IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

THOMAS L. and LINDA RADLEY,	)	
	)	
Plaintiffs/Appellants,	)	**Shelby Chancery No. 104603-1 R.D.**
	)	
VS.	)	**Appeal No. 02A01-9512-CH-00269**
	)	
BOBBY E. and ALICE E. BROOKS,	)	
	)	
Defendants/Appellees.	)	

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE NEAL SMALL, CHANCELLOR

RUSSELL J. JOHNSON
Memphis, Tennessee
Attorney for Appellant

J. LOGAN SHARP
BATEMAN AND CHILDERS
Memphis, Tennessee
Attorney for Appellee

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

HOLLY KIRBY LILLARD, J.

In this action, the Plaintiffs, Thomas and Linda Radley, filed suit against the

Defendants, Bobby and Alice Brooks, based upon breach of a land sales agreement. The Plaintiffs base their suit upon the following alternative theories: breach of contract, breach of warranty, negligence, misrepresentation, fraud and violation of the Tennessee Consumer Protection Act. The trial court rendered a judgment in favor of the Plaintiffs for $2,000.00 and found that the Defendants were not liable to the Plaintiffs for intentional fraud, negligence or for violation of the Tennessee Consumer Protection Act. For the reasons stated hereafter, we affirm the judgment of the trial court.

FACTS

On September 28, 1991, the Plaintiffs and the Defendants signed a real estate purchase agreement whereby the Plaintiffs agreed to buy and the Defendants agreed to sell a certain piece of property located at 5619 Bartlett Grove, Bartlett, TN. The real estate purchase agreement included the sale of a certain wood stove insert within the fireplace and provided an express warranty that all appliances in the home were "in good working order at the time of closing."

The Defendant, Bobby Brooks, installed the wood stove insert into the prefabricated fireplace in the fall of 1984. In 1991, the Defendants called the Bartlett Fire Department and reported a chimney fire in their home. After taking the stove insert out of the fireplace, the fire department found smoldering creosote burning on the floor near the rear of the fireplace. The fire department then extracted the smoldering creosote from the fireplace, replaced the wood stove insert and gave no warnings to the Defendants of any potential future hazards regarding the stove insert. The Defendants continued to use the stove insert after the fire during the fall of 1991 until the Defendants sold the house to the Plaintiffs.

When the Defendants gave possession of the house to the Plaintiffs, they left the wood stove insert in the house. The manufacturer's manual for the stove insert was left inside a cabinet in the house.

The Plaintiffs took possession of the house in November of 1991. The Plaintiffs used the stove insert during the winter of 1991 and 1992 and during the winter of 1992 and 1993. In October of 1993, the Plaintiffs had the stove insert cleaned by Coopertown's Mastersweep, Inc. ("Coopertown"). Because the prefabricated fireplace had been improperly modified and because the wood stove insert was installed in the prefabricated fireplace contrary to the manufacturer's instructions, Coopertown advised the Plaintiffs not to use the wood stove insert.

LAW

The two issues before this Court are as follows: 1) did the trial court err in holding that the Defendants were not liable for any intentional fraud, negligence or violation of the Tennessee Consumer Protection Act; and 2) did the trial court err in awarding the Plaintiffs $2,000.00 in damages.

First, we consider whether the Defendants are liable to the Plaintiffs for fraud. In Hiller v. Hailey, 915 S.W.2d 800, 803 (Tenn. Ct. App. 1995), this Court stated:

> [t]he general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to material fact, must be false and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true.

This Court further stated that "[t]he party alleging fraud takes upon himself the burden of proving every necessary and material element of fraud, and fraud will not be presumed from a showing merely that a motive or intent to perpetrate the same existed." Hiller, 915 S.W.2d at 803.

To constitute fraud, the complained of factual misrepresentations must have been false. Harrogate Corp. v. Systems Sales Corp., 915 S.W.2d 812, 817 (Tenn. Ct. App. 1995). The complaining party must have relied upon the false representation in reaching their decision, and the fact misrepresented must have been "so material that it determined

the conduct of the party seeking relief. " Id. For an alleged misrepresentation to be actionable, it must constitute a "material inducement" for the complaining party to act. Id.

In the present case, the Plaintiffs had the opportunity to discover the improper installation of the wood stove insert when they hired their own inspector to inspect the house before they signed the land sales agreement. The Plaintiffs also had another opportunity to discover the improper installation of the wood stove insert by reading the manufacturer's manual that came with the stove insert. We, therefore, agree with the court below that there was no reliance on any alleged misrepresentation, and there can be no recovery for any fraudulent misrepresentation.

Second, we consider whether the Defendants are liable to the Plaintiffs for negligence. A claim of negligence requires proof of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn. 1995); Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993); Kilpatrick v. Bryant, 868 S.W.2d 594, 598 (Tenn. 1993); McClenahan v. Cooley, 806 S.W.2d 767, 774 (Tenn. 1991). Whether the Defendants owe a duty of care to the Plaintiffs is entirely a question of law for the court to determine by reference to the body of statutes, rules, principles and precedents which make up the law. Bradshaw, 854 S.W.2d at 869.

Although the concept of duty was not part of the early English common law of torts, it has since become an essential element in all negligence cases. McCall v. Wilder, 913 S.W.2d at 153; Bradshaw v. Daniel, 854 S.W.2d at 869. Properly defined, duty is the legal obligation owed by the defendant to the plaintiff to conform to the standard of care of a reasonable person for protection against unreasonable risks of harm. McCall v. Wilder, 913 S.W.2d at 153; Pittman v. Upjohn Co., 890 S.W.2d 425, 428 (Tenn.1994); Nichols v. Atnip, 844 S.W.2d 655, 661 (Tenn. Ct. App. 1992); W. Keeton, Prosser and Keeton on the Law of Torts, § 53 (5th ed. 1984). A risk is unreasonable and gives rise to a duty to act

with due care if the foreseeable probability and gravity of harm posed by the defendant's conduct outweigh the burden upon the defendant to engage in alternative conduct that would have prevented the harm. McCall v. Wilder, 913 S.W.2d at 153; See also; Restatement (Second) of Torts, § 291 (1964).

In McCall v. Wilder, the Tennessee Supreme Court listed several factors which must be considered in determining whether a risk is an unreasonable one. The factors listed by the court include the following: the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by the defendant; the usefulness of the conduct to the defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. 913 S.W.2d at 153; Restatement (Second) of Torts, § 292, 293 (1964). The court in Wilder, therefore, concluded that a duty of reasonable care exists if the defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property. Wilder, 913 S.W.2d at 153.

Once it is determined that the defendant owes the plaintiff a legal obligation to conform to a reasonable person standard of care, then the question becomes whether the defendant failed to exercise reasonable care under the circumstances. Wilder, 913 S.W.2d at 153. Because the Defendants used the wood stove insert in the house from the fall of 1984 until September of 1991, we agree with the court below in its determination that the Defendants were not negligent in exposing the Plaintiffs to an unreasonable risk of harm.

Next, we consider whether the Plaintiffs have established a viable cause of action under the Tennessee Consumer Protection Act. This Court stated in Smith v. Scott Lewis Chevrolet, Inc., 843 S.W.2d 9, 12 (Tenn. Ct. App. 1992), that an unfair or deceptive act need not be willful or knowingly made in order to recover actual damages under the Consumer Protection Act. See also, Haverlah v. Memphis Aviation, Inc., 674 S.W.2d 297

(Tenn. Ct. App. 1984). To limit recovery to only fraudulent, willful or knowing misconduct would render the treble damages provision for willful and knowing violations of the Act redundant. Scott Lewis Chevrolet, Inc., 843 S.W.2d at 12. Thus, recovery under the Act is not limited to intentional acts, but it also contemplates negligent conduct. Id. at 13. However, because there must be at least a minimum a finding of negligence, the Plaintiffs' cause of action under the Consumer Protection Act is rendered moot by our affirmance of the trial court's finding that the Defendants are not liable to the Plaintiffs for negligence.

Finally, we consider whether the trial court erred in awarding the Plaintiffs damages in the amount of $2,000.00. In Lamons v. Chamberlain, 909 S.W.2d 795, 801 (Tenn. Ct. App. 1993), this Court stated that in an action for breach of contract, the injured party is only entitled to be put in the same position that he would have been had the contract been performed, and he should not profit by the defendant's breach. See also, Hennessee v. Wood Group Enterprises, Inc., 816 S.W.2d 35, 37 (Tenn. Ct. App. 1991); Action Ads, Inc. V. William B. Tanner Co., 592 S.W.2d 572 (Tenn. Ct. App. 1979).

Because the Plaintiffs' expert, Ken Robinson, testified that the Plaintiffs could buy and install a new prefabricated fireplace for $2,000.00, it is the opinion of this Court that the court below did not err in awarding damages to Plaintiffs in that amount.

Accordingly, we affirm the judgment of the trial court. Costs on appeal are taxed to Appellants.

HIGHERS, J.

CONCUR:

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CRAWFORD, P.J., W.S.

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LILLARD, J.