STATE OF MICHIGAN

COURT OF APPEALS

RALPH W. BARBIER, JR., and MARINA S. BARBIER,

Plaintiffs-Appellants/
Cross-Appellees,

v

FRANK C. PIKU, SHIRLEY A. PIKU, PIKU MANAGEMENT COMPANY, a Michigan corporation, JOHNSTONE & JOHNSTONE, INC., a Michigan corporation, and GRACE LINZELL, jointly and severally,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
May 16, 1997

No. 181506
Macomb Circuit Court
LC No. 90004389 CK

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action in favor of defendants Frank and Shirley Piku, the Piku Management Company (hereafter, the "Pikus") and Grace Linzell. They also appeal from a jury verdict of $19,250 against defendant Johnstone & Johnstone. The Pikus and Linzell cross-appeal from the trial court's order awarding each of them $30,000 in attorney fees as mediation sanctions under MCR 2.403. We affirm.

I

The trial court did not err in denying plaintiffs' motion for judgment notwithstanding the verdict. *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 395; 493 NW2d 441 (1992).

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* Circuit judge, sitting on the Court of Appeals by assignment.

To establish common-law fraud, a plaintiff must prove that: (1) the defendant made a material misrepresentation, (2) the misrepresentation was false, (3) the defendant knew it was false or made it recklessly without any knowledge of its truth, (4) the defendant made it with the intention that it be acted upon by the plaintiff (5) the plaintiff acted in reliance upon it and (6) consequently, the plaintiff suffered injury. *Price v Long Realty, Inc*, 199 Mich App 461, 470; 502 NW2d 337 (1993).

Viewing the evidence in a light most favorable to the Pikus, the jury verdict was supported by credible evidence. The jury reasonably could have found that the Pikus did not make a representation that they knew was false or that they made it recklessly, without any knowledge of its truth. Mr. Piku testified how he calculated the square footage. His figure of 4,915 square feet encompassed not only the living area "above grade," but the lower living area, garages, decks and other areas. Based on Mr. Pikus' explanation of how he calculated the square footage, a reasonable jury could find that he did not make false misrepresentations.

Moreover, a reasonable jury could conclude that plaintiffs did not rely on Pikus' representation. The record shows that the plaintiffs increased their offer by $100,000 even after they saw an advertisement in the Grosse Pointe News indicating that the house contained only 4,000 square feet. Significantly, plaintiffs made no inquiries to clarify the discrepancy. Reasonable inferences from plaintiffs' testimony indicate that they wanted to buy the house primarily because of its location on the lake, not because of the square footage as represented by the Pikus. Therefore, the trial court did not err in denying plaintiffs' motion for JNOV with respect to the claims of misrepresentation against the Pikus.

II

With respect to defendant Johnstone & Johnstone, we find that the evidence supported the jury verdict awarding $19,250 to plaintiffs. Defendant Johnstone & Johnstone had represented that the house had 4,000 square feet. Plaintiffs asserted that, according to their measurements, it had only about 3,000 square feet. During closing argument, defense counsel for Johnstone & Johnstone admitted that a mistake had been made, and the square footage was actually closer to 3,500 square feet. The jury believed that this error was reckless, and there was evidence to support the finding.

However, there was also ample evidence supporting the jury's finding that plaintiffs' square footage figures were wrong. There was evidence that the ground floor square footage of 1,963 should have been multiplied by 1 ¾stories, rather than 1½stories as argued by plaintiffs. Given those facts, the house would comprise 3,435 square feet. Barbara Barry, who prepared the mortgage appraisal of the property, testified that the house was 2,979 square feet and, if the lower level area of 492 square feet was added, it was approximately 3,471 square feet. The jury averaged these figures to arrive at its conclusion that defendant Johnston & Johnston overestimated the square footage by 550 square feet. We will not overturn that decision, as the testimony indicated that it was difficult to determine the square footage in the unusually shaped house.

III

With respect to damages, defense counsel discredited plaintiffs' evidence that the house was worth only $600,000. The jury was free to believe or disbelieve plaintiffs' evaluation of the property. Barry testified that the square footage affects the market value of a house at the rate of $35 a square foot. Therefore, a proper calculation of damages is the difference between the market value of a 4,000 square foot home and that of a home of 3,450 square feet. In this case, damages totaled $19,250. The evidence supported that figure, and the judge did not err in refusing plaintiffs' motion for JNOV.

Based on the foregoing, we conclude that the trial court did not abuse its discretion in denying the motion for a new trial. MCR 2.611(A)(1)(e); *Bosak v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985).

IV

The trial court also did not abuse its discretion in denying plaintiffs' motion for leave to amend their complaint to add a claim for violation of the Michigan Consumer Protection Act ("MCPA"). *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134 (1973); *Taylor v Detroit*, 182 Mich App 583, 586; 452 NW2d 826 (1989). The trial court properly observed that plaintiffs unduly delayed in seeking amendment. Moreover, granting the amendment to add a new cause of action on the eve of trial would have prejudiced defendants.

V

Next, the trial court properly exercised its discretion in refusing to take judicial notice of the MCPA, the National Association of Realtors Code of Ethics and Standards of Practice, and the Grosse Pointe Board of Realtors Bylaws, because the statute and regulations were inapplicable to this case. MRE 202; *Bourke v North River Ins Co*, 117 Mich App 461, 465-466; 324 NW2d 52 (1982). The trial court did not abuse its discretion in denying plaintiffs' request for judicial notice of adjudicative facts. MRE 201.

VI

There is no merit to plaintiffs' contention that the trial court erroneously barred them from arguing that defendant Linzell misrepresented the property value at $600,000. First, plaintiffs argued that the land value was misrepresented in their opening and closing statements. Moreover, plaintiffs testified that Linzell told Mrs. Barbier that the land was worth $600,000. Barry also testified that the land was worth $600,000 based on a comparison of the sale of vacant lots in the Grosse Pointe area. Contrary to plaintiffs' contention, the general rule of law stated in *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 555; 487 NW2d 499 (1992), is applicable, because plaintiffs had various opportunities to examine the property. Also, defendants did not have specific or peculiar knowledge that plaintiffs lacked regarding the uses of the property.

The trial court did not abuse its discretion by reducing the jury verdict to $19,250, because the jury improperly entered an award of $22,000 that was intended to punish defendant Johnstone & Johnstone. *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 340; 425 NW2d 791 (1988).

Finally, the trial court did not abuse its discretion in awarding the Pikus and Linzell each $30,000 in attorney fees as mediation sanctions under MCR 2.403. *Jernigan v General Motors Corp*, 180 Mich App 575, 587; 447 NW2d 822 (1989).

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress