2016 IL App (3d) 150538-U

Order filed April 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

KEVIN FIALKO and ELIZABETH FIALKO,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiffs-Appellants,	)	La Salle County, Illinois,
	)	
v.	)	Appeal No. 3-15-0538
	)	Circuit No. 11-LM-602
DANA E. WIEGAND and MARI K.	)	
WIEGAND,	)	Honorable
	)	Troy D. Holland,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not err in denying plaintiffs' motion for judgment *non obstante veredicto*; (2) defense counsel did not make improper remarks in closing arguments; and (3) the presence of defendants' child at trial was not prejudicial.

¶ 2 Plaintiffs appeal from the trial court's denial of their motion for judgment *non obstante veredicto* (JNOV). They argue that the evidence introduced at trial was overwhelmingly in their favor, and that a JNOV was therefore required. Plaintiffs also challenge certain remarks in closing arguments and the presence of defendants' child at trial. We affirm.

¶ 3 FACTS

¶ 4 From 2008 through 2010, defendants, Dana and Mari Wiegand, owned a home located at 1620 North 1590th Road in Streator. In 2010, defendants sold the home to plaintiffs, Kevin and Elizabeth Fialko, with closing occurring on December 29, 2010.

¶ 5 One year after the closing, plaintiffs filed the instant lawsuit, alleging fraudulent misrepresentation on the part of defendants. More specifically, plaintiffs contended that upon moving into the home, they discovered a noxious odor, caused by a faulty septic system. Plaintiffs asserted that defendants had actual knowledge of the issue, but nevertheless failed to disclose it. The matter proceeded to a jury trial on January 6, 2015.

¶ 6 Before the jury was brought into the courtroom on the first day of trial, counsel for plaintiffs objected to defendants' son being in the courtroom. Counsel argued: "Yesterday, they had five children here. And they were here, you know, when the jury is coming and going, I think they identify that they have their family here. And I just don't see the purpose of having a young lad here during this kind of a proceeding." The court overruled the objection, as long as there were no interactions between defendants and their son.

¶ 7 Plaintiffs' first witness was Elizabeth Fialko. Elizabeth testified that she lived at 1620 North 1590th Road in Streator. She purchased the home from defendants on December 29, 2010. Elizabeth testified that she visited the house three times before closing, including once for a house inspection.

¶ 8 Plaintiffs' exhibit 4A was a "Residential Real Property Disclosure Report" (disclosure report) for the property in question. The thirteenth item on the disclosure report read as follows: "I am aware of material defects in the septic, sanitary sewer, or other disposal system." Next to that item, an "x" has been handwritten in the column corresponding to "NO." The disclosure

report was signed by defendants on November 5, 2010, and by plaintiffs on November 26, 2010. Elizabeth testified that she recognized the form, and that she had relied upon it.

¶ 9 Elizabeth recalled that they moved into the home on January 7, 2011. Approximately two weeks later, following a rain storm, she began to notice a noxious odor emanating from the vents in the house. As Elizabeth described it: "the whole house smelled like poop." She noticed that the odor was particularly potent in the area of the sump pump. The odor lingered "for a few days." Elizabeth began to notice that the odor would recur every time it rained. The odor caused her to have headaches and nausea.

¶ 10 Elizabeth contacted Brad Bliss of Bliss Plumbing and Heating in December of 2011 because she "couldn't take the smell any longer." Bliss suggested that placing a lid on the sump pump would prevent the odor from emanating throughout the house. Elizabeth indicated that she was disinterested in this solution because it would not address the root cause of the odor. Bliss eventually discovered that the pipe running from the home to the septic tank was detached from the base of the home. Bliss reconnected the pipe to the foundation. Further inspection from Dennis Hatzer uncovered that the home's leach field needed replacement.

¶ 11 A report authored by Hatzer on March 7, 2008, was admitted into evidence (2008 septic report). The report concluded that the septic tank was in "good condition" and that "[t]he system appears to be working properly as of this date." The report indicated that it only referred to an inspection of the septic tank itself, and did "not include any inspection, size, or location of a leach field, or any other discharge point from the septic tank." The report also included the following addendum, added beneath Hatzer's signature: "Note: the inlet is backpitched toward the house."

¶ 12 A second report authored by Hatzer, this one on December 14, 2010, was also admitted into evidence (2010 septic report). This report was nearly identical to the 2008 septic report, indicating that the septic tank was in good condition, and noting that the report only referred to the tank itself. Again, Hatzer noted below his signature that the inlet was "back-pitched."

¶ 13 Hatzer testified that he was a septic contractor. He testified that he inspected the septic tank prior to plaintiffs' purchase of the home, at the request of a realtor. That inspection revealed that the inlet pipe to the septic tank was down-pitched, or back-pitched—meaning that the pipe from the house to the septic tank ran at an uphill angle. Hatzer noted this on the 2010 septic report. Hatzer explained that a septic system is comprised of three distinct parts: the inlet pipe from the house to the septic tank, the septic tank itself, and the leach field. Hatzer recalled that he inspected the same septic system in 2008, with his son. He noticed then that the inlet pipe was back-pitched.

¶ 14 Plaintiffs' counsel asked Hatzer if the back-pitched pipe "would [be] one of the reasons *** that nothing was going into the septic tank." Hatzer replied: "Well, I think some was going into it. It wasn't back-pitched that bad, but it definitely was back-pitched. Of course, you've got to make note of it."

¶ 15 Hatzer testified that plaintiffs contacted him in late 2011 regarding the odor in their home. Hatzer thought the back-pitched pipe could be the cause of the problem, but could not be sure. He suggested plaintiffs contact a plumber. Hatzer explained that Bliss Plumbing excavated the inlet pipe, revealing that the pipe had separated from the coupling that connected it to the home. Hatzer observed the digging process, and saw that the top of the pipe had pulled approximately a quarter of an inch away from the coupling. He hypothesized that the changing of weather may have caused the pipe to slip further away once it had become detached. Hatzer

testified that the ensuing leakage seeped into the house's foundation, and the odor entered the house through the sump pump.

¶ 16 On cross-examination, Hatzer confirmed that the 2008 septic report was completed when defendants were purchasing the house from the original builder. Hatzer visited the property on an earlier occasion when defendants reported a foul odor. Hatzer suspected that the smell might be emanating from the sump pump and that the problem might be related to the venting of the plumbing system. He suggested that defendants pour water down their floor drains, as this often removes a foul odor related to venting. Hatzer also suggested defendants contact a plumber. Hatzer testified that a septic system can still work properly if the inlet pipe is slightly back-pitched, as long as everything is connected. He suspected that was the case at the time of the 2008 septic report. Hatzer testified that in 2011, when he observed that the inlet pipe had become partially detached, some sewage would still have been flowing to the septic tank.

¶ 17 Kevin Fialko testified that he was married to Elizabeth. They moved into the house at 1620 North 1590th Road in January of 2011. Kevin testified that within two weeks of moving in, he and Elizabeth began to notice an odor. The odor—which Kevin described as smelling "[l]ike poop"—would linger for up to two days. It came up through the vents and would cause headaches. The odor recurred every time there was rain. Kevin described the process of contacting Bliss and Hatzer, and learning that the inlet pipe had become detached from the home. Kevin did not know until late 2011 that Hatzer had previously done inspections at the property. He knew that the property had been the subject of a septic inspection prior to closing, but he never saw the actual report. Kevin testified that his and Elizabeth's real estate agent, Jeff Plesko, told them over the telephone "[t]hat the Septic Report had passed."

¶ 18 Plaintiffs called Plesko as their final witness. Plesko testified that he brokered the sale of the property in question from defendants to plaintiffs. Pursuant to a dual agency agreement, Plesko represented both plaintiffs and defendants. Prior to closing, he was unaware of any problems with the septic system. He only became aware of the odor in the home when plaintiffs contacted him after closing. Though Plesko could not recall the exact conversation, Plesko testified that he likely told Kevin to pour water in the floor drains, as that remedy had worked for Plesko when odor would occur in his home.

¶ 19 Plesko testified that either he or his office ordered the 2010 septic report. When plaintiffs' counsel asked Plesko whether the notation about a back-pitch indicated a problem, Plesko responded in the negative. Plesko explained: "[I]t didn't indicate there was a problem. Everything he wrote on here was in good condition." Plesko did not think that an odor was a material defect in a home because, in his personal experience, some odor was normal.

¶ 20 On cross-examination, Plesko testified that he e-mailed the 2010 septic report to plaintiffs on December 22, 2010. He had previously informed Elizabeth when the septic inspection was first ordered.

¶ 21 Before resting, plaintiffs' counsel read for the jury defendants' answers to certain requests to admit facts. In summary, defendants admitted that they contacted Hatzer to determine the source of an occasional odor in the home, and that his subsequent report in 2008 indicated that the inlet pipe was back-pitched. They admitted that the odor was one of "rotten eggs" and that Hatzer suggested it was a venting problem with the plumbing system. Defendants admitted that they took no action with regard to the inlet pipe at any time prior to the sale, but denied having any knowledge of any problems with the septic system.

¶ 22 Defendants called Dana Wiegand as their first witness. Dana testified that he purchased the property in question in 2008. He testified that no contractor ever informed him that there was an operational deficiency in the septic system. Dana testified that he never had any discussions with Hatzer regarding inadequacies in the leach field or the size or operation of the septic tank. The septic system functioned properly the entire time defendants resided at the property.

¶ 23 Dana testified that he saw the 2008 septic report, and that it indicated that the inlet pipe was back-pitched. The report also indicated that "[t]he system appears to be working properly as of this date." Dana chose not to perform any work relating to the back-pitch because he had been told by experts that the system was operational. He never noticed any problems with the septic system or with the flushing of toilets.

¶ 24 Dana did notice that a foul odor would occur in the house after heavy rains. He specified that the odor would not occur after any rainfall, but only after particularly heavy events. The odor would last "for a day or two." Defendants called Hatzer in the spring of 2010 to find out if Hatzer could uncover the source of the odor. Dana recalled that Hatzer postulated the odor was related to the venting, and suggested defendants contact a plumber. In fact, Hatzer specifically indicated that he did not think the odor was caused by a problem in the septic system. The plumber did not suggest that the odor was related to the septic system. The plumber recommended defendant cover the sump pump pit to eliminate the odor. Hatzer suggested they pour water down their floor drains. Defendants did not notice the odor any time after the spring of 2010.

¶ 25 On cross-examination, Dana testified that the reference to the back-pitch in the 2008 septic report "really didn't" mean anything to him. Defendants' realtor ordered the inspection

when they were in the process of buying the home. Defendants purchased the home after the realtor told them that the septic system had passed the inspection.

¶ 26 Dana testified that while Hatzer was on the property investigating the odor, Dana inquired about rerouting the flow from the sump pump. At the time, the sump pump drained into a ditch to the east of the house. As a result, weeds and cattails would grow in the ditch. Hatzer recommended that defendants not take any action with regard to the sump pump.

¶ 27 Mari Wiegand's testimony was substantially similar to that of Dana. She testified that the occasional odor of "rotten eggs" would recur when there was a heavy rainfall. The odor was not one of fecal waste. Mari was able to make that distinction because she "grew up on a hog farm."

¶ 28 Plaintiffs called Elizabeth as a rebuttal witness. She testified that the odor was not one of "rotten eggs."

¶ 29 The court denied defendants' motion for a directed argument, and the matter proceeded to closing arguments. Defense counsel argued that plaintiffs' case must fail because no evidence had been introduced to demonstrate that defendants had any knowledge of the septic system's deficiencies at issue in the case. Counsel closed by asking the jury "if you find that my clients are not guilty under the statute and under the law, that you don't compensate the [plaintiffs] anything."

¶ 30 The jury was instructed that each element must be proven by clear and convincing evidence to support a verdict for plaintiffs. The jury returned a verdict in favor of defendants. The jury was also provided with a special interrogatory which read as follows:

> "Defendants *** were required to answer Question Number 13, Residential Real Property Disclosure Form question as follows: I'm aware of material defects in the septic, sanitary sewer, or other disposal system.

Did defendant fail to disclose material defects in the septic, sanitary sewer, or other disposal system of which the defendants had actual knowledge?"

The jury answered "No" to the special interrogatory.

¶ 31 Plaintiffs subsequently filed a motion to vacate the jury verdict and for the court to enter a JNOV. In the motion, plaintiffs argued that the evidence was overwhelmingly in their favor. Plaintiffs also argued that it was improper for defense counsel to use the phrase "not guilty of any wrongdoing" in closing arguments because that suggested the case was a criminal action. Finally, plaintiffs argued that it was improper for defendants' six children to be in the courtroom when the jury was selected, and for their son to be present throughout the trial. This conduct, plaintiffs alleged, "was intended to influence the jury to find for the defendants because of family considerations, on the basis of sympathy."

¶ 32 After defendants filed a written response, plaintiffs filed a "brief and memorandum of law" in support of their original motion. In that filing, plaintiffs argued for the first time that the trial court had erred in refusing plaintiffs' tendered jury instruction on the habitability of the home. The trial court denied plaintiffs' motion.

¶ 33 ANALYSIS

¶ 34 On appeal, plaintiffs argue that the trial court erred in denying their motion for JNOV because the evidence adduced at trial was overwhelmingly in their favor. Plaintiffs also contend that they were prejudiced by improper comments during closing arguments and by the presence of defendants' family in the court room. Plaintiffs also renew their argument that the trial court erred in refusing to issue their tendered jury instruction relating to the habitability of the home. Finally, plaintiffs argue for the first time that the circuit court improperly charged a fee for the filing of plaintiffs' posttrial motion. We take each issue in turn.

¶ 35 I. Judgment *Non Obstante Veredicto*

¶ 36 A motion for JNOV requests that the trial court set aside a jury verdict and enter judgment in favor of the movant. Such a motion should only be granted where " 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple v. Gustafson,* 151 Ill. 2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). JNOV may not be entered where "there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Id*. at 454. We review the trial court's denial of a motion for JNOV *de novo*. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650 (2010). In doing so, we are cognizant that the appellate court—like the trial court—"should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple*, 151 Ill. 2d at 452-53.

¶ 37 The Residential Real Property Disclosure Act (Act) provides that the seller of residential real property "shall disclose material defects of which the seller has actual knowledge." 765 ILCS 77/25(b) (West 2010). The Act provides that a seller who knowingly violates that duty is liable for actual damages. 765 ILCS 77/55 (West 2010). A seller is not liable for any error or inaccuracy if the seller has no knowledge of the error or inaccuracy. 765 ILCS 77/25(a)(i) (West 2010). Similarly, the seller is not liable if an error or inaccuracy was based upon a reasonable belief that a material defect had been corrected, or if the error or inaccuracy was based upon information provided by a contractor or similar expert. 765 ILCS 77/25(a)(ii), (iii) (West 2010).

¶ 38 The Act provides a "Residential Real Property Disclosure Report." 765 ILCS 77/35 (West 2010). That form lists a number of statements, next to which appear three blank spaces corresponding to the answers "YES," "NO," and "N/A." *Id*. The eighth such statement reads: "I am aware of material defects in the plumbing system (includes such things as water heater, sump pump, water treatment system, sprinkler system, and swimming pool)." *Id*. The thirteenth reads: "I am aware of material defects in the septic, sanitary sewer, or other disposal system." *Id*.

¶ 39 While the Act provides a statutory cause of action, this does not impact a buyer's ability to bring a claim of common law fraudulent misrepresentation. 765 ILCS 77/45 (West 2010); see also *Bauer v. Giannis*, 359 Ill. App. 3d 897, 906 (2005) ("A fraudulent misrepresentation claim may be based solely on a disclosure made pursuant to the Act."). The elements of a claim of fraudulent misrepresentation are:

> "(1) [a] false statement of material fact (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980).

¶ 40 Accordingly, to prevail under either statutory or common law, a plaintiff must prove that a defendant knew any false statements to be false. Here, plaintiffs were required to prove that when defendants indicated that they were aware of no material defects relating to the septic system, defendants knew that statement to be false. Plaintiffs failed to meet that burden.

¶ 41 While defendants did notice an occasional "rotten egg" odor in the house, they testified that the issue had been resolved in the spring of 2010, well before defendants filled out the disclosure form on November 5, 2010. When defendants contacted Hatzer, a septic contractor,

regarding the odor, he suggested that the issue was not with the septic system, but with the plumbing. Specifically, Hatzer posited that the issue was with the plumbing's venting. He suggested defendants pour water into their floor drains and contact a plumber. The plumber subsequently recommended that defendants place a cover over their sump pump. The odor never recurred.

¶ 42 The evidence makes clear that defendants, at the time they filled out the disclosure report, were not of the belief or knowledge that there was a defect in the septic system causing an odor. Primarily, defendants were under no obligation to disclose an issue that had apparently been resolved for at least six months. See 765 ILCS 77/25(a)(ii) (West 2010). Moreover, even when the odor was present, defendants were informed by a septic contractor that the odor was probably not caused by the septic system, but instead by the plumbing system. Any inaccuracy in the disclosure report, then, was based upon information received from an expert, and cannot be held against defendants. 765 ILCS 77/25(a)(iii) (West 2010).

¶ 43 Plaintiffs also emphasized—both at trial and on appeal—that defendants were made aware by the 2008 septic report that the inlet pipe was back-pitched. This defect, plaintiffs contend, should have been disclosed on the disclosure report. The evidence, however, shows that defendants had no reason to know or believe that the back-pitch was a material defect.[1] The notation that the inlet pipe was back-pitched was a footnote following a report that declared "[t]he system appears to be working properly as of this date." The fact of the back-pitch was presented as an innocuous observation. One can reasonably infer that if the back-pitched inlet

[1]The Act defines a material defect as "a condition that would have a substantial adverse effect on the value of the residential real property or that would significantly impair the health or safety of future occupants." 765 ILCS 77/35 (West 2010).

pipe *was* problematic, the report would not have concluded that the system was working properly. Indeed, Hatzer testified that the back-pitch "wasn't *** that bad," and that a septic system with a back-pitched inlet pipe can still function properly. It is also notable that plaintiffs themselves had knowledge of the same back-pitch, as provided in the 2010 septic report.

¶ 44 The evidence demonstrates that there was, at the very least, a factual dispute as to whether defendants had knowledge of any defect in the septic system. As evidenced by its response to the special interrogatory, the jury determined that defendants did not have such knowledge. The evidence certainly did not " 'overwhelmingly favor[]' " plaintiffs in regard to that element. *Maple,* 151 Ill. 2d at 453 (quoting *Pedrick,* 37 Ill. 2d at 510). Accordingly, the trial court properly denied plaintiffs' motion for JNOV.

¶ 45 II. Improper Closing Argument

¶ 46 Plaintiffs' next contend that defense counsel made a number of improper and prejudicial remarks in closing arguments. Specifically, plaintiffs contend that counsel's use of the word "guilty" in closing arguments improperly suggested to the jury that the case was a criminal action. Plaintiffs also argue that counsel improperly referred to the septic system as "operating properly." We find that defense counsel's comments were not improper.

¶ 47 Initially, we note that plaintiffs have failed to cite any authority which might support the proposition that the use of the word "guilty" at a civil trial is improper and prejudicial. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Plaintiffs' argument also neglects the fact that the word "guilty," while often invoked in criminal verdicts, is not definitionally bound to the criminal trial. Indeed, Black's Law Dictionary makes this distinction. In addition to defining "guilty" as "[h]aving committed a crime," it also defines the word as "[r]esponsible for a civil wrong, such as a tort or breach of contract." Black's Law Dictionary 824 (10th ed. 2014). Moreover, the trial

court repeatedly instructed the jury that the necessary elements needed to be proved only by clear and convincing evidence.

¶ 48 Plaintiffs also contend that it was improper for defense counsel to remark that the septic system was working properly. Plaintiffs have failed to support this argument with a record citation, and we are unable to find such a comment in defense counsel's closing argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Nevertheless, we would note that if counsel did make such a comment, it would be wholly supported by the evidence, as both the 2008 and 2010 septic report concluded that "[t]he system appears to be working properly as of this date."

¶ 49 III. Presence of Defendants' Children in Courtroom

¶ 50 Plaintiffs next argue that the presence of defendants' children in the courtroom was prejudicial. Specifically, plaintiffs assert that defendants' six children were present in front of the jury array and that one of defendants' children was present throughout the trial. Their presence, plaintiffs contend, amounted to an attempt by defense counsel "to present the case by non-verbal conduct." We disagree.

¶ 51 First, we note that the report of proceedings in this case begins just before opening statements. As a result, there is no transcript of earlier proceedings, including jury selection. Plaintiffs' counsel objected to defendants' son being present in the courtroom during trial. In making that objection, counsel asserted that more children had been present the day before. However, that statement is unsupported by any documentation in the record. Accordingly, we will consider only whether the court erred in overruling plaintiffs' objection to the presence of a single child during trial. See, *e.g.*, *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (appellant has burden to provide a sufficiently complete record to support a claim of error; any incompleteness of the record is resolved against the appellant).

¶ 52 Plaintiffs have failed to assert any precise reason that the presence of defendants' son was prejudicial. That is, they make no claim that either defendants, their son, or defense counsel made any comments, gestures, or movements that would even draw attention to the presence of the child. By requesting that we grant a new trial based on the child's presence alone, plaintiffs are, in effect, asking this court to craft a rule of law that would *per se* exclude young family members from the courtroom. We will not do so.

¶ 53 IV. Habitability of Home

¶ 54 Plaintiffs next argue that the trial court erred in refusing to present to the jury their proposed instruction regarding the habitability of the home. In support, plaintiffs argue that the implied warranty of habitability is extended to subsequent purchasers such as themselves.

¶ 55 The record provided to this court, however, is completely devoid of any reference to such an instruction. At no point in the report of proceedings do the parties even discuss proposed jury instructions. This incompleteness of the record must be resolved against plaintiffs. *Id.* at 392.

¶ 56 V. Filing Fee for Posttrial Motion

¶ 57 Finally, plaintiffs argue that the circuit clerk improperly charged a $50 fee for the filing of their posttrial motion. Again, however, there is no indication in the record that plaintiffs were charged that fee. Nor is there any indication that plaintiffs ever raised this issue with the trial court. Accordingly, this issue must also be resolved against plaintiffs. *Id.*

¶ 58 CONCLUSION

¶ 59 The judgment of the circuit court of La Salle County is affirmed.

¶ 60 Affirmed.