originally imposed in the Justice of the Peace Court. *Commonwealth v. Moore and Battle*, 226 Pa. Super. 58, 312 A. 2d 422 (1973).

ORDER OF COURT

NOW, August 18, 1975, the Court finds the defendant not guilty of disorderly conduct.

NEWLIN v. STIMMLER, C.P. Montgomery County, No. 73-7474

Assumpsit - Motion for Non-suit - Fraud in Inducement of Real Estate Contract - Expert Witness

1. A claim of error on the part of the judge in not granting a non-suit is not grounds for a new trial.

2. The plaintiffs are entitled to have the testimony reviewed in the light most favorable to them because they are the verdict winners.

3. In support of an allegation of fraud, it is competent to show false statements which induced execution of a sales agreement.

4. A mere misstatement of the amount of land is not sufficient to prove fraud unless the deficiency is great in proportion to the whole and the misrepresentation has been made by a real estate broker as agent for the seller. This establishes a prima facie case for the jury.

5. The law implies that real estate brokers, bankers, attorneys, etc. will exercise competent skill and proper care when they act in their respective realms of expertise.

6. In the case of a real estate expert, essential elements of his competency to testify include his knowledge of the property and the real estate market in which it is situated, as well as his evaluating skill and experience as an appraiser.

Michael J. O'Donoghue, Esq., Attorney for Plaintiffs

Francis P. O'Hara, Esq., Attorney for Defendants

OPINION AND ORDER

Opinion by EPPINGER, P.J., 39th Judicial District, Specially Presiding, December 12, 1975:

Joseph and Harriet Stimmler, husband and wife, sold a property to Paul and Joanne Newlin. Mr. Stimmler had placed an advertisement in the Philadelphia Inquirer offering for sale "approximately 10 wooded acres of land" located on the Grebe Road in Limerick Township, Montogomery County. This was just the size tract the Newlins were interested in because they wanted to have horses, so they contacted Mr. Stimmler about the property. He took them out and pointed out three boundaries. The fourth was obscured by a woods. At the time the property was shown the ground was covered with slush and mud and the weather was cold. Mr. Newlin said he relied on statement made by Mr. Stimmler that the property contained 10 acres. He knew the Stimmlers had lived on the property and that Mr. Stimmler was a real estate broker. Mr. Newlin didn't know how many acres were in the tract except by the representations of the owners.

Mr. Newlin even questioned Mr. Stimmler on the language of the agreement, "10 acres or less", because he wanted to be sure he was getting 10 acres. Mr. Stimmler indicated that this was simply the way real estate agents wrote up agreements and said there was 9.872 acres. Mr. Newlin spoke about getting a survey. Mr. Stimmler said it wouldn't be necessary, noting surveys were expensive. Mr. Newlin, in turn, trusted Mr. Stimmler and eventually settled for the property for $39,000.00 without getting any information about the acreage except that which he received from Mr. Stimmler.

A month after settlement Mr. Newlin was again concerned about not haing a survey and again Mr. Stimmler told him a survey was unnecessary. Apparently after settlement the deed was left for record and ultimately mailed to the Newlins. When they received it no acreage was mentioned in the description. Again they became concerned and finally had a survey made. They found the tract contained 7.423 acres.

This news led to this law suit filed on three counts: (1) an action in assumpsit for breach of contract against the Stimmlers; (2) an action in trespass against Joseph Stimmler only, alleging that with knowledge of the falsity of his statement and with the intent to deceive and defraud the Newlins, or with reckless disregard of the truth or falsity of his statements, he represented to the Newlins that the property contained 10 acres; and (3) an action in trespass against Joseph Stimmler only, alleging that he was a real estate broker and as such negligently represented the tract contained 10 acres.

The case was heard by a jury with President Judge George C. Eppinger, of the 39th Judicial District, specially presiding. At

LEGAL NOTICES, cont.

If you wish to defend against the claims set forth in the above mentioned Complaint you must take action within 20 days after service of the Complaint and notice has been completed by publication by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claims or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

You should take this notice to your lawyer at once. If you do not know of a lawyer, contact

Legal Reference Service of
Franklin-Fulton Counties
Court House
Chambersburg, PA 17201
Tel. No.:
Chambersburg 264-4125, Ext. 13

This Action concerns the land herein described: All the following described real estate lying and being situate in the Village of Fannettsburg, Metal Township, Franklin County, Pennsylvania, bounded and limited as follows: Bounded on the north by public road L. R 28093, and having a frontage thereon of 53½ feet more or less; bounded on the west by lands of Lower Path Valley Presbyterian Church and extending along same 165¾ feet more or less; bounded on the south by lands formerly of John H. Walker, now lands of Maurice A. Yocum and other lands of the plaintiffs herein and extending along the same 53½ feet more or less; and bounded on the east by lands formerly of J. H. Walker, now Leslie Park and extending along the same 166 feet more or less.

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(2-23, 3-2, 3-9)

the trial a real estate expert called by the Newlins testified that, based on comparable sales, the missing acreage had a value of $7,473.00. The jury returned a verdict against Joseph Stimmler only in the amount of $6,000.00 plus 6% interst from April 12, 1971.

Mr. Stimmler's after-verdict motions for a new trial and judgment notwithstanding the verdict were based on grounds that the verdict was against the evidence, against the weight of the evidence, against the law and the charge of the Court and that the trial judge erred in not directing a verdict for the defendants. Thereafter Jospeh Stimmler filed two additional reasons for a new trial, one being that the Court erred in permitting the Newlins' expert witness to testify to the value of the property.

In his brief Joseph Stimmler does not argue his original grounds and so we consider them abandoned.

DID THE COURT ERR IN FAILING TO GRANT DEFENDANT'S (JOSEPH'S) MOTION FOR A NON-SUIT?

A claim of error on the part of the judge in not granting a non-suit is not grounds for a new trial. In this case, after the Court refused to grant the non-suit, defendants submitted evidence. In *F. W. Wise Company, Inc. v. Beech Creek Railroad Company*, 437 Pa. 389, 263 A. 2d 389 (1970), the Court said that under these circumstances failure to grant a non-suit could not be raised as a ground for a new trial.

By returning a verdict against Mr. Stimmler the jury found against him for fraud and misrepresentation or on negligent conduct as a real estate broker. There was sufficient evidence on either ground to support the jury's verdict. Thus there is no reason to grant the judgment notwithstanding the verdict.

It is the law of Pennsylvania that where a purchaser of land views the property and had an opportunity to look it over, he is entitled only to the land enclosed in the boundaries of the deed. *Smith v. Donahue*, 60 Pa. Super. 424 (1915); *White v. Price*, 202 Pa. 128, 51 A. 755.

The Newlins' recovery might be barred in this case if that was the sole issue. Here Mr. Stimmler continually represented that there were 10 acres of land and because he was a real estate broker the Newlins trusted him. Besides, the Newlins kept insisting that they'd get a survey of the land and Mr. Stimmler kept telling them it was unnecessary. Because of his experience as a real estate broker Mr. Stimmler knew or should have known

that the tract did not approach 10 acres but contained approximately 7½ acres. During the trial Mr. Newlin testified (N.T. 17): "Well, I said -- you know, I wanted to be sure about this thing, and I said, 'Should I have a survey map done?'. And he said, 'No, it's not necessary. It's too expensive. It's just not necessary. I lived there. I know the property and it is as I say it is.' "[1].

If the jury believed this testimony, and we can assume they did because the plaintiffs are entitled to have the testimony reviewed in the light most favorable to them because they are the verdict winners, *Commonwealth v. Rankin*, 441 Pa. 401, 272 A. 2d 886 (1971); *Commonwealth v. Ingram*, 440 Pa. 239, 270 A. 2d 190 (1970), then it is clear that Mr. Stimmler either through neglect or fraud caused them to purchase a tract of approximately 10 acres when he knew or should have known it contained much less.

In support of an allegation of fraud it is competent to show false statements which induced execution of a sales agreement. *Ohlbaum v. Mayer*, 285 Pa. 260, 131 A. 858 (1926). A misrepresentation is material when it is of such character that if it had not been made the transaction would not have been entered into. *Acari v. Hatch*, 94 Montg. L. Rep. 369 (1970). Moreover, where the vendor cannot make title to all that he has covenanted to convey, the purchaser can take what the vendor can give with an abatement of purchase price for the deficiency in quantity of land. *Merritz v. Circelli*, 361 Pa. 239, 64 A. 2d 796 (1949).

In *Griswald v. Gebbie*, 126 Pa. 353, 172 A. 673 (1889), a case not dissimilar factually to this one, it was held that a mere misstatement of the amount of land was not sufficient to prove fraud, but if the deficiency was great in proportion to the whole and the misrepresentation had been made by a real estate broker as agent for the seller, there was a prima facie case to go to the jury on fraud. In our case the deficiency was about 2½ acres out of a purported 10 acres or less and the statements had been made both in advertisements and in specific oral representations to the buyer.

1. The Stimmlers had originally owned a tract purportedly containing 11.3 acres of land and Montgomery County had condemned 3.3 acres of it.

There was also sufficient evidence in the case for the jury to conclude that in dealing with the Newlins Mr. Stimmler was negligent. The law implies that real estate brokers, bankers, attorneys, etc. will exercise competent skill and proper care when they act in their respective realms of expertise. *Wingate v. Mechanics Bank*, 10 Pa. 104 (1948). *Ladner on Conveyancing in Pennsylvania* (3rd Ed., Sect. 18:38). The jury could have found that a representation that he had 10 acres or less when there was about 7½ acres was a negligent representation, even if he didn't know there was a 25% shortage.

QUALIFICATIONS OF EXPERT WITNESS AS TO VALUE OF REAL ESTATE

Plaintiffs called an expert to testify to the value of real estate, that is to their loss occasioned by the fact that they received only 7.423 acres. Mr. Stimmler argues that the expert was not qualified to express an opinion. An expert witness is one who, because of his possession of knowledge not within ordinary reach of a layman is specially qualified to speak upon the subject to which his attention is drawn. *Taylor v. Spencer Hospital*, 222 Pa. Super. 17, 292 A. 2d 449 (1972). In the case of a real estate expert, essential elements of his competency to testify include his knowldge of the property and the real estate market in which it is situated, as well as his evaluating skill and experience as an appraiser. *United States v. 60.14 Acres of Land*, 362 F. 2d 660 (3rd Cir. 1966). Whether the qualifications of a witness justify the admission of his testimony as an expert witness is a question for the trial judge's discretion.

In this case, after objecting that the real estate expert was not qualified, the Court gave defendant the opportunity to cross examie him on his qualifications. Plaintiff's expert said he had been in the real estate business since 1938, that he had viewed the property and that he had in mind some comparables, mentioning them. His opinion was properly presented to the jury for its consideration.

While not argued in his brief defendant's counsel raised objections to the Court's charge at the time of argument. But having made no objections to the charge at the time of trial, these arguments are not properly before the Court. *Commonwealth v. Cockley*, 411 Pa. 437, 192 A. 2d 693 (1963).

ORDER OF COURT

NOW, December 12, 1975, the defendant Joseph Stimmler's motions for new trial and judgment notwithstanding the verdict are denied. Exception granted to said defendant.