



1 of 1 DOCUMENT

**GERALD T. BRANNON and LINDA L. BRANNON, Plaintiffs-Appellants, vs.
MUELLER REALTY & NOTARIES, LOUISE E. MUELLER and CONSTANCE
BARRETT, Defendants-Appellees.**

APPEAL NO. C-830876, TRIAL NO. A-8205753

**COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON
COUNTY**

1984 Ohio App. LEXIS 11140

October 24, 1984

PRIOR HISTORY: [*1] Civil Appeal from the Court of Common Pleas

DISPOSITION: Judgment appealed from is: Affirmed

COUNSEL: Messrs. Lindhorst & Dredame, James M. Moore of counsel, 1200 American Building, Cincinnati, Ohio 45202, for Plaintiffs-Appellants.

Mr. Richard A. Bernat, 4931 Delhi Pike, Cincinnati, Ohio 45238, for Defendants-Appellees Mueller Realty & Notaries and Louise E. Mueller.

Mr. Raymond P. Barber, 5115 Delhi Road, Cincinnati, Ohio 45238, for Defendant-Appellee Constance Barrett.

JUDGES: BLACK, J., CONCURS. KEEFE, P.J., CONCURRING IN JUDGMENT ONLY.

OPINION BY: SHANNON, J.

OPINION

OPINION.

In this appeal, we are called upon to review an order of the Court of Common Pleas granting summary judgment in favor of the several defendants named in an

action that sought, *inter alia*, the rescission of a land contract for the sale of a home on the ground that the purchasers had been fraudulently induced to enter into the agreement. The plaintiffs-appellants, Gerald and Linda Brannon, have advanced their argument in one assignment of error, which requires us to determine from the record whether there were genuine issues of material fact that stood in the way of a conclusion as a matter [*2] of law that the defendants were entitled to judgment on the claim of fraud pursuant to Civ. R. 56.

The allegations of the complaint, which was filed in the court below on July 16, 1982, centered on an incident that allegedly occurred when the Brannons first visited the home in the company of a real estate agent who was acting on behalf of the seller of the property, one Constance Barrett. According to deposition testimony later made a part of the record in connection with the defendants' motions for summary judgment, Linda Brannon asked the agent as they walked from room to room of the unoccupied premises about the whereabouts of the owners. In response to the inquiry, the agent, Lillian Mueller, was reported to have said, out of the earshot of Gerald Brannon, that Constance Barrett and her family had moved out of the house during the preceding winter after her husband died unexpectedly of a heart attack.

There is no question from the record, however, that

the death of Barrett's husband was not a product of natural causes, but was instead a suicide. In view of the discrepancy between the account allegedly given by Mueller and the circumstances that actually prevailed, it was [*3] the Brannons' theory that Mueller had either misrepresented or concealed a fact material to their decision to purchase the home, and that the misrepresentation or concealment ultimately induced them to enter into the land contract with Constance Barrett after their efforts to obtain financing for a conventional purchase proved fruitless.

In addition to Mueller and her real estate company, the Brannons named Mrs. Barrett as a defendant in the action on the theory that the acts that formed the basis of their claim of fraud took place within the scope of an agency relationship. Although rescission of the land contract was without doubt the major objective of the lawsuit, the relief requested in the complaint also included the return of the monies paid to Barrett pursuant to the terms of the agreement after the Brannons took possession of the premises.

After the various parties were afforded the opportunity to pursue discovery, the defendants separately moved for summary judgment against the Brannons, and in compliance with Civ. R. 56(C), supporting evidence was supplied to the court largely in the form of deposition testimony from those who possessed first-hand knowledge of the facts [*4] relevant to the claim that the land contract had been procured by fraud. Although the separate motions relied to some extent upon distinctly reasoned arguments, each offered as the primary justification for the entry of judgment against the Brannons as a matter of law the contention that the Brannons had full knowledge concerning the actual circumstances behind the death of Barrett's husband before they entered into the land contract for the purchase of the home, and that such knowledge effectively constituted a waiver of their claim of fraudulent inducement.

The order granting the defendants' motions and ordering the dismissal of the Brannons' complaint was places of record on November 10, 1983. It recited only that the court had given due consideration to the "evidence, memoranda and arguments of counsel," T.d. 29, without identifying the particular grounds for its conclusion that the defendants were entitled to judgment as a matter of law. Under these circumstances, it should

be noted that although what the parties have deemed to be the appropriate issues were defined with some clarity by the respective arguments given to the court in connection with the motions, we cannot in [*5] the end be certain of the actual basis of the court's ruling.

As it has now been given to us in argument by the Brannons, the asserted error lies in the trial court's assessment that the evidence made a part of the record with the motions provided an appropriate basis for terminating the action by the entry of summary judgment in the defendants' favor. As the Brannons see it, there were genuine issues of material fact that precluded the disposition of their claim of fraud as a matter of law in no less than three essential areas of concern: (1) whether there was a duty on the part of the owner of the property and her agent to disclose to prospective purchasers the true facts concerning the death of the owner's husband; (2) whether the Brannons were entitled to rely upon the truth of the statements made by the owner's agent concerning the circumstances of the death; and (3) whether the Brannons were induced to enter into the land contract by virtue of a material misrepresentation or concealment of fact attributable to the owner and her agent.

Having carefully reviewed the evidence submitted to the court below in its totality, we think it fair to say that there existed conflicts [*6] with respect to several matters of relevance in the course of events upon which the Brannons' claim depended, including the substance of the representations made by Mueller concerning the death of Barrett's husband. Because Civ. R. 56(C) requires that the evidence be viewed in a light most favorable to the party against whom summary judgment is sought, we must in this case give the Brannons the benefit of all evidence reasonably tending to support their claim before we can determine ultimately whether the trial court was correct in its application of Civ. R. 56. *Williams v. First United Church of Christ* (1974), 37 Ohio St. 2d 150, 309 N.E.2d 924; *Morris v. First National Bank of Ravenna* (1970), 21 Ohio St. 2d 25, 254 N.W.2d 683.

With this in mind, it must be said at the outset that there is evidence in the record to demonstrate that Mueller did misrepresent or conceal facts relating to the death of Barrett's husband in the course of her dealings with Linda Brannon. The evidence also shows, however, that the Brannons occupied the house under an informal rental agreement for approximately two months before

they actually entered into the land contract with Constance Barrett. [*7] During the period they were in possession of the premises without a contract of sale, the subject of the death of Barrett's husband came up in a conversation between Linda Brannon and a neighbor by the name of Terry Rizzo. After Brannon remarked about the unfortunate circumstances of the death, there is no question that Rizzo informed her that Barrett's husband had not suffered a heart attack, but had instead committed suicide in the home. Linda Brannon later stated in her deposition that she did not immediately reveal the information conveyed by Rizzo to her husband because she feared that he would react adversely to it.

There is, in fact, no indication in the record that Gerald Brannon had any knowledge concerning the circumstances behind the death of Barrett's husband prior to September 8, 1981, the date when the parties entered into the land contract. Despite her conversation with Terry Rizzo, there is similarly no indication in the record that Linda Brannon again brought up the subject of the death, either to her husband or to Lillian Mueller or to Constance Barrett, before the signing of the contract. What the record does show is that the Brannons maintained their residence [*8] in the home uneventfully until the latter part of October of 1981, when Gerald Brannon inadvertently learned of the suicide and drifted into a period during which he experienced emotional trauma that apparently produced an attempt to take his own life and ultimately resulted in a separation from his wife and a refusal to return to the home.

Where, as here, fraudulent inducement is the basis upon which a party seeks to set aside a contract, the elements of proof necessary to prevail on the claim have been well defined. There must be a misrepresentation or concealment of a fact relating to the transaction; that fact must be material; and the misrepresentation or concealment must, in fact, justifiably induce the party endeavoring to void the agreement to enter into the bargain to his detriment. *Mulvey v. King* (1883), 39 Ohio St. 491; *Fillegar v. Walker* (1st Dist. 1936), 54 Ohio App. 262, 6 N.E.2d 1010. See also *Feichtner v. Zicka Homes* (March 23, 1983), Hamilton App. No. C-820427, unreported.

Contrary to the traditional theory of fraud in the realm of tort law, the element of scienter is not essential in an action for the rescission of a contract; while an intentional [*9] or knowing misrepresentation of fact

may well serve to nullify the agreement, it has been said that even an innocent misrepresentation may, under the appropriate circumstances, justify a rescission in the interests of fairness. *Ott v. Midland-Ross Corporation* (6th Cir. 1979), 600 F.2d 24. Cf. *Pumphrey v. Quillen* (1956), 165 Ohio St. 343, 135 N.W.2d 328 (holding that in an action for damages based upon a fraudulent misrepresentation, the plaintiff need not prove that the statement was made with knowledge of its falsity, as long as it is shown that it was made without any knowledge of the underlying facts).

As we have already noted, there is no question in the instant case that the record contains evidence sufficient to overcome a motion for summary judgment with respect to the existence of a misrepresentation concerning the circumstances of the death of Constance Barrett's husband. For this reason, the focus of our inquiry must turn to the elements of materiality and justifiable reliance.

In our estimation, the most appropriate definition of materiality appears in the *Restatement of Contracts*, and we herewith adopt it in the resolution of the issues posed in this [*10] appeal. According to the Restatement, a misrepresentation of fact is material when it would be likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction in question. *Restatement of Contracts* § 470(2). See also *W. Prosser, Handbook of the Law of Torts* 178-19 (4th ed. 1971). The standard is, by its terms, an objective one that generally precludes, quite properly as we see it, the consideration of any idiosyncratic qualities a party might bring to a particular transaction.

This is not to say, however, that subjective considerations can never have a bearing on the matter of materiality. There is an exception to the general rule of objectivity in cases where the individual responsible for the misrepresentation is aware that the recipient is peculiarly disposed to attach importance to a particular subject; in such an instance, the misrepresentation should be deemed material, regardless of its significance to a reasonable person under similar circumstances. See generally *J. Calamari and J. Perillo, The Law of Contracts* 278-79 (2d ed. 1977). See also *Restatement of Torts* § 538(2)(b).

In a case such as this where [*11] the contract involves a sale of improved real property, we can envision a number of considerations that might be deemed material to the transaction, such as the size of the

lot and the placement of the lot lines, or the age and condition of any structure on the property. It is not difficult to understand why these factors would have some importance to a reasonable person contemplating a contract of purchase because they quite obviously can be said to bear directly and reasonably upon the value of the subject matter at the heart of the bargain. The same cannot be said, however, for the consideration at issue in the case *sub judice*. In our judgment, the particular manner in which one of the former owners of the property died could not, in any real sense, be said to have had an impact on the value of the property or on its use or enjoyment by a prospective purchaser. Its importance, insofar as it might have existed, would have been apparent only to such individuals as those with some belief in the occult. We must conclude, therefore, that the misrepresentation concerning the circumstances of the death was not material in a legal sense because the true state of facts would not, [*12] pursuant to the rule of the *Restatement*, have been likely, under the circumstances, to affect the conduct of a reasonable person with reference to a decision to purchase the home.

In reaching our conclusion, we do not intend to cast doubt upon the subjective importance attached to the death by Gerald Brannon, or to question the emotional troubles that apparently accompanied his knowledge that a suicide had occurred in the home. There is, however, no evidence in the record to indicate that Constance Barrett or her agent, Lillian Mueller, was or should have been aware of his peculiar sensitivity to the subject. In the absence of such evidence, we cannot say that there was a genuine issue of material fact with respect to the recognized exception to the objective standard governing the materiality of the misrepresentation.

Even if there were some evidence in the record to overcome a motion for summary judgment on the issue of materiality, there would be another basis for sustaining the entry of judgment in favor of the defendants as a matter of law, at least insofar as Linda Brannon is concerned. There is no question that Linda learned about the suicide from her neighbor, Terry [*13] Rizzo, before she and her husband entered into the land contract. The record further reveals that she specifically admitted in the course of her deposition that she believed Rizzo was telling the truth, and that she elected not to address the subject again prior to the signing of the contract, notwithstanding her knowledge about the suicide. Under these circumstances, it must be said as a matter of law

that the death of Constance Barrett's husband could have played no part in Linda Brannon's decision to purchase the home, and that she was not, therefore, induced to enter into the contract by Lillian Mueller's misrepresentation.

Although it may not be appropriate in law to state that Linda's knowledge should have served as an absolute barrier to her husband's right to pursue relief, there is similarly an alternative basis on the state of this record to justify the resolution of the action against the husband as a matter of law pursuant to Civ. R. 56. According to the evidence, Gerald Brannon did not hear Lillian Mueller's statements regarding the death of Constance Barrett's husband, nor did he learn about them prior to the signing of the land contract. Beyond this, there is, [*14] as we see it, no evidence in the record to show that Gerald was relying in any way on Mueller or Constance Barrett in coming to an agreement with his wife to purchase the home. Without such evidence, we cannot say that a reasonable mind would have been entitled to conclude that Gerald was induced to enter into the contract by anything said or concealed by the defendants.

Because we can, in sum, discern from the record several valid reasons to justify a determination that the defendants were entitled to judgment as a matter of law, we must conclude that the motions for summary judgment were properly disposed of by the trial judge. The assignment of error given to us by the Brannons is, accordingly, without merit.

The judgment of the Court of Common Pleas is hereby affirmed.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

CONCUR BY: KEEFE, P.J.

CONCUR

KEEFE, P.J.

I concur with my brothers Shannon and Black in the conclusion they reach in the circumstances present in the matter *sub judice*. I agree principally because the Brannons ultimately had adequate knowledge about the particulars behind the death [*15] of Constance Barrett's

husband before the Brannons entered into the land contract for the purchase of the home from Mrs. Barrett.

However, I am not able to agree with the view in the opinion *supra*, as I understand it to be expressed, that as a general rule the particular manner in which an owner of improved real property (such as a home), died, could not be said to be material in law. After noting that the size of a lot, the placement of lot lines, or the age or condition of any structure on the property would ordinarily be material, the opinion states that the manner in which a previous owner died would not be material *in law*. The opinion states:

In our judgment, the particular manner in which one of the former owners of the property died could not, in any real sense, be said to have had an impact on the value of the property or on its use or enjoyment by a prospective purchaser. . . . Its importance, insofar as it might have existed, would have been apparent only to such individuals as those with some belief in the occult. We must conclude, therefore, that the misrepresentation concerning the circumstances of the death *was not material in a legal sense* . . . (italicized [*16] for emphasis).

I am not prepared to find that such a misrepresentation, that is, about the manner in which a death occurs in a prospective home, is not material in a legal sense. I believe the misrepresentation here was

material; it lost its legally detrimental effect here because the Brannons did learn how the previous owner did in fact die before they signed the contract to purchase.

Of course, the particular manner of death in most cases is through natural causes. However, the occurrence of extraordinary or uncommon deaths (homicides, suicides, for example) do occur in houses. As I view it, the subject of the particular manner in which an owner of a house dies may be material in law. This does not signify that an owner-vendor must volunteer the cause of death; under the doctrine of caveat emptor there is much information that a vendor of improved real property is not required to come forward with, unsolicited. However, when the cause of death of an owner-vendor is in fact solicited from the owner-vendor, or his/her agent, by a prospective purchaser, the subject, if it rises to the level of materiality in law, must be treated truthfully by the owner-vendor or his/her agent.

[*17] "Material in law" (as an adjective), is defined as follows in 57 C.J.S. *Material* (1948) (omitting footnote citations):

MATERIAL. In law. Constituting a matter that is entitled to consideration; going to the merits; such as does or would affect the determination of a case, the effect of an instrument, or the like; such as must be considered in deciding a case on its merits.