

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 3, 2023

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Clerk of the
Appellate Courts

MARTINA SMITH ET AL. v. DONNA JEAN WALKER ET AL.

Appeal from the Circuit Court for Madison County
No. C-19-181 Kyle C. Atkins, Judge

No. W2022-00748-COA-R3-CV

The plaintiffs, Martina and Eddie Smith (“Buyers”)¹, filed suit in the Madison County Circuit Court (“Trial Court”) regarding their purchase of a piece of real property from the defendant, Donna Jean Walker (“Seller”). Buyers alleged intentional misrepresentation, negligent misrepresentation, and failure to disclose the presence of mold within the home. The Trial Court granted summary judgment in favor of Seller. Buyers previously filed an appeal to this Court regarding the grant of summary judgment. During that appeal, this Court held that the Trial Court had not provided a sufficient basis for granting Seller’s motion for summary judgment and remanded for entry of a new order explaining its reasoning. Thereafter, the Trial Court entered a revised order providing detailed reasoning for its grant of summary judgment in favor of Seller on each of Buyers’ claims against her. Buyers timely appealed the revised order to this Court. During this second appeal, Buyers filed essentially the same brief as in the previous appeal despite entry of the Trial Court’s revised order following remand. Because Buyers failed to address the revised order in their appellate brief and failed to cite to the record submitted to this Court in this appeal, Buyers waived their issues for appeal by failing to comply with Tenn. R. App. P. 27 and Tenn. Ct. App. R. 6. We, therefore, affirm the judgment of the Trial Court in its entirety.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which CARMA DENNIS MCGEE and JEFFREY USMAN, JJ., joined.

Samuel W. Hinson, Lexington, Tennessee, for the appellants, Eddie Smith and Martina Smith.

¹ In addition to their individual capacities, Martina and Eddie Smith are also suing in their capacity as next of kin to their grandson who moved into their home.

Marc A. Sorin, Memphis, Tennessee, for the appellee, Donna Jean Walker.

MEMORANDUM OPINION²

This matter was previously appealed to this Court in *Smith v. Walker*, No. W2021-00241-COA-R3-CV, 2022 WL 842988 (Tenn. Ct. App. Mar. 22, 2022) (mem. op.) (“*Smith I*”). In *Smith I*, this Court set forth the background of this case as follows:

In March 2019, [Buyers] entered into a Purchase and Sale Agreement with [Seller] for the purchase of [Seller’s] house. [Buyers] discovered mold contamination in the home not long after moving in, which they allege, *inter alia*, caused Mrs. Smith and their grandson, Parker Smith, to become severely ill, contaminated most of their personal property to the extent that it had to be destroyed, and rendered the home effectively beyond repair. [Buyers] filed a complaint against [Seller] and Amerispec Inspection Services (“Amerispec”)[³] in the Circuit Court of Madison County (“the trial court”) on July 25, 2019. Therein, [Buyers] alleged causes of action against [Seller] for breach of contract, negligence and gross negligence, negligent misrepresentation, intentional misrepresentation, and failure to disclose.[⁴] [Buyers] also sought compensatory and punitive damages. Essentially, [Buyers] claimed that they thought they were purchasing a habitable home free from major defects, when [Seller] knew or should have known of the mold contamination but did not inform them of it.

[Seller] filed an answer, asserting a litany of affirmative defenses and requesting that the claims against her be dismissed. Amerispec filed a motion for judgment on the pleadings on October 15, 2019, which [Seller] joined on March 26, 2020. In joining the motion, [Seller] specifically sought dismissal of [Buyers’] claims of negligence and gross negligence. On November 2, 2020, [Seller] filed a motion for summary judgment as to [Buyers’] claims of breach of contract, negligent misrepresentation, and intentional misrepresentation.

² Rule 10 of the Rules of the Court of Appeals provides: “This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated ‘MEMORANDUM OPINION,’ shall not be published, and shall not be cited or relied on for any reason in any unrelated case.”

³ This matter was ultimately dismissed against Amerispec, and it is not a party to this appeal.

⁴ This Court noted in *Smith I* that Buyers had abandoned their claims of breach of contract, negligence, and gross negligence against Seller. *Smith I*, at *3.

Id. at *1 (internal footnote omitted). The Trial Court entered a short order in February 2021, in which it found that pursuant to the express terms of the purchase agreement, Buyers agreed to accept the property in “as is” condition in exchange for a reduced purchase price. The Trial Court, therefore, found that the “as is” provision absolved Seller “from any misrepresentations concerning the condition of her home at the time of this real estate transaction.” The Trial Court further found that no proof was presented by Buyers to demonstrate any intentional misrepresentation made by Seller in connection with the real estate transaction. As such, the Trial Court granted summary judgment in favor of Seller. Buyers appealed the Trial Court’s February 2021 order.

After briefing and oral argument were completed in the previous appeal, this Court issued an opinion, in which it held that the Trial Court’s order was deficient because it did not address each of the causes of action alleged by Buyers and included scant reasoning and explanation regarding its ruling leaving this Court unable to decipher how the Trial Court reached its decision. *Id.* at *3. This Court vacated the Trial Court’s order granting summary judgment in favor of Seller and remanded to the Trial Court for entry of an order explaining the reasoning for its decision. *Id.* In *Smith I*, this Court addressed concerns regarding the inadequacies in Buyers’ appellate brief but found that because of the Trial Court’s insufficient order, the issues with Buyers’ brief were not dispositive. *Id.* at *3 n.5.⁵ However, in *Smith I*, this Court strongly encouraged the parties to comply with the relevant procedural rules of this Court and advised that it “may not be so forgiving in the future.” *Id.*

Upon remand, the Trial Court entered a detailed revised order in May 2022, addressing each of Buyers’ claims and granting summary judgment in favor of Seller. In its revised order, the Trial Court addressed Buyers’ claims of negligent representation, intentional representation, and failure to disclose in detail as follows in pertinent part:

In order for [Buyers] to establish prima facie claim of either negligent misrepresentation or intentional misrepresentation they must present evidence that the [Seller] supplied false information to the [Buyers]. *Williams v. Berube & Assocs.*, 26 S.W.3d 640, 644-45 (Tenn. Ct. App. 2000). [Buyers] have failed to identify any “false information” provided by [Seller]. Furthermore, [Buyers] failed to present any credible proof that [Seller] represented to them that the home was “free from mold or other contaminants.” In fact, Plaintiff Martina Smith admitted that the word mold

⁵ In the previous appeal, Buyers filed a principal brief without citations to the record, and Seller argued that Buyers had failed to comply with Rule 27. In their reply brief in the initial appeal, Buyers included the same facts as in the principal brief and added citations to the record for that portion. In this second appeal, Buyers have filed the same brief as the first appeal except that the citations to the previous record from the reply brief are inserted into the principal brief.

was never even uttered by either party when they discussed the condition of the home.

To establish prima facie claim of intentional misrepresentation, in addition to the evidentiary requirement of proof that the defendant supplied false information, a plaintiff has the additional burden to prove 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." *Hodge v. Craig*, 382 S.W.3d 325, 343 (Tenn. 2012). Pursuant to the express language of the real estate sales contract, it was the duty of the [Buyers] to inspect for mold or other contaminants. Furthermore, [Buyers] have failed to present this Court with any credible proof that [Seller] knew there was mold in the home at the time the parties entered into the real estate sales contract. Furthermore, given that Disclosure Form specifically negated any requirement for [Seller] to have the home inspected or otherwise investigated before completing the disclosure form, [Buyers] have no proof that [Seller] was somehow reckless by failing to independently investigate whether there was mold in the home prior to the sale.

The Tennessee Residential Property Disclosure Act requires an owner to either disclose in good faith any known material defects regarding the condition of a property, or state to a buyer that "the owner makes no representations or warranties as to the condition of the real property or any improvements thereon and that purchaser will be receiving the real property 'as is.'" Tenn. Code Ann. § 66-5-202. The TRPDA contains an "actual knowledge" requirement:

- (a) The owner shall not be liable for any error, inaccuracy or omission of any information delivered pursuant to this part if:
 - (1) The error, inaccuracy or omission was not within the actual knowledge of the owner ...

Id. § 66-5-204(a)(1). Again, there is simply no proof that [Seller] had "actual knowledge" that there was mold in the home at any time relevant to this real estate transaction. [Buyers] have failed to establish any question of fact on this material issue.

Based on the foregoing, the Trial Court ruled as follows regarding those claims:

The Court finds the [Buyers'] claim for Negligent Misrepresentation must fail as the evidence before the Court is insufficient to establish that [Seller]

supplied false information to the [Buyers] which is . . . essential to establish a claim of Negligent Misrepresentation.

This Court finds that the [Buyers'] claim for Intentional Misrepresentation must fail as the evidence before the Court is insufficient to establish that [Seller] had actual knowledge that the information,[sic] she provided the [Buyers] concerning the condition of the home was false, or that [Seller] was somehow reckless in filling out the Disclosure form.

To the extent that the claims of failure to disclose and concealment are part and parcel of [Buyers'] misrepresentation claims, for the same reasons as stated above, those claims also fail as a matter of law.

Furthermore, [Buyers] have failed to demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in their favor.

(Other internal citations omitted.) The Trial Court, therefore, granted Seller's motion for summary judgment. Buyers again timely appealed to this Court.

During this appeal, Buyers filed a motion to consolidate with the previous appeal, which this Court denied determining that not only had Buyers' motion not complied with Tenn. R. App. P. 22, but that "[t]he Second Appeal is based on the trial court's new judgment" and that Buyers had provided "no explanation of the grounds for including the record from the First Appeal with the record from the Second Appeal." This Court further recognized that this Court had already received the appellate record for the second appeal. As such, this Court denied Buyers' motion to consolidate. Briefing subsequently was completed in this appeal.

On appeal, Seller argues that Buyers' appellate brief fails to comply with Tenn. R. App. P. 27 or Tenn. Ct. App. R. 6. Tenn. R. App. P. 27(a) specifies that an appellant's brief must contain, *inter alia*:

(6) A statement of facts, setting forth the facts relevant to the issues presented for review ***with appropriate references to the record***;

(7) An argument, which may be preceded by a summary of argument, setting forth:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, ***with*** citations to the authorities

and *appropriate references to the record* (which may be quoted verbatim) relied on

Tenn. R. App. P. 27(a) (emphasis added). Rule 27(g) further provides that references in a party's brief to the appellate record "shall be *to the pages of the record involved.*"⁶ *Id.* 27(g) (emphasis added).

Tenn. Ct. App. R. 6(a) further emphasizes the importance of citing to the appellate record by providing that an appellant must include citations to the appellate record for statements regarding: (1) the actions by the trial court that are alleged to be erroneous, (2) how the appellant seasonably called such erroneous action to the attention of the trial judge, (3) evidence of the resultant prejudice to appellant, and (4) each determinative fact relied upon by the appellant. Additionally, Rule 6(b) provides the consequences of a party's failure to provide proper citations to the record for a party's argument and factual assertions, stating as follows:

No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

In this second appeal, we first note that Buyers have not provided any citations to the appellate record in the argument section of their brief to support their arguments as required by Tenn. R. App. P. 27(a)(7)(A). Secondly, Buyers have filed the same brief for this appeal except for the added record citations from the previous record that were included in the previous reply brief. The page numbers included in Buyers' brief citing to the record match exactly to those in the previous reply brief submitted by Buyers. The problem, however, is that except for the complaint located at the very beginning of the record, the page numbers in the appellate record for this appeal do not match the page numbers for the appellate record in the previous appeal.

When filing their appellate brief, Buyers were aware that a second appellate record had been filed and was relevant to the present appeal. Because Buyers did not bother to verify their record citations in this appeal, their citations to the appellate record point to incorrect pages in the appellate record in this appeal. Consistently incorrect citations to the appellate record is no improvement from a complete lack of citations. Both result in this Court having to dig through several volumes of appellate record searching for the appropriate documents or evidence within the appellate record to support an appellant's argument or factual assertions. Based on the foregoing, Buyers clearly have not properly

⁶ Except as provided in Tenn. R. App. P. 28(c), which includes optional appendices to appellate briefs.

cited to the appellate record in this appeal as required by Tenn. R. App. P. 27 and Tenn. Ct. App. R. 6.

Furthermore, Buyers' failure to provide accurate citations to the record is not the only problem with their appellate brief. In the previous appeal, Buyers appealed the Trial Court's February 2021 order, which primarily focused on Buyers' agreement to accept the property in "as is" condition in exchange for a reduced purchase price. However, this Court vacated that judgment by the Trial Court in the previous appeal and remanded for entry of a new order better explaining the Trial Court's reasoning behind the grant of summary judgment in favor of Seller and addressing all of Buyers' claims against Seller. *See Smith I*, at *3. On remand, the Trial Court did as we had instructed and entered a much more detailed revised order that included sufficient reasoning behind the grant of summary judgment of each claim. The reasoning provided in the revised order was not included in the previous order and, as a result, was not in existence in the previous appeal.

During the second appeal, Buyers raise a single issue of whether the Trial Court erred when it ruled the "as is" clause in the parties' purchase agreement barred their claims of misrepresentation when Buyers had presented evidence that Seller had negligently and/or intentionally misrepresented the condition of the home. This is the exact issue they raised on appeal during the previous appeal and obviously related to the Trial Court's February 2021 order despite it being vacated.

The present appeal involves the Trial Court's May 2022 revised order. In Buyers' notice of appeal, they state that they are appealing to this Court "concerning the ruling of the trial court which was filed on May 18, 2022 wherein the Circuit Court granted [Seller's] Motion for Summary Judgment." In its order denying Buyers' motion to consolidate, this Court stated, *inter alia*, that "[t]he Second Appeal is based on the trial court's new judgment." This order was entered prior to Buyers filing their appellate brief in this appeal. However, despite this Court vacating the February 2021 order and the subsequent entry of the Trial Court's revised order on remand, Buyers filed essentially the same brief as in the previous appeal. In their brief, Buyers never cite to or mention the Trial Court's revised order entered on remand, which provided the law and reasoning behind the grant of summary judgment. By not addressing the Trial Court's revised order that is relevant to this appeal, Buyers are essentially expecting this Court to identify any potential errors with the Trial Court's revised order, research those potential issues, and draft an argument on behalf of Buyers of how the Trial Court erred in its legal reasoning in the revised order. This is not a proper description of our role, and we decline to do so.

As our Supreme Court has stated, "the appellate court 'is not charged with the responsibility of scouring the appellate record for any reversible error the trial court may have committed.'" *Donovan v. Hastings*, 652 S.W.3d 1, 9 (Tenn. 2022). We cannot write Buyers' appellate brief for them or construct supported and well-reasoned arguments on their behalf where none are otherwise set forth. To do so would place Seller in a distinct

and likely insurmountable and unfair disadvantage as this Court would be acting as Buyers' lawyer.

This Court has consistently held that a party's noncompliance with Tenn. R. App. P. 27 can have serious consequences and result in waiver of his or her issues on appeal. *See, e.g., Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000); *Murray v. Miracle*, 457 S.W.3d 399, 402 (Tenn. Ct. App. 2014); *Rummage v. Rummage*, No. M2016-02356-COA-R3-CV, 2018 WL 2134018, at *4 (Tenn. Ct. App. May 9, 2018). In fact, this Court previously instructed Buyers in the first appeal of the importance of adhering to procedural rules on appeal and warned them that this Court "may not be so forgiving in the future." *See Smith I*, at *3 n.5. Due to Buyers' failure to cite to the appropriate appellate record in its brief and to even address the revised judgment from which they appealed, we hold that Buyers have failed to comply with Tenn. R. App. P. 27 and Tenn. Ct. App. R. 6, making it unfeasible to attempt to conduct any realistic review of the Trial Court's revised judgment without providing an unfair advantage to Buyers. Therefore, Buyers have waived any issues and arguments on appeal, and we affirm the Trial Court's judgment.

To the extent that Seller is requesting an award to her for her attorney's fees incurred during the appeal in the argument section of her appellate brief, we deny such request. Seller failed to raise as an issue on appeal in her statement of the issues that she was requesting an award for attorney's fees on appeal. Therefore, Seller has waived this issue. *See Rigsby v. Rigsby*, No. E2014-02095-COA-R3-CV, 2015 WL 7575075, at *7 (Tenn. Ct. App. Nov. 25, 2015) ("Because [the party] did not raise the issue of attorney's fees on appeal in her statement of the issues, we determine this issue to be waived." (citing *Champion v. CLC of Dyersburg, LLC*, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011))).

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 appellants, Eddie Smith and Martina Smith, and their surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE