

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD D. FULLER and ARLENE FULLER,

Plaintiffs-Appellants,

v

DAVID G. HUGHEY and JOYCE R. HUGHEY,

Defendants-Appellees,

and

STEPHANIE M. KITTLE-METZGER,
TERRY H. KITTLE, WILLIE BLOHM, INC.,
d/b/a DOWNRIVER REALTY and
CALVIN LAGINESS,

Defendants.

Before: Hood, P.J., and Saad and T.S. Eveland,* JJ.

PER CURIUM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendants David and Joyce Hughey. Plaintiffs argue that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate because genuine issues of material fact exist regarding their claims of innocent misrepresentation, fraudulent misrepresentation and fraudulent concealment. We disagree, and affirm.

I

Plaintiffs first contend that the trial court erred in disposing of their claim of innocent misrepresentation against defendants. According to *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116-118; 313 NW2d 77 (1981), to prevail on a claim of innocent misrepresentation, a plaintiff must establish:

- (1) a transaction between the parties,

- (2) a false representation,
- (3) actual deception,
- (4) detrimental reliance, and
- (5) that the injury to the deceived party inures to the benefit of the other party.

The person making the representation need not know that it is false. *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

Here, plaintiffs assert that Joyce Hughey's representations that the house was in "good" or "excellent" condition were sufficient to raise a dispute of fact over whether these assurances were false. We disagree. Ms. Hughey's comments were nothing more than the usual "puffing" about one's residence and not a false representation about termites. See *Hayes Const Co v Silverthorn*, 343 Mich 421, 426; 72 NW2d 190 (1955); *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987).

II

Plaintiffs next contends that the trial court erred in summarily disposing of their claim for fraudulent misrepresentation. Again, we disagree. Fraudulent misrepresentation requires proof of both scienter and an intention that the misrepresentation be acted upon by the plaintiff. *United States Fidelity & Guaranty Co*, 412 Mich at 118. Here, defendants presented no evidence that defendants were aware of the termite infestation. Although plaintiffs presented evidence showing that some prior owner(s) knew about the termite infestation, there was no evidence that these plaintiffs, who had only owned the home for one year, had any knowledge about the problem. We disagree with plaintiffs' contention that, in the face of evidence that some previous owner of the home knew of the termites, plaintiffs' denial of such knowledge automatically creates a dispute of fact over whether plaintiffs had such knowledge. The trial court properly dismissed plaintiff's claim for fraudulent representation.

III

Plaintiffs also contend that the trial court erred in summarily disposing of their claim of fraudulent concealment. We find no merit to this claim. Fraudulent concealment occurs when a vendor, rather than making false representations, fails to disclose material defects. See *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). To prove fraudulent concealment in the context of a real estate action between a vendor and vendee, a plaintiff must prove: (1) that at the time of the sale there was a concealed condition on the property, (2) that the condition was known to the vendor, and (3) that the vendee had no knowledge of the defect. See *Lorenzo v Noel*, 206 Mich App 682, 686-687; 522 NW2d 724 (1994); *Farm Bureau Mutual Ins Co v Wood*, 165 Mich App 9, 16; 418 NW2d 408 (1987).

In *Conahan v Fisher*, 186 Mich App 48, 49-50; 463 NW2d 118 (1990), on similar facts to those here, we reasoned that termite infestation did not qualify as a concealed condition. Although the plaintiffs in *Conahan* “viewed the house themselves and had a professional inspection of the house performed which revealed no termite infestation,” the plaintiffs’ termite expert opined that “a competent inspector qualified to make recommendations regarding structural soundness for residences should reasonably have been expected to have discovered evidence of active termites in that home. . . .” *Id.* at 50. Similarly, here plaintiffs’ termite expert opined that “a thorough termite inspection would have readily revealed evidence of termites.” Therefore, we conclude that plaintiffs’ termite problem was not a “concealed condition” and thus it cannot serve as the basis for a fraudulent concealment claim. Summary disposition was properly granted.

Affirmed. Defendants may tax costs.

/s/ Henry William Saad

/s/ Thomas S. Eveland