



**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: February 7, 2006
Decided: June 6, 2006

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Re: *Luellen Williams v. White Oak Builders, Inc., et al.*,
Civil Action No. 17556

Dear Counsel:

This is an action for specific performance of an alleged covenant or rescission of a contract for the sale of a townhouse. Specifically, plaintiff Luellen Williams requests specific performance of a covenant to fix a water problem in the basement of her townhouse made by defendant White Oak, Inc. ("White Oak"). In the alternative, Williams seeks rescission of the "Sales Agreement" she entered into with defendant Capano Builders, Inc. ("Capano Builders") for her townhouse on the grounds of intentional misrepresentation, negligent misrepresentation or mutual mistake. Finally, Williams asserts a claim of negligent misrepresentation against White Oak, Capano Builders and White Oak Builders, Inc. ("White Oak Builders").¹

¹ The Court will refer to the three defendants collectively as "Defendants."

These issues formed the basis of a multi-day trial held on March 17, June 1 and June 2, 2005. On May 31, 2005, the Court, accompanied by Williams and counsel, visited the townhouse and visually inspected it and the surrounding property. With the agreement of the parties, the Court made its observations part of the official trial record.² This letter opinion embodies the Court's post-trial findings of fact and conclusions of law. For the reasons stated, the Court concludes that Williams is not entitled to relief under any of the theories she advanced and enters judgment in favor of Defendants on all counts.

I. BACKGROUND

Williams is a Delaware resident who resides at 7 Richeson Drive in New Castle, Delaware.³ Defendants are all Delaware corporations.⁴

A. The Townhouse

Williams entered into a contract to purchase a townhouse at 7 Richeson Drive from Capano Builders on September 13, 1996.⁵ The townhouse was one of 88 townhouses comprising the Woodburne project.⁶ The Woodburne project is located in

² Tr. at 614–23. Citations in this form (“Tr.”) are to the trial transcript and indicate the page and, where it is not clear from the text, the witness testifying.

³ Joint Pretrial Stip. & Order ¶ 1; PX 1.

⁴ Joint Pretrial Stip. & Order ¶¶ 2–4.

⁵ *Id.* ¶ 5; PX 1.

⁶ DX 1; DX 2.

the Woodburne Subdivision, New Castle Hundred, New Castle County, and recorded in the Office of the Recorder of Deeds in and for New Castle County in Microfilm No. 12658.⁷ Williams's house is the end unit of a seven unit building.⁸ On or about November 26, 1996, Williams and M.J. Massa, a Capano Builders superintendent, conducted a final walk through of the townhouse.⁹ The sale closed on November 27, 1996.¹⁰ Williams, Pat Muzzi and others attended the closing.

At the closing, Williams asked Muzzi why her yard was wet.¹¹ Muzzi told Williams that he would take care of the problem, but Williams wanted a written assurance to that effect.¹² Muzzi then made a telephone call; when he finished the call, he wrote on a document titled "White Oak, Inc. Walk Thru" (the "Walk Thru Checklist"), "[w]ater problem in basement to be resolved."¹³

⁷ DX 1; DX 2; DX 6.

⁸ Tr. at 35–36, 111 (Williams); Tr. at 363–64 (Csoltko). Williams's unit is located on lot three; the other units in her building are on lots four through nine. Tr. at 363–64 (Csoltko); DX 2; DX 6.

⁹ Tr. at 44, 47 (Williams); PX 2.

¹⁰ Joint Pretrial Stip. & Order ¶ 6.

¹¹ Tr. at 45 (Williams).

¹² *Id.*

¹³ PX 2 at 000167; Tr. at 45 (Williams). One witness speculated that Muzzi telephoned the late Anthony Marioni, but the witness did not have first-hand knowledge of the call. Tr. at 587 (Capano, Jr.) (testifying that it would have been consistent with "the normal chain of command" for Muzzi to call Marioni).

The record contains conflicting evidence and testimony as to who Muzzi represented. At the closing, he signed the Walk Thru Checklist on a line that said “Builders [sic] Signature & Date when all items completed.”¹⁴ Williams testified that she “believed” Muzzi represented “[t]he builder,” but “[a]s far as [she] kn[ew], [she] actually never heard him say, you know, if he represented White Oak or Capano.”¹⁵ In contrast, Michael Capano, the head of White Oak Homes, LLC, but, at the time in question, a supervisor of the forepersons responsible for the Woodburne project, testified that all of the employees working on the Woodburne project “were White Oak Builders.”¹⁶ In further contrast, the President of all three Defendants, Frank J. Capano, Jr., testified that White Oak Builders had no involvement in the Woodburne project and that he could not remember whether White Oak was involved.¹⁷ Finally, Capano, Jr., testified that Muzzi was authorized to sign on behalf of Capano Builders and did, in fact, sign the Walk Thru Checklist for Capano Builders.¹⁸ Based in large part on this testimony of Capano, Jr., the

Defendants’ witnesses referred to Marioni as a “super foreman” of Capano Builders, *i.e.*, he supervised all of the other foreman during construction of the Woodburne project. Tr. at 557 (Capano); Tr. at 585 (Capano, Jr.).

¹⁴ PX 2; Tr. at 44 (Williams).

¹⁵ Tr. at 43, 42.

¹⁶ Tr. at 556.

¹⁷ Tr. at 574.

¹⁸ Tr. at 586, 594.

Court concludes that Muzzi was, at the least, an agent of Capano Builders at the closing on Williams's townhouse.

B. The Water Problem

According to Williams, there is a water problem in her basement that has not been resolved. Water constantly flows into the sump pump pit in Williams's basement.¹⁹ Williams's expert witness, Klas Haglid, testified that water flows into the basement at a consistent rate of three gallons per minute.²⁰ The water flows into the basement regardless of whether it has rained or snowed recently and even in periods of drought.²¹ Consistent with Haglid's observation, the Court observed a steady flow of water into the sump pit when it made its visit on a dry day in late May 2005.²²

¹⁹ Tr. at 99 (Williams). A sump pump is "a pump (as in a basement) to remove accumulations of liquid from a sump pit." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1182 (1987). See also *Sump Pump*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sump_pump ("[A] pump used for drainage that removes accumulated water from a sump pit. A sump pit, commonly found in the home basement, is simply a hole dug in the ground to collect water. The water may enter via perimeter drains funneling into the pit, or may arrive from natural ground water in the earth.").

²⁰ Tr. at 247.

²¹ Tr. at 99–100 (Williams).

²² Tr. at 615. The Court could not comment on the rate of the flow of water. *Id.* ("I can't say that it was three gallons per minute. I don't have any way to gauge that.").

Williams's sump pump runs intermittently, but regularly to pump the water out of the basement.²³ The basement also has an interior French drain,²⁴ but water tends to sit in the trough instead of flowing into the sump pit.²⁵ The sump pump and French drain notwithstanding, there is a significant amount of moisture in Williams's basement.²⁶ All of this moisture has resulted in a moldy smell in Williams's basement.²⁷

²³ PX 32 at 000058 (Haglid Engineering & Associates' Structural Inspection) (observing that the sump pump runs every other minute).

²⁴ "French drain refers to a ditch filled with gravel, rock or perforated pipe that redirects surface and ground water away from an area. They are commonly used to prevent ground and surface water from penetrating or damaging building foundations." *French drain*, WIKIPEDIA, http://en.wikipedia.org/wiki/French_drain. In Williams's basement, the water collects in a perforated pipe in the ditch and then runs through another pipe into the sump pit. Tr. at 252–57 (Haglid). The French drain in Williams's basement runs along all four of the basement walls. Tr. at 255 (Haglid).

²⁵ Tr. at 101, 103 (Williams); Tr. at 252, 269 (Haglid). Haglid testified that the interior French drain is crippled because the pipe that takes water from the perimeter of the basement to the sump pit is filled with concrete. Tr. at 252, 256.

²⁶ Tr. at 247, 250 (Haglid) (testifying that the amount of moisture in Williams's townhouse is "extreme").

²⁷ Williams testified that some items she stored in her basement eventually became "mildewed." Tr. at 203. When the Court visited the townhouse, the basement smelled moldy. Tr. at 614 (the Court). From these observations and other evidence, the Court finds that the moisture in Williams's basement has caused the moldy smell.

Williams's basement also has flooded on occasion.²⁸ Because of the volume of water flowing into the sump pit, a brief loss of electricity will cause the sump pit to overflow.

As early as 1997, Williams began complaining of a water problem in her basement to Capano Builders and New Castle County.²⁹ Defendants and their agents made numerous attempts to resolve Williams's concerns,³⁰ but were never able to do so to her satisfaction.

C. Haglid's Conclusions and Predictions

In 1999, Williams's expert witness, Haglid,³¹ conducted a limited examination of Williams's townhouse.³² Haglid limited his examination to a visual inspection of Williams's townhouse and property; he did not perform any destructive or invasive testing.³³ Haglid concluded that, to a reasonable degree of engineering certainty, the source of the water in the townhouse basement "is an elevated water table, and . . .

²⁸ Tr. at 100 (Williams); PX 19; PX 33.

²⁹ Tr. at 56–57 (Williams); PX 6; PX 8.

³⁰ *See, e.g.*, Tr. at 84–87 (Williams) (describing attempts made to resolve water problem).

³¹ Haglid is a licensed Professional Engineer. PX 32 at 000070. The parties stipulated that he is qualified as an expert. Tr. at 243.

³² PX 32 at 000057 (“[T]his evaluation is limited in scope, focusing on the basement water penetration problem.”)

³³ *Id.*

probably a spring.”³⁴ Haglid further testified that “[g]iven the amount of water and also the unusual interior/exterior French drain . . . to a reasonable degree of engineering certainty, the water was there when the original excavation took place, more likely than not”³⁵ Haglid also predicted that the townhouse “basement and foundation will have chronic flooding and settlement problems.”³⁶ Finally, he predicted that, within twenty years, “the condition of the home is going to be very poor and structurally unstable.”³⁷

D. Defendants’ Expert Witness and Fact Witnesses

Gejza Joseph Csoltko, a licensed Professional Engineer, testified as an expert witness for Defendants.³⁸ Csoltko testified that it is necessary to conduct a physical study of the relevant land to determine “with absolute certainty” the source of water in Williams’s basement.³⁹ Csoltko suggested several methods of performing this physical study, all of which, in his opinion, are more reliable than a mere visual inspection.⁴⁰

Csoltko also testified as a fact witness for Defendants. He drafted the Record Major Subdivision Plan for the Woodburne project and visited the site at least once a

³⁴ Tr. at 274; PX 32 at 000058.

³⁵ Tr. at 333.

³⁶ PX 32 at 000059.

³⁷ Tr. at 278.

³⁸ The parties stipulated that Csoltko is qualified as an expert. Tr. at 347.

³⁹ Tr. at 406.

⁴⁰ Tr. at 407–08.

week during construction.⁴¹ According to Csoltko, the hole dug for the foundation of Williams's building was always dry when he was at the Woodburne project site.⁴² Further, Csoltko never observed any water conditions in the vicinity of Williams's building that would have been a concern.⁴³

The Woodburne project foreman, Lee Blevins, also testified as a fact witness for Defendants. Blevins went to the Woodburne project site on a daily basis.⁴⁴ He testified that the foundation hole was 'open' for approximately two weeks, *i.e.*, from the time it was dug until the foundation and basement walls were built and the hole was backfilled.⁴⁵ During these two weeks, Blevins never saw any water in the hole other than rain water.⁴⁶ In fact, he testified that the area of the hole where Williams's townhouse is located was "completely dry."⁴⁷

In addition to Csoltko and Blevins, two other witnesses familiar with the construction of the Woodburne project testified that they never saw any water in the hole dug for the foundation of Williams's townhouse building. Michael J. Connor of

⁴¹ Tr. at 352, 362 (Csoltko).

⁴² Tr. at 409.

⁴³ Tr. at 380.

⁴⁴ Tr. at 463 (Blevins).

⁴⁵ Tr. at 475.

⁴⁶ Tr. at 477.

⁴⁷ Tr. at 500.

Christiana Excavating Company was responsible for the infrastructure at the Woodburne project site.⁴⁸ He saw neither water in the hole⁴⁹ nor anything that would have alerted him to a water problem at the site.⁵⁰ And, Michael Capano testified that he never saw any water other than rain water in the foundation hole.⁵¹

Finally, several of Defendants' witnesses testified that if they had seen anything that would have put them on notice of a water problem in the foundation hole, they would have notified the engineer in charge of the project (evidently, Csoltko) and New Castle County.⁵² Similarly, if a New Castle County inspector had observed a water problem at the site, he would have notified the project engineer and halted the project until the problem was addressed.⁵³ None of the witnesses recalled such a water problem arising as to the foundation hole dug for Williams's townhouse. Further, Blevins and Connor

⁴⁸ Tr. at 520 (Connor). "Infrastructure" includes sanitary sewers, storm sewers, water lines and some utilities. Tr. at 517 (Connor).

⁴⁹ Tr. at 537.

⁵⁰ Tr. at 538–40.

⁵¹ Tr. at 559.

⁵² Tr. at 409–10 (Csoltko); Tr. at 540 (Connor).

⁵³ Tr. at 538–40 (Connor).

testified that New Castle County inspectors approved the pouring of the foundation for Williams's townhouse building.⁵⁴

Based on the credible and factually consistent testimony of Defendants' fact witnesses, the Court finds that Defendants did not know of any water problem affecting Williams's townhouse through the time they backfilled the foundation hole. To the extent this finding is inconsistent with Haglid's expert opinion, the Court finds Haglid's opinion unpersuasive in part because it did not involve any invasive or physical testing.⁵⁵

E. Procedural history

Williams initiated this case in November 1999. As late as December 2002, the parties were engaged in discovery, but the case apparently sat idle in 2003. Following the elevation of Vice Chancellor Jacobs to the Supreme Court in July 2003, the case was reassigned. In response to a call of the calendar in 2004, the parties represented to the Court that the case was ready for trial.⁵⁶ In the Scheduling Order entered by the Court on

⁵⁴ Tr. at 501–02 (Blevins) (testifying that he has never supervised the pouring of a foundation over wet or muddy soil); Tr. at 538 (Connor) (testifying that New Castle County inspects the footing, the backfill and the waterproofing).

⁵⁵ In support of his conclusion, Haglid also relied on the existence of the “unusual interior/exterior French drain,” but he did not buttress this statement with any evidence of why such a combination is unusual. In contrast, Csoltko testified that New Castle County regulations have variously required interior or exterior French drains. Tr. at 386–87; 434–35. He further testified that he has inspected other houses with both interior and exterior French drains. Tr. at 435. Blevins testified that all of the townhouses in the Woodburne project have both an interior and an exterior French drain. Tr. at 480.

⁵⁶ Status Report (Apr. 26, 2004).

November 3, 2004, the parties agreed that fact discovery was complete and that expert reports were complete and had been exchanged.⁵⁷

II. ANALYSIS

A. Specific Performance

Williams requests specific performance of Muzzi's promise to fix the water problem in her basement. Assuming for purposes of argument that Williams has proven the existence of a contract with White Oak by clear and convincing evidence,⁵⁸ she still has failed to demonstrate that specific performance is appropriate under these circumstances.

"It is elementary that the remedy of specific performance is designed to take care of situations where the assessment of money damages is impracticable or somehow fails to do justice."⁵⁹ In other words, Williams must have demonstrated at trial that the remedy at law for the alleged breach, *i.e.*, damages, is inadequate.⁶⁰ She failed to prove that.

⁵⁷ Scheduling Order ¶¶ 1–2 (Nov. 3, 2004).

⁵⁸ "[A] party seeking specific performance has the burden of proving the existence and terms of an enforceable contract by clear and convincing evidence." Donald J. Wolfe, Jr., & Michael A. Pittenger, *CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 12-3 at 12-35 (citing cases).

⁵⁹ *Equitable Trust Co. v. Gallagher*, 102 A.2d 538, 546 (Del. 1954).

⁶⁰ *See* Wolfe & Pittenger § 12-3 at 12-36 ("The quintessential guidepost for availability of specific performance, therefore, is inadequacy of the remedy at law.").

“In order for a legal remedy to act as a bar to the equitable relief of specific performance, the legal remedy must be as complete, practical, and efficient to the ends of justice and its prompt administration as the equitable remedy, and also must be available to the plaintiff as a matter of right.”⁶¹ Williams wants the “water problem in [her] basement to be resolved.”⁶² Presumably, this means Williams wants to reduce the amount of moisture in her basement and ensure that her basement will not flood.⁶³ She likely could accomplish the former objective by having a qualified contractor fix her interior French drain; similarly, she likely could accomplish the latter objective by having a qualified contractor install a heavy duty sump pump with a battery backup⁶⁴ or a second sump pump.⁶⁵ To the extent that the water flowing into Williams’s basement has caused any structural damage to her townhouse, a qualified contractor likely could fix that damage. Williams also may want to explore whether it is possible to redirect the flow of

⁶¹ *Id.* (internal citation omitted).

⁶² PX 2.

⁶³ *See* Tr. at 35 (Williams) (expressing desire to “finish” basement but claiming she cannot because there is too much moisture in the basement), 101–02 (Williams) (testifying that she is afraid to leave her home because her basement might flood if the electricity goes out and no one is there to restart the sump pump when the electricity is restored).

⁶⁴ Tr. at 447 (Csoltko) (testifying to availability of back up systems).

⁶⁵ Tr. at 596–97 (Capano, Jr.) (testifying that one way to deal with a high volume of water is to add a second sump pump).

water around her townhouse so that water no longer flows into her basement.⁶⁶ To the extent this is possible, Williams has not proven that White Oak is the only entity who can do it.⁶⁷

Williams has not proven either that there is anything unique about the services White Oak would provide with respect to her water problem or that there are not other contractors just as qualified that could perform this work. Williams also did not prove that an award of damages would be difficult to quantify.⁶⁸ As such, an award of damages

⁶⁶ Pl.’s Post-Trial Opening Br. (“POB”) at 25.

⁶⁷ Williams “suggests that it is impossible to fix [her water problem] per the opinion of her expert.” POB at 4 n.25. This admission provides a second justification for denying Williams’s request for specific performance. If the Court were to enforce White Oak’s promise to “resolve” the contractually undefined “water problem in basement,” White Oak’s obligations “would be so imprecise as to make judicial supervision impracticable.” *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found., Inc.*, 2005 WL 1364616, at *4 (Del. Ch. May 27, 2005); *see also Ryan v. Ocean Twelve, Inc.*, 316 A.2d 573, 575 (Del. Ch. 1973) (dismissing a request for specific performance of a construction contract to fix various defects in a number of condominiums because “[i]t is an inescapable conclusion that in each case whether or not a defect is completed will depend greatly upon the eye and taste of a given Plaintiff.”).

⁶⁸ Williams argues that “[d]amages are insufficient in this case because the damage being done to Ms. Williams’ home is continual in nature.” POB at 25. The damages, to the extent there are any, are continual only because the water problem remains unabated. Damage would cease, however, as soon as a contractor fixed the water problem and any damage resulting therefrom. The cost of this fix would then constitute sufficient damages and complete relief, just like the requested specific performance.

for the cost of the necessary work would afford full relief. The availability of such an adequate remedy at law deprives this Court of the power to order specific performance.⁶⁹

In the Joint Pretrial Stipulation and Order, Williams states that she

seeks equitable relief in the form of specific performance of Defendants' covenant to cure Plaintiff's water problem and an amount to be determined by the Court that would compensate Plaintiff for the damage to her house, including rot and mold, due to the presence of water in her home for over nine years and any other damages as the Court deems proper.⁷⁰

Assuming that this language includes a request for damages in the event specific performance is unavailable and that Williams's request is timely even though she did not plead a claim for damages or seek leave of the Court to amend the Amended Complaint,⁷¹ the Court must decline to award any damages.⁷²

⁶⁹ *Robbins v. Tremont Medical, Inc.*, 1997 WL 30214, at *3 (Del. Ch. Jan. 16, 1997) (reciting plaintiff's requests for specific performance of various contracts and stating these are "requests which this Court may not grant if plaintiff has an adequate remedy at law.").

⁷⁰ Joint Pretrial Stip. & Order ¶ V.A.

⁷¹ *See* Ct. Ch. R. 15(b) (providing that this Court "may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party in maintaining an action or defense upon the merits").

⁷² Defendants argue that this Court lacks jurisdiction over Williams's claim for breach of a covenant because it is a purely legal claim. Yet, Defendants ignore the clean-up doctrine. This Court unquestionably has jurisdiction over Williams's claim for equitable rescission of the Sales Agreement. *See Wolfe & Pittenger* § 12-4[a] at 12-52 (noting that the Court of Chancery has jurisdiction over claims

It is well settled that a plaintiff “must prove [her] damages with a reasonable degree of precision”⁷³ “Responsible estimates that lack mathematical uncertainty are permissible *so long as the Court has a basis to make a responsible estimate of damages.*”⁷⁴ Williams has not provided this Court with any basis from which it could make a responsible estimate of the cost to resolve the water problem or of the damages resulting from White Oak’s failure to resolve the water problem.

Williams’s basement has flooded occasionally.⁷⁵ Williams testified that her backyard is “always wet.”⁷⁶ She testified that she no longer stores some of her clothes in the basement because the ones she did store there “were mildewed.”⁷⁷ She also

for equitable rescission and that “equitable relief may also be required, thus necessitating equitable rescission, where the unwinding of a transaction calls for the restoration of unique, specific property from one party to another.”). As such, equitable jurisdiction exists and this Court may exercise jurisdiction, and does so, over Williams’s other purely legal claims. *See id.* § 12-10[b] at 12-103 (“It is well settled that when the Court of Chancery obtains jurisdiction over a controversy, it will decide the entire matter, and give complete relief. The ‘clean-up’ doctrine includes the authority to grant legal remedies to rectify the violation of legal rights where at least some part of the case involves equity.”).

⁷³ *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004) (internal citations omitted).

⁷⁴ *In re Fuqua Indus., Inc.*, 2005 WL 1138744, at *8 (Del. Ch. May 6, 2005) (internal citations omitted).

⁷⁵ Tr. at 100; PX 19; PX 33.

⁷⁶ Tr. at 210–11. The backyard was dry on the day of the Court’s inspection. Tr. at 617.

⁷⁷ Tr. at 203.

complained of cracks in her walls.⁷⁸ Finally, Williams testified that she would like to have a deck built in her backyard, but has not because she thinks it is too wet.⁷⁹ In the aggregate, this testimony proves that Williams's basement is damp and there is occasionally excess water in her basement and backyard, but nothing more.

This testimony does not prove the cost of compensating Williams for these problems or the cost to prevent their reoccurrence. There is nothing in the record concerning the price of, for example, a new interior French drain or a more reliable sump pump configuration. Likewise, there is nothing in the record quantifying the damage, if any, to chattel or to real property caused when Williams's basement has flooded.⁸⁰ There is no evidence of the cost to repair any structural damage to Williams's townhouse resulting from the water in her basement, assuming Williams proved any such damage.⁸¹

⁷⁸ Tr. at 52, 55, 62, 72.

⁷⁹ Tr. at 207. Williams made no attempt to determine if a deck could be built in her backyard, the water notwithstanding. Tr. at 207.

⁸⁰ Williams proffered the testimony of a real estate expert but did not disclose her intention to Defendants to have this expert testify until two weeks before trial. Williams also did not provide any background on her proffered expert or any indication of the substance of the expert's testimony. Further, Williams initially filed this case in 1999; the parties engaged in discovery in 2001 and 2002. In May 2004, the parties informed the Court that the case was ready for trial and that fact and expert discovery was complete. Because of the long pendency of this case, the failure by Williams to comply with Court of Chancery Rule 26(e)(1), and the prejudice to Defendants of introducing a new expert and issue just before trial, the Court excluded this proposed testimony. *See generally* Pretrial Conference Tr.

⁸¹ Csoltko testified that a crack in a foundation wall that is 3/16 of an inch or wider is considered a "structural crack." Tr. at 416. In its view of the townhouse, the

And, there is absolutely no evidence of the cost of redirecting the flow of water away from Williams's townhouse.

Because there is no evidence in the record that would allow the Court to determine the value of the damaged personal or real property, if any, the cost to reduce the amount of moisture and water in Williams's basement or the cost to prevent the flow of water into Williams's basement, the Court has no reliable basis on which to award damages.⁸²

"Delaware law does not permit the fact finder to supply a damages figure based on 'speculation or conjecture' where the plaintiff has failed to meet its burden of proof on damages."⁸³ Accordingly, the Court must deny Williams's claim for damages.

Court did not observe any cracks in the walls approaching this width. Tr. at 617 ("While we were in the house we were shown some cracks in the wall in the basement. However, those cracks really, you could see the cracks, but there was not significant separation, certainly nothing anywhere near 3/16ths of an inch"), 619 ("We walked up to the first floor, and there was some cracking in the wall that was indicated to me Again, I could see the crack, but there wasn't any separation of the wall that you could easily measure."). Further, there is no evidence that these slight cracks resulted from the water in Williams's basement.

⁸² Cf. *Acierno v. Goldstein*, 2005 WL 3111993, at *6 (Del. Ch. Nov. 16, 2005) (declining to award damages for alleged trespass to timber where evidence proved only that there had been timber on the property, but nothing with respect to the value of that timber).

⁸³ *Id.* (citing *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1950) (further holding that proof of injury is insufficient, in and of itself, to allow an award of damages without some other evidence of the amount of damages)).

B. Rescission of the Sales Agreement

This Court “may rescind contracts for the sale of real property on the basis of fraud, misrepresentation, or mistake. But rescission is a remedy rarely granted, as it results in the abrogation or unmaking of an agreement and attempts to return the parties to the *status quo*.”⁸⁴ As such, this Court “must feel a high degree of confidence in order to employ this extreme remedy.”⁸⁵

1. Intentional misrepresentation

A claim of intentional misrepresentation, or common law fraud, requires proof

1) [of] the existence of a false representation, usually one of fact, made by the defendant; 2) [that] the defendant had knowledge or belief that the representation was false, or made the representation with requisite indifference to the truth; 3) [that] the defendant had the intent to induce the plaintiff to act or refrain from acting; 4) [that] the plaintiff acted or did not act in justifiable reliance on the representation; and 5) [that] the plaintiff suffered damages as a result of such reliance.⁸⁶

The representation need not be overt; deliberate concealment of material facts or silence in the face of a duty to speak also may constitute intentional misrepresentation.⁸⁷ To support rescission, the claimed misrepresentation must be one of material fact.⁸⁸

⁸⁴ *Liberto v. Bensinger*, 1999 Del. Ch. LEXIS 241, at *19 (Del. Ch. Dec. 22, 1999) (internal quotation omitted).

⁸⁵ *Id.* (internal quotation omitted).

⁸⁶ *Kronenberg*, 872 A.2d at 585 n.25 (internal citation omitted).

⁸⁷ *Id.*

⁸⁸ *Wolfe & Pittenger* § 12-4[a] at 12-54 (citing cases).

Williams's claim for rescission based on an intentional misrepresentation by Capano Builders fails because she did not prove that Capano Builders knew that a representation was false or of facts that gave rise to an obligation to speak. In particular, Williams bases her claim for rescission on an allegation that her house had a serious and intractable water problem because, in the words of her expert, it was built where there is "an elevated water table, and . . . probably a spring."

Williams presented no persuasive evidence, however, that Capano Builders knew of a serious water problem at the time the parties entered into the Sales Agreement. Further, the Court has already found that Capano Builders did not learn of such a water problem in connection with digging the foundation hole, constructing the foundation or backfilling the foundation hole, approximately two weeks after it was dug.⁸⁹

Williams argues that Muzzi's notation on the Walk Thru Checklist of a water problem in the basement when she asked about water in the backyard proves that Capano Builders knew about the water problem before settlement.⁹⁰ Accordingly, she argues that the representation in the Sales Agreement by Capano Builders that it knew of nothing that could materially and adversely affect the value of her property became false sometime before settlement. Therefore, Williams concludes, Capano Builders made a false representation by remaining silent.

⁸⁹ *See supra* § I.D.

⁹⁰ POB at 20.

Muzzi's notation and promise prove nothing more than Capano Builders knew that there was an issue regarding water in the basement of Williams's townhouse that would have to be addressed.⁹¹ The promise does not prove, however, that Capano Builders knew that the flow of water would become a problem that they could not fix through normal corrective measures. To the extent a water "problem" existed at the time of settlement, the Court finds that Williams has not shown that Capano Builders knew that the nature of the problem was out of the ordinary.⁹²

The mere existence of water in the basement of a home in New Castle County is not abnormal.⁹³ As such, the fact that the basement of Williams's townhouse had water in it at the time of closing did not render the statement in the Sales Agreement false. Nor did Capano Builders remain silent in the face of a duty to speak because there is no

⁹¹ Because the Court found that Muzzi was an agent of Capano Builders, *see supra* Section I.A., his knowledge is imputed to Capano Builders. *See In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1108 n.22 (Del. Ch. 2003) (noting general rule that the knowledge of an agent is imputed to its principal).

⁹² Williams herself did not observe any water on the basement floor or walls or hear the sump pump running during the walk through despite spending several minutes in the basement. Tr. at 125–27 (Williams). Moreover, the evidence suggests that a large number of homes in New Castle County have water in their basements at some point. *See infra* n.93. Consequently, a notation of a "[w]ater problem in basement to be resolved" on a checklist related to settlement does not imply a serious and intractable problem.

⁹³ *See* Tr. at 577 (Capano, Jr.) (testifying that half of the homes Capano Builders built in New Castle County have sump pumps because they have "a water problem"); Tr. at 447–48 (Csoltko) (testifying to the existence of homes with a greater volume of water flowing into their basements than Williams where there is no problem as long as the water is pumped out of the basement).

convincing evidence it knew that the water issue noted at settlement would become a serious problem. Similarly, Capano Builders did not, through Muzzi, make a misrepresentation at closing because there is no credible evidence that Capano Builders knew that the water problem would be so difficult to correct.⁹⁴ Based on the the evidence in its entirety, the Court finds that the one notation of a “problem” on the Walk Thru Checklist is not sufficient to prove that Capano Builders knew of the problem as it ultimately came to exist. Rather, Muzzi disclosed, and promised to fix, what Capano Builders knew, *i.e.*, that the basement of Williams’s townhouse, like many others in New Castle County, had water that needed to be pumped out.

⁹⁴ In *Alabi v. DHL Airways, Inc.*, the Delaware Superior Court held that “if the misrepresentation was fraudulent, it is not required to be material for the contract to be voidable.” 583 A.2d 1358, 1362 (1990). In contrast, in *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, this Court noted that one of the elements of common law deceit is “misrepresentation of a *material* fact.” 832 A.2d 116, 124 (2003) (emphasis added). Thus, there may be some uncertainty in the Delaware case law on this point. But any such uncertainty is immaterial for purposes of this case because the Court concludes that if Capano Builders misrepresented anything, it did not know it was doing so.

2. Negligent misrepresentation⁹⁵

A claim of negligent misrepresentation, or equitable fraud, requires proof of all of the elements of common law fraud except “that plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly.”⁹⁶ Perhaps in contrast to a claim of intentional misrepresentation or common law fraud, misrepresentation of a *material* fact “is undoubtedly an element of equitable fraud.”⁹⁷

Williams’s claim for rescission on the ground of Capano Builders’ negligent misrepresentation also must fail because Williams has not proven by a preponderance of the evidence that the water problem, as it currently exists, existed at the time of the

⁹⁵ Williams asserts a claim of negligent misrepresentation against all three Defendants, Am. Compl. at Count III, but does not seek any relief, damages or otherwise, from this claim. *See* Am. Compl. at 5 (requesting specific performance or, in the alternative, rescission of the sales agreement). The claim is therefore duplicative of Williams’s request for rescission of the Sales Agreement based on, among other theories, negligent misrepresentation by Capano Builders. In any event, Williams failed to prove that *any* of the Defendants made a negligent misrepresentation. Moreover, Williams waived any claim for negligent misrepresentation distinct from her claim for rescission by not addressing it in her opening post-trial brief. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (“It is settled Delaware law that a party waives an argument by not including it in its brief.”); *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (finding that a party waived an argument by not addressing it in its opening post-trial brief). For all of these reasons, the Court will not separately address Williams’s claim for negligent misrepresentation against all three Defendants.

⁹⁶ *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 144 (Del. Ch. 2003) (internal quotation omitted).

⁹⁷ *Mark Fox Group, Inc. v. E.I. du Pont de Nemours & Co.*, 2003 WL 21524886, at *5 n.13 (Del. Ch. July 2, 2003).

closing. There is credible evidence that the water problem existed in 1999 and 2005, but not on November 27, 1996, the day of the closing. In other words, Williams did not prove that Capano Builders made a misrepresentation of a material fact.⁹⁸

On March 18, 1999, New Castle County found Capano Builders in violation of Section 1224.0 of the BOCA National Building Code/1990 As Amended By New Castle County because “[t]he foundation walls have several areas where water is penetrating.”⁹⁹ Similarly, Haglid observed the water problem in 1999 when he inspected Williams’s townhouse. He testified that, “to a reasonable degree of certainty” and “more likely than not,” the water problem existed before the foundation hole was dug.¹⁰⁰ In late May 2005, the Court conducted a site visit and noticed a steady flow of water into the sump pit and a moldy smell in Williams’s basement.

As to late 1996, all of Defendants’ fact witnesses testified that they did not observe any water in the foundation hole, other than rain water, and that they did not observe anything that would cause them to be concerned that a water problem might exist. Williams herself did not observe any water in the basement of her townhouse during the walk through in November 1996.¹⁰¹ The only contemporaneous evidence that

⁹⁸ This conclusion provides an independent basis on which to deny Williams’s claim of intentional misrepresentation.

⁹⁹ PX 25.

¹⁰⁰ Tr. at 333.

¹⁰¹ Tr. at 126; *see also supra* n.92.

a problem existed in November 1996, then, is Muzzi's notation on the Walk Thru Checklist. But, as previously discussed, this proves nothing more than there was water in Williams's basement at that time.

Ultimately, Williams, through her expert, asks this Court to adopt a *res ipsa loquitur* theory: because the water problem existed in September 1999 and May 2005, that same problem must have existed in November 1996. The only evidence for that proposition adduced by Williams is the opinion of her expert that the source of the water is an elevated water table or a spring that existed at the time of construction. Haglid formed his conclusion after one visit to Williams's townhouse three years after it was built and during which he made only a visual inspection.¹⁰² Csoltko testified that one must conduct a physical inspection to determine the exact source of a water problem. Having considered all of the evidence, the Court finds that Haglid's theory and testimony based on his visual inspection is insufficient to prove, by a *preponderance of the evidence*, let alone provide this Court with the high degree of confidence it needs to grant rescission, that the water problem he observed existed in 1996.

¹⁰² PX 32 at 000057.

Haglid's testimony notwithstanding,¹⁰³ Williams did not prove that the water problem that forms the basis for her complaint existed at the time of closing. She proved that Capano Builders knew there was water in her basement at the time of closing and that sometime before 1999 a problem developed that involved a near constant flow of water into the sump pit in her basement. As such, Capano Builders could not have made a misrepresentation at the closing and Williams's claim for rescission because of a negligent misrepresentation fails.¹⁰⁴

3. Mutual mistake of fact

A claim of rescission based on a mutual mistake of fact requires proof that 1) both parties were mistaken as to a basic assumption, 2) the mistake materially affects the agreed upon exchange of performances and 3) the party adversely affected did not

¹⁰³ In its role as the fact finder, this Court is free to reject expert testimony even if it is uncontradicted. *See Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797–98 (6th Cir. 1996); *Scullari v. United States*, 2000 U.S. App. LEXIS 3416, at *6 (2d Cir. Feb. 24, 2000) (“[A] fact finder is always free to reject, in whole or part, expert testimony and arrive at an independent conclusion.”).

¹⁰⁴ Williams cites an alternative formulation of negligent misrepresentation that requires proof of 1) a pecuniary duty to provide accurate information, 2) the supplying of false information, 3) failure to exercise reasonable care in obtaining or communicating information and 4) a pecuniary loss caused by justifiable reliance upon the false representation. POB at 21. This formulation merely restates the elements of equitable fraud. Pursuant to this formulation, Williams's claim still fails because she failed to prove that Capano Builders supplied her with false information. Williams also argued that Capano Builders was negligent in not performing ground water testing before building Williams's townhouse. POB at 22. This argument fails because Williams did not prove that the applicable building code required such testing. *See* Tr. at 408, 451–54 (Csoltko).

assume the risk of the mistake.¹⁰⁵ The mistake “must be as to a fact which enters into, and forms the very basis of, the contract; it must be the essence of the agreement, the *sine qua non* or, as it is sometimes expressed, the efficient cause of the agreement.”¹⁰⁶ Finally, Plaintiff must prove the elements of mutual mistake by “clear and convincing evidence; mere preponderance does not suffice.”¹⁰⁷

“In determining whether a mutual mistake of fact has occurred, the court will examine the facts as they existed at the time of the agreement.”¹⁰⁸ Williams argues that the mutual mistake is the magnitude of the flow of water into the basement of her townhouse.¹⁰⁹ She thus had the burden of proving that this flow of water existed at the time she and Capano Builders entered into the Sales Agreement, *i.e.*, on September 13, 1996. For the reasons previously stated, Williams did not prove that an abnormal flow of water existed at that time. Assuming for the sake of argument that a claim of mutual

¹⁰⁵ *Liberto*, 1999 Del. Ch. LEXIS 241, at *45.

¹⁰⁶ Wolfe & Pittenger § 12-4[a] at 12-55 (internal quotation omitted) (citing cases).

¹⁰⁷ *Liberto*, 1999 Del. Ch. LEXIS 241, at *45 (internal citations omitted).

¹⁰⁸ 48 AM. JUR. 3D *Proof of Facts* § 505 at § 6 (2005); *see also Darnell v. Myers*, 1998 Del. Ch. LEXIS 84, at *21 (Del. Ch. May 27, 1998) (determining whether the parties were mutually mistaken “at the time they signed the contract of sale”).

¹⁰⁹ POB at 23 (“[The evidence] establishe[s] that there is definitely a defect on the property. Mr. Haglid, an expert in this field, stated that he has never seen a flow of this magnitude into a home. Ms. Williams testified that she was not aware of the issue and assuming the Court finds that Defendants had no knowledge of the defect, the mistake would be mutual.”) (internal citations omitted).

mistake could lie if the water problem had developed by the time of closing on the Sales Agreement, Williams still would not be entitled to relief because she did not prove that the water problem existed at closing. As such, mutual mistake cannot provide a basis for rescission of the Sales Agreement.

III. WILLIAMS'S OTHER CLAIMS

Williams seeks damages for mental anguish she suffered because of the water in the basement of her townhouse. When a plaintiff has not established a right to recovery under any theory other than mental anguish, she can recover damages for proven mental anguish only when “the act causing such condition is intentional or willful, unreasonable . . . [or] done with such gross carelessness or recklessness as to show an utter indifference to the consequences.”¹¹⁰ Williams has not shown any act taken by any of the Defendants with the requisite intent that caused her any mental anguish.

Williams also seeks payment of the attorneys' fees she incurred in the prosecution of this action. In Delaware, “parties bear their own attorneys' fees pursuant to the American Rule.”¹¹¹ Although exceptions to this rule exist in equity, including for bad faith conduct in litigation, Williams has not shown that any such exception applies here.

¹¹⁰ 25 C.J.S. *Damages* § 95 (2005) (citing cases).

¹¹¹ *Carlson v. Hallinan*, 2006 WL 771722, at *22 (Del. Ch. Mar. 21, 2006) (internal citations omitted).

IV. CONCLUSION

Williams failed 1) to prove that she is entitled to specific performance, 2) to satisfy her burden of proof with respect to her claims for damages and 3) to satisfy her burden of proof with respect to her claim for rescission of the Sales Agreement. Williams also failed to establish any entitlement to damages for mental anguish or attorneys' fees. Judgment therefore is entered in favor of Defendants on all counts.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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