots
- ... employer, Crye-Leike, Inc. and Crye-Leike, Realtors , REO Division (" Crye-Leike "); and Southern Title ...

25.



West v. Shelby County Healthcare Corp., 459 S.W.3d 33

Overview: Hospital was unable to use a hospital lien to recover from third-party tortfeasors the unadjusted costs of medical services because neither the Tennessee Hospital Lien Act, Tenn. Code Ann. §§ 29-22-101 to 29-22-107, nor the hospital's contracts with insurance companies authorized the hospital to maintain its lien after an adjusted bill was paid.

- ... categories of damages that can be awarded in health care **liability** actions is the cost of reasonable and necessary medical care. ...
- ... conversion, intentional interference with contract rights, and intentional and/or negligent **misrepresentation** . Because of the ERISA claim, the Med removed the case ...
- ... of the contract controls the dispute, Maggart v. Almany Realtors , Inc ., $\,259$ S.W.3d 700 , $\,704\,$...
- ... categories of damages that can be awarded in health care **liability** actions is the "cost of reasonable and necessary medical care." ...

Jurisdiction Tennessee

Court Supreme Court

Date 2014-12-19

^{26.} Alfonso v. Bailey, 2016 Tenn. App. LEXIS 569

Overview: The trial court properly dismissed under Tenn. R. Civ. P. 12.02(6) mortgagors' action alleging that real estate investors knew that the mortgagors and the mortgagee were engaged in discussions to complete a short sale but purchased the property anyway because the mortgagors stated no cause of action against the investors.

- ... conduct of the Defendant(s) amounts to breach of contract, fraud, **misrepresentation** , fraudulent concealment, and conspiracy, for which the Defendants should be ...
- ... on the sale of the Property. 9. Ms. Kathryn Lovell, **realtor** and certified distressed property expert, acted as agent for Plaintiffs ...
- ... acted and Defendants' conduct amounts to breach of contract, fraud, **misrepresentation**, fraudulent concealment, and conspiracy, that they have been unjustly enriched, ...
- ... with contract rights, inducement of breach of contract, conspiracy, fraud, **misrepresentation**, fraudulent concealment, and for deceptive and unfair business practices, in ...
- ... the Tennessee Consumer Protection Act ("TCPA"); (2) fraudulent **misrepresentation**; (3) fraud; (4) unjust enrichment; (5) civil conspiracy; (6)

Jurisdiction

Tennessee Court

Appeals Eastern Grand Division

Date 2016-08-09

inducement ...

- ... with contract rights, inducement of breach of contract, conspiracy, fraud, **misrepresentation**, fraudulent concealment, and for deceptive and unfair business practices, in ...
- ... Defendant, CUS, LLC, is an active Tennessee limited **liability** company with a principal address of, Floor 2, 708 South ...

Dulaney v. Don Walker Constr., 2014 Tenn. App. LEXIS 440

Overview: A decision in favor of defendants with regard to real property and a house constructed and sold by defendants to plaintiffs was affirmed, as the trial court made sufficient findings of fact under Tenn. R. Civ. P. 52.01. While some findings were brief, this brevity was because little or no evidence was presented with regard to that specific fact.

- ... cracks or the damage associated therewith. With respect to negligent **misrepresentation** and **misrepresentation**, the Court does not believe that the evidence preponderates in ...
- ... Trial Court specifically found and held: With respect to negligent **misrepresentation** and **misrepresentation**, the Court does not believe that the evidence preponderates in ...
- ... We next consider whether Plaintiffs proved that Defendants made negligent **misrepresentations**. Our Supreme Court has explained that: ...
- ... in December of 2011 alleging, in pertinent part, negligent construction, **misrepresentation**, and violation of the Tennessee Consumer Protection Act.
- ... of damage which may have been caused by such **misrepresentations** . The same may be said of the claim for violation ...
- ... the Trial Court's holding that Plaintiffs failed to prove negligent **misrepresentation**....
- ... discussed above, that Plaintiffs had not proven their claims of **misrepresentations** and further that Plaintiffs had not proven any damages. The ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2014-07-30

^{28.} Wofford v. M. J. Edwards & Sons Funeral Home Inc., 490 S.W.3d 800

Overview: An arbitration clause in a funeral services contract was unenforceable where the contract was one of adhesion, the arbitration clause lacked specific terms, the daughter was required to sign the contract in an expedient manner, the contract was offered on a take it or leave it basis, and there was comparatively unequal bargaining power.

... rights, and the contract did not change the duties or **liabilities** of the parties); Philpot v. Tenn. Health Mgmt., Inc. ...

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2015-11-23

- ... weaker party or which serve to limit the obligations and **liability** of the stronger party. Additionally, where it is contained in ...
- ... eventually sued the manufacturer for defects in the products and **misrepresentation**. 2015 Tenn. App. LEXIS 356, [WL] at *1-*2...
- ... that he contacted defendant at the recommendation of his **realtor** , but plaintiff likely could have obtained the service from someone ...
- ... weaker party or which serve to limit the obligations and **liability** of the stronger party." Buraczynski 919 S.W.2d ...

^{29.} Dutton v. Farmers Group, Inc., 2010 Tenn. App. LEXIS 395

Overview: Because the mold resulting from flooding in a home that caused plaintiffs' health problems was not discovered until 2005, a personal injury complaint against the insurers and a repairmen was timely filed under Tenn. Code Ann. § 28-3-104 even though the flooding occurred in 2002.

... review for summary judgment. See Maggart v. Almany **Realtors** , Inc ., No. M2005-02532-COA-R3-CV, 2007 Tenn. App. LEXIS 482 ...

... for Knox County (Tennessee) for negligence, intentional and negligent **misrepresentation** , and violations of the Tennessee Consumer Protection Act. ...

... Plaintiffs allege various claims including negligence, intentional and negligent **misrepresentation**, and violations of the Tennessee Consumer Protection Act ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2010-06-22

30. Fowler v. McCroskey, 2014 Tenn. App. LEXIS 446

Overview: Criminal court clerk was granted summary judgment on a state prison inmate's breach of contract claim because the court clerk negated the inmate's claim that the plea agreement waived court costs and the inmate could not use an affidavit by him to raise a genuine issue of material fact when the meaning of the agreement was plain and unambiguous.

... (2013). It is unlawful for any person, by inducement, persuasion, **misrepresentation**, or other means, to induce or procure the breach or ...

 \dots is 'the wilful violation of a known right." Crye-Leike **Realtors** , Inc. v. WDM, Inc., No. 02A01-9711-CH-00287, 1998 WL \dots

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2014-07-31

31. Irvin v. Bass, 2014 Tenn. Cir. LEXIS 163

... applies to Irvin's claims of breach of fiduciary duty, negligent **misrepresentation**, and fraud is three years. T.C.A. §28-3-105(1). These ...

 \dots money would be applied against the purchase price. Further, a **realtor** 's six percent fee was to be paid by sellers. The \dots

Jurisdiction Tennessee

Court Circuit Court, ... the following claims: attorney malpractice; breach of fiduciary duty; negligent **misrepresentation**; fraud. Conclusions of Law Summary judgment is appropriate when there ...

20th JD

Date 2014-02-28

... and that his claims for breach of fiduciary duty, negligent **misrepresentation** , and fraud were barred by the running of the statute ...

Thomas v. Miller, 2015 Tenn. App. LEXIS 102

Overview: A material circumstantial change warranted changing a child's residential parent, under Tenn. Code Ann. § 36-6-101(a)(2)(B), because her mother (1) enrolled her in school without the father's consent, (2) let a domestic violence perpetrator in the home, (3) exposed her to inappropriate paramours, and (4) asked the father to increase parenting time.

... in the decision-making process and that she did so by "misrepresenting " that she and the Child were residents of Franklin ...

... substitute teaching; failed to actively develop her career/employment as a **realtor**; obtained only part-time employment working one day per week with ...

Jurisdiction Tennessee

CourtAppeals Middle Grand Division

Date 2015-02-27

Morrison v. Hubbell, 2014 Tenn. App. LEXIS 71

Overview: Tenant had the burden to provide the court with a fair account of what transpired in the trial court, under Tenn. R. App. P. 24(b), but he failed to carry that burden, and without a complete record from which to determine if the trial court acted properly, the court was compelled to presume that the decision in favor of the landlords was supported.

... students who would have been students of the [Tenants]. The **misrepresentation** concerning and/or failure to disclose the intended competition damaged the ...

 \dots to counsel in a civil trial. Memphis Bd. of **Realtors** v. Cohen , 786 S.W.2d 951 , 953 \dots

Jurisdiction

Tennessee

CourtAppeals Middle Grand Division

Date 2014-02-11

34. Smith v. Hi-Speed, Inc., 2016 Tenn. App. LEXIS 638

Overview: Because conduct occurring after the execution of a written lease agreement could have served as a basis for modifying the written contract, the parol evidence rule should not have prevented the trustee of the trust which owned the rented property from establishing the existence of a loan guaranty agreement.

... proof of payment is consistent with a general defense to **liability** . As former Tennessee Supreme Court Justice ...

... of the statute of frauds when the defendant has knowingly misrepresented a

Jurisdiction

Tennessee

Court Appeals Western Grand Division

Date 2016-08-30

fact. Equitable estoppel is not a cause of action, ...

- ... of the statute of frauds when the defendant has knowingly **misrepresented** a fact." Seramur v. Life Care Ctrs. of Am., ...
- \dots to support plaintiff's case and avers that plaintiff's theory of **liability**, even though sustained by the evidence, does not lead to \dots
- \dots correctness to the trial court's determination." Maggart v. Almany **Realtors** , Inc. , 259 S.W.3d 700 , 703 \dots
- ... of the statute of frauds when the defendant has knowingly **misrepresented** a fact. Equitable estoppel is not a cause of action, ...
- ... of the statute of frauds when the defendant has knowingly **misrepresented** a fact." ...

^{35.} ♦ In re Estate of Ellis, 2013 Tenn. App. LEXIS 194

Overview: Former wife was not entitled to funds in two joint banking accounts after former husband's death, even though husband failed to remove wife's name from accounts, because parties' "Marital Dissolution Agreement" (MDA) divested wife of all interest in accounts and, as such, MDA effectively amended contract that existed when accounts were established.

- ... Section 45-2-703(a) in particular absolves a bank from any **liability** for the payment of funds from a joint account to ...
- ... debts thereon and indemnify and hold wife harmless from any **liability** and/or responsibility thereon." The list of items following this declaration ...
- \dots that intention, consistent with legal principles." Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 703-04 \dots
- ... section (a) in particular absolves a bank from any **liability** for the payment of funds from a joint account to ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2013-03-20

Overview: Although plaintiff was not required to file a formal complaint upon appeal from general sessions court to circuit court, the circuit court had authority to order her to file a formal complaint as it was necessary to set out basis for relief she sought in her action for damages. Her complaint did allege a claim upon which relief could be granted.

- ... Shirley Nicholson ("Plaintiff") filed a civil warrant against Lester Hubbard **Realtors**, Regina H. Hubbard, Lester Hubbard, and Kimberly Jackson (collectively, ...
- ... Session Appeal denied by Nicholson v. Lester Hubbard **Realtors**, 2011 Tenn. LEXIS 248 (Tenn., Mar. 9, 2011) ...
- \dots this appeal are taxed equally to the Defendants/Appellees, Lester Hubbard Realtors , Regina H. Hubbard, Lester Hubbard, and Kimberly Jackson, and the

Jurisdiction Tennessee

Court Appeals Western Grand Division

Date 2010-10-28

...

... SHIRLEY NICHOLSON v. LESTER HUBBARD **REALTORS**, ET AL. Nicholson v. Lester Hubbard **Realtors** No. W2010-00658-COA-R3-CV Court of Appeals of Tennessee, at Jackson...

... Memphis, Tennessee, for the appellees, Lester Hubbard **Realtors**, Regina H. Hubbard, Lester Hubbard and Kimberly Jackson. ALAN E. ...

Nicholson v. Lester Hubbard Realtors, 2011 Tenn. LEXIS 248

... Shelby County . No. CT-005422-04. Nicholson v. Lester Hubbard **Realtors** , 2010 Tenn. App. LEXIS 680 (Tenn. Ct. App., ...

... SHIRLEY NICHOLSON v. LESTER HUBBARD **REALTORS** ET AL. Nicholson v. Lester Hubbard **Realtors** No. W2010-00658-SC-R11-CV Supreme Court of Tennessee, at Jackson 2011 Tenn. ...

Jurisdiction Tennessee

Court Supreme Court

Date 2011-03-09

Overview: The distribution of the marital assets was affirmed because the court did not abuse its discretion in awarding the wife \$118,000 as her portion of the equity in the residence; the proposal made by the husband and adopted by the court relieved the wife of liability for any further drop in value and provided her with a certain amount quickly.

... court should have adopted the valuation offered by the parties' **realtor** and found the house had a value between \$570,000 and ...

... mental health, vocational skills, employability and earning capacity, estate, financial **liabilities** and financial needs of each of the parties. Currently the ...

... led to a contract to sell the house. 3 The **realtor** testified that in December 2009 one interested purchaser made a ...

- ... in the house, taking into consideration the mortgage and the **realtor** 's commission fee of six percent. 4 The record indicates that ...
- ... and adopted by the court relieved Wife of **liability** for any further drop in value and provided her with ...
- ... husband and adopted by the court relieved the wife of **liability** for any further drop in value and provided her with ...
- \dots husband and adopted by the court relieved the wife of **liability** for any further drop in value and provided her with \dots

Jurisdiction

Tennessee

Court Appeals Middle Grand Division

Date 2012-06-19

^{39.} Riad v. Erie Ins. Exch., 436 S.W.3d 256

Overview: In an insurance coverage dispute following a jury assessing damages at \$ 343,430, the trial court did not err in trebling the damages

Jurisdiction Tennessee assessed by the jury under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-109.

... actually "an additional insured on [two of the buildings] for **liability** purposes only." He explained that property loss such as theft ...

- ... vandalism would not be covered for someone who only held **liability** coverage. He could not recall whether he spoke with Mr. ...
- ... bond, a sum not exceeding twenty-five percent (25%) on the **liability** for the loss; provided, that it is made to appear ...
- ... that she and her husband, with the help of a **realtor** , purchased the Property. She recalled that they chose the ...
- ... she visited the Property "a number of times" with her **realtor** prior to the sale and that she did not notice ...
- ... fidelity bond; and provided, further, that the additional **liability**, within the limit prescribed, shall, in the discretion of the ...
- \dots 871 (Tenn. 2010) . In limiting **liability** , the court in Rice held that the legislature's \dots

Court

Appeals
Eastern Grand
Division

Date 2013-10-31

40. A Heaton v. Heaton, 2014 Tenn. App. LEXIS 536

Overview: The trial court should have considered all income from any source, rather than simply considering the wife's interest income from a promissory note, for purposes of Tenn. Comp. R. & Degs. 1240-2-4-.04, and thus the child support ruling had to be vacated for lack of an appropriate determination of the wife's gross income.

... separate property. The sales contract, according to William Weathers, the **realtor** who drafted the document, listed only. Wife as the buyer, per the parties' instruction. The **realtor** explained that the contract provided that the deed was to ...

- ... same. The court divided the remainder of the assets and **liabilities** pursuant to the parties' agreed-upon list, finding this distribution to ...
- ... her sole name and that she had so advised the **realtor** . The closing agent told her, erroneously, that since the parties ...
- ... separate funds. Wife claimed that she instructed the **realtor** to have the deed drafted to name her as the ...
- ... while launching Husband's career as a contractor. William Weathers, the **realtor** who drafted the sales contract concerning the subject real property, ...
- ... separate property. The sales contract, according to William Weathers, the **realtor** who drafted the document, listed only. Wife as the buyer, per the parties' instruction. The **realtor** explained that the contract provided that the deed was to ...

Jurisdiction

Tennessee

Court

Appeals
Eastern Grand
Division

Date

2014-08-29

Overview: Because the divorce decree was not final, it was subject to revision under Tenn. R. Civ. P. 54.02, and all modifications were permissible; the court was unable to effectively review the child support calculations, and the court remanded for findings of fact and conclusions of law under Tenn. R. Civ. P. 52.01.

... adjudicates fewer than all the claims or the rights and **liabilities** of fewer than all the parties shall not terminate ...

- ... the judgment adjudicating all the claims and the rights and **liabilities** of all the parties.")....
- ... residence and gave Wife "sole authority to engage a licensed **realtor** and list the home for sale, without Husband's permission or ...
- ... the trial court found that both parties agreed on a **realtor** and stated that "when an offer is made to purchase ...
- ... adjudicates fewer than all the claims or the rights and **liabilities** of fewer than all the parties shall not terminate ...
- ... the judgment adjudicating all the claims and the rights and **liabilities** of all the parties."). Wife's Payment of Attorney Fees We ...
- ... trial court also ordered the parties to meet with a **realtor** within two weeks. In December 2009, the trial court entered ...

Jurisdiction

Tennessee

Court

Appeals Western Grand Division

Date

2014-08-21

42. A Molloy v. Hrisko, 2015 Tenn. App. LEXIS 555

Overview: Trial court did not err by granting neighbors, an attorney, and his law firm summary judgment as to landowner's tortious inducement of breach of contract claim for informing a real estate broker of a purported restriction on landowner's property where the truthfulness of attorney's statement in the letter to the broker negated element of malice.

- ... defendant and adding a cause of action for respondeat superior **liability** as a basis for **liability** of the Hriskos for the actions of their agent, Heard, ...
- ... Truthful information . HN9 There is of course no **liability** for interference with a contract or with a prospective contractual ...
- ... not the information is requested. There is of course no **liability** for interference with a contract or with a prospective contractual ...
- ... sent to **Realtor** Melinda Barrington made the property uninsurable for marketability purposes and ...
- ... the February 15, 2008 letter written by Attorney Heard to **Realtor** Melinda Barrington. Ms. Molloy also submitted her own affidavit, ...
- ... There is of course no **liability** for interference with a contract or with a prospective contractual ...
- ... not the information is requested. There is of course no **liability** for interference with a contract or with a prospective contractual ...

Jurisdiction

Tennessee

Appeals Middle Grand Division

Date

Court

2015-07-14

^{43.} A Powell v. Clark, 487 S.W.3d 528

Overview: As a driver's insurer, rather than the passenger's insurer, was the primary carrier for uninsured motorist coverage under Tenn. Code Ann. § 56-7-1201(b)(3), it was not entitled to offset the amount paid by the passenger's insurer despite the language in its policy allowing offsets for medical payments; thus, the offset was correctly denied.

... alone or in combination with similar coverage afforded under other **liability** policies, to afford limits in excess of those that would ...

... with a motorist who was insured under a policy of **liability** insurance with the minimum limits described in §55-12-107, or the uninsured motorist **liability** limits of the insured's policy if the limits are higher ...

- ... Code Ann. § 56-7-1201(d) . d) The limit of **liability** for an insurer providing uninsured motorist coverage under this section ...
- ... policy less the sum of the limits collectible under all **liability** and/or primary uninsured motorist policies. . .applicable to the bodily ...
- ... However, there is also a more subtle concept of legal **liability** at play in the statutes and caselaw. This idea of **liability** is not specifically fault-based; rather, it rests upon the equitable ...
- ... However, there is also a more subtle concept of legal **liability** at play in the statutes and caselaw. This idea of **liability** is not specifically fault-based; rather, it rests upon the equitable ...
- ... 27, 2012) (holding that HN21 The limitation of liability language ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2015-02-03

^{44.} A Flynn v. Citizens Nat'l Bank, 2015 Tenn. App. LEXIS 874

Overview: Landlord was entitled, under a long-term ground lease, to an award of unpaid rent, taxes, and attorney's fees because, pursuant to the provisions of a separate agreement between the parties, a successor tenant did not have the right to unilaterally surrender the premises with no further obligation to pay rent after a fire at the leased property.

... tenant like an original tenant with all the benefits and **liabilities** of the lease. And then it says -- the question ...

... between some very clear parts, that we're talking about its **liability** that arises because it is the tenant and not **liability** because it may be a successor to the other tenant in other regards. There may be **liabilities** involved with premises **liability** that have gone from the previous tenant to the ...

- ... assignee, the Lender shall be released from all **liability** for obligations under the New Lease from the date of ...
- ... Tenant shall indemnify and hold harmless the Landlord against all **liabilities**, including but not limited to attorney fees and other expenses, ...
- ... interest in the Leased Premises , and any such personal liability shall exist

Jurisdiction Tennessee

Court

Appeals
Eastern Grand
Division

Date

2015-10-26

only so long as the Lender ...

... to read the sentence stating that the Bank's personal liability would be "limited to the Lender 's interest in ...

45. Giffin v. Sawyer, 2012 Tenn. App. LEXIS 451

Overview: In this breach of contract action, the order finding that defendant did not breach the sales agency contract and that plaintiffs were not entitled to collect a commission under the sales agency contract was affirmed because defendant did not hide his discussions with the fossil plant from plaintiffs.

- ... a transaction until after termination of the agency and avoid liability for the commission upon a subsequent sale to the buyer ...
- ... he sell to a purchaser after the agency terminates without liability for the broker's commission. Generally, a seller cannot delay consummation ...
- ... a transaction until after termination of the agency and avoid liability for the commission upon a subsequent sale to the buyer ...
- ... he sell to a purchaser after the agency terminates without liability for the broker's commission. Id . Parks v. Morris ...
- ... legal sales contract." She admitted that TVA told the realtors that TVA was going to deal with the homeowners directly. ...
- ... have contact with TVA as far as between ourselves as Realtors and TVA regarding our situation, what part we were involved ...
- ... sales contract." She admitted that TVA told the realtors that TVA was going to deal with the homeowners directly. ...

Jurisdiction

Tennessee

Court **Appeals** Eastern Grand Division

Date 2012-07-03

46.



Estate of Thompson, 2012 Tenn. App. LEXIS 171

Overview: Trial court abused its discretion in awarding attorney \$ 39,215.50 in fees for services representing executor of an estate because trial court erroneously relied on percentage formula in Maury County, Tenn., Ch. Ct. R. 33.04 and amount awarded was well beyond what was considered reasonable under factors in Tenn. Sup. Ct. R. Prof. Conduct 8, 1.5(a).

- ... a premium attorney fee for doing the work of a realtor would be inappropriate. Thus, we find that, in general, it ...
- ... home belonging to the Decedent, "thus saving [the Estate] a Realtor 's fee of s[ome] six (6) percent." 8 ...
- ... the sale of the house and did not hire a **realtor** for it. This was a benefit to the Estate. Considering ...
- ... done without retaining a real estate firm, thus saving a realtor 's fee of some six percent. Hon. Jerry Colley ...
- ... the need of a real estate firm, thus saving a Realtor 's fee of sum [sic] six (6)

Jurisdiction

Tennessee

Court Appeals Middle **Grand Division**

Date 2012-03-14 percent. 3) Mr. ...

- ... sale instead of listing the home for sale with a **realtor** . We find that the house sale is an appropriate ...
- ... the Decedent's house , avoiding the necessity of a **realtor** 's fee was a benefit to the Estate. Overall, we find ...

47. **1** Moon v. Moon, 2016 Tenn. App. LEXIS 270

Overview: The trial court properly distributed the marital estate because it reviewed and applied the statutory factors set forth in Tenn. Code Ann. § 36-4-121(c) to the financial situations of the husband and the wife and explained its decision in a well-reasoned manner.

... her a two-year average under her new employment as a **realtor** of \$18,000 a year. Both parties ...

... skills of the parties; employability; earning capacity; financial needs; financial **liabilities**; the relative ability of each party for future acquisitions of ...

... two year average income in her new profession as a **realtor** is only reaching \$18,000. The Husband [has] a yearly income ...

 \dots of their marriage, the parties decided Wife should become a **realtor**, so she left her position with Home Depot \dots

... August 2012. In 2013, Wife earned around \$21,000 as a **realtor** , and as of the time of trial in mid-December 2014, ...

 \dots of their marriage, the parties decided Wife should become a **realtor**, so she left her position with Home Depot \dots

 \dots August 2012. In 2013, Wife earned around \$21,000 as a **realtor**, and as of the time of trial in mid-December 2014, \dots

Jurisdiction

Tennessee

Court
Appeals
Eastern Grand
Division

Date 2016-04-21

Overview: The judgment was affirmed as to the trial court's finding that the evidence established a quasi contract between the parties, but was vacated as to both defendants; the trial court's reliance on the testimony of the realtors when it based the damage award on 10 percent of the sale place was misplaced.

... problems with this approach. First the testimony from the two **realtors** was that a 10 percent commission was customary on the ...

... at trial was applicable to a listing agreement wherein the **realtor** was acting as the agent of the seller, and plaintiff ...

... reason, the trial court's reliance on the testimony of the **realtors** when it based the damage award on 10 percent of ...

... problems with this approach. First the testimony from the two realtors was

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2010-01-13

that a 10 percent commission was customary on the ...

- ... at trial was applicable to a listing agreement wherein the **realtor** was acting as the agent of the seller, and plaintiff ...
- \dots reflect the value of the specific services performed by the **realtor** . See, Marta v. Nepa , 385 A. \dots
- ... and awarded plaintiff a judgment based on evidence that a **realtor** under a contract with the seller upon the sale of ...

49. A Comm'rs v. Util. Mgmt. Review Bd., 427 S.W.3d 375

Overview: Judgment was affirmed, in part, as amended Tenn. Code Ann. § 7-82-307(b) was not unconstitutionally vague since utility district commissioners of ordinary intelligence could construe their fiduciary duty under Tenn. Code Ann. § 7-82-309(b)(1) when exercising duties, powers, and authority set forth in Tenn. Code Ann. tit. 7, ch. 82.

- ... to their wards; trustees owe fiduciary duties to trust beneficiaries, **realtors** owe fiduciary duties to their clients; attorneys owe a fiduciary ...
- ... UMRB observes, section 48-58-601(b) is applicable to personal **liability** actions against members of non-profit boards, it is not a ...
- ... S.W.3d 338 (Tenn. Ct. App. 2001); **realtors** owe fiduciary duties to their clients, e.g., Ann Taylor **Realtors**, Inc. v. Sporup, No. W2010-00188-COA-R3-CV, 2010 Tenn. App. ...
- ... relevant to this matter where it pertains to the personal **liability** of non-profit board members and not to the grounds for ...
- ... 7-82-307(b) . Section 48-58-601(b) is applicable to personal **liability** actions against members of non-profit boards, it is not a ...
- ... for example, provides that a member of a member-managed limited **liability** company (LLC) has a fiduciary duty to account to the ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2013-07-31

Dick v. Dick, 2015 Tenn. App. LEXIS 556

Overview: A trial court properly dealt with the sale of a marital residence where the husband's failure to ensure that an adequate transcript or record was filed effectively waived his right to challenge due process or the trial court's decision as to the right of first refusal. Ordering payment of the wife's COBRA benefits was an abuse of discretion.

 \dots on the market for sale with, Kathy Garrett of Zeitlin **Realtors**, at a price suggested by the **realtor**, and listed in accordance with the Order of September 1, \dots

... sold, and after payment of the mortgage and HELOC indebtedness, **realtor**'s fees and necessary closing costs, ...

... on the market for sale with, Kathy Garrett of Zeitlin Realtors, at a price

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2015-07-14

suggested by the ${\bf realtor}$, and listed in accordance with the Order of September 1, ...

- ... After having listened to the testimony of Ms. Garrett [the **realtor**], after having listened to [Husband's] statement, what he thinks the ...
- ... property is currently listed with Kathy Garrett of Zeitlin **Realtors** for a sale price of \$497,900. By December 1, 2012, ...
- ... any fees or costs charged by Kathy Garrett or Zeitlin **Realtors** , under the current listing agreement. Upon refinance, Husband shall be ...
- ... on the market for sale with, Kathy Garrett of Zeitlin **Realtors**, at a price suggested by the **realtor**, and listed in accordance with the Order of September 1, ...

Desgro v. Pack, 2013 Tenn. App. LEXIS 8

Overview: The language the homeowner complained of limiting the time for him to file a cause of action against the home inspector to one year from the date of inspection was not an unenforceable exculpatory clause as it was a contractual limitations period, which was enforceable because the one year period of time to file a cause of action was reasonable.

- ... Carey , the agreement stated: [t]his company assumes no **liability** and shall not be liable for any mistakes, omissions, or ...
- ... employee beyond the cost of the report. This limitation of **liability** shall include and apply to all consequential damages, bodily injury ...
- ... stated that he contacted defendant at the recommendation of his **realtor**, but plaintiff likely could have obtained the service from someone ...
- ... sue within one year after insurance company's first denial of **liability**); Hill v. Home Ins. Co., 22 Tenn. ...
- \dots The provision does not exculpate defendant from most or all ${\it liability}$, but rather limits the time period within which plaintiff can \dots
- ... did not exculpate the home inspector from most or all **liability** , but rather limited the time period within which the homeowner ...
- ... 14 days of discovery, defendant would be released from all **liability** . Plaintiff also notes that the contract provided that if defendant ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2013-01-08

Overview: Where mother filed civil contempt petitions alleging father failed to pay child support or reimburse her for certain expenses, though he purged himself of contempt, he did not do so in a timely manner; thus, pursuant to parties' marital dissolution agreement, he was properly ordered to pay counsel fees mother incurred in filing contempt petitions.

... a money judgment against Father for \$10,302.36 for her tax liability and

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2012-08-06

\$3,500 in attorney's fees. The court denied Mother ...

- ... required to pay an additional \$10,302.36 in federal income tax **liability** . The divorce complaint was set to be tried on March ...
- ... money judgments entered against him for Mother 's tax **liability** and attorney's fees should be vacated because they were based ...
- ... affirm the award of \$10,302.36 for Mother 's tax **liability** and the award of \$3,500 for a portion of ...
- ... pay the mother \$10,302.36 plus post-judgment interest for the tax **liability** she incurred due to the father's refusal to file a ...
- ... subsequently quit to begin working part-time for herself as a **realtor** and interior designer. During their ten years of marriage, Father ...
- ... Mother was entitled to a judgment for her tax **liability** and that, under the MDA, Mother was entitled ...

^{53.} Brady v. Brady, 2015 Tenn. App. LEXIS 664

Overview: Marital home was properly divided in the division of a marital estate, under Tenn. Code Ann. § 36-4-121(c), because, even though the trial court allocated a majority of the home's equity value to the husband, the trial court appropriately valued and divided the home equity value and ordered the sale of the marital home at auction.

... Parties shall list the property for sale with an independent **Realtor**, and both parties shall follow the recommendations of the **Realtor** as to the condition of the property for marketing." ...

... and mental health, vocational skills, employability, earning capacity, estate, financial **liabilities** and financial needs of each of the parties; (3) The ...

Jurisdiction Tennessee

Court
Appeals Middle
Grand Division

Date 2015-08-18

^{54.} **Crye-Leike**, Inc. v. Carver, 415 S.W.3d 808

Overview: Although eventual purchasers of a home who personally viewed the home one day after expiration of a realty company's listing agreement earlier had viewed the realty company's internet advertisement of the home, the company was not entitled to a sales commission on the home. The listing agreement did not define a showing of the property.

... the evolving importance in the real estate market of the **realtor** 's online presentation of property and the fact that properties are ...

 \dots its 'plain, ordinary, and popular sense.'" Maggart v. Almany Realtors , Inc ., 259 S.W.3d 700 , 704 \dots

... quotation marks omitted) (quoting Blake D. Morant, Contracts Limiting **Liability**: A Paradox with Tacit Solutions, 69 Tul. L. ...

Jurisdiction Tennessee

CourtAppeals
Western Grand

Date 2011-05-26

Division

Overview: In this divorce case, based upon the sole authority vested in the wife to convey the property and a preponderance of the evidence that she exercised this authority in good faith, the trial court did not err in vesting continued authority in her to convey the property, and the approval of the sale of the property for a certain price was not error.

... one priced at \$500,000.00 or more. She had been a **realtor** for twenty-four years and had listed and sold property in ...

- ... is all that's out there. The testimony of the **realtor** and broker both indicate that this sale price is within ...
- ... that she be allowed to secure an appropriate auctioneer or **realtor** to finalize the sale of the Property. Husband filed an ...
- ... country, in this area. It was testified to by the **realtors** and brokers who testified that the economy has caused homes ...
- ... a buyer through her efforts and diligence, work with the **realtors** , found the best possible price that could be obtained for ...

Jurisdiction

Tennessee

Court Appeals

Eastern Grand
Division

Date

2014-09-26

56.



Wright v. Dixon, 2011 Tenn. App. LEXIS 217

Overview: Because contract to purchase real property was conditioned on 100 percent financing and buyer demonstrated that he sought such financing from multiple institutions and was denied for various reasons, including that he did not qualify, evidence preponderated against trial court's finding that buyer failed to make reasonable efforts to obtain loan.

... not qualify. She testified that she let defendant and his **realtor** know that he did not qualify on June 27, and then faxed a denial letter to the **realtor** on June 27. The evidence also showed that at some ...

- ... April 22, 2010, and plaintiff testified that she was a **realtor** and listed her property for sale. Defendant submitted an offer, ...
- ... on July 1, she received a faxed document from defendant's **realtor** asking that the earnest money be released to defendant. Plaintiff ...
- ... conversation directly with defendant, but rather handled everything through his **realtor** . Plaintiff testified that she subsequently sold the house and one ...
- ... April 22, 2010, and plaintiff testified that she was a **realtor** and listed her property for sale. Defendant submitted an offer, ...
- ... on July 1, she received a faxed document from defendant's **realtor** asking that the earnest money be released to defendant. Plaintiff ...
- ... conversation directly with defendant, but rather handled everything through his **realtor** . Plaintiff testified that she subsequently sold the house and one ...

Jurisdiction

Tennessee Court

Appeals Eastern Grand Division

Date 2011-05-02





Overview: The judgment awarding summary judgment in favor of appellee was reversed because the agreement stated unequivocally that it terminated upon repayment of the underlying loan, making the placement fee provision unenforceable.

... continuation of the agreement a condition precedent to Max Well's **liability** for the fee. Rather, the placement fee became a **liability** of MAX Well when the loan was made and remained a **liability** until Collateral Plus brought suit. The fact that ...

... under the agreement is not inconsistent with MAX Well's continuing **liability** for payment of the placement fee "upon a change of ...

... intended that termination of the agreement would extinguish MAX Well's **liability** for the placement fee. I believe such a result to ...

... its 'plain, ordinary, and popular sense.'" Maggart v. Almany Realtors , 259 S.W.3d 700 , 704 (Tenn. ...

... conclude that the parties did not intend for MAX Well's **liability** for the placement fee to survive the termination of the ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2011-03-29

Graham v. Crye-Leike Realty Corp., 2014 Tenn. App. LEXIS 859

Overview: Res judicata barred an owner's complaint because (1) she admitted she "resubmitted" previously litigated claims, (2) an added intentional interference with a business relationship claim could have been litigated in the prior suit, and (3) the only possible liability of a law firm added as a defendant was based on respondeat superior.

... the res judicata doctrine, because the only potential source of **liability** of the law firm is under the theory of vicarious **liability** based on respondeat superior, for the actions of their ostensible ...

... party from suing a merely vicariously responsible party, as its **liability** is purely derivative. where "the injured party sue[s] ...

... offer was made in the Agreement form by S&J through **realtor** Crye-Leike to purchase the Real Property from Plaintiff for \$35,000; ...

... party from suing the merely vicariously responsible party, as [its] **liability** [is] purely derivative." Id . at 107 ("[its]" added ...

... litigated in the prior suit, and (3) the only possible **liability** of a law firm added as a defendant was based ...

... been litigated in the prior suit, and the only possible **liability** of a law firm added as a defendant was based ...

... litigated in the prior suit, and (3) the only possible **liability** of a law firm added as a defendant was based ...

Jurisdiction Tennessee

Court Appeals Eastern Grand Division

Date 2014-12-29

Overview: Reading Tenn. Code Ann. § 28-1-108 in conjunction with Tenn. Code Ann. § 28-1-106, a plaintiff's mental incompetency must have been judicially adjudicated at the time a cause of action accrued. The one-year statute of limitations was not tolled where the decedent had not been adjudicated as incompetent as of the date of his fall.

- ... The statute of limitations for health care **liability** actions is one year from the date the action accrued. ...
- \dots § 29-26-116 . The statute of limitations for health care **liability** actions is one year from the date the action accrued. \dots
- \dots correctness to the trial court's determination. Maggart v. Almany Realtors , Inc. , 259 S.W.3d 700 , 703 \dots
- ... 29-26-116 . HN5 A plaintiff in a health care **liability** action is required to provide pre-suit notice of his intent ...
- ... JJ., joined. J. STEVEN STAFFORD Plaintiff filed a health care **liability** action on behalf of her deceased husband. Plaintiff provided pre-suit ...
- ... mailed her pre-suit notice of a potential health care **liability** action against Lakeside. Several months later, on February 7, 2014, ...
- ... of Limitations HN4 The statute of limitations for health care **liability** actions is one year from the date the action accrued. ...

Jurisdiction

Tennessee

Court

Appeals Western Grand Division

Date

2015-12-23

Tarver v. Ocoee Land Holdings, LLC, 2011 Tenn. App. LEXIS 523

Overview: When a husband and wife were sellers of real estate, but the wife failed to sign a purchase and sale agreement, application of the doctrine of equitable estoppel was appropriate because it was the buyer's real estate agent who gave the wife false and misleading information that her signature was not required on the document.

 \dots HN10 Pursuant to the provisions of the Limited **Liability** Company (LLC) Act and the Revised LLC \dots

- \dots for lots 17, 18 and 19 because Ocoee Land Holdings's **realtor**, Tammy Davis, told him that Holly did not need to \dots
- ... and is not otherwise personally liable for the acts, debts, **liabilities** , or obligations of the LLC whether such arise ...
- ... Ocoee Land Holdings, LLC is a Tennessee limited **liability** company with its principal place of business at 6881 Kings ...
- ... Ocoee Mountain Homes, LLC is a Tennessee limited **liability** company with its principal place of business at 6881 Kings ...
- ... the them was correct. HN9 Under the Limited **Liability** Company (LLC) Act and the Revised LLC ...
- ... and is not otherwise personally liable for the acts, debts, **liabilities** , or obligations of the LLC whether such arise in contract, ...

Jurisdiction Tennessee

Court

Appeals
Eastern Grand
Division

Date 2011-09-19

Overview: Insurer was not obligated to pay insureds damages for emotional distress they allegedly suffered from seeing their son's body after he was struck by an uninsured motorist (UM), as the phrase "bodily injury," as used in both Tenn. Code Ann. § 56-7-1201(a) and UM provision of policy, did not include damages for a mental or emotional injury by itself.

... Tenn. Code Ann. § 56-7-1201(a) (2008). Every automobile **liability** insurance policy delivered, issued for delivery or renewed in this state, covering **liability** arising out of the ownership, maintenance, or use of any ...

... alleged tortfeasor had assumed his own financial responsibility by purchasing **liability** insurance. Uninsured motorist insurance does not actually insure the uninsured ...

... of some recovery when the other parties do not have **liability** insurance. The purpose of Tenn. Code Ann. § 56-7-1201(a) ...

... (2008) is to protect those who purchase motor vehicle **liability** insurance from those who do not....

... (2008) is to protect those who purchase motor vehicle **liability** insurance from those who do not. insured is allowed to ...

... alleged tortfeasor had assumed his own financial responsibility by purchasing **liability** insurance." Id . In other words, "uninsured motorist ...

 \dots 436 (Tenn. 2012) ; Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 703 \dots

Jurisdiction Tennessee

Court Supreme Court

Date 2012-08-22

62.



Garrison v. Bickford, 2011 Tenn. App. LEXIS 412

Overview: A trial court erred in finding that Tenn. Code Ann. § 56-7-1201(a) applied in parents' bystander negligent infliction of emotional distress claim against their insurer, as the policy did not cover the claim where there was no allegation that the parents sustained any injury to their bodies that caused them emotional sickness or disease.

... 56-7-1201 (a) , the uninsured motorist statute provides: "Every automobile **liability** insurance policy delivered, issued for delivery or renewed in this state, covering **liability** arising out of the ownership, maintenance, or use of any ...

... Ann. § 56-7-1201(a)(1), (2). (a) Every automobile **liability** insurance policy delivered, issued for delivery or renewed in this state, covering **liability** arising out of the ownership, maintenance, or use of any ...

... bodily injury" of Michael Garrison and clearly fell within the **liability** limitations contained in the "each person" provisions of the Policy. ...

... uninsured motorist coverage shall be equal to the bodily injury **liability** limits stated in the policy. 2) However, any named insured ...

... correctness afforded to the trial court. Maggart v. Almany Realtors , Inc .,

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2011-07-29

259 S.W.3d 700, 703 ...

... in the context of a CGL policy 3 Commercial General **Liability** policy. in Am. Indem. Co. v. Foy Trailer ...

Bevans v. Burgess, 2012 Tenn. App. LEXIS 177

Overview: In plaintiff's action seeking specific enforcement of a purchase and sale contract, a trial court did not err in granting summary judgment to defendants because there was no meeting of the minds concerning what short sale provisions were intended to be included in the contract and, as such, there was no enforceable contract.

... case is the standard Purchase and Sale Agreement provided to **Realtors** in Tennessee by the Tennessee Association of **Realtors**. The standard "Short Sale Addendum" form provided to **Realtors** in Tennessee by the Tennessee Association ...

... case is the standard Purchase and Sale Agreement provided to **Realtors** in Tennessee by the Tennessee Association of **Realtors**. The standard "Short Sale Addendum" form provided to **Realtors** in ...

... agreement" form copyrighted by the Tennessee Association of **Realtors** . The agreement was made contingent on Bevans's ability to obtain ...

... a form copyrighted by the Tennessee Association of **Realtors** , provides in pertinent part as follows: The undersigned agree to ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date 2012-03-19

64. Univ. Corp. v. Wring, 2012 Tenn. App. LEXIS 645

Overview: A decision requiring a real estate agent to disgorge funds received pursuant to an agreement with a nonprofit corporation to acquire foreclosed properties was reversed, as the agent was not required to submit documentation of actual repair costs on properties acquired pursuant to the parties' original oral agreement.

- ... The liability of the principal for the acts and contracts of his ...
- \dots a single transaction, or to a series of transactions. The **liability** of the principal for the acts and contracts of his \dots
- ... the oral agreement were erroneously included in the determination of **liability** and damages, we need not address Wring's claims concerning whether ...
- ... In the fall of 1994, Bruce Wring ("Wring"), an associate **realtor** in Memphis , Tennessee , introduced Queen to ...
- ... the execution of the written agreement within his determination of **liability** and damages. Therefore, we reverse the judgment of the ...
- ... (Tenn. Ct. App. 2001) : HN8 The **liability** of the principal for the acts and contracts of his ...
- ... a single transaction, or to a series of transactions. The liability of the

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2012-09-18

principal for the acts and contracts of his ...

65.



Keenan v. Fodor, 2012 Tenn. App. LEXIS 521

Overview: In a dispute between neighbors over ownership of a gate used for entry into both their properties, the previous owners of defendants' property did not intend to allow the gate to become a fixture on plaintiffs' realty and it was included in the sale of their home to defendants. Defendants were the true owners of the gate.

 \dots A copy of the letter was sent to the Keenans' realtor , who made the requested changes to the MLS listing. Debra \dots

... asserted that they owned the gate and compelled the plaintiffs' **realtor** to remove all mention of the gate from sales materials. ...

 \dots iron privacy gate." The brochure was drafted by the Rutherfords' **realtor**, and was printed by the Keenan Group, Inc., \dots

... and the Fodors. Other witnesses testified briefly, including the **realtor** who sold the Rutherford home to the Fodors, ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2012-07-30

66. A Leedy v. Realty Store, Inc., 2010 Tenn. App. LEXIS 472

Overview: The trial court did not err in finding that appellant's ownership interest in the business terminated in September 2005 and that thereafter he was operating as an independent contractor because appellant's failure to support the business financially weighed against joint ownership.

... 2002, with accompanying assumption by Leedy of "all **liabilities** of The 1833 House, LLC that have come ...

 \dots escrow account, as required by the state agency that regulates **realtors**, into which rents were to be deposited. Leedy \dots

... 2004, with accompanying assumption by Jones as buyer of "all **liabilities** of Allo'ra LLC that have come into existence ...

... May 3, 2000 with accompanying assumption by Jones of all **liabilities** of "The Realty Store, Inc. that have come into existence ...

Jurisdiction

Tennessee

Court

Appeals
Eastern Grand
Division

Date

2010-07-26

67. A RCR Bldg. Corp. v. Pinnacle Hospitality Partners, 2012 Tenn. App. LEXIS 787

Overview: Trial court erred in granting summary judgment to project owner on issue of liquidated damages in dispute with general contractor over construction of hotel because owner's failure to pursue claim for liquidated damages under claims procedure in contract was condition precedent to its ability to seek liquidated damages in the instant litigation.

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

TODD SHOLAR

... perspective, there was no dispute about Contractor's liability for liquidated damages, there was no Claim either. Owner ...

Date 2012-11-15

- ... the final payment owed to Contractor . Regarding Contractor's liability for liquidated damages, the trial court found that Owner ...
- ... that intention, consistent with legal principles." Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 703-704 ...
- ... provided in 33.206(a), if it is disputed either as to **liability** or amount or is not acted upon in a reasonable ...

68. Shoffner v. Tenn. Consol. Ret. Sys., 2014 Tenn. App. LEXIS 868

Overview: The Tennessee Consolidated Retirement System properly did not include certain compensation when calculating an employee's retirement benefits, under Tenn. Code Ann. § 8-34-101(14)(A), because it was for more than his services, as (1) it was paid if no services were performed, and (2) he released his employer's liability for terminating a contract.

Court

Tennessee

Jurisdiction

Appeals Middle **Grand Division**

Date 2014-12-29

- ... Modification Agreement which relieves Claiborne County of future liability relative to the prior contract does not change the fact ...
- ... no services were performed, and (2) he released his employer's liability for terminating a contract. HOLDINGS: [1]-Appellee Tennessee Consolidated ...
- ... not services were performed, and he released his employer from liability for terminating a prior contract; [2]- The appellate court ...
- ... that intention, consistent with legal principles." Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 703-04 ...

69. Yates v. Yates, 2016 Tenn. App. LEXIS 144

Overview: In a divorce case, a former wife's disclosure of her assets provided a former husband with an essentially accurate understanding of her financial holdings, and the husband knowledgeably entered into a prenuptial agreement under Tenn. Code Ann. § 36-3-501.

... adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the ...

- ... the judgment adjudicating all the claims and the rights and liabilities of all the parties. When the trial court entered its ...
- ... in Murfreesboro in or about June 2009. Husband was a realtor and 20% owner of the real estate company Red Realty. ...
- ... entry of judgment adjudicating all the claims and rights and liabilities of all parties"); Winter v. Smith, 914 ...

Jurisdiction Tennessee

Court Appeals Middle **Grand Division**

Date 2016-02-24 Overview: As the document as a whole referred to the insurance policies of the patient, the act of simply naming the insurer, a third party's insurance provider, did not change the overall meaning of the document, which failed to effectively assign the proceeds of a claim between the patient and the insurer; summary judgment for the insurer was affirmed.

Jurisdiction

Tennessee

Court Supreme Court

Date 2015-07-01

... the dispute. Id. (citing Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 704 ...

- ... insurance company on the assignment. Defendant Erie was the automobile **liability** insurance provider for William L. Burnette, Jr., the other individual ...
- ... a 'direct action' state where a plaintiff can sue the liability insurance carrier of the defendant who allegedly caused the harm."), ...

71. Barnett v. Barnett, 2010 Tenn. App. LEXIS 170

Overview: Judgment which denied the husband's motion for new trial and ruled on other matters related to the contempt of the husband and enforcement of the judgment of divorce was affirmed because the issues raised by the husband did not have any basis either in the facts or the law that came close to requiring a reversal or modification of the judgment.

... mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties; (3) The ...

... each, in light of the total universe of assets and liabilities . B. Shortly after the marriage, Wife left the ...

... ordered that the Market Street property be sold, either by realtor or public auction, and that the proceeds be used first ...

Jurisdiction Tennessee

Court **Appeals** Eastern Grand Division

Date 2010-02-26

72. Consulting & Fin. Servs. v. Friedmann, 2012 Tenn. App. LEXIS 254

Overview: In suit brought by owners against contractor to recover for the contractor's breach of contract, specifically, performance of negligent work on the owners' home, trial court erred in computing damages to include repair work on owner's deck as there was no evidence indicating that owners notified contractor about issue within time frame in contract.

... in this regard was the testimony of Susan Maddox-Reed, a realtor hired by Plaintiffs, who testified that the home was ...

... \$4,252.00 in discretionary costs. Contractor appeals asserting that, in finding **liability**, the trial court failed to apply the standard of performance ...

... issue on appeal centers around his belief that, in finding liability in this case, the trial court employed the implied warranty ...

Jurisdiction Tennessee

Court Appeals Middle **Grand Division**

Date 2012-04-19



Overview: Where an insurer filed an interpleader action under Tenn. R. Civ. P. 22.01 due to competing claims to proceeds of life insurance policy by insured's mother and husband, court erred in granting the mother summary judgment because the insured's beneficiary designation was ambiguous and no extrinsic evidence was presented to show the insured's intent.

... plaintiff is or may be exposed to double or multiple **liability** . It is not ground for objection to the joinder ...

 \dots court's role in interpreting contracts in Maggart v. Almany **Realtors**, Inc., 259 S.W.3d 700 (Tenn. 2008), \dots

... Rules of Civil Procedure in order to limit its **liability** . Rule 22.01 provides that: HN18 See Tenn. ...

Jurisdiction

Tennessee

Court

Appeals Western Grand Division

Date

2012-11-21

^{74.} Suzich v. Booker, 2012 Tenn. App. LEXIS 509

Overview: As pursuant to the terms of the parties' construction loan agreement, a bank had no contractual duty to complete inspections of the parties' home, their breach of contract claim based on the bank's failure to complete inspections, which resulted in improper disbursement of the loan funds, was properly resolved by summary judgment for the bank.

 \dots that intention, consistent with legal principles." Maggart v. Almany **Realtors** , Inc., 259 S.W.3d 700 , 703-704 \dots

- ... 13. AGREEMENTS. Until the Loan and all related debts, **liabilities** and obligations are paid and discharged, I [the Bookers] will ...
- ... *1 . The agreement further provided: Lender has no **liability** in connection with said improvements or the construction or completion ...

Jurisdiction Tennessee

Court

Appeals Western Grand Division

Date 2012-07-27

^{75.} A Wilkinson v. Wilkinson, 2011 Tenn. App. LEXIS 639

Overview: Whether classified as part of property division under Tenn. Code Ann. § 36-4-121 or alimony in solido under Tenn. Code Ann. § 36-5-122, trial court erred in assigning husband \$ 75,000 debt wife incurred as loan from her brother because wife used money to maintain standard of living at a level far beyond income and assets then available to parties.

... and mental health, vocational skills, employability, earning capacity, estate, financial **liabilities** and financial needs of each of the parties; (3) The ...

... expenditures necessary to repair the home as determined by the **realtor** will also be divided two-thirds (2/3) to Wife and one-third ...

... will pay all debts in his name including the tax **liability** , if any, owed for any years the parties filed tax ...

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

Date

2011-11-29

237

Overview: In this breach of contract action, the grant of summary judgment to defendants was reversed because the Letter of Intent only provided plaintiff with the option to opt out of the transaction.

 \dots Ct. App. W.S., Sept. 30, 2004) (quoting Crye-Leike <code>Realtors</code> , Inc ., 1998 Tenn. App. LEXIS 641, 1998 WL 651623, \dots

 \dots its 'plain, ordinary, and popular sense.'" Maggart v. Almany **Realtors** , 259 S.W.3d 700 , 704 (Tenn. \dots

... apply to inducement to breach a contract claims. Crye-Leike **Realtors** , Inc. v. WDM, Inc., No . 02A01-9711-CH-00287, 1998 Tenn. ...

Jurisdiction

Tennessee

Court

Appeals
Eastern Grand
Division

Date

2011-05-11

Overview: Designating mother as primary residential parent and awarding her parenting time of 218 days per year was in best interest of four-year-old child with special needs, Tenn. Code Ann. §§ 36-6-106 and 36-6-404, because mother, inter alia, offered stability as primary care giver, attended to child's daily needs, and had more active role in parenting.

... including the recent increase in Father's earning capacity as a **realtor** and the court's conclusion that Father's financial evidence was not ...

... As of January 2012, he was also employed as a **realtor** with a brokerage firm for which he had sold two ...

 \dots at-risk pre-teens and teenagers and is also employed as a realtor . He married in September 2012 and lives with his family, \dots

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date 2014-07-29

78. A State v. Caronna, 2014 Tenn. Crim. App. LEXIS 1043

Overview: Evidence supported defendant's conviction of first degree murder under Tenn. Code Ann. § 39-13-202(a)(1), as the jury could have found that defendant was the perpetrator and had engaged in the homicidal conduct with intent and premeditation; his right to a speedy trial under U.S. Const. amend. VI and Tenn. Const. art. I, § 9 was not violated.

... home purchase at work. The victim had mentioned that the **realtor** would not return the Defendant's calls, and she thought that ...

 \dots based on the surveillance. The police had contacted the **realtor** and learned that the Defendant could not have had a \dots

... process, including issues with the builder, the lender, and the **realtor** who would never call the Caronnas back. He last saw ...

Jurisdiction

Tennessee

Court

Criminal
Appeals
Western Grand
Division

Date

2014-11-18

Overview: Judgment in a marital dissolution was affirmed because the trial court did not err in its valuation of the marital property, particularly, in the valuation of the husband's real estate development partnership interests, and the evidence did not preponderate against the court's division of the marital property under Tenn. Code Ann. § 36-4-121(c).

... of marketability discount applicable to husband's interest in one limited **liability** company but not to husband's interest in another limited **liability** company based on the facts). Under the facts of this ...

- ... mental health, vocational skills, employability, earning capacity, estate, financial **liabilities** and financial needs of each of the parties; (3) The ...
- ... builders, including GCI . The partnerships do not pay **realtor** commissions when selling these lots. Husband has a twenty percent ...
- \dots only tax consequence from this division is future income tax **liability** . See Jekot v. Jekot , 232 S.W.3d \dots

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2016-05-12

80. Ruff v. Reddoch Mgmt., LLC, 2011 Tenn. App. LEXIS 644

Overview: A trial court did not err in dismissing a former landlord from a tenant's action under the Uniform Residential Landlord and Tenant Act, Tenn. Code Ann. § 66-28-305, because the former landlord sold the property to the current owner, a bona fide purchaser, and, as such, the former landlord was relieved of liability.

- ... fide purchaser, landlord or agent, or both, is relieved of **liability** under the rental agreement and this chapter as to events ...
- \dots Reddoch, a bona fide purchaser, Adams Rentals is relieved of **liability**, and the trial court did not err in dismissing it \dots
- ... filed suit against Adams Rentals and Reedy & Dompany Realtors in Shelby County General Sessions Court (the "Ruff ...
- ... purchaser, and, as such, the former landlord was relieved of **liability** . A trial court did not err in dismissing a former ...
- ... purchaser, and, as such, the former landlord was relieved of **liability**. Judgment affirmed. Judgment of the Circuit Court...
- ... fide purchaser, landlord or agent, or both, is relieved of **liability** under the rental agreement and this chapter as to events ...
- \dots Reddoch, a bona fide purchaser, Adams Rentals is relieved of **liability**, and the trial court did not err in dismissing it \dots

JurisdictionTennessee

CourtAppeals Middle Grand Division

Date 2011-11-30

81.

Beal v. Nashville Elec. Serv., 2010 Tenn. App. LEXIS 676

Overview: The decision affirming the employee's termination was affirmed; regardless of whether the employee provided timely doctor's excuses

Jurisdiction Tennessee technically complying with the employer's sick leave policy, his attendance could be deemed unsatisfactory and his absence could be deemed unnecessary under the employer's policy manual.

CourtAppeals Middle
Grand Division

Date 2010-10-28

- ... In conclusion, Employee was working as a **realtor** in uncontrolled environments while at the same time telling his ...
- ... Employee's action of showing and selling real estate as a **realtor** and participating in other activities, such as discussions with others ...
- ... outside in an uncontrolled environment after conducting business as a **realtor**, while on sick leave and instead of working any time ...
- ... could work on a limited basis, but worked as a **realtor** while on paid sick leave and never disclosing to ...
- ... Beal as follows: In conclusion, Employee was working as a **realtor** ir uncontrolled environments while at the same time telling his ...
- ... Employee's action of showing and selling real estate as a **realtor** and participating in other activities, such as discussions with others ...
- ... outside in an uncontrolled environment after conducting business as a **realtor**, while on sick leave and instead of working any time ...

82. A Cameron Gen. Contrs., Inc. v. Kingston Pike, LLC, 370 S.W.3d 341

Overview: In this breach of contract action, the judgment in favor of plaintiff was reversed because the contract at issue clearly and unambiguously provided that once plaintiff chose to terminate the contract, plaintiff's sole remedy for defendant's breach was a return of plaintiff's earnest money deposit.

... "), sued Kingston Pike, LLC, a Georgia limited **liability** company ("Kingston Pike"), for breach of a contract concerning the ...

... 805 (Tenn. 1975) . Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 703-04 ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2011-12-21

83. A Dye v. Waldo, 2013 Tenn. App. LEXIS 127

Overview: In property dispute concerning 19.26 acres, trial court properly found landowner's adverse possession claim against neighbors was barred by Tenn. Code Ann. § 28-2-110(a) because neither landowner nor predecessorin-title ever disputed assessment of property, never filed action to recover disputed property, and never paid taxes on disputed property.

 \dots recently had listed her property for sale with a local **realtor** — advertising the total acreage to be 16.7 acres. The \dots

... purposes." It simply cannot be said that increasing Plaintiff's tax **liability** from an assessment based on 16.7 acres to an assessment ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2013-02-26

84. A Gordon v. Gordon, 2010 Tenn. App. LEXIS 665

Overview: An award of permanent spousal support to the wife was properly changed to transitional alimony under Tenn. Code Ann. § 36-5-121(d)(4) and (g)(1) because, although the wife had a need at the time of trial, she clearly had significant earning capacity as a pilot and therefore did not need permanent spousal support.

 \dots would be any equity after payment of the encumbrances, the **realtor** 's commission, and the accrued interest -- " [T]hat isn't \dots

... and mental health, vocational skills, employability, earning capacity, estate, financial **liabilities** and financial needs of each of the parties; (3) The ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2010-10-27

85. A Jane Doe v. USA Swimming, 2012 Tenn. App. LEXIS 379

Overview: Imposition of sanctions against non-party deponent was proper because, inter alia, during the deposition, deponent's attorney objected to almost every question in an argumentative and suggestive manner, consulted with deponent several times during questioning, and unilaterally terminated deposition, in clear violation of Tenn. R. Civ. P. 30.03.

... client; therefore, the deponent should not be excused from **liability** for his attorney's misconduct, especially considering the deponent is experienced ...

 \dots to insist on a jury trial. Memphis Bd. of **Realtors** v. Cohen , 786 S.W.2d 951 , 952-53 \dots

JurisdictionTennessee

CourtAppeals Middle Grand Division

Date 2012-06-12

86. Scent v. Shoemaker, 2012 Tenn. App. LEXIS 822

Overview: A trial court properly determined that under the doctrine of merger, plaintiff's deed of trust held a priority position over defendant's deed of trust; a mortgagee's acceptance of a deed in lieu of foreclosure from defendant's predecessor in interest, with actual and constructive notice of plaintiff's lien, extinguished that lien based on merger.

... 2008 when she decided to foreclose. At that time, a "**realtor** friend" advised Scent's son that he had heard that the ...

... exchange for which the senior mortgagee releases the mortgagor from **liability** . In the illustration where the senior mortgagee had no knowledge ...

Jurisdiction Tennessee

Court Appeals Eastern Grand Division

Date 2012-11-29

Overview: Corporation did not continue to owe fee residuals to LLC and corporation was entitled to summary judgment because first and second agreements between corporation and a customer had substantially different

Jurisdiction Tennessee

Court

terms which made the agreements inconsistent with each other, and, thus, the second agreement was not a renewal of the first agreement.

Supreme Court

Date

2012-11-20

 \dots at issue is ambiguous. See Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 704 \dots

- ... 435 (Tenn. Ct. App., Aug. 11, 2011) Appellee limited **liability** company (LLC) sued appellant corporation, alleging that the corporation's failure ...
- ... to the other of the default; provided, however, that CheckVelocity's **liability** for any CheckVelocity Net Fee Residuals payable under Section 2 ...

88. A Southern Trust Ins. Co. v. Phillips, 474 S.W.3d 660

Overview: In this insurance case, the vacancy exclusion for vandalism and malicious mischief, theft or attempted theft did not encompass arson; the policy consistently made a distinction between fire and vandalism and malicious mischief, and in common speech, vandalism and arson were separate and distinct activities.

... 436 (Tenn. 2012); Maggart v. Almany **Realtors**, Inc., 259 S.W.3d 700, 703 ...

... its 'plain, ordinary, and popular sense.'" Maggart v. Almany Realtors , Inc. , 259 S.W.3d 700 , 704 ...

Jurisdiction Tennessee

Court Appeals Eastern Grand Division

Date 2015-06-10

89. State v. Hufford, 2014 Tenn. Crim. App. LEXIS 877

Overview: Trial court violated defendant's rights by conditioning continuance to hire counsel upon raising bond that would render him incarcerated, as continuance was first requested and did not increase flight risk. Trial court did not err in ordering consecutive sentences based on criminal history and fact defendant committed offenses while on probation.

... 7, 2012. The State's first witness was Shelby Bass, a **realtor** in Kingsport , Tennessee . In July 2010, ...

... being the voice of the caller. Melanie Jennings, previously a **realtor** in Kingsport, then testified that in March 2010, she ...

Jurisdiction Tennessee

Court Criminal Appeals Eastern Grand Division

Date 2014-09-08

90. Bowley v. Lane, 2013 Tenn. App. LEXIS 574

Overview: A trial court did not err in denying the builders' motion for remittitur given that the jury's award of \$ 50,000 in damages fell far short of the upper limit of the range of reasonableness in light of the testimony that the cost to repair the homeowners' house properly would be \$ 335,643.

... Ms. Bowley testified that she and her husband gave their realtor the authority

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

to do the final walk-through prior to the ...

... and personal commitments. Plaintiffs released the final payment upon their **realtor** 's word even though the House was not completed ...

Date 2013-08-29

- ... Prior to moving to Tennessee , Plaintiffs contacted a **realtor** and viewed several houses including at least one log house. ...
- ... Ms. Bowley testified that she and her husband gave their **realtor** the authority to do the final walk-through prior to the ...
- \dots and personal commitments. Plaintiffs released the final payment upon their **realtor**'s word even though \dots

91. A Hudson v. Grunloh, 2014 Tenn. App. LEXIS 132

Overview: The trial court did not err in finding an attorney's fee reasonable, Tenn. Sup. Ct. R. Prof. Conduct 8, 1.5(a), as the evidence indicated the client's divorce involved a complicated implied partnership issue, the client and the attorney agreed to a \$200 per hour rate, and that this rate was customary within the locality.

 \dots that intention, consistent with legal principles." Maggart v. Almany **Realtors** , Inc., 259 S.W.3d 700 , 703-04 \dots

... as to the division of assets. Ms. Grunloh hired a **realtor** to sell the properties and she hired an auctioneer to ...

... that Mr. Hudson 's meetings and calls with the **realtor** of Ms. Grunloh, and with the attorney representing a prospective ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2014-03-11

92. Bengs v. Bengs, 2013 Tenn. App. LEXIS 287

Overview: Declaratory judgment declaring post-nuptial agreement enforceable was affirmed where agreement awarded wife marital home in event of divorce and provided that, if she sold property, husband would receive half of equity; agreement did not have to contain sale price or mechanism to determine sales price to be enforceable.

 \dots Bengs one-half (1/2) of the equity in said property less **realtor** fees, closing costs and moving expenses. The parties acknowledge \dots

... he has been fully informed of his legal rights and **liabilities**; that he believes that the provisions of this Agreement are ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2013-04-23

93. A Consulting & Fin. Servs. v. Friedmann, 2014 Tenn. App. LEXIS 235

Overview: In a breach of contract case, a trial court's damages calculation on remand was vacated because the law of the case was not followed when, in excluding damages for defects not complained of within a warranty period from its award, the trial court, without explanation under Tenn. R. Civ. P.

Jurisdiction Tennessee

Court Appeals Middle 52.01, used a rate different from that originally applied.

Grand Division

Date

2014-04-24

... we were asked to review the trial court's finding of **liability** , and particularly whether the trial court failed to apply the ...

... in this regard was the testimony of Susan Maddox-Reed, a **realtor** hired by [Appellees], who testified that the home was originally ...

94. Crews v. Jack, 2015 Tenn. App. LEXIS 399

Overview: The trial court abused its discretion in denying defendant's motion to set aside the default judgment entered in favor of plaintiff because the undisputed testimony established that defendant had no notice of the trial date.

... docket call to answer Ms. Crews's allegations. Mr. Jack disputed **liability** in this case at the docket call, and a trial ...

 \dots to file any responsive pleadings. Nicholson v. Lester Hubbard **Realtors** , No. W2010-00658-COA-R3-CV, 2010 Tenn. App. LEXIS 680 , \dots

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2015-05-29

95. Davis v. Hood, 2016 Tenn. App. LEXIS 459

Overview: The trial court properly modified the residential parenting schedule because the mother proved a material change of circumstance pursuant to Tenn. Code Ann. § 36-6-101(a)(2)(B). The father's increasingly erratic behavior and alcohol use was a material change because the father admitted to abusing alcohol and refused to stop drinking entirely.

... weekend because of her job. Mother is a **realtor** and works as the sales manager in a subdivision Wednesday ...

... for 2013 included purchasing a helium tank, balloons, materials for **realtor** functions, drinks, snacks, paper goods, coffee and a new coffeemaker ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date 2016-06-30

Overview: Property where former boyfriend and former girlfriend had last resided was partnership property, Tenn. Code Ann. §§ 61-1-203 and 61-1-204(d), because previous houses where parties lived were subject of partnership agreement as were properties purchased after property at issue and partnership funds were used to pay, inter alia, monthly mortgage.

... about this issue as follows: Q. You've been a licensed **realtor** as of April 5, 2008, for four years; true? A. ...

... Repeat that question, please. Q. You have been a licensed **realtor** for four years as of September 5, 2008....

Jurisdiction

Tennessee

Court

Appeals Western Grand Division

Date

2013-05-06

... Q. You've been a licensed **realtor** as of April 5, 2008, for four years; true? A.

... Repeat that question, please. Q. You have been a licensed **realtor** for four years as of September 5, 2008. A. Approximately, ...

97. Fox v. Fox, 2011 Tenn. App. LEXIS 145

Overview: A trial court's award of periodic alimony was not supported by the evidence. Considering the factors under Tenn. Code Ann. § 36-5-121(i) such as the duration of the marriage, the husband's greater financial resources, and the wife's physical problems that could impact her ability to work in the future, a higher monthly amount was awarded.

... She is a college graduate and was employed as a **realtor** during much of the parties' marriage. Wife was successful as ...

... it is. In the absence of that, she has a **Realtors** license, which she has the opportunity to use if she ...

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

Date 2011-03-24

98. Holt v. Holt, 2013 Tenn. App. LEXIS 253

Overview: Award of alimony in solido under Tenn. Code Ann. § 36-5-121(h)(1) to wife was reversed as wife did not seek alimony in solido based on husband's missed mortgage payments; there was no indication court sought to adjust distribution of marital estate; court simply concluded that wife was entitled to amount of husband's missed mortgage payments.

... in turn began foreclosure proceedings. While husband did contact a **realtor** and attempt to relieve the parties of this obligation, it ...

 \dots realities of the situation or refused to cooperate with the **realtors**, which contributed to the property being foreclosed. A request that \dots

... While husband did contact a **realtor** and attempt to relieve the parties of this obligation, it ...

 \dots realities of the situation or refused to cooperate with the **realtors**, which contributed to the property being foreclosed. A request that \dots

Jurisdiction Tennessee

Court Appeals Western Grand Division

Date 2013-04-15

99. Hutcherson v. Hutcherson, 2014 Tenn. App. LEXIS 229

Overview: Trial court properly determined "Paragraph 7" of parties' marital dissolution agreement was ambiguous because term "net" was not defined when used in regards to wife's interest in proceeds from sale of several properties, and finding ambiguity allowed court to consider parol evidence to determine meaning; parties intended to split proceeds equally.

... be responsible for listing the properties for sale, selecting the realtor or

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2014-04-22

realtors, and negotiating a sales price as he deems appropriate. Mrs. ...

100. Kantz v. Bell, 2014 Tenn. App. LEXIS 494

Overview: Buyer failed to sufficiently plead breach of contract claim against a seller of real property because the buyer did not allege facts sufficient to establish an agreement that time was of the essence as it pertained to the closing date, and the contract did not establish what would happen if property did not close on the respective closing date.

 \dots Tenn. Ct. App. 2000) (quoting Crye-Leike Realtors , Inc., v. Hay , No. 02A01-9104-CV-00057, 1991 Tenn. App. \dots

... sales contract, unless otherwise specified in the contract." Crye-Leike **Realtors**, Inc., 1991 Tenn. App. LEXIS 790, 1991 WL 192493, ...

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2014-08-15

Webb v. Hays, 2010 Tenn. App. LEXIS 290

Overview: Summary judgment for a real estate agent was proper in a landowner's suit against the agent for breach of fiduciary duty in releasing certain funds to the landowner's employee at closing, because the owner filed no affidavits contrary to the agent's affidavits that the owner signed the closing statement showing payment of the funds to the employee.

... be sold by Veit Spero of Crye-Leike, Inc. , **Realtors** , and Auctioneer Harold Carman, Jr. Kelly set forth ...

 \dots simply states that he was told by Veit Spero, the realtor , that Ms. Lane and the auctioneer told him the money \dots

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

Date

2010-04-26

White v. White, 2011 Tenn. App. LEXIS 48

Overview: The denial of a defendant's claim that he was entitled to more money than the settlement agreement provided for him to receive was proper because he was unable to complain that plaintiffs were unjustly enriched when he agreed to the method of disbursement utilized by the trial court.

... still owned by the partnership would be listed with a **realtor** for one year. Any proceeds from the sale of such ...

 \dots their own attorney's fees. The property was listed with a **realtor**, and after the one-year listing period expired, Plaintiffs filed a \dots

Jurisdiction Tennessee

Court

Appeals
Western Grand
Division

Date

2011-02-04

103. A Shempert v. Cox, 2016 Tenn. App. LEXIS 611

Overview: As the vehicle driven by an injured insured was made available by his employer for his regular use, and as the vehicle did not fall within the

JurisdictionTennessee

definition of "your insured car" in the policy, the circuit court properly awarded summary judgment in favor of an insurer in the insureds' action for uninsured motorist benefits.

Court **Appeals**

Western Grand Division

... not like general health or accident insurance coverage. The liability policy covers a scheduled vehicle, and extends its protection, through ...

Date 2016-08-24

- ... ownership, maintenance, or use . . . " occur within the "Liability " portion of the insurance policy. It is unsurprising, then, that ...
- ... insurance policy contains the following provisions: PART I **LIABILITY** ...
- ... 436 (Tenn. 2012); Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 703 ...
- ... Authorities accepting the [narrow coverage theory] point out that vehicular liability insurance is ordinarily written upon and follows particular scheduled vehicles. ...

104. Kuhlo v. Kuhlo, 2016 Tenn. App. LEXIS 425

Overview: For purposes of Tenn. Code Ann. § 36-5-121, the award of transitional alimony to the wife was not unnecessary or unfair; the wife needed temporary financial assistance in adjusting to the economic consequences of the divorce, plus the trial court did not abuse its discretion in ordering the husband to pay the wife's attorney fees.

- ... partnership, whether the entity provides for limited or general liability of the partners for partnership debts, or any other attributes ...
- ... whether the partnership interest was transferrable, or what risks or liabilities are attached to the interest. Accordingly, we find no error ...
- ... partnership, whether the entity provides for limited or general liability of the partners for partnership debts, or any other attributes ...
- ... Tenn. Ct. App. 2005); Memphis Bd. of Realtors v. Cohen, 786 S.W.2d 951, 953...
- ... the entity provides for limited or general liability of the partners for partnership debts, or any other attributes ...
- ... whether the partnership interest was transferrable, or what risks or liabilities are attached to the interest. Accordingly, we find no error ...

Jurisdiction Tennessee

Court Appeals Middle **Grand Division**

Date 2016-06-23

105. Adler v. Double Eagle Props. Holdings, LLC, 2015 Tenn. App. LEXIS 191

> Jurisdiction Tennessee

Court **Appeals** Western Grand

Overview: Court discerned no ambiguity in the rooftop agreement, and the trial court did not err in refusing to consider parol evidence and in concluding, based on the rooftop agreement, that the contract between a business and appellant was a lease subject to proration; the issue of mutual mistake was waived for failure to comply with Tenn. R. Civ. P. 9.02.

Division

Date 2015-04-02

 \dots that intention, consistent with legal principles." Maggart v. Almany **Realtors** , Inc. , 259 S.W.3d 700 , 703—704 \dots

106. B & B Enters. of Wilson County, LLC v. City of Leb., 318 S.W.3d 839

Overview: Developer's regulatory taking claim against a city was barred by the one-year statute of limitations, Tenn. Code Ann. § 29-16-124 (2000), which began to run when the city's planning commission declined for the second time to approve the developer's plans, not when the developer prevailed on judicial review of the city's action.

JurisdictionTennessee

Court Supreme Court

Date 2010-08-31

... 226 (Tenn. 2010); Maggart v. Almany **Realtors**, Inc., 259 S.W.3d 700, 703 ...

107. Bochette v. Bochette, 2010 Tenn. App. LEXIS 82

Overview: In a divorce proceeding, a trial court's judgment was affirmed because it correctly found that an ex-husband's workers' compensation award was marital property, and it did not err in reducing the home's appraised value by 10 percent to account for the costs associated with selling it.

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

... take judicial notice of the fact that there would be **realtor** fees and closing costs associated with the sale of the ...

Date 2010-02-02

brown v. Columbia Precast, LLC, 2011 Tenn. App. LEXIS 395

Overview: The judgment finding that the employee did not give up his 10% ownership interest by signing the agreement was affirmed because plaintiff earned his 10% ownership interest in the company in January 2003, once he completed his six-year term of employment with the company.

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

 \dots provision is neutralized or rendered meaningless. Maggart v. Almany Realtors , 259 S.W.3d 700 , 704 (Tenn. \dots

Date 2011-07-21

Overview: As the Home Affordable Modification Program (HAMP) did not provide a private right of action to a borrower, the trial court erred when it denied the lender's motion dismiss the borrower's third-party beneficiary

Jurisdiction Tennessee claims for negligent implementation of HAMP and wrongful foreclosure.

... the mortgage on his home was a notice from a **realtor** that the home had been sold. The issues presented for ...

Court
Appeals
Eastern Grand
Division

Date 2012-06-26

110. Corbitt v. Amos, 2012 Tenn. App. LEXIS 686

Overview: Although successful bidder at real estate auction breached the contract, chancery court erred in awarding sellers \$ 55,300 in general damages because sellers did not prove property's FMV on date of breach; the second auction was not promoted or conducted under circumstances similar to first auction and property was vandalized after first auction.

... the fact that she was no longer licensed as a **realtor** by the date of the trial. Ms. Amos also entered ...

JurisdictionTennessee

CourtAppeals Middle
Grand Division

Date 2012-09-27

Overview: Husband had only approximately \$ 43 per month in excess income, and it was error for the trial court to award the wife alimony under Tenn. Code Ann. § 36-5-121(f)(1) in an amount that caused the husband to experience a deficit, where there was no indication that his stated income was being manipulated.

... her efforts to sell the marital residence, including hiring a **realtor** for a period of time, but explained that those ...

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2015-08-17

^{112.} A Forrest Erectors, Inc. v. Holston Glass Co., 2011 Tenn. App. LEXIS 618

Overview: When plaintiff filed breach of contract action in Montgomery County against defendant for money allegedly owed for services plaintiff rendered in North Carolina, trial court properly found plaintiff's complaint was transitory action governed by Tenn. Code Ann. § 20-4-101(a), and thus, venue was proper in Sullivan County, the residence of defendant.

... with no presumption of correctness. Maggart v. Almany $\textbf{Realtors}\ ,\ 259$ S.W.3d 700 , 703 (Tenn. ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2011-11-14

Overview: Where mortgagor did not allege existence of agreement or contract in which bank or president agreed to act in fiduciary capacity on his behalf as required by Tenn. Code Ann. § 45-1-127 and because nothing in

JurisdictionTennessee

amended complaint suggested he and president shared confidential relationship, trial court did not err by granting bank summary judgment.

Court
Appeals Middle
Grand Division

... Coffee County Bank . Mr. Garner consulted with a **realtor** in determining whether to extend the sales contract, and he ...

Date 2015-10-23

Overview: A finding against the employee in the employer's action, in part under Tennessee's Trade Secrets Act, Tenn. Code Ann. § 47-25-1701 et seq., was proper because the information that was e-mailed to the employee's personal e-mail was a trade secret.

 \dots LEXIS 638, [WL] at *4 (citing Crye Leike **Realtors** , Inc. v. WDM, Inc., No. 02A01 9711 CH 00287, \dots

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2010-01-28

115. A Hopkins v. Bradley County, 338 S.W.3d 529

Overview: Defendants violated Tenn. Code Ann. § 40-11-150 by holding a domestic violence arrestee for 12 hours before allowing him to post bond when a magistrate had not found him to be a threat to a victim, public safety, or a bail risk. However, the arrestee's constitutional rights to due process were not violated by defendants' mistake.

 \dots given to the trial court's decision. Marrart v. Almay Realtors , Inc., $\,$ 259 S.W. 3d 700, $\,$ 703 $\,$ \dots

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2010-11-19

^{116.} **•** Hughes v. New Life Dev. Corp., 387 S.W.3d 453

Overview: A successor developer could develop subdivision land its predecessor allegedly reserved as wilderness because (1) it became the developer, (2) as such, it properly cast the votes required to validly amend restrictive covenants, and (3) there was no basis for implied restrictive covenants arising from a general plan of development or from a plat.

 \dots 226 (Tenn. 2010) ; Maggart v. Almany Realtors , Inc ., 259 S.W.3d 700 , 703 \dots

Jurisdiction Tennessee

Court Supreme Court

Date 2012-11-19

^{117.} In re K.G.S., 2015 Tenn. App. LEXIS 347

Overview: The mother was over \$ 4,000 in arrears for child support and she did not resume making payments until after the petition was pending; she willfully failed to pay support and the trial court did not err in terminating the

Jurisdiction Tennessee

Court

mother's rights on the ground of abandonment by willful non-support for purposes of Tenn. Code Ann. §§ 36-1-102, 36-1-113(g)(1).

Appeals Eastern Grand Division

... with a photographer and viewed houses for K.Y.'s aunt, a realtor, for two weeks but received no compensation for her time. ...

Date 2015-05-19

118.



🛕 In re Madison K. P., 2010 Tenn. App. LEXIS 736

Overview: The designation of the father as the primary residential parent was improper because, although a material change in circumstances existed, it was in the child's best interest that the mother be named the primary residential parent and that the child reside with the mother. None of the factors in Tenn. Code Ann. § 36-6-106(a) favored the father.

... would live. She testified that she began meeting with a **realtor** in January 2009, that she was already approved for a ...

Jurisdiction Tennessee

Court Appeals Middle **Grand Division**

Date 2010-11-23

119. 🚺 🛮 In re Miracle F. H., 2015 Tenn. App. LEXIS 184

Overview: As a mother substantially failed to comply with the requirements of the permanency plans, abandoned the child by failing to visit and support her, and as the child was ready for adoption and needed a level of care that the mother could not provide, the trial court properly terminated the mother's parental rights under Tenn. Code Ann. § 36-1-113(i).

... intake. She contended that she had an appointment with a realtor the day after trial to obtain appropriate housing. In regard ...

Jurisdiction

Tennessee

Court **Appeals** Eastern Grand Division

Date 2015-04-01

120. Lampley v. Town of Chapel Hill, 2014 Tenn. App. LEXIS 208

Overview: Agreement between town and developer evidenced parties' intention that sewer and water taps were to be used in connection with the development of the subject property developer owned when agreement was executed. Town did not breach agreement when it transferred sewer and water taps once the subject property was lost through foreclosure.

... understood in more ways than one." Maggart v. Almany Realtors, Inc., 259 S.W.3d 700, 704 ...

Jurisdiction Tennessee

Court Appeals Middle **Grand Division**

Date 2014-04-15

121. Ogles v. Ogles, 2015 Tenn. App. LEXIS 5

Overview: A trial court properly valued the husband's business where the goodwill was more attributable to him personally than the business, there was no evidence as to the goodwill attributable to the business alone, and the value was within the values presented by the parties' experts. The

Jurisdiction Tennessee

Court

classification of property and alimony award were also affirmed.

Appeals Middle Grand Division

... selling real estate. Wife had worked for various **realtors** in the past and was also employed as an ...

Date 2015-01-07

Reelfoot Util. Dist. v. Samburg Util. Dist., 2014 Tenn. App. LEXIS 523

Overview: The trial court properly granted a utility district summary judgment on a water provider's claim seeking to enjoin it from entering into a contract for water services with another provider where the contract specified a permanent termination date unless another agreement was entered, and thus, Tenn. Code Ann. § 7-51-401(c) (2011) did not apply.

 \dots de novo on the record. Maggart v. Almany Realtors , Inc ., $\,$ 259 S.W.3d 700 , 703 $\,$ \dots

Jurisdiction Tennessee

Court
Appeals
Western Grand
Division

Date 2014-08-27

123. A State v. Davis, 2013 Tenn. Crim. App. LEXIS 971

Overview: Evidence was sufficient to sustain defendant's robbery conviction under Tenn. Code Ann. § 39-13-401(a) because defendant testified that he initially encountered the victim with the intent to rob her, and after he left the victim in the bedroom closet, he went to the kitchen and took the victim's purse.

... driveway at 49 Derbyshire and park in front of a **realtor** 's car. Ms. Mowell identified the defendant as the person who ...

Jurisdiction

Tennessee

Court
Criminal
Appeals
Western Grand
Division

Date 2013-11-08

124. A State v. Scott, 2011 Tenn. Crim. App. LEXIS 446

Overview: Defendant's conviction for second-degree murder under Tenn. Code Ann. § 39-13-210(a)(1) was proper because, although it was error to have allowed the chief to testify as to the cause of the victim's bruise, that error was harmless because other witnesses testified that the bruise appeared to be a shoeprint.

 \dots bruising on the victim at that time. Lisa Harris, a **realtor**, testified that she assisted the defendant and the victim in \dots

Jurisdiction

Tennessee

Court Criminal Appeals Western Grand

Division

Date 2011-06-14

State v. Thomas, 2014 Tenn. Crim. App. LEXIS 979

Overview: The evidence supported defendant's convictions of especially aggravated kidnapping, aggravated robbery, attempted aggravated robbery,

Jurisdiction Tennessee and being a convicted felon in possession of a handgun, for purposes of Tenn. Code Ann. §§ 39-13-305(a)(1), 39-13-402(a)(1), 39-12-101(a)(1)-(3), 39-17-1307(c)(1), and a jury instruction error was harmless.

... at the residence, Ms. Howard was speaking with a female **realtor** about the sale of her home. The appellant's green ...

Court

Criminal
Appeals
Western Grand
Division

Date 2014-10-27

126. A State v. Tucker, 2012 Tenn. Crim. App. LEXIS 259

Overview: Evidence was sufficient to sustain defendant's theft conviction under Tenn. Code Ann. § 39-14-103 because defendant exercised control over the victim's property without her consent; an investigator discovered the property in defendant's apartment, and a witness testified that he purchased some of the furniture from defendant.

... Extended. When he arrived at the residence, he observed a **realtor** sign in the yard, and it appeared that no one ...

Jurisdiction

Tennessee

Court

Criminal
Appeals
Western Grand
Division

Date 2012-04-25

Sullivan Elec., Inc. v. Robins & Morton Corp., 2013 Tenn. App. LEXIS 139

Overview: In this breach of contract action, the trial court's award to the subcontractor was reversed because the subcontractor was entitled under the express terms of the agreement to no more than its pro rata share of the settlement proceeds, which the court calculated to be \$258,242.61, and the subcontractor already received \$300,000.

 \dots of law and not of fact. Maggart v. Almany Realtors , Inc ., $\,$ 259 S.W.3d 700 , 703 $\,\dots$

Jurisdiction Tennessee

Court

Appeals Middle Grand Division

Date 2013-02-27

128. Summey v. Monroe County Dep't of Educ., 2012 Tenn. App. LEXIS 343

Overview: It was proper to enter judgment in favor of a county board of education in a coach's breach of contract action because the coach breached his contract when he refused to accept a new assignment. Although the coach was relieved of his duties, he never was fired but refused any assignment to any position other than that of head football coach.

 \dots 805 (Tenn. 1975) . Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 703-04 \dots

Jurisdiction Tennessee

Court

Appeals
Eastern Grand
Division

Date 2012-05-29

129. Thomas v. Thomas, 2013 Tenn. App. LEXIS 207

Overview: As trial court acted within its discretion when it imputed an income of \$60,000 to appellant husband for the purpose of setting his child support payments, the amount of child support awarded was affirmed. Trial court's use of \$60,000 in determining husband's alimony obligation was also affirmed. Appellee wife met her burden of proof on the issue.

 \dots by his tax returns, Husband's income, while working as a **realtor**, was reported as follows: \$131,097 in 2003, \$92,050 in 2004, \dots

Jurisdiction

Tennessee

Court

Appeals Middle Grand Division

Date

2013-03-26

Town of Collierville v. Town of Collierville Bd. of Zoning Appeals, 2015 Tenn. App. LEXIS 203

Overview: A town and its development department had standing to contest its board of zoning appeals' (board) decision because the board did not state the town's final position, under Tenn. Code Ann. § 13-7-206(b) (2011) and Collierville, Tenn., Ordinances § 151.308(F)(5) (2009), as those who could appeal to the board could also appeal the board's decision.

... of the putatively illegal conduct of the defendant." Gladstone, **Realtors** v. Vill. of Bellwood , 441 U.S. 91 , ...

Jurisdiction Tennessee

Court

Appeals Western Grand Division

Date 2015-04-07

131. A TWB Architects, Inc. v. The Braxton, LLC, 2014 Tenn. App. LEXIS 703

Overview: The law allowed the firm to bring a lien enforcement action up to one year after the improvement was complete, for purposes of Tenn. Code Ann. § 66-11-106; the notice of completion stated the date of October 21, 2008, and the firm timely filed suit within the one-year statute of limitations.

 \dots 93 (Tenn. 2012) (citing Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 704 \dots

Jurisdiction Tennessee

Court

Appeals Middle
Grand Division

Date 2014-10-30

Union County Educ. Ass'n v. Union County Bd. of Educ., 2014 Tenn. App. LEXIS 525

Overview: Education association had organizational standing to pursue a declaratory judgment action under the Tennessee Professional Educators Collaborative Conferencing Act of 2011, Tenn. Code Ann. § 49-5-603, because school administrators refused to allow a teacher to have a representative from the association present during an investigatory interview.

... which each affected member is entitled. St. Louis Ass'n of **Realtors** v. City of Ferguson, 354 S.W.3d 620, ...

JurisdictionTennessee

Court

Appeals Eastern Grand Division

Date 2014-08-28

Overview: A wife's motion to dismiss the husband's petition to terminate alimony obligations was properly granted where the parties' marital dissolution agreement contained a clear non-modification clause, and although Tenn. Code Ann. § 36-5-121(g)(2) (2014) allowed modification to transitional alimony, it did not apply in the face of the parties' agreement.

... elementary contract interpretation principles. See Maggart v. Almany **Realtors**, Inc., 259 S.W.3d 700, 704 ...

JurisdictionTennessee

Court
Appeals
Western Grand
Division

Date 2014-11-17

134. A Watson v. Waters, 375 S.W.3d 282

Overview: Summary judgment for defendants was affirmed as any violations of Tennessee Open Meetings Act were remedied when proposed rule changes were deliberated by Board of Commissioners at subsequent meeting. There was no evidence of secret deliberations with respect to that meeting, There was affirmative evidence that there were no secret deliberations.

 \dots a presumption of correctness on appeal. Maggart v. Almany Realtors , Inc ., 259 S.W.3d 700 , 703 \dots

JurisdictionTennessee

Court
Appeals
Eastern Grand
Division

Date 2012-02-27

135. Wilkerson v. Leath, 2012 Tenn. App. LEXIS 409

Overview: Where a daughter filed suit against her father's surviving wife to prevent her from inheriting from him under Tenn. Code Ann. § 31-1-106 based on her conviction for his first degree murder, a trial court erred in granting summary judgment based on collateral estoppel, as the daughter was not in privity with the state and the judgment was not final.

 \dots of correctness." Id . (citing Maggart v. Almany Realtors , Inc ., $\,$ 259 S.W.3d 700 , 703 $\,\dots$

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2012-06-22

136. Beacon4, LLC v. I & L Invs., LLC, 2016 Tenn. App. LEXIS 637

Overview: A contractor did not violate the Tennessee Contractor's Licensing Act (TCLA) by dividing its project work into a site contract and a building contract which, together, exceeded its monetary licensing limit because it assumed responsibility for the site contract to comply with the TCLA and accommodate the owner's needs, who knew the licensing limit.

... degree of deference on appeal.") (citing Worsham v. Action **Realtors**, Inc., No. 03A01-9412-CV-00428, 1995 Tenn. App. LEXIS 251 ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2016-08-30

- ... L is registered as a Tennessee limited liability company and has principal offices located in Springfield, Missouri ...
- ... for work that Beacon4 would perform. Beacon4 is a limited liability company registered in Tennessee but with principal offices ...

137. Morristown Heart Consultants, LLC v. Patel, 2016 Tenn. App. LEXIS 592

Overview: As the trial court's order granting a doctor's counterclaim did not resolve a practice group's declaratory judgment claims or a doctor's claims for damages, and as the trial court did not direct the entry of a final judgment under Tenn. R. Civ. P. 54.02, the appellate court lacked jurisdiction to hear the group's appeal.

... adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or ...

... of a final judgment adjudicating all the claims, rights, and liabilities of all parties." Tenn. R. App. P. 3(a)

... the parties could not agree on a sales price or realtor); In Re Estate of Goza , No. W2013-00678-COA-R3-CV, ...

Jurisdiction

Tennessee

Court **Appeals** Eastern Grand Division

Date 2016-08-18

138. Panda v. Panda, 2016 Tenn. App. LEXIS 596

Overview: As a husband failed to comply with the parties' marital dissolution agreement (MDA) until after the wife filed several actions to compel his performance and an order was entered by the trial court, and as an award of attorney fees on appeal was contemplated in the MDA, the circuit court erred in denying the wife's request for attorney fees.

... June 29, 2013, requesting permission to allow Pam Wilson, a realtor employed by Crye-Leike, to negotiate the sale of the marital ...

..., payment of attorney's fees and costs and [Husband's] liability for any loss sustained by reason of [his] refusal" to ...

Jurisdiction

Tennessee

Court **Appeals** Eastern Grand Division

Date 2016-08-19

139. A Bunch v. Bunch, 2015 Tenn. App. LEXIS 840

Overview: A trial court did not err in refusing to find that a quitclaim deed from a mother to a daughter was void for lack of capacity where at the time the mother executed the deed, she was living on her own and managing her own financial affairs, and the testimony established that she understood what she was doing.

... designation of a surveyor and one (1) or two (2) realtors to comprise the commissioners necessary to make the determination with ...

Jurisdiction Tennessee

Court **Appeals** Eastern Grand Division

Date 2015-10-15

140. Carter v. Hemmen, 2010 Tenn. App. LEXIS 126

Overview: The judgment which awarded a portion of the disputed property to plaintiffs and a portion of the property to defendants was affirmed because the instant court found that the majority of witnesses who could recall relevant facts testified favorably to plaintiffs, and defendants provided no testimony to contradict this testimony.

... Carter and Johnny Carter assisted a Lawrence County **Realtor** , Skeets Eskridge, to come up with a description of the ...

JurisdictionTennessee

CourtAppeals Middle
Grand Division

Date 2010-02-19

141. Clean Harbors Envtl. Servs. v. State, 2016 Tenn. App. LEXIS 343

Overview: The Tennessee Claims Commission properly granted a contractor summary judgment in its action to recover the amounts the Tennessee Department of Environment and Conservation recouped because it did not breach the parties' contract. It complied with by providing signed certificates of disposition from the final disposal or recycling facility.

 \dots contract impossible to perform. See Maggart v. Almany **Realtors** , Inc. , 259 S.W.3d 700 , 704 \dots

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2016-05-18

Hutcherson v. Hutcherson, 2013 Tenn. Cir. LEXIS 119

... solely responsible for listing the properties for sale, selecting the **realtor** and negotiating the sales price "as he deems appropriate." The ...

Jurisdiction Tennessee

Court Circuit Court, 20th JD

Date 2013-06-20

143. An In re Estate of Ross, 2013 Tenn. App. LEXIS 428

Overview: The trial court erred in decreeing a resulting trust in a house paid for by a decedent on property owned by her son, as the law of resulting trusts did not permit a court to declare such a trust based on improvements to real property.

... California to live with her. Rachel McDonald, a **realtor** , testified for the defendants. She listed Ms. Ross's house on ...

Jurisdiction Tennessee

CourtAppeals Middle
Grand Division

Date 2013-06-27

Jeremiah v. Blalock, 2011 Tenn. App. LEXIS 418

Overview: The judgment granting a directed verdict to defendant on the ground that there was no consideration to support the contract was reversed because the mutual promises made by the parties constituted adequate consideration; both parties bargained for the terms of the contract to move the drain.

... written release of their claims against the builder, the builder's realtor, and its agents, in return for the builder's promise to ...

Jurisdiction

Tennessee

Court

Appeals Middle **Grand Division**

Date

2011-07-29

145.



Martin v. State, 2014 Tenn. Crim. App. LEXIS 348

Overview: Counsel was not ineffective under U.S. Const. amend. VI for failing to present a witness at the trial because the witness could not provide an alibi by placing petitioner somewhere other than the crime scene, and although the victim initiated violence at times, no evidence existed that the victim initiated violence when the offenses were committed.

... brother, Ms. Furlow and her daughter, Polly Rogers, and his realtor, Connie. He said he wanted counsel to talk to Connie ...

Jurisdiction

Tennessee

Court

Criminal **Appeals** Western Grand Division

Date 2014-04-11

146.



Owens v. Owens, 2013 Tenn. App. LEXIS 499

Overview: Wife's inability to be rehabilitated was change of circumstances warranting modification of alimony award, converting rehabilitative award to alimony in futuro under Tenn. Code Ann. § 36-5-121(d)(3), as she was in her mid-60s and had been unable to become self-sufficient, she needed continuing support, and husband's income had grown since divorce.

... She had started on a new career as a realtor —one which will necessarily be short-lived because Ms. Owens faces retirement ...

Jurisdiction

Tennessee

Court

Appeals Middle **Grand Division**

Date

2013-07-30

147. Pinkava v. Kovacs-Pinkava, 2014 Tenn. App. LEXIS 773

Overview: In a case involving the interpretation of a marital dissolution agreement, a former husband's argument that an award of future military retirements was alimony in solido under Tenn. Code Ann. § 36-5-121(h)(1) and not modifiable was rejected; the former wife did not receive the benefit of the husband's advancements in rank following the divorce.

... 93 (Tenn. 2012) (citing Maggart v. Almany Realtors, Inc., 259 S.W.3d 700 . 704 ...

Jurisdiction

Tennessee

Court

Appeals Middle **Grand Division**

Date

2014-11-26

148.



Ray Bell Constr. Co. v. State, 356 S.W.3d 384

Overview: It was improper to affirm a finding that a construction company was entitled to an incentive payment and an extension of the completion date contained in its contract with the Tennessee Department of Transportation because the contract was unambiguous and did not permit an extension of the incentive date.

Jurisdiction

Tennessee

Court

Date

Supreme Court

 \dots contract according to its plain terms. Maggart v. Almany **Realtors** , Inc ., 259 S.W.3d 700 , 704 \dots

2011-12-12

State v. Smith, 2015 Tenn. Crim. App. LEXIS 424

Overview: Evidence supported defendant's conviction for aggravated burglary, in violation of Tenn. Code Ann. §§ 39-14-402 and 39-14-403, because defendant entered into a rental property, under the guise of working for the bank responsible for the property, but a bank employee testified that she did not know and had not hired defendant to clear the property.

... \$1000. Carol Stout testified that she was employed as a **realtor** and that she represented Regions Bank in the ...

Jurisdiction

Tennessee

Court
Criminal
Appeals
Western Grand
Division

Date 2015-06-01

150. A Stevenson v. Am. Cas. Co. of Reading, Pa., 2016 Tenn. App. LEXIS 48

Overview: As an insured's fencing material did not have an intimate relation or connection to him, and as the trial court provided a sufficient explanation for its ruling under Tenn. R. Civ. P. 56.04, the fencing material was not a "personal effect"; thus, the trial court properly granted summary judgment to the insurer.

 \dots 436 (Tenn. 2012) ; Maggart v. Almany Realtors , Inc. , 259 S.W.3d 700 , 703 \dots

Jurisdiction

Tennessee

Court
Appeals
Western Grand
Division

Date 2016-01-27

Wayland-Goodman Props., LP. v. Southside Package Store, Inc., 2010 Tenn. App. LEXIS 257

... the next witness, and he testified that he was a **realtor** and auctioneer, and had been since 1971. He testified that ...

Jurisdiction Tennessee

Court

Appeals
Eastern Grand
Division

Date 2010-04-08

State v. Gentry, 2016 Tenn. Crim. App. LEXIS 599

Overview: The evidence supported defendant's conviction of theft under Tenn. Code Ann. §§ 39-14-103; she exercised control over the bank's property, entered without permission, barred entry of the lawful owner, placed signs around the property indicating her right to deprive the owner of the property, and the property sold for \$ 2.4 million dollars.

... the parties presented the following evidence: Jon Dickens, a Marx-Bensdorf **Realtors** agent, testified that he began his involvement with the sale ...

... requiring paint; however, the most costly damage was the missing **realtor** box containing the house key. As a result, the bank ...

Jurisdiction Tennessee

Court Criminal Appeals Western Grand Division

Date 2016-08-12

153.



Halliman v. Heritage Bank, 2015 Tenn. App. LEXIS 288

Overview: Bank, after foreclosing on lots, was entitled to satisfy the outstanding deficiency by foreclosing on the debtors' family-owned property that additionally secured the obligations because the debtors failed to prove that the sales price for each of the foreclosed properties was materially less than their fair market value at the time of each sale.

... did the fair market value calculations the way any other **realtor** would do. They take the sales price per square foot ...

Jurisdiction

Tennessee

CourtAppeals Middle
Grand Division

Date 2015-04-30

154. A SunTrust Bank v. Burke, 491 S.W.3d 693

Overview: Realty company was not subject to a six-month, continuous garnishment, under Tenn. Code Ann. § 26-2-214, when a bank served a writ of garnishment on the company for the wages of the bank's debtor, because it was undisputed that the debtor, to whom the company paid commissions, was not an employee of the company.

 \dots \$57,508.25 on November 1, 2011. Mr. Burke worked as a **realtor** with Crye-Leike, Inc. (" Crye-Leike " or "Appellant"). ...

Jurisdiction

Tennessee

Court

Appeals Western Grand Division

Date 2015-02-02

155. Young Bok Song v. Lehman, 2011 Tenn. App. LEXIS 526

Overview: The granting of the Arkansas attorneys' motion to dismiss the inmate's action against them for lack of personal jurisdiction was proper because their contacts with Tennessee were insufficient to have justified exercising specific personal jurisdiction.

... App. Jun. 27, 2007) (citing Memphis Bd. of **Realtors** v. Cohen , 786 S.W.2d 951 , 953 ...

Jurisdiction

Tennessee

Court

Appeals
Eastern Grand
Division

Date

Branham v. Metro. Gov't of Nashville, 2016 Tenn. App. LEXIS 647

Overview: In an inverse condemnation case, it was not error to find a landslide was minor because the evidence showed the slope was compromised before the slide by a major rainfall and the slide would have occurred regardless of governmental action.

... the testimony of Mr. Branham and Ms. Becky Anderson, a **realtor** . The only other testimony pertaining to monetary damages was that ...

JurisdictionTennessee

Court Appeals Middle

Grand Division

Date
2016-08-30

Owens v. Owens, 2012 Tenn. Cir. LEXIS 985

... affiliated with Main Street Reality, which was a full service **realtor** . She testified that she held open houses. She advertised her ...

Jurisdiction Tennessee

Court Circuit Court, 20th JD

Date 2012-05-02

A Rocky Top Realty, Inc. v. Young, 2012 Tenn. App. LEXIS 661

Overview: Plaintiff realty company was entitled to a 4% commission recovery against defendant property seller where there was no written listing contract between company and the seller, but an agent of the company, acting as a facilitator brought a buyer to the seller, and the property in question was sold to the buyer for \$2.7 million.

... the testimony regarding customary fees applied to instances where the **realtor** was a listing agent, and not merely a facilitator. We ...

Jurisdiction Tennessee

Court
Appeals
Eastern Grand
Division

Date 2012-09-13

End of Document

A Few Words About Fiduciary Relationships

The type of relationship formed between a Sales Associated and his or her client (whether buyer or seller) is called a *fiduciary relationship*. A fiduciary relationship is one based on trust because the Sales Associate owes the following duties to the client:

- ♦ Loyalty As your Buyer's Agent, I'm obligated to put your interests ahead of the seller's at all times. In return, you authorize me as your exclusive representative in your home-hunting and home-purchasing efforts.
- ♦ Diligence 1 promise to work hard on your behalf. You get my best efforts 100% of the time.
- Confidentiality I will never divulge your negotiation strategies or financial secrets to a seller or seller's agent without your express written permission. Nor will I take advantage of that knowledge to benefit myself in any way.
- ♦ Reasonable Care I will take care to pay close attention to all the details of your transaction. Only by doing so can I assure you a smooth, stress-free home-buying process.
- Obedience I promise to faithfully carry out all of your lawful instructions to me at all times, whether or not I agree with them.
- Disclosure I will inform you of any condition or circumstance that in my professional opinion could negatively affect you future enjoyment of your prospective new home. Examples of this include poor location, environmental risk factors or a home that is significantly overpriced for the market.
- Accounting I promise to protect your assets, including your earnest money, to the best of my ability.

SERVICES PROVIDED TO THE BUYER

- Work full time, all the time, to find your new home.
- ♦ I am available with a cell phone to handle and return all calls and questions promptly.
- Full time staff available to answer questions and provide information.
- ♦ Please E-mail me at: <u>sturner@crye-leike.com</u>
- ♦ Recommend excellent loan officers to discuss financing options and begin the <u>pre-approval process</u>.
- Determine your needs and preferences in a home during an initial counseling session.
- ♦ Research several times daily what is new on the market through our Multiple Listing Service, or company and office networking sessions, and will then call or E-Mail the information to you as appropriate.
- Educate you on what to look for in viewing homes.
- Assist you in making a decision and prepare the contract offer to be presented to the seller.
- Negotiate fairly differences you and the seller may have about the offer and present an objective third party viewpoint.
- Help you and the seller come to terms that will satisfy both.
- Advise you on resale.

- Recommend a professional inspection and inspectors and guide you through this process.
- Suggest changes in the property to enhance value.
- Recommend contract laborers you may need such an electricians, plumbers, painters, handymen etc.
- ♦ Handle and advise on any and all complications that occur through the buying process, from before the contract to after the close.
- Arrange final walk-thru inspection.
- Arrange closing and notify all involved parties of time, location and specifics.
- Check back with you after closing to make sure you are satisfied with your home and my services.
- We will request the name of a least on person you know who is thinking of buying or selling a home.

How Realtors® are paid

As a consumer in the real estate market, you will benefit from the services of an experienced Realtor throughout the home buying or selling process. Even though you may not be footing the bill, it's important that you understand how real estate agents are paid.

Basically, the people selling the house pay a commission to their listing broker based on a percentage of the selling price. The listing broker then splits this commission with both the buyer's broker and their respective agents.

Did you Know...

- sales associates are selfemployed, and receive no salary or benefits. They get no paid vacation time, insurance, company cars or expense accounts from the firm they work with.
- sales associates are only paid for results—if and when they successfully complete a property transaction.
- as independent contractors, sales associates have ongoing out-of-pocket expenses similar to those of any small business.

Business Expenses:

- all property advertising
- advertising and marketing of their services
- marketing materials & direct mail
- for sale sign installation
- lock boxes, open house signs
- ♦ MLS access fees
- **computer hardware & software**
- long distance, cellular and paging service
- postage and courier fees
- business cards, stationery, office supplies
- business insurance
- continuing education courses
- monthly technology & office fees
- real estate license fees
- dues to local, state, and national real estate associations
- web site costs

ESTABLISH NEEDS

This is a most important part of the process. Defining what <u>you need</u>, placing these needs in some sort of priority order, and distinguishing your needs from your <u>wants</u>.

Items to be considered in this process include:

- Style of home
- Floor plan
- Age of home
- Size of home
- Number of bedrooms
- Location in relationship to sphere of friends, hobbies, work, etc.
- Schools
- Fireplace
- Air Conditioning
- Special needs i.e. Space for Piano, Bedroom Set, Wheelchair accessible, etc.
- RESALE CONSIDERATIONS!

GEOGRAPHIC CONSIDERATIONS

- Driving Time to Work
- Distance to Friends, Relatives, Places of Worship
- Outside Interests (i.e. boating, golf, tennis)
- Desired Home Features: Newer homes are generally further "out" but offer features not found in older home and vice versa.
- Future Highway Construction
- Life Style Considerations: Country style has many wonderful features; are you prepared to always drive your children to their playmates' homes? On the other hand you'll have more control over their selection of playmates!
- Schools

Note:

When trying to determine which neighborhood or community would be right for you, the natural inclination of most buyers is to ask their Realtor the simple question... "What is a good neighborhood?" The State of Tennessee forbids Realtors form "steering" buyers from or to a particular area. I can assist you with geographic considerations that do not relate, or cannot be construed to relate, to issues regarding race, religion, national origin, or sexual preferences. I am prohibited by law from imposing my beliefs into your buying decision. I can respond to quantitative parameters, i.e. size of home, year built, proximity to certain geographic locations, features of the home, etc. Questions regarding crime rates, for example, should be directed to the local police departments. Please don't ask me to comment on or direst you to or away from neighborhoods based on questions or issues that fall under the broad criteria of "fair housing" laws.

Viewing Properties

One of the most exciting aspects of buying a home is looking at different properties in your price range and seeing houses in all sizes, conditions and styles. It's the best real estate education of all.

How Many to See

How many homes should you plan to view before you make a decision? That's up to you, and will depend on the neighborhood, the market, and your specific requirements. This chart gives you an idea of what most people do. With all the homes on the market at any given time, the key is to focus your efforts on suitable properties. Your Realtor will help be eliminating homes that don't meet your criteria – and tracking down those that do.

25%	30%	25%	20%
1-4 homes	5-8 homes	9-12 homes	14+ homes

What To Expect

Your Realtor is happy to show you any house that's on the market. Once you're ready to view a property, here's what you can expect:

Before

- ✓ Schedule all visits in advance with your Realtor: The seller typically needs at least 2 hours notice, although 24 hours is preferred
- ✓ Plan to spend up to 30 minutes seeing each property.
- ✓ Wear shoes that slip off easily
- ✓ Try not to bring small children they get bored. You can focus better without them

During

- ✓ Pay attention to the home's curb appeal, floor plan and overall amenities.
- ✓ Take notes, ask questions and make comments that will help your Realtor understand you needs and what you like and don't like about the home.
- Be considerate of the owners, who may or may not be present during the tour
- ✓ Relax and have fun!

WHAT ABOUT NEW CONSTRUCTION?

MOST BUILDERS IN THE AREA ARE REPRESENTED BY LICENSED REALTORS. BY APPROACHING A BUILDER DIRECTLY WITHOUT BEING REPRESENTED, THE AGENT REPRESENTING THE BUILDER GENERALLY KEEPS 100% OF THE COMMISSION ON THE SALE OF THE HOME, AND YOU ARE LEFT WITHOUT ANY REPRESENTATION AT ALL.

Some smaller builders may not use a Realtor to represent them, but they may be including a higher profit margin to compensate for building fewer homes each year or to cover their own marketing costs.

Since such a large proportion of the contractors rely on the Realtors to bring them qualified buyers, they are extremely sensitive to maintaining a good working relationship with the brokers.

OPEN HOUSES

I'm often asked...

"Does it make a difference if we go into an Open House while we're out driving around?

YES, IT DOES MAKE A DIFFERENCE!

Agents holding open houses are generally representing the <u>Seller</u>. Their fiduciary responsibility is to the seller, and they are thus acting in the seller's best interest, <u>not yours!</u> Furthermore, if you enter an Open House and engage in a dialogue about the home with the agent there, you may be jeopardizing your ability to negotiate the best terms and conditions for yourself, and you may be jeopardizing your ability to have **your own agent represent you.**

The best action you can take if you see an Open House that you may have some interest in is to call me with the address of the property and allow me to schedule an appointment for all of us to see the property together.

TRUE STORY:

Several years ago, a young coupe went into an Open House without their Realtor. The Agent holding the open house, representing the Seller, convinced them they needed to write an offer on the property right then. Working on the <u>seller's</u> behalf, the agent structured the contract so that the buyers were responsible for any repairs the appraiser cited for the property, and these repairs had to be completed prior to closing.

This couple ended up paying for a new roof on a home that they didn't even own yet!

SUPPOSE YOU SEE A HOME THAT IS FOR SALE BY OWNER ("F.S.B.O.")

Almost every FSBO will gladly work with an agent representing buyers, and will pay the buyer's agent half of the usual commission. In fact, FSBO sellers have often welcomed the expertise of an agent to prepare the contracts and handle the process including abstracting, mortgage analysis, deed preparation, etc.

IF YOU COME ACROSS A HOME THAT IS BEING OFFERED FSBO, WRITE DOWN THE ADDRESS AND PHONE # AND CALL ME WITH THE INFORMATION. I WILL ARRANGE THE SHOWING

IF THE HOMEOWNER DOES NOT WISH TO COOPERATE WITH ME, I WILL INFORM YOU OF THIS AND WILL NOT TRY TO DISCOURAGE YOU FROM VIEWING THE HOME ON YOUR OWN.

Please note however... Buyers generally <u>do not</u> gain any financial advantage from purchasing a FSBO home. The seller will enjoy the gain of not paying out a brokerage commission, thereby netting a higher dollar amount. The buyer still is purchasing the home at the value that the seller has established. Don't pay more for a home than you should.

MAKING AN OFFER - NEGOTIATING

The standard question I always hear from my clients is... "How much should we offer?"

While this is very much an important question, the answer is really not simple.

Everybody sees a home differently. The "audiophile" may find a great deal of value in the "surround sound" built in system with top of the line BOSE speakers in every room. The home buyer who is deaf will find no value in this. The buyer who loves outdoor yard work may find tremendous value in the extensive yard and garden; the buyer who travels constantly and would prefer to spend time on the golf course may see little value in the large yard.

If I were to tell a buyer that they should make a full price offer for a home, only to have them buy the home, move in, then find out from a neighbor that the sellers were about to lower the price the next day, my buyer would be fairly upset. On the hand, if I state that the buyers should start with an offer so low that the seller is offended, throws me out of the home and tells me never to come back with another offer from these buyers – the buyers will be just as upset if they did, in fact, truly want the home.

In a "hot market" it is quite customary for the buyers to pay full price; and if they're competing for the home against other buyers, it will often take an "over full price offer" to secure the home.

What we'll generally try to do is determine a fair price for the home and then devise a negotiation strategy to purchase the home at the best possible price for you.

Do not forget that everything in the purchase agreement is negotiable. Certain aspects of the transaction are of differing value to both the buyer and seller. For example, if a seller has already purchased another home and the closing on that home is fast approaching, the seller may be motivated to sell the home for a slightly lower price in return for a "quick close".

MAKING AN OFFER - NEGOTIATING

We must always remember that it takes a *motivated seller* and a *willing buyer* to complete the transaction. In addition, the old saying, "timing is everything" also comes into play.

When a home is just listed and a low offer is presented to the seller the first day their home is on the market, they might not be as likely to accept that offer as they would if the home had been listed for 6 months.

Also, if we find ourselves in a "multiple offer" situation, where there is more than one buyer trying to purchase a home. We must consider that we're no longer negotiating with a seller, we're bidding against another buyer. The good new is that they've seen the same value as you have, and this may provide some psychological comfort for you in choosing this home as being a good value for what you're looking for.

The presentation of the offer is fairly straightforward. I, as your agent, will contact the listing agent after we have completed all of the documents. I will inform the agent that we have an offer on his/her listing. The listing agent will then contact the sellers and arrange to present the offer.

After the offer is presented, the sellers have three options – they can accept the offer, reject the offer or make a "counter offer". If, in fact they "counter" your offer I will be contacting you immediately. Upon receiving a counter offer, you, the buyers also have the same three options.

The process continues until we all agree on a price and terms and conclude the transaction, or until one of the parties decides that further negotiations are fruitless and will not result in a "meeting of the minds".

Be an Informed Buyer

It is your responsibility to be an informed buyer. Be sure that what you buy is satisfactory in every respect. You have the right to carefully examine your potential new home with a qualified home inspector. You should arrange to have a home inspection before you purchase your home. Make sure your contract states that the sale of the home depends on the inspection.

Choosing a Home Inspector

You may already have a qualified home inspector in mind. If you need help finding an inspector you may wish to call Crye-Leike Home Services. Home Services will give you names of inspectors who will call you and give you the details of their services.

HOME INSPECTIONS

I always strongly recommend to my clients that every offer to purchase a home include an addendum to the contract making the sale contingent upon a satisfactory home inspection by an inspector selected and paid for by the buyer.

Even with this contingency, every buyer must still realize that the <u>inspectors</u> are not perfect. You will generally find some surprises upon moving into your home. If these are major flaws that were missed by an inspector and you feel the seller had prior knowledge of this condition, there are avenues provided by the law and/or contract that can help bring about a resolution to the issues should the seller be unwilling to resolve the matter.

Why a Buyer Needs a Home Inspection

A home inspection gives the buyer more detailed information than an appraisal—information you need to make a wise decision. In a home inspection, a qualified inspector takes an in-depth, unbiased look at your potential new home to:

- Evaluate the physical condition: structure, construction, and mechanical systems
- Identify items that need to be repaired or replaced
- Estimate the remaining useful life of the major systems, equipment, structure, and finishes

What Goes Into a Home Inspection

A home inspection gives the buyer an impartial, physical evaluation of the overall condition of the home and items that need to be repaired or replaced. The inspection gives a detailed report on the condition of the structural components, exterior, roofing, plumbing, electrical, heating, insulation and ventilation, air conditioning and interiors.

PRE-CLOSING "WALK THROUGH"

Immediately prior to the actual closing (when the home officially becomes yours) we will conduct a final inspection of the home. This is done for several reasons:

- ♦ To insure that the condition of the home has not changed from the time the purchase agreement was signed.
- **To be certain the sellers have removed all of their personal items and debris from the home.**
- **To review any corrective actions the seller was to have completed on the home as part of the terms of the contract.**

What is title insurance?

You have signed a purchase agreement and you are scheduled for closing on the home of your dreams. Who wants to think about something as obscure as title insurance? Actually, you would be foolish not to.

A title is the document that verifies your legal right to your new home. To make sure there are no past errors or legal entanglements that might affect your ownership rights, all properties are subjected to a title search before closing. Sometimes, however, a title problem will unexpectedly surface days or years later. If a problem does occur, you will be glad to have the protection of title insurance. There are two kinds of title insurance: one that protects the lender (required) and one that protects you (optional).

Do not underestimate the importance of this coverage.

Lender's Policy

- mandatory for buyers to purchase
- protects the mortgage lender
- covers title defects, easement problems, judgments or liens
- remains in effect until the mortgage is paid off.

Owner's Policy

- □ optional for buyer to purchase but a small investment for peace of mind
- protects you, the buyer, against title defects, easements, judgments or liens
- pays for court costs and fees associated with claims, plus any other losses
- □ covers you and your heirs forever even after you sell the property

Potential Threats to Your Title

- usudden appearance of unknown heirs
- ☐ discovery of forgery, fraud or impersonation
- evidence of altered deeds
- □ discovery of unfiled or defective legal documents
- ☐ liens for unpaid taxes or assessments

MAKE YOUR MOVE

The following checklist will help you prepare for the big day:

	Ask for referrals from friends
	Check with Crye-Leike Home Services
Get Mo	oving Supplies
	Cartons, tape, scissors, labels, markers
	Packing material: newspaper, tissue, bubble wrap
Change	e Your Address
Comple	te a change of address card from the post office so
they wil	I know where to forward your mail. You will also
want to	notify other people directly.
	Dasifica associates
	- reressionar contacts
	reagainted and paoneutions
	outer contacts (citos, associations)
	Friends and relatives
Settle F	inancial Matters
	Close local charge accounts
	The state of the s
	Empty safe deposit box
Cancel	Services and Establish at New Location
	Newspapers
	Home Security
	Garbage collection
	Cable TV
	Lawn/Pool services
	Cleaning service
Cancel I	Utilities and Establish at New Location
	Telephone
	Electrical
	Gas/Fuel Oil
	Water/Sewer
Contact	Schools and Daycare
	Notify of move
_	Get children's records or transcripts
_	Set emidien a records of transcripts
Tie He I	oose Ends
	Return borrowed items, including library books
ā	Pick up dry cleaning, laundry, items in for repairs
_	Obtain medical and dental charts and records
_	Get copies of prescriptions
	proser preservations