RENDERED: September 20, 1996; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 95-CA-0518-MR

T.J. LEWIS and SARA LEWIS — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 94-CI-1995

WISEMAN HOMES, INC. — APPELLEE

OPINION

AFFIRMING

*** *** *** ***

BEFORE: EMBERTON, JOHNSON, and MILLER, Judges.

MILLER, JUDGE: T.J. Lewis and Sara Lewis bring this appeal from a January 30, 1995, order of the Fayette Circuit Court. We affirm.

Appellants purchased a home from appellee, Wiseman Homes, Inc. Following the closing upon the home, appellants found construction of the home to be faulty and filed the instant action against appellee in the Fayette Circuit Court. On November 11, 1994, appellee moved the court to submit the matter to arbitration and to stay discovery. On January 30, 1995, the

court issued an order submitting the matter to arbitration and staying discovery. This appeal follows.

Appellants contends the circuit court committed reversible error by submitting the matter to arbitration. Apparently, at the closing on the home, appellants signed an application for an extended warranty provided through the Home Owners Warranty Program (HOW). The application contained the following provision:

> PLEASE READ THE SAMPLE WARRANTY/INSURANCE DOCUMENTS PROVIDED BY YOUR BUILDER CAREFULLY. The obligations of HOW and the insurer under the HOW Program are strictly governed by the terms and conditions of these documents. No one is authorized to make any representations on behalf of HOW or the insurer inconsistent with the terms and conditions of the Sample Documents provided for your review and neither HOW nor the Program's insurer will be bound by such representations.

HOW's warranty contained a clause requiring that any dispute between the homeowner and the builder be addressed through arbitration. Appellants claim they had no knowledge of the arbitration clause because the insurance warranty documents (containing the arbitration clause) were not furnished when they signed the HOW application. Hence, appellants aver they never agreed to arbitration and should not be bound by the arbitration provision in question. We disagree.

It is a well-settled principle of law that he who signs a contract is bound by its terms. See Gibson v. Dupin, Ky., 377 S.W.2d 585 (1964). We think the application put appellants on sufficient notice that they would be bound by the warranty/

insurance documents. Appellants' failure to read such documents is no defense.

Appellants next contend that appellee should be "estopped" from using arbitration as a defense. Even though appellants allege estoppel, their argument appears to center upon waiver. Thus, we will entertain the issue of waiver. Relying upon Valley Construction Co., Inc. v. Perry Host Management Co., Inc., Ky. App., 796 S.W.2d 365 (1990), the circuit court concluded that appellee had not waived arbitration. Upon review of the whole, we cannot say the circuit court erred in its determination that appellee did not waive arbitration.

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

David M. Andrews
John D. Christopher Jr.
Andrews & Williams
Lexington, KY

BRIEF FOR APPELLEE:

Carroll M. Redford III
Miller Griffin & Marks PSC
Lexington, KY

RENDERED: August 7, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3246-MR

T. J. LEWIS and SARA K. LEWIS — APPELLANTS

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 94-CI-1995

WISEMAN HOMES, INC. — APPELLEE

OPINION AFFIRMING

* * * * * *

BEFORE: DYCHE, JOHNSON, and KNOPF, Judges.

DYCHE, JUDGE. T. J. Lewis and Sara Lewis appeal from an order of the Fayette Circuit Court dismissing their action against Wiseman Homes, Inc., which sought damages for the allegedly improper construction of a home which they purchased from Wiseman. The matter was, by order of the trial court, as affirmed by this court, submitted for arbitration, which resulted in a decision overwhelmingly in favor of Wiseman.

The present appeal is taken from an order of the trial court which dismissed the complaint of appellants due to their willful concealment of an expert's report prepared on their behalf; the report, by its own terms, indicates that it was prepared in anticipation of use in the litigation. Appellants also incorrectly answered interrogatories concerning what persons had knowledge of the subject matter of the litigation, omitting the name of the expert who made their investigation and report.

Wiseman became aware of the existence of this hidden report during the course of the arbitration. The present case was stayed during the arbitration; when the arbitration became final, Wiseman moved the trial court to dismiss the action due to appellants' concealment of the report and the alleged perjury in incorrectly answering the interrogatories. The trial court conducted a hearing on the matter, and offered both parties the opportunity to produce further evidence and to brief the issues.

On October 30, 1996, the trial court entered an order dismissing appellants' complaint, citing the two factors complained of by appellee, as well as the "lockout" of appellee's representatives from the home in dispute. The trial court opined that with the "lockout" in effect, and with the concealment of the inspection report, appellee had, and would have, no reasonable opportunity to "obtain facts and opinions on the same subject matter by any other means when it could not ascertain the most

basic information regarding any problems from the Plaintiffs before the suit was initiated." This appeal followed.

We begin by stating that it would appear that all of the controversies stemming from the alleged construction problems have been finally resolved; the single minor flaw found by the arbitrators has been remedied by appellee. It would appear that the controversy is moot. The parties are nevertheless contending that we must decide the propriety of the trial court's order dismissing. Since such resolution might have impact on future controversies, we shall so decide.

Appellants couch their arguments in terms of a dispute over discovery, under Kentucky Rules of Civil Procedure 26.02(4)(b) and 37.02. Appellee maintains that this is not a discovery dispute, but an exercise of the trial court's inherent power to regulate the course of litigation and manage its docket.

We have examined the record under both theories, and find no error under either. The trial court found, without using the exact words "bad faith," that appellants' behavior constituted exactly that. We agree that litigation should not involve deception and hiding of items which might possibly be discoverable. If a party is in possession of items which it desires to keep private, but which have been directly sought under interrogatories or other methods of discovery, that party's remedy is not the concealment and denial of the existence of same. The party should

admit the existence of the items, and ask for protection from disclosure under the appropriate Civil Rule.

The conduct of appellants in this case is not proper. The trial court so found, and we agree. While we might not ordinarily agree with the severe sanction imposed herein, see Greathouse v. American National Bank & Trust Company, Ky. App., 796 S.W.2d 868 (1990), as the arbitration has effectively disposed of the gravamen of appellants' complaints, we find no error.

The order of the Fayette Circuit Court is affirmed.

KNOPF, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent. I agree with the appellants that this case concerns a discovery dispute and must be addressed under CR 26.02(4)(b) and 37.02. I do not believe the trial court's order dismissing this action properly addressed the factors under CR 37.02. See Greathouse v. American National Bank & Trust Company, Ky. App., 796 S.W.2d 868 (1990); and Nowicke v. Central Bank & Trust Company, Ky. App., 551 S.W.2d 809 (1977). I would vacate the order and remand for further findings pursuant to the civil rules.

BRIEF FOR APPELLANTS

David M. Andrews
Andrea N. Bostrom
Noel M. Botts
Lexington, Kentucky

BRIEF FOR APPELLEE

Carroll M. Redford III
Robert S. Miller
Lexington, Kentucky