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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2006-2007

2060144

ERA Class.com and Robert Mikkelsen

v.

Charles David Stoddard and Rita Stoddard

Appeal from Baldwin Circuit Court
(CV-04-898)

BRYAN, Judge.

The defendants ERA Class.com ("ERA") and Robert Mikkelsen appeal from the denial of their postjudgment motions seeking a judgment as a matter of law ("JML") or, in the alternative, a new trial. We reverse and remand with instructions.

The plaintiffs Charles David Stoddard ("Dr. Stoddard") and Rita Stoddard ("Mrs. Stoddard") sued ERA and Mikkelsen in June 2004. The Stoddards alleged that Mikkelsen, a real-estate agent with ERA, had listed a parcel of property in Gulf Shores owned by Mildred Casey ("the Casey property") for sale as commercial property; that Mikkelsen had placed a for-sale sign on the Casey property describing it as commercial property; that the Stoddards, relying on Mikkelsen's description of the Casey property as commercial property, had purchased the Casey property in order to build a dentist's office for Dr. Stoddard, who is a dentist; that, when the Stoddards subsequently submitted their site-plan application to the city, they were informed for the first time that the Casey property was zoned for residential use only and, therefore, could not be used for a dentist's office without rezoning; and that, although the Casey property was subsequently rezoned for commercial use, the Stoddards nonetheless sustained damages because the rezoning process delayed their use of the Casey property. Based on those allegations, the Stoddards asserted claims of negligence, wantonness, fraud, and suppression.

Answering, Mikkelsen and ERA denied that they were liable to the Stoddards. Thereafter, the case proceeded to trial before a jury. At the close of the evidence, Mikkelsen and ERA moved the trial court for a JML on the grounds, among others, that the Stoddards' claims were barred by the doctrine of caveat emptor and that, even if they were not barred by the doctrine of caveat emptor, they were barred by the Stoddards' signing an "as is" sales contract to purchase used real estate. The trial court denied that motion, charged the jury regarding the Stoddards' claims of negligence, wantonness, fraud, and suppression, and submitted those claims to the jury. The jury returned a general verdict in favor of the Stoddards and awarded them compensatory damages in the amount of $85,000. Thereafter, the trial court entered a judgment on the jury verdict. Mikkelsen and ERA then renewed their motion for a JML and filed an alternative motion for a new trial. Those motions were denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. Mikkelsen and ERA then timely appealed to the supreme court, and the supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

On appeal, Mikkelsen and ERA first argue that the trial court erred in denying their renewed motion for a JML because, they say, the Stoddards' claims were barred by the doctrine of caveat emptor and that, even if they were not barred by the doctrine of caveat emptor, they were barred by the Stoddards' signing an "as is" sales contract to purchase used real estate. In reviewing the denial of a motion for a JML, "we are bound to view the evidence in a light most favorable to the nonmovant." Kmart Corp. v. Kyles, 723 So. 2d 572, 573 (Ala. 1998). Viewed in that manner, the evidence at trial established the following material facts.

In May 2002, the Stoddards engaged real-estate agent Gena Price to assist them in finding a parcel of real estate on which they could build a dental office for Dr. Stoddard. On June 20, 2002, Casey's attorney in fact engaged Mikkelsen to list the Casey property for sale. The Casey property had a used building located on it and consisted of two adjacent lots. Both lots were zoned for residential use only. The master zoning map adopted by the City of Gulf Shores, which was kept in the office of the city's zoning administrator, Frank Breaux, accurately indicated that both lots were zoned

for residential use only; however, the zoning map that the city made available to the public erroneously indicated that both lots were zoned for mixed use, a zoning classification that allowed property to be used for both residential and commercial uses.

The same day he was engaged to list the Casey property for sale, Mikkelsen called the Gulf Shores Planning Commission ("the Commission") and inquired regarding the zoning classification of the Casey property. Sherry Smith, the Commission's secretary, told Mikkelsen that the Casey property was zoned for commercial use. Mikkelsen then listed the Casey property in the Multiple Listing Service ("the MLS") used by real-estate agents, put a for-sale sign on the Casey property, and arranged to advertise that the Casey property was for sale in a local newspaper. The MLS listing, the for-sale sign, and the newspaper advertisement all indicated that the Casey property was commercial property.

On June 25, 2002, Mikkelsen called the Commission a second time to double check the zoning of the Casey property. This time, Sherry Smith told Mikkelsen that one of the lots was zoned for residential use only and the other was zoned for

mixed use. However, Mikkelsen did not make any changes to the MLS listing, the for-sale sign, or the newspaper advertisement as a result of the information he received from Sherry Smith on June 25.

On July 27, 2002, Mrs. Stoddard saw the for-sale sign on the Casey property as she was driving by. That same day, the Stoddards toured the existing used building on the Casey property.

On July 28, 2002, the Stoddards made a written offer to purchase the Casey property for a purchase price of $90,000. The offer also stated that "[p]urchaser intends to tear down existing structure; therefore offer is contingent upon purchaser obtaining all necessary approval from City of Gulf Shores to construct planned building and associated parking, utilities, etc." Casey's attorney in fact rejected the July 28 offer.

Following the rejection of the July 28 offer and before the Stoddards made another offer to purchase the Casey property, Gena Price, the agent representing the Stoddards, called Frank Breaux, the zoning administrator, to verify that the Casey property was zoned for commercial use. Breaux told

Price that the Casey property was indeed zoned for commercial use. Price then told Dr. Stoddard that Breaux had confirmed that the Casey property was zoned for commercial use. Thereafter, the Stoddards instructed Price to prepare another written offer to purchase the Casey property. The Stoddards instructed Price to delete the provision making the offer contingent on the Stoddards' obtaining approval from the city to build a new building on the Casey property and to increase the purchase price to $103,500. Price delivered this second written offer to Mikkelsen on August 2, 2002. Casey's attorney in fact wrote a counteroffer on the Stoddards' August 2 offer. The counteroffer stated:

> "The above offer is accepted at price of $106,500 -- 'AS IS.' No termite bond, guarantee on electrical, heating & cooling, etc. 'AS IS.' No survey."

(Emphasis added.) The Stoddards accepted the counteroffer, and the parties closed the sale on September 4, 2002.

On November 2, 2002, Dr. Stoddard went to city hall to file his site plan for the Casey property and met with Breaux. During this meeting, Breaux consulted the master zoning map and informed Dr. Stoddard that the Casey property was zoned for residential use only. Because of the error in the zoning

map that was available to the public, Breaux stated that the city would seek to rezone the Casey property to allow commercial use of it and that the city would expedite the rezoning. The city completed the rezoning process on May 10, 2003.

In Moore v. Prudential Residential Services Limited Partnership, 849 So. 2d 914 (Ala. 2002), the supreme court stated:

> "Although Alabama has abrogated the rule of caveat emptor in the sale of new real estate, that rule still applies in the sale of used real estate. Blaylock v. Cary, 709 So. 2d 1128, 1130 (Ala. 1997); Ray v. Montgomery, 399 So. 2d 230, 233 (Ala. 1980). Thus, in the sale of used real estate, a seller or the seller's agent generally has no duty to disclose to the purchaser any defects in the property. Blaylock, 709 So. 2d at 1130; Cato v. Lowder Realty Co., 630 So. 2d 378, 382 (Ala. 1993). However, this Court has recognized exceptions to this rule:
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> > "'Under § 6-5-102, Ala. Code, 1975, the seller has a duty to disclose defects to a buyer if a fiduciary relationship exists between the parties. In addition, if the buyer specifically inquires about a material condition concerning the property, the seller has an obligation to disclose known defects.'
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> "Commercial Credit Corp. v. Lisenby, 579 So. 2d 1291, 1294 (Ala. 1991).
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> > "'Moreover, if the agent (whether of the buyer or of the seller) [or the seller] has

> knowledge of a material defect or condition that affects health or safety and the defect is not known to or readily observable by the buyer, the agent [or seller] is under a duty to disclose the defect and is liable for damages caused by nondisclosure.'

"Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988). See also Blaylock, 709 So. 2d at 1131.

> "....
>
> "Where a purchaser's direct inquiry would otherwise impose a duty of truthful disclosure, this Court has held that a purchaser's fraud claim is precluded by language in a sales contract stating that the purchase is 'as is.' Leatherwood, Inc. v. Baker, 619 So. 2d 1273, 1274 (Ala. 1992); Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086, 1089 (Ala. 1990); Massey v. Weeks Realty Co., 511 So. 2d 171, 173 (Ala. 1987). In Massey, after the purchaser noted damage to some exterior columns, the real estate agent stated that the damage was caused by dry rot and that the damage was inexpensively remedied. The purchaser then signed an 'as is' contract for the purchase of the house without having the house inspected for termites. The contract further provided that the realtor did not warrant or guarantee the condition of the property. After he moved into the house, the purchaser found that the house was infested with termites. This Court held that the purchaser 'did not have the right to rely on the oral representations of [the agent] made prior to the execution by [the purchaser] of the form containing the "as is" provision and the purchase agreement that provided that the realtor did not warrant or guarantee the condition of the property.' Massey, 511 So. 2d at 173.

"In Haygood, the buyers asked the sellers, themselves real estate agents, if the basement had ever leaked, and the sellers replied, '[N]o, it is well constructed.' There was evidence, however, indicating that the sellers had had repair work performed in the basement because of cracks in the foundation walls that had permitted water to penetrate the basement. The buyers signed an 'as is' contract for the purchase of the house. The sales contract also contained a clause that stated:

> "'"Neither the Seller nor the Broker have made or make any other representations about the condition of the property and the Purchaser agrees that he has not relied on any other representation...."'

"571 So. 2d at 1089. After holding that the Haygoods had not alleged that they had relied on the misrepresentations, this Court concluded that 'even if they had made such an allegation, the plaintiffs' signing of the two documents that indicated no reliance would have made the summary judgment ... proper.' 571 So. 2d at 1089.

"In Leatherwood, the purchasers asked a real estate agent to inquire about the foundation of a house they were interested in purchasing. The real estate agent contacted the agent who had previously listed the house, and that agent informed her that the sellers knew of only one crack around the air-conditioning system. The Bakers then signed an 'as is' sales contract for the property. After the Bakers moved into the house, they discovered severe problems; the house began to crack in several places. The realty company had documents in its possession that indicated that the house had structural problems. This Court held that the Bakers' signing of an 'as is' contract prohibited them from pursuing both their negligence and fraud claims against the realty company. Leatherwood, 619 So. 2d at 1274."

849 So. 2d at 923-25.

In the case now before us, the trial court explained its rationale for rejecting Mikkelsen and ERA's argument that the Stoddards' claims were barred by the doctrine of caveat emptor as follows:

> "Now, normally I believe that caveat emptor would apply in a case like this; however -- and I want to explain this very carefully for the record because I want the appellate court to understand why I am denying the charges on caveat emptor.
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> "In all of the cases that were presented to me, none of them factually quite fit the facts in this case; that is, this was a case where a direct representation was made. The Plaintiffs relied on that direct representation. Subsequently, based on the testimony, the Defendants learned that that representation was untrue and did not correct the representation.
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> "Therefore, the court holds that caveat emptor does not apply in this very narrow circumstance. So that's my ruling on that."

However, the trial court did not state its rationale for rejecting Mikkelsen and ERA's argument that, even if the Stoddards' claims were not barred by the doctrine of caveat emptor, they were barred by the Stoddards' signing an "as is" sales contract to purchase used real estate. The supreme court's holdings in Leatherwood, Haygood, Massey, and Moore suggest that, even if Mikkelsen and ERA were under a duty to

disclose to the Stoddards that the Casey property was zoned for residential use only, the Stoddards' fraud and suppression claims were barred by the Stoddards' signing the "as is" sales contract to purchase the Casey property.

The Stoddards, citing Zekoff v. Franklin, 380 So. 2d 869 (Ala. Civ. App. 1979), and DeWitt v. Long, 519 So. 2d 1363 (Ala. Civ. App. 1987), argue on appeal that the Stoddards' signing the "as is" sales contract does not bar their fraud and suppression claims because, they say, Mikkelsen made an affirmative misrepresentation. However, the supreme court has indicated that all fraud claims are barred if the sale is subject to the doctrine of caveat emptor and the purchaser signs an "as is" sales contract. See, e.g., Clay Kilgore Constr., Inc. v. Buchalter/Grant L.L.C., 949 So. 2d 893, 897-98 (Ala. 2006) ("Under a growing body of Alabama caselaw involving circumstances in which the rule of caveat emptor is applicable, a fraud or fraudulent-suppression claim is foreclosed by a clause in a purchase contract providing that the purchaser of real property accepts the property 'as is.' Moore v. Prudential Residential Servs. [Limited P'ship], 849 So. 2d [914] at 923 [(Ala. 2002)]; Leatherwood, Inc. v.

Baker, 619 So. 2d 1273, 1274 (Ala. 1992); Haygood v. Burl Pounders Realty Co., 571 So. 2d 1086, 1089 (Ala. 1990); and Massey v. Weeks Realty Co., 511 So. 2d 171 (Ala. 1987). This is so, because an 'as is' clause negates the element of reliance essential to any claim of fraud and/or fraudulent suppression. Haygood, 571 So. 2d at 1089; Massey, 511 So. 2d at 173; and Gaulden v. Mitchell, 849 So. 2d 192, 199 (Ala. Civ. App. 2002)." (Emphasis added.)). Leatherwood, Haygood, and Massey all involved fraud claims based on affirmative misrepresentations, and the supreme court nonetheless held that those fraud claims were barred because the purchasers had signed "as is" sales contracts to purchase used real estate. Zekoff and DeWitt, the cases cited by the Stoddards, are not apt because (1) neither one involved an "as is" sales contract and (2) they both predate the supreme court's decisions in Leatherwood, Haygood, Massey, Moore, and Clay Kilgore Constr.

Finally, we note that, in Leatherwood, the supreme court held that the purchasers' signing an "as is" sales contract to purchase used real estate barred not only the purchasers' fraud claim but also their negligence claim. Accordingly, we conclude that the holdings of the supreme court in

Leatherwood, Haygood, Massey, Moore, and Clay Kilgore Constr. govern the case now before us; that, pursuant to those holdings, the Stoddards' signing an "as is" sales contract to purchase used real estate barred all the Stoddards' claims; and, therefore, that the trial court erred in denying Mikkelsen and ERA's motion for a JML. Accordingly, we reverse the trial court's judgment and remand the case to the trial court with instructions to enter a judgment in favor of Mikkelsen and ERA. Because Mikkelsen and ERA's first argument disposes of the appeal, we pretermit discussion of their other arguments.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman, J., concurs in the result, with writing, which Thomas and Moore, JJ., join.

Thompson, P.J., dissents, with writing.

PITTMAN, Judge, concurring in the result.

The parties' purchase agreement specifically states that the property "is sold and is to be conveyed ... subject to present zoning and flood plain classification" (emphasis added). Although the Stoddards were arguably not obligated to perform an independent investigation of the zoning status of the property in light of the defendants' printed representations, see Ex parte ERA Marie McConnell Realty, Inc., 774 So. 2d 588, 591 (Ala. 2000), it is undisputed that the Stoddards did not enter into the contract until after their agent had independently determined from the zoning administrator of the City of Gulf Shores that the property was zoned for commercial use. In my view, by proceeding with the transaction based upon the results of their agent's investigation, which none of the defendants intentionally prevented from being effective, the Stoddards must be presumed to have acted upon the results of that investigation and not upon any misrepresentation by the defendants. See Burroughs v. Jackson Nat'l Life Ins. Co., 618 So. 2d 1329, 1332 (Ala. 1993). I therefore concur in the result to reverse.

Thomas and Moore, JJ., concur.

THOMPSON, Presiding Judge, dissenting.

I respectfully dissent from the main opinion. I agree with the trial court that the circumstances of this case are distinguishable from the following cases on which the main opinion relies: Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893 (Ala. 2006); Moore v. Prudential Residential Servs. Limited P'ship, 849 So. 2d 914 (Ala. 2002); Leatherwood, Inc. v. Baker, 619 So. 2d 1273 (Ala. 1992); Haygood v. Burl Pounders Realty, Inc., 571 So. 2d 1086 (Ala. 1990); and Massey v. Weeks Realty Co., 511 So. 2d 171 (Ala. 1987).