

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE ROSE and FRANCES ROSE,

Plaintiffs/Counter Defendants-
Appellants,

v

NATIONAL AUCTION GROUP,

Defendant/Counter Plaintiff,

and

ANDREW BONE, WILLIAM BONE, DONALD
BOOZER, EDDIE HAYNES, and EDDIE HAYNES,
INC.,

Defendants,

and

RANDALL R. HALL,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED

March 7, 2000

No. 209582

Alpena Circuit Court

LC No. 96-002148-CH

GEORGE ROSE and FRANCES ROSE,

Plaintiffs/Counter Defendants-
Appellants,

v

NATIONAL AUCTION GROUP,

No. 210666

Alpena Circuit Court

LC No. 96-002148-CH

Defendant/Counter Plaintiff-Appellee,

and

ANDREW BONE, WILLIAM BONE, DONALD
BOOZER, EDDIE HAYNES, and EDDIE HAYNES,
INC.,

Defendants-Appellees,

and

RANDALL R. HALL,

Defendant/Counter Plaintiff.

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,* JJ.

PER CURIAM.

In this real estate auction case, plaintiffs/counter defendants appeal as of right from the trial court's separate orders granting summary disposition under MCR 2.116(C)(10) to defendants National Auction Group, Andrew Bone, William Bone, Donald Boozer, Eddie Haynes, and Eddie Haynes, Inc. (hereafter referred to collectively as the "Auction Group defendants"), and to defendant Randall R. Hall. The trial court entered judgment in favor of Hall on his counterclaim for specific performance of certain real property conveyance instruments, and also awarded sanctions of \$10,000 on the basis that certain claims asserted against him by plaintiffs were frivolous. The trial court also entered judgment in favor of the National Auction Group on its counterclaim for its commission and auction fee in the amount of \$29,050. This Court ordered plaintiffs' separate appeals consolidated.

I. Facts and Proceedings

In 1969, plaintiffs George and Frances Rose purchased a 73-acre island in Lake Huron, commonly called Crooked Island. Since that time, the Rose family has used the island as a vacation retreat. In the summer of 1995, after reading an article in the newspaper about the National Auction Group, an auction company located in Alabama that was then in the process of preparing to auction another island property in Michigan, George Rose contacted the Auction Group about possibly using their services to auction Crooked Island. Plaintiffs intended to use the sale proceeds to fund their retirement.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Soon after being contacted, William Bone, president of the Auction Group, met with plaintiffs and toured Crooked Island. During this tour, Bone allegedly stated to George Rose that Crooked Island was larger, nicer, and better located than the other island property the company was auctioning, which he stated would sell for at least \$1.2 million. Bone is also alleged to have stated to George Rose that if the Auction Group were allowed to auction Crooked Island they would make Rose a “wealthy man,” and that Bone was confident the property would sell for several million dollars. Plaintiffs allege that they informed the Auction Group defendants that they required a minimum price of \$850,000, and that they were repeatedly assured this price would be attained.

After first contacting the Auction Group, plaintiffs spent approximately one year mulling the decision to sell Crooked Island. During this time, George Rose attended several other auctions conducted by the Auction Group defendants. Eventually, on June 25, 1996, plaintiffs signed a one-year exclusive listing agreement with the Auction Group. The agreement provided, in pertinent part:

2. The National Auction Group, Inc. will sell the Property at ABSOLUTE AUCTION with no minimums or reserves. The Property will be sold to the highest bidder(s) regardless of the bid price and Seller understands and acknowledges that he relinquishes any right to place any minimum or reserve on the bidding with respect to the Property. Seller has right to withdraw property prior to auction.

3. Seller acknowledges that The National Auction Group, Inc. has made no representations or promises as to the price that may be bid at the auction and that The National Auction Group, Inc. has in fact stated it has no opinion as to the value of the property or of the price it will bring at the auction sale.

* * *

10. This agreement is subject to the final approval of the President or CEO of The National Auction Group, Inc.

* * *

16. This Agreement will be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns, and this Agreement constitutes the entire contract between parties. There are no oral representations or understandings other than the terms set forth herein. Any changes to be effective shall be in writing and signed by both parties.

Plaintiffs also signed an attached disclaimer, which provided:

THE SELLER(S) ACKNOWLEDGES THAT NEITHER AUCTION COMPANY NOR ANY OF ITS STOCKHOLDERS, OFFICERS, AGENTS OR REPRESENTATIVES HAVE GUARANTEED OR PROMISED THAT THE AUCTION SALE SHALL BRING ANY PARTICULAR PRICE FOR THE PROPERTY. AND SELLER REPRESENTS AND WARRANTS THAT

AUCTION COMPANY HAS IN FACT STATED TO SELLER THAT AUCTION COMPANY HAS NO OPINION AS TO THE VALUE OF THE PROPERTY OR OF THE PRICE IT WILL BRING AT THE AUCTION SALE.

ALSO, THIS AGREEMENT REPRESENTS ALL AGREEMENTS BETWEEN AUCTION COMPANY AND SELLER, UNLESS AGREED UPON IN WRITING AND SIGNED BY BOTH PARTIES.

BY SIGNING MY NAME BELOW, I ACKNOWLEDGE THAT I HAVE READ AND UNDERSTAND THE ABOVE DISCLAIMER.

The Auction Group defendants prepared for an auction of Crooked Island on Saturday, August 31, 1996—which was Labor Day weekend. The primary auction site was to be on Mackinac Island, with an additional audio auction site in Troy. Advertising materials indicated that Crooked Island, along with a lakefront lot in Alpena, were to be sold at “absolute auction,” “regardless of price.”

Plaintiffs allege that when they arrived at the auction site on Mackinac Island on August 31, 1996, they immediately expressed concern to the Auction Group defendants that an insufficient number of bidders were present. Plaintiffs allege that they exercised their option under ¶ 2 of the written listing agreement to withdraw the property from the auction. At that point, William Bone allegedly proposed a new agreement to induce plaintiffs to go forward with the auction that day. Bone proposed to allow the auctioneer to open bidding and when the bidding stalled a short recess would be called at which time Bone would meet in private with plaintiffs and ask them if they were satisfied with the highest bid. In the event plaintiffs were not satisfied, an agent for the Auction Group would submit the high bid and the property would essentially be removed from the market until it could be auctioned or sold at a later date by the Auction Group under the one-year listing agreement. Plaintiffs allege that they agreed to proceed with the auction based on these new terms, which were not reduced to writing.

The bidding started and quickly stalled at \$175,000, at which time a recess was called. Plaintiffs, accompanied by their adult son, met with the Auction Group defendants in another room and expressed dissatisfaction with the price, reasserting their demand of a minimum price of \$850,000. Plaintiffs instructed the Auction Group defendants to proceed under their oral agreement and place the high bid so as to remove the property from the auction. When the bidding was reopened, no further bids were offered and the auctioneer announced that the property had been sold to Mr. Hall, a bidder from the Troy site.

Plaintiffs allege that they were emotionally distraught after the auction ended, and that when George Rose was presented with a purchase agreement for the sale of the property to Hall for \$185,500 (\$175,000 plus a 6% buyer's fee), he initially refused to sign the document. However, he alleges that he eventually did sign it after the Auction Group defendants physically impeded him from leaving the premises and threatened him with a lawsuit. Frances Rose refused to sign the purchase agreement.

In November 1996, plaintiffs filed a fourteen-count complaint against defendants. As to the Auction Group defendants, plaintiffs sought to rescind the parties' written listing agreement, and alleged, among other claims, fraud, misrepresentation, breach of fiduciary duty, negligence, unconscionability, conspiracy, and intentional infliction of emotional distress. As to defendant Hall, plaintiffs sought to rescind the conveyance instruments and also sought monetary damages for conspiracy and intentional infliction of emotional distress. Defendant Auction Group filed a counterclaim for specific performance, seeking to force plaintiffs to close on the sale to Hall and to pay the Auction Group its commission and auction fee under the listing agreement of \$29,050. Defendant Hall filed a counterclaim for specific performance and damages.

Following some discovery, defendant Hall moved for summary disposition of his counterclaim under MCR 2.116(C)(8) and (10). The trial court granted the motion pursuant to MCR 2.116(C)(10), finding that none of the numerous theories raised by plaintiffs presented a material issue of fact. In particular, the court rejected plaintiffs' contention that the Auction Group defendants lacked authority to conduct the auction without reserve, finding that the bidders, including defendant Hall, were clearly under the impression that the Auction Group was authorized to auction the property without reserve to the high bidder. The court further found that the oral agreement between plaintiffs and the Auction Group defendants was void as violative of the statute of frauds, the parol evidence rule, and public policy. The court granted defendant Hall's request for specific performance, including the grant of an easement across a mainland lot owned by plaintiffs to provide access to the island. The court also awarded \$10,000 in sanctions, attorney fees, and costs to defendant Hall, finding that plaintiffs' claims of conspiracy and intentional infliction of emotional distress were frivolous. Plaintiffs/counter defendants appealed this ruling in Docket No. 209582.

Thereafter, the Auction Group defendants moved for summary disposition under MCR 2.116(C)(7) and (10). The trial court granted the motion, finding that the terms of the parties' written listing agreement refuted every argument proffered by plaintiffs relating to their claims of fraud and misrepresentation. In particular, the court noted that the written agreement provided that the Auction Group defendants made no representations as to value or the price the property would bring at auction, that the auction would be conducted without reserve, and that any subsequent agreements between the parties must be in writing. The court further found that the alleged statements of the Auction Group defendants constituted mere puffing, statements of opinion, or statements pertaining to future events. Lastly, the court rejected plaintiffs' argument that the oral agreement had supplanted the written agreement, noting in particular that the oral agreement involved the illegal use of a false bidder. The court concluded that the auction had been conducted in accordance with the parties' written agreement, and that the Auction Group defendants were entitled to their commission and auction fee under the contract. Plaintiffs/counter defendants appealed this ruling in Docket No. 210666.

II. Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim, and is subject to review de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 8 (1999). In reviewing such a motion, a court considers pleadings, depositions, affidavits, and other documentary evidence submitted by the parties in a light most favorable to the party opposing the

motion. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *Id.* at 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. Contract Claims

A. Validity and Enforceability of Written Listing Agreement

Plaintiffs assert at the outset that the parties' written listing agreement was invalid because plaintiffs were unaware whether the Auction Group's president had approved the agreement, as provided for in ¶10 of the agreement. We reject this assertion as wholly baseless. No principle of contract law requires that each party to a written contract have in its possession a fully executed copy of the contract before its terms become effective. Here, the listing agreement was signed by both parties and their subsequent conduct constituted an acknowledgment that they considered themselves bound by its terms. The contract was not merely an illusory promise on the part of defendant Auction Group, as was found in *Mustaw v Naiukow*, 105 Mich App 25; 306 NW2d 378 (1981), a case heavily relied upon by plaintiffs.

We likewise reject plaintiffs' claim that the parties' listing agreement was void and unenforceable as unconscionable. Plaintiffs have not demonstrated any genuine issue of material fact whether the contract was one of adhesion or whether its terms were substantively unreasonable. *Paulsen v Bureau of State Lottery*, 167 Mich App 328, 336; 421 NW2d 678 (1988); *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 44; 466 NW2d 325 (1991).

Accordingly, we hold that plaintiffs' claims challenging the validity and enforceability of the parties' written contract were properly dismissed.

B. Election of Remedies

Plaintiffs' multi-count complaint sought relief in both law and equity. In particular, plaintiffs sought equitable rescission of the written listing agreement executed with the Auction Group and the conveyance instruments executed in favor of defendant Hall,¹ and also sought monetary damages based in tort. In Michigan, a plaintiff must generally elect between inconsistent remedies so as to prevent double recovery for a single injury. *Riverview Co-op Inc v First Nat'l Bank and Trust Co of Michigan*, 417 Mich 307, 311-313; 337 NW2d 225 (1983); *Triplett v St Amour*, 444 Mich 170, 196; 507 NW2d 194 (1993) (Griffin, J, dissenting). See generally, 10 Mich Civ Jur (revised ed 1997), Fraud and Undue Influence, § 88. On these facts, we deem plaintiffs as having elected to affirm both the written contract with the Auction Group and the conveyance to Hall and to seek damages in tort.² Accord *Willard v Shekell*, 236 Mich 197, 205; 210 NW 260 (1926) (the assertion of a claim to rescind a contract on the ground of fraud repudiates the assertion of a claim on the contract).

Generally, the equitable remedy of rescission is unavailable where the party seeking to rescind can be made whole with monetary damages. Here, because plaintiffs intended to dispose of the island property, and their alleged damages relate to the amount of money they received from its sale, they have

a complete and adequate remedy at law. See 10 Mich Civ Jur, Fraud and Undue Influence, §§ 103-105. Upon affirmance of the parties' written contract, defendant Auction Group was entitled to its commission, and, as we will hold later in this opinion, plaintiffs are entitled to pursue certain of their tort claims before a trier of fact.

As to plaintiffs' claim for rescission of the conveyance to defendant Hall, we would agree with the trial court that, on these facts, Hall was entitled to specific performance. No evidence was presented to show that Hall was involved in a scheme to defraud plaintiffs or that he was aware of any secret dealings between plaintiffs and the Auction Group defendants with respect to the auction procedure. Accord *Kammer Asphalt Paving Co, Inc v East China Township Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993) (the equitable remedy of a constructive trust will not be imposed upon a party who in no way contributed to the reasons for its imposition).

We also expressly reject plaintiffs' attempt to invalidate the conveyance instruments on the grounds that (1) in light of the oral agreement between plaintiffs and the Auction Group defendants, the Auction Group defendants lacked either actual or apparent authority to conduct the auction "without reserve," (2) at the close of the auction, Mr. Rose signed the purchase agreement under duress as a result of threats made by the Auction Group defendants, (3) Mrs. Rose did not sign the purchase agreement despite her status as a tenant by the entirety, or (4) minor differences existed between the purchase agreement signed by Mr. Rose and the one signed later by Mr. Hall. None of these claims defeat Hall's entitlement to specific performance in light of generally recognized principles of law relating to auctions. The auction was advertised and held as "without reserve," which means that the property owner has entered into a collateral contract with bidders that the property will not be withdrawn from sale once bidding begins, and if the property is wrongfully withdrawn, the highest bidder is entitled either to damages or the property. *J&L Investment Co v Dep't of Natural Resources*, 233 Mich App 544, 551; 593 NW2d 196 (1999). Once the hammer was brought down on Hall's high bid, plaintiffs' attempts to invalidate the auction are of no material consequence.³

Given the foregoing, we conclude that the trial court properly granted specific performance in favor of Hall, and properly granted summary disposition in favor of the Auction Group defendants of plaintiffs' claim for equitable rescission of the written listing agreement.

C. Easement Granted to Defendant Hall

The judgment entered by the trial court provides for "an easement of access from Misery Bay Road to the boat launch site for the purposes of ingress and egress to the boat launch site and well, and for suitable docking, parking and storing of motor vehicles, trailers, and watercraft to provide access to Crooked Island." The easement further provided that, "The Grantors hereby allow the Grantees, their heirs and assigns, the right to do the following on the easement: to drive, to park motor vehicles, to park water craft and water craft trailers, and any other activities necessary for grantees to reach Lake Huron in order to transport themselves to the property commonly known as Crooked Island."

On appeal, plaintiffs request that this Court remand this matter to the trial court for a hearing to determine the proper scope of the easement granted. We reject plaintiffs' request. Before the start of

the auction, it was announced that in lieu of including a mainland lot, as had been advertised, an access easement and right of first refusal as to the sale of the mainland lots would be included in the auction of Crooked Island. Plaintiffs' attorney had drafted the language of the easement. As noted by the trial court, no controversy regarding the scope of the easement was then pending, and the court specifically instructed the parties that any issues related to reasonable use of the easement would be addressed by the court if and when such issues arose. Under the circumstances, we conclude that plaintiffs have not demonstrated the need for a remand on this issue.

IV. Tort Claims Against the Auction Group Defendants

Plaintiffs' complaint alleged separate counts of fraud, innocent misrepresentation, negligent misrepresentation,⁴ breach of fiduciary duty,⁵ and negligence⁶ based upon certain conduct of the Auction Group defendants. Because we draw a legal distinction between those acts alleged to have been committed to induce plaintiffs to enter into a written contract with the Auction Group and those committed after execution of the contract, our analysis is directed toward the context in which the challenged conduct occurred.

A. Pre-Contract Statements

1. Fraud in the Inducement or Misrepresentation

The elements of actionable fraud are (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew when the representation was made that it was false, or made recklessly, without knowledge of its truth as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon the misrepresentation, and (6) the plaintiff suffered damage. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are in fact relied upon. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). A claim of innocent misrepresentation is established if a party detrimentally relies upon a false representation so that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraud but eliminates the need to prove a fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and includes the need to show that an unintentionally false representation was made in connection with the making of a contract and that the resulting injury inure to the benefit of the party making the misrepresentation. In addition, a plaintiff alleging an innocent misrepresentation claim must show that the plaintiff and defendant were in privity of contract. *M & D, Inc, supra* at 27-28.

Here, to induce plaintiffs to sign the exclusive listing agreement, the Auction Group defendants allegedly stated that they could obtain plaintiffs' minimum price of \$850,000 at auction for Crooked Island, that the island was worth more than a million dollars, that they would make Mr. Rose a "wealthy man," and that they would never put plaintiffs' property in jeopardy. In granting summary disposition to defendants, the trial court ruled that these statements could not serve as a basis for a fraud claim

because they were either statements of opinion, puffing, or statements pertaining to future events. Plaintiffs challenge this ruling on appeal. We find no error.

Neither an expression of opinion nor a salesman's hyperbole in promoting a sale, commonly referred to as puffing, constitute actionable fraud. 10 Mich Civ Jur, Fraud and Undue Influence, § 25. See, e.g., *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). Further, it is well settled that a statement of value is a mere expression of opinion that may not be the basis for a fraud action. This rule is particularly appropriate where the party alleging fraud in a real estate transaction has an unfettered opportunity to assess the value of property, but fails to do so. A party who relies on another's opinion of value does so at his own peril. 10 Mich Civ Jur, Fraud and Undue Influence, §§ 26, 28-29.

Assuming as we must that the Auction Group defendants made the statements attributed to them by plaintiffs, we would agree with the trial court that the statements were merely salesman puffing or expressions of opinion as to value. Contrary to plaintiffs' assertion that the parties' preliminary negotiations were influenced by the unequal bargaining power of the parties, plaintiffs clearly controlled their future. Indeed, the undisputed evidence demonstrates that plaintiffs are intelligent adults, that they had the benefit of legal counsel during this period, that they mulled the decision to auction the island for approximately one year before signing the listing agreement with the Auction Group, and that during this period they attended several other auctions conducted by the Auction Group. Despite the importance of this decision on their financial future, plaintiffs failed to obtain an objective appraisal of the fair market value of the island before signing the exclusive listing agreement with the Auction Group. Further, plaintiffs signed the agreement despite the fact that some of its terms were at variance with verbal representations made by defendants. For example, the agreement expressly provided in ¶ 2 that the property would be sold at "ABSOLUTE AUCTION with no minimums or reserves." Yet, in his deposition, Mr. Rose testified that he read and signed the agreement even though he did not fully understand the meaning of the terms "absolute auction" or "without reserve." As another example, the agreement included a separate boldface disclaimer providing that "NEITHER AUCTION COMPANY NOR ANY OF ITS STOCKHOLDERS, OFFICERS, AGENTS OR REPRESENTATIVES HAVE GUARANTEED OR PROMISED THAT THE AUCTION SALE SHALL BRING ANY PARTICULAR PRICE FOR THE PROPERTY," and that defendant "HAS IN FACT STATED TO SELLER THAT AUCTION COMPANY HAS NO OPINION AS TO THE VALUE OF THE PROPERTY OR OF THE PRICE IT WILL BRING AT THE AUCTION SALE." The disclaimer further provided that "THIS AGREEMENT REPRESENTS ALL AGREEMENTS BETWEEN AUCTION COMPANY AND SELLER, UNLESS AGREED UPON IN WRITING AND SIGNED BY BOTH PARTIES." Yet, plaintiffs claim to have relied to their detriment on the Auction Group defendants' verbal representations of the fair market value of the island or the amount it would bring at auction. "To allow persons of intelligence and mature age to repudiate their written contracts, which they have an opportunity to read before signing and can read, would lend uncertainty to business transactions and render the making of contracts unsafe." *Draeger v Kent County Sav Ass'n*, 242 Mich 486, 490; 219 NW 637 (1928). See also *Paterek v 6600 Ltd*, 186 Mich App 445, 450; 465 NW2d 342 (1990) (one who signs a contract cannot seek to invalidate it on the basis that he did not read it or thought that its terms were different, absent a showing of actionable fraud or mutual mistake).

Under the circumstances of this case, plaintiffs' pre-contract fraud claim will not be countenanced by this Court.⁷

Citing *Hayes Const Co v Silverthorn*, 343 Mich 421; 72 NW2d 190 (1955), plaintiffs argue that, because of the Auction Group defendants' special knowledge and expertise in the field of real estate auctions, the general rules cited above are inapplicable. In the context of plaintiffs' pre-contract fraud claim, we are unpersuaded by this argument. In *Silverthorn*, an experienced general contractor brought suit against a heating subcontractor for allegedly defective furnaces. The plaintiff-contractor alleged that the defendant-subcontractor had committed fraud when he persuaded plaintiff to install the allegedly defective furnaces by stating that the maintenance was nil, that they were reasonably priced, and that they would do the job that the plaintiff needed done. In addressing the plaintiff's fraud claim, the Michigan Supreme Court explained:

[W]e are here in the realm of what the common law has for years termed 'puffing,' a salesman's praise of his own property, involving matters of estimate or judgment upon which reasonable men may differ. Ordinarily these are not regarded as actionable, even though the vendee's joys of realization fail short of those of his anticipation. The reason for this lies in the realities of commercial intercourse.

* * *

The relationship of the parties may, however, impose more stringent requirements. One party may have special knowledge and the other none and without the means of getting it. In this case the latter cannot fairly and reasonably exercise his own judgment. The parties, therefore, do not stand on equal terms and the buyer has a right to rely upon the representations of excellence made by the seller. [*Id.* at 426-427.]

Here, unlike in *Silverthorn*, plaintiffs' ability to fairly and reasonably exercise their own judgment before entering into a contractual relationship with the Auction Group defendants was in no manner circumscribed by defendants. *Id.* at 427. Thus, the "special knowledge" exception has no applicability to the facts before us.

2. Breach of Fiduciary Duty

It is axiomatic that a person cannot hold another liable for duties and obligations incident to an agency relationship unless the creation and existence of that relationship is established. 1 Mich Civ Jur, Agency, § 18. Here, the parties' agency relationship became effective on June 25, 1996, when their written contract was executed. Therefore, any statements or conduct on the part of the Auction Group defendants prior to that date may not serve as the basis for a breach of fiduciary duty claim. Accordingly, we order any such factual allegations stricken from plaintiffs' complaint.⁸

Given the foregoing, we conclude that plaintiffs have failed to state a prima facie case of actionable fraud, misrepresentation, or breach of fiduciary duty as to the Auction Group defendants' pre-contract statements or conduct.

B. Post-Contract Statements, Promises, and Conduct

1. Fraud and Misrepresentation

The bulk of plaintiffs' remaining allegations relate to statements or promises made by the Auction Group defendants on the day of the auction. Plaintiffs allege that when they arrived at the auction site they expressed concern to defendants regarding what they believed to be an insufficient number of bidders present and indicated an intent to withdraw the property before the start of the auction, as they were allowed to do under ¶ 2 of the listing agreement. Plaintiffs allege that defendants induced them to proceed with the auction by stating that they would not sell the property for less than \$850,000, and that, if the bidding did not attain plaintiffs' minimum price, defendants themselves would submit the high bid and thereafter sell the property at auction at a later date. Plaintiffs assented to the terms of this oral agreement, and the auction proceeded. The Auction Group defendants did not, however, submit a bid on the property, and the hammer was brought down on Hall's high bid of \$175,000.

a. Withdrawal of Property Prior to Auction and Oral Agreement

As a preliminary matter, we disagree with plaintiffs' characterization of their attempted withdrawal of the property prior to the auction as amounting to a cancellation of their written agreement and the creation of a "new" oral agreement based on defendants' verbal representations at that time. The parties' written contract was a one-year exclusive listing agreement, under which plaintiffs were provided the opportunity to withdraw their property prior to auction. Plaintiffs' invocation of the withdrawal option, however, did not operate to cancel the entire contract, but rather permitted the Auction Group to sell the property at another auction at a later date within the one-year period covered by the listing agreement.⁹ As such, the parties' oral agreement constituted a modification of the terms of their written contract.

Because the oral modification entailed new consideration from both parties—i.e., plaintiffs forfeited their contractual right to withdraw the property from the auction and defendants promised to obtain plaintiffs' minimum bid price—it was not invalid for lack of consideration, MCL 566.1; MSA 26.978(1), nor was it in violation of the statute of frauds,¹⁰ *Minor-Dietiker v Mary Jane Stores of Mich Inc*, 2 Mich App 585, 589-590; 141 NW2d 342 (1966). In *Minor-Dietiker, supra* at 589-590, this Court quoted the following from *Zannis v Freud Hotel Co*, 256 Mich 578, 584-585; 240 NW 83 (1932), in which the estoppel doctrine was invoked to find that an oral modification of a written lease did not violate the statute of frauds:

"Had defendant claimed such verbal lease to be void under the statute of frauds, it would have been estopped for the same reason that we determine that plaintiffs are estopped from so claiming. The facts of the case, as confirmed by the verdict of the jury, establish the fact that a consideration was received and acted upon by each of the parties for the modification of the written lease. There is no question but that the modification itself comes within the statute of frauds, it being an oral change of a written lease. *Abell v Munson*, 18 Mich 306, 100 Am Dec 165 [1869]. While the

law of this state has consistently held that an agreement required by the statute of frauds to be in writing may not be substantially altered by a verbal agreement, it has also held that parties may not accept the benefits from such alteration and then claim that the transaction is void.”

Thus, we conclude that the parties’ written contract remained valid and enforceable notwithstanding the parties’ subsequent oral modification of certain of its terms.

b. Claims of Fraud or Misrepresentation Based Upon Oral Agreement

The question that arises is whether plaintiffs can recover from the Auction Group defendants under theories of fraud and misrepresentation for inducing plaintiffs to enter into an oral agreement which purported to violate Michigan’s common-law prohibition against the use of false bidders, also referred to as shillers, by-bidders, or secret puffers, to raise the bid price of property at auction.¹¹ See *Bronson v Leach*, 74 Mich 713, 721; 42 NW 174 (1889); *Kulenkamp v Groff*, 71 Mich 675, 676; 40 NW 57 (1888). See generally, 7 Am Jur 2d, Auctions and Auctioneers, § 25 (property owner may not engage in the bidding at auction, either directly or indirectly, unless it is expressly announced that he reserves such privilege; he is not allowed to make secret bids with the intent to enhance the price of the property). In this context, plaintiffs’ first amended complaint alleged fraud and misrepresentation based on the following statements:

Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated that he would withdraw Plaintiffs’ property, Crooked Island, from the auction if the sale price was not at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars;

Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated that he would purchase and resell Crooked Island for at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars.

A contract founded on an act prohibited by statute, or a contract in violation of public policy, is void.¹² *Mahoney v Lincoln Brick Co*, 304 Mich 694; 8 NW2d 883 (1943); *Maids Int’l Inc v Saunders Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997). A contract that is void, however, can support a claim of fraud or misrepresentation to the extent that the claim is not dependent upon either direct or indirect enforcement of its terms. A leading case on this aspect of the law is *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426; 280 NW 814 (1938), in which the defendant corporation orally agreed to grant the plaintiff the exclusive manufacturing and selling rights for a certain territory in California of a cheese product known as O-Ke-Doke. Under the terms of the oral agreement, the plaintiff was required to purchase from the defendant a certain minimum amount of cheese per month. Thereafter, with the knowledge and consent of the defendant, the plaintiff expended substantial amounts of time and money in working out the preliminary details for manufacturing and selling the product in California. Before commencement of the business, however, the defendant notified the plaintiff that it would not fulfill its obligations under the oral contract, and instructed the plaintiff to discontinue any further efforts to commence business. The Michigan Supreme Court dismissed the plaintiff’s breach of contract claim, holding as a matter of law that the alleged oral contract was in violation of the statute of

frauds and therefore unenforceable. The Court also rejected the plaintiff's attempt to assert a fraud claim, stating that an action for damages cannot be maintained on the ground of fraud in refusing to perform an oral contract within the statute of frauds, even though the defendant at the time of the making of the oral contract may have had no intention of performing it. *Id.* at 435. In rejecting the plaintiff's argument that the statute of frauds should not be invoked to allow the defendant to perpetrate a fraud—an argument advanced by plaintiffs in the present case—the Court noted that, although the maxim had been “troublesome” in application, “[i]t is not a fraud to refuse to perform an unenforceable agreement.” *Id.* at 437, quoting *Connell v Slater*, 137 Misc 249; 243 NYS 25, 27 (1930). The Court continued:

In every case where parties deal at arm's length each is supposed to know the law. In the instant case plaintiff was bound to know that he could not consummate a valid contract, such as he asserts in this case, except it was reduced to writing or in some other manner compliance with the statute of frauds was accomplished. Plaintiff could not be defrauded except he was deceived. Hence he must be held bound by the knowledge that he never consummated an enforceable contract with defendant. We are mindful it is plaintiff's theory that he can rely upon defendant's alleged oral contract to enter into a written contract, and that the damage sought is claimed to be such as resulted from defendant's refusal to consummate the written contract. [*Cassidy, supra* at 438.]

Rejecting the plaintiff's assertions of ignorance of the law and detrimental reliance, the Court stated that “to hold otherwise would relieve the parties of their duty to execute a contract in conformity with the public policy of this state. *Id.* at 436-437.

We find *Cassidy* to be distinguishable from the facts before us. Unlike *Cassidy*, which involved an arm's length transaction and the absence of any valid contract, the facts of our case involve a fiduciary relationship between plaintiffs and the Auction Group defendants from which arose a valid written contract. *Cassidy*'s damages flowed entirely from the defendant corporation's failure or refusal to execute a written contract, i.e., from the defendant's breach of the parties' oral agreement. Hence, *Cassidy*'s tort claim was wholly dependent upon enforcement—albeit indirectly—of the parties' void oral agreement. In the present case, however, we do not find plaintiffs' fraud and misrepresentation claims to be wholly dependent upon direct or indirect enforcement of the void oral agreement. Certainly, any damages claimed to arise from the Auction Group defendants' failure or refusal to place the high bid and remove the property from the auction would not be recoverable, because such a claim would indeed be dependent upon enforcement of the oral agreement. However, any damages arising from defendants' false statements or fraudulent promises that were intended to induce plaintiffs not to withdraw their property from the auction and to proceed—resulting in a lost opportunity to sell the property at a later date—are recoverable, as is the commission paid to defendants in consequence of the sale of the property pursuant to the terms of the parties' valid written contract. Recovery of such damages is not dependent upon either direct or indirect enforcement of the parties' void oral agreement, which is severable from their valid and enforceable written contract. See *Samuel D Begola Services, supra* at 641.

Further, to maintain an action for fraud based on a transaction that is void because of illegality or because it is violative of public policy, a plaintiff must establish that his or her reliance on the defendant's representations was reasonable. *Novak v Nationwide Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464-465; 517 NW2d 235 (1994).¹³ In this case, an issue of fact exists whether plaintiffs reasonably relied on the Auction Group defendants' representations that they would use a false bidder to prevent plaintiffs' property from being sold below their minimum price. Plaintiffs contend that they were unaware that the use of a false bidder was illegal, and that they placed their trust and confidence as to such matters in the Auction Group defendants, who represented themselves as experienced and knowledgeable in the field of auctions. Defendants contend, assuming the truth of plaintiffs' allegations, that plaintiffs were or should have been aware that the use of a false bidder would be illegal and that they should not be permitted to impose liability against defendants for their own ignorance of the law.

Michigan courts have long held that mere ignorance of the law, standing alone, cannot prevent its enforcement. *Nagy v Michigan Copper & Brass Co*, 233 Mich 552, 557; 207 NW 850 (1926). However, when a mistake of law is predicated on an affirmative misrepresentation by one who acts in a fiduciary capacity, the law is more forgiving:

It is true . . . that mistakes of law cannot usually be a ground of relief, when standing alone. The current of authority runs in that direction most strongly, although in some states even such relief has been granted. But it is also true that there are cases of fraudulent misrepresentations or concealments of matters of law by those holding confidential relations to the person wronged thereby which equity will relieve against. Where one relies upon another, and has a right to so rely, and the person relied upon omits to state a most material legal consideration, within his knowledge, of which the other is ignorant, affecting his rights, and the person thus ignorant acts under this misplaced confidence, and is misled by it, a court of equity will afford relief, especially if such action is to the advantage of the person whose advice is taken, even though no fraud was intended. [*Tompkins v Hollister*, 60 Mich 470, 480; 27 NW 651 (1886).]

See also *Carpenter v Detroit Forging Co*, 191 Mich 45, 53-54; 157 NW 374 (1916).

It has been said that the only "rigid rule" forbidding relief from fraud on an illegal transaction is where the parties are *in pari delicto*, in equal guilt. Over a century ago, in *Hess v Culver*, 77 Mich 598; 43 NW 994 (1889), the defendant used fraudulent representations to obtain the plaintiff's promissory note for the purchase price of Bohemian oats at an exorbitant price in return for an agreement and bond of a fictitious corporation to sell a larger quantity for plaintiff at the same price for a commission. The Michigan Supreme Court held that, to the extent the trial court had directed a verdict in favor of the defendant on the theory that the transaction was illegal and the parties *in pari delicto*, the theory was to be rejected:

If plaintiff were seeking to enforce such a bond as was palmed off on him, his ignorance that it was illegal in its purposes would not perhaps absolve him from the consequences of trusting to a void contract. But it has been held by this court in repeated instances

that, while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law. Where a man is defrauded, as often happens, by the misrepresentations of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. The only rigid rule forbidding relief is where parties are in equal guilt. While the law does not draw fine distinction in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. Even actual knowledge of legal rights and liabilities is not always conclusive against relief. . . . One of the elements in this fraud was that defendant accomplished it by representing that the alleged company was a corporation authorized to do the acts referred to by the laws of this state, and therefore having full legal sanction and recognition in its doings, so that plaintiff had no reason to suppose the dealings would be subject to any lawful objection. [*Id.* at 601-602. Citations omitted.]

In this case, we conclude that questions of fact exist whether defendants made false representations and whether plaintiffs relied upon those misrepresentations to their detriment. Such questions are properly within the sphere of the trier of fact. See 1 Mich Civ Jur, Agency, § 142. That is, if the trier of fact finds that defendants induced plaintiffs to enter into the oral agreement, and that plaintiffs had either actual or constructive knowledge at the time that the use of a false bidder was against public policy, plaintiffs are barred from recovery on these claims. Accord, *Knight v Linzey*, 80 Mich 396, 406; 45 NW 337 (1890) (another Bohemian Oat scheme case in which the plaintiff's fraud claim was dismissed because the plaintiff conceded that he knew it was a fraud, and that he could not gain unless someone else other than the defendants lost. The Court found that the plaintiff "was not actually deceived, and he was 'consciously wrong.'"). In such a case, where the parties are determined to be *in pari delicto*, the courts will generally leave them where their respective conduct has placed them. See 10 Mich Civ Jur, Fraud and Undue Influence, § 79.

Conversely, recovery would not be barred if the trier of fact finds that plaintiffs reposed trust and confidence in the specialized knowledge and advice of defendants and that plaintiffs were operating under a mistake of law, instigated by defendants, as to the legal effect of the use of a false bidder at auction. Accord, *Pearl v Walter*, 80 Mich 317; 45 NW 181 (1890) (in this Bohemian Oat scheme case, the plaintiff conceded he was afraid there was "something wrong" with the transaction at first, but his fears and suspicions were overcome by the defendants' fraudulent representations). Because we do not find that the scheme allegedly proposed by the Auction Group defendants in this case amounted to a "transparent fraud," see *id.* at 322, plaintiffs may present their post-contract fraud claim to a trier of fact.

Given the foregoing, we reverse the order granting summary disposition in favor of the Auction Group defendants as to plaintiffs' post-contract claims of fraud and innocent misrepresentation,¹⁴ and remand for further proceedings.

2. Breach of Fiduciary Duty and Negligence

Plaintiffs' first amended complaint made numerous allegations that the Auction Group defendants breached their fiduciary obligations or were otherwise negligent in the performance of their duties under the written listing agreement and the oral agreement. The Auction Group defendants moved for summary disposition, arguing that no genuine issue of material fact existed as to these claims, citing defendant Eddie Haynes' deposition testimony that the advertising and marketing conducted in preparation for the auction of Crooked Island was adequate and that the auction itself was conducted in an appropriate manner.¹⁵

Plaintiffs responded to defendants' motion by submitting an affidavit of Douglas P. Bilodeau, a certified auctioneer who had conducted auctions for thirty-one years, and who was president of the International Auction School of South Deerfield, Massachusetts. Bilodeau averred that "auctioneers owe fiduciary obligations to their clients, consisting of good faith and loyalty and to exercise due care, skill and diligence in performing their duties." Bilodeau averred that he had reviewed the facts and pleadings of this case and that in his opinion the Auction Group defendants "violated their fiduciary obligations to the Plaintiffs" by failing to "advise the owner intelligently and honestly as to the market value of the property prior to selling at auction," and "failing to properly market and advertise the property being auctioned for sale." Bilodeau further averred that the Auction Group would be in violation of its fiduciary duties "if it represented to its client that it could achieve a certain price at auction without knowing the value of the property being auctioned," or "if it fails to advise its clients adequately of the substantial risk involved in selling property without reserve and without a minimum upset price."

In response to plaintiffs' submission of the Bilodeau affidavit, the Auction Group defendants supplemented their motion by submitting a non-notarized letter from F. Vladi, an international island broker and appraiser, who opined that the fair market value of Crooked Island was between \$150,000 and \$225,000. Defendants argued that, based on the final sales price of \$185,500 for Crooked Island, plaintiffs had failed to demonstrate an issue of fact whether any act or omission by defendants was a proximate cause of any damages to plaintiffs.

The trial court's order granted summary disposition in favor of the Auction Group defendants of plaintiffs' complaint in its entirety. The court did not explicitly cite its reasoning for dismissal of plaintiffs' various post-contract tort claims. On review de novo of the lower court's order, we conclude that, while certain of plaintiffs' post-contract tort claims were properly dismissed, certain others were sufficiently pleaded to withstand summary disposition.

A fiduciary duty arises where there is a fiduciary relationship between the parties. The duty arises out of the relationship between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). When the fiduciary relationship is betrayed by the party in the position of influence, the betrayal is actionable, and the origin of the confidence is immaterial. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263, 274; 288 NW2d 613 (1979). Under agency principles, a fiduciary relationship exists between an auctioneer and a seller. If an auctioneer assumes a position that is entirely inconsistent with that of his

agency relationship, he may be deprived of compensation for his services. 7 Am Jur 2d, Auctions and Auctioneers, § 70.

To establish a prima facie case of simple negligence, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) the plaintiff suffered damages. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

a. Certain Fiduciary Obligations Disclaimed by Contract

The parties' exclusive listing agreement, although not unconscionable, was drafted by the Auction Group defendants to their clear advantage. Under the contract, the Auction Group defendants' express obligation to plaintiffs was merely to "sell the Property at ABSOLUTE AUCTION with no minimums or reserves" within seventy-five days of June 25, 1996. Conversely, plaintiffs' obligations, liabilities, and waiver of rights under the contract were many. For example, the contract provided that plaintiffs (1) "relinquish[] any right to place a minimum or reserve on the bidding with respect to the Property," (2) "acknowledge[] that The National Auction Group, Inc. has made no representations or promises as to the price that may be bid at the auction and that The National Auction Group, Inc. has in fact stated that it has no opinion as to the value of the property or of the price it will bring at the auction sale," (3) acknowledge that the Auction Group defendants had not guaranteed or promised that the auction sale shall bring any particular price for the property, (4) "represent[] and warrant[] that Auction Company has in fact stated to Seller that Auction Company has no opinion as to the value of the property or of the price it will bring at the auction sale," (5) "shall pay The National Auction Group, Inc. a commission equal to ten percent (10%) of the gross sales price paid by the Buyer at Closing," and (6) shall convey clear title to the buyer by warranty deed.

On appeal, plaintiffs contend that the Auction Group defendants violated their fiduciary obligations by failing to advise them as to the market value of the property before selling it at auction, and representing that it could achieve a certain price at auction without knowing the value of the property. Defendants contend that their fiduciary obligations to plaintiffs in this respect were abrogated by the terms of their written contract. Defendants assert that, because the parties' written contract and disclaimer disavowed any requirement that defendants render an opinion as to value or obtain a pre-sale appraisal of the property's fair market value, plaintiffs' claims in this regard must fail. We reluctantly agree with defendants on this issue.

An agent in a fiduciary relationship is obligated to inform the principal fully of all material facts within the agent's knowledge relating to the subject matter of the agency relationship. See 1 Mich Civ Jur, Agency, § 111. However, the duties and liabilities of a fiduciary relationship may be modified by contract. See *id.* at § 22. See also 1 Restatement Trusts, 2d, § 2, Comment b, p 6 (a fiduciary relationship imposes a duty to act for the benefit of the other as to matters within the scope of the relation).¹⁶ Here, the parties' contract modified the Auction Group defendants' broad common-law fiduciary duties by expressly negating any duty to inform plaintiffs of their opinion as to the value of the island or the price that it may bring at auction. Accordingly, to the extent that plaintiffs' tort claims are

based on the Auction Group defendants' failure to perform these duties, we conclude that the claims were properly dismissed.

b. Breach of Fiduciary Duty and Negligence Concerning the Parties' Oral Agreement

Notwithstanding that the parties' oral agreement was void and unenforceable as violative of public policy, the question that arises is whether the agreement may form the basis for liability against the Auction Group defendants for breach of fiduciary duty and negligence. Having reviewed the record available at this stage of the litigation, we conclude that genuine issues of material fact exist such that summary disposition of plaintiffs' claims was premature.

Independent of any contract establishing a fiduciary relationship, the common-law recognizes certain implied duties of trust, confidence, loyalty, and good faith. *Portage Aluminum Co, supra*. When the acts of an agent in a fiduciary relationship tend to violate any of these duties and obligations, the principal may seek recovery without a showing of either actual fraud by the agent or injury to the principal. 1 Mich Civ Jur, Agency, § 115. "Fidelity in the agent is what is aimed at, and as a means of securing it, the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." *Flint & Pere Marquette Railway Co v Dewey*, 14 Mich 477, 487 (1866), quoting *People v Township Bd of Overysse*, 11 Mich 222, 225 (1863). See also *Prince v Clark*, 81 Mich 167, 170-171; 45 NW 663 (1890). Relief is to be granted whenever influence has been acquired and abused, whenever confidence has been reposed and betrayed. *Stephenson v Golden (On Rehearing)*, 279 Mich 710, 739; 276 NW 849 (1937); *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Neither the origin of the confidence nor the source of the influence are material. *Stephenson, supra*.

Here, the Auction Group defendants held themselves out as particularly skilled auctioneers of unique properties, such as Crooked Island. As such, they were obligated to use the degree of care and skill that would ordinarily be exercised at that time by someone performing similar functions under like circumstances. *Stephens v Detroit Trust Co*, 284 Mich 149, 158; 278 NW 799 (1938). Further, where a fiduciary relationship exists, and the agent knows that the principal is relying on him for a full and truthful statement of all material facts, the agent is bound to exercise honesty and good faith in his transactions with the principal, and to make a full and fair disclosure of all the material facts and circumstances in relation to the transaction, and to act in the principal's interest. *Horvath v Langel*, 276 Mich 381, 385; 267 NW 865 (1936). "Fidelity upon the part of the agent to his principal is the essential basis of agency." *Id.*

While the focus in a breach of fiduciary duty claim is assuredly on the conduct of the defendant, *Stephenson, supra* at 741, we do not mean to imply that the plaintiff's conduct is irrelevant. Indeed, recovery remains dependent upon a showing that the plaintiff in fact reposed trust and confidence in the defendant, such that the defendant had the opportunity to betray his principal. In this case, the question whether plaintiffs' assent to the Auction Group defendants' proposed use of a false bidder should limit or foreclose their recovery is probative of the existence of the fiduciary relationship that is the *sine qua non* of a breach of fiduciary duty claim.¹⁷ Thus, as we determined in the context of plaintiffs' post-contract fraud and misrepresentation claims, if a trier of fact were to find that plaintiffs were aware or

should have been aware of the illegality of the use of a false bidder at the time it was proposed by defendants, the trier of fact may conclude that defendants betrayed no confidence and leave the parties where they were found. On the other hand, if a trier of fact were to find that plaintiffs were ignorant of the law regarding false bidders, and in fact reposed trust and confidence in the statements and promises of defendants, recovery on this claim is not barred.

The measure of damages in such a matter is generally the unjust enrichment that has been gained by the defendant, rather than the actual damage that has been suffered by the plaintiff. *McIntosh v Fixel*, 297 Mich 331, 342; 297 NW 512 (1941). See also *Stephenson*, *supra* at 741 (the “controlling question” is whether the agent who abused the confidence reposed in him by his principal should be “allowed to retain the fruits of his perfidy”). Here, we are of the opinion that damages in this context are limited to the commission and fees paid to the Auction Group defendants pursuant to the terms of the parties’ written contract.

Given the foregoing, we conclude that plaintiffs’ breach of fiduciary duty and negligence claims are not defeated as a matter of law because of the underlying illegality of the oral agreement. We remand these claims for further proceedings in the trial court.

3. Remaining Post-Contract Tort Claims

Plaintiffs’ remaining factual allegations generally relate to the Auction Group defendants’ preparation for and conduct during and after the auction. Having thoroughly reviewed the parties’ pleadings and documentary evidence submitted below, we conclude that summary disposition was improperly granted to defendants on these remaining allegations because issues of material fact exist whether defendants breached their fiduciary obligations to plaintiffs or otherwise were negligent in the exercise of their duties. Accordingly, plaintiffs are entitled to present these tort claims to a trier of fact.

V. Sanctions Awarded to Defendant/Counter Plaintiff Hall

A claim or defense is “frivolous,” for purposes of the statute governing an award of sanctions, when: (1) the party’s primary purpose was to harass, embarrass, or injure the prevailing party; (2) the party had no reasonable basis upon which to believe the underlying facts were true; or (3) the party’s position was devoid of arguable legal merit. MCL 600.2591(3)(a); MSA 27A.2591(3)(a). The circumstances existing at the time a case is commenced is critically important in determining whether a lawsuit has a legal or factual basis. *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991). A trial court’s finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous. If the court finds a claim or defense to be frivolous, the imposition of sanctions is mandatory. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266, 268; 548 NW2d 698 (1996).

At the hearing on defendant Hall’s motion for summary disposition, the trial court specifically questioned plaintiffs’ counsel regarding the reasons for bringing claims of conspiracy and intentional infliction of emotional distress against Hall. Plaintiffs’ counsel explained:

When this case was first filed I was contacted personally by a representative [of the Auction Group's insurer]. . . . He said to me, we are getting an attorney. Please do not, for these defendants, do not file defaults. I said fine.

I was thereafter contacted by a Miss Donna Pratchard, who is an employee and personal secretary for a partner in the law firm of Plunkett and Cooney, Petoskey office. Miss Pratchard said to me, Mr. Clos, I am calling on behalf of—and I don't have the attorney's name. . . . We would like some additional time to file an answer on behalf of the National Auction Group. I said certainly. That's fine. . . . I said, let me ask you something, Miss Pratchard. . . . [H]as Plunkett Cooney represented the National Auction Group in the past? She says, numerous times we have. Her quote to me.

Subsequent thereto, I received a call from Mr. White's office, who told me he was representing them [Auction Group], . . . because there was a conflict of interests with the Plunkett Cooney law firm.

Based on that, Your Honor, we believe that we had enough to tie Mr. Hall to the National Auction Group because of the fact Mr. Hall is a shareholder of Plunkett Cooney, or a partner, whatever the case might be. That was set out for discovery.

Plaintiffs' counsel further explained that he offered to dismiss the conspiracy and intentional infliction of emotional distress counts against Hall when extensive discovery failed to produce any factual support for the claims. In granting summary disposition to defendant Hall, the trial court awarded sanctions, pursuant to MCR 2.625(A)(2) and MCL 600.2591(3)(a)(i) and (ii); MSA 27A.2591(3)(a)(i) and (ii), in the amount of \$10,000. The court found no basis in law or fact to support plaintiffs' conspiracy and intentional infliction of emotional distress claims against Hall, noting that they were based only on "a secretary's 'hunch.'"¹⁸

On appeal, plaintiffs argue that the award of sanctions was clear error because the factual scenario outlined above "indicat[ed] a potential conspiracy between Defendant [Hall], a lawyer in the same law firm that was representing the [Auction Group] Defendants." We strongly disagree. The facts, as alleged by plaintiffs' counsel, are that Hall's law firm declined to represent the Auction Group defendants because a potential conflict of interest was recognized. This was a logical conclusion in light of the conflict of interest provisions of the Rules of Professional Conduct. What is not logical, however, is plaintiffs' counsel's misguided attempt to transform a commonplace conflict of interest matter into an allegation against Hall of conspiracy and willful intent to harm plaintiffs. As the trial court aptly found, at the time plaintiffs' counsel filed a complaint alleging these counts against Hall, no evidence whatsoever existed, beyond counsel's own active imagination, to support such allegations. *Louya, supra*. It is also clear that plaintiffs' counsel failed to conduct any investigation in an attempt to find such factual support before filing a complaint against defendant Hall. This Court has held that "[t]he statutory scheme is designed to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual basis of a claim or defense, not to discipline those whose cases are complex or face an 'uphill fight.'" *Louya, supra* at 163-164. Under the circumstances, it is appropriate that plaintiffs and their

attorney¹⁹ bear the costs of using discovery to determine whether plaintiffs had a viable claim in the first instance. MCL 600.2591(1); MSA 27A.2591(1).

Lastly, we decline to address the parties' remaining claims as such claims are either disposed of directly or indirectly by our holdings above or wholly without merit.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ John W. Fitzgerald

¹ Plaintiffs' complaint framed their equitable claims as a request for "declaratory rulings" to void the written listing agreement and the conveyance to Hall.

² As a general rule, election of remedies is an affirmative defense that must be pleaded by the defendant in its first responsive pleading, or it is waived. MCR 2.111(F)(a); *Stowe v Mather*, 247 Mich 329, 330-331; 225 NW 504 (1929). Although the Auction Group defendants did not assert election of remedies in their first responsive pleading, we find that the unique factual circumstance of this case demands that we raise it sua sponte so as to narrow the issues for appeal and for remand to the trial court.

³ We also expressly reject plaintiffs' attempt to invalidate the auction by analogizing to cases involving deeds procured by forgery or fraud.

⁴ In particular, plaintiffs' fraud and misrepresentation counts of their first amended complaint alleged in ¶ 138 that "Defendants [Auction Group], Andrew Bone, William Bone, Eddie Haynes and Eddie Haynes, Inc. made numerous material misrepresentations and omissions to Plaintiffs, including, but not limited to, the following:

- a. Defendant Andrew Bone, individually and on behalf of Defendant [Auction Group], stated that he would not put Plaintiffs' property in jeopardy;
- b. Defendant Andrew Bone, individually and on behalf of Defendant [Auction Group], stated that he would adequately advertise Crooked Island for sale and otherwise market Crooked Island in a manner sufficient to obtain a sale price of at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars;
- c. Defendant Andrew Bone and William Bone, individually and on behalf of Defendant [Auction Group], stated that they could get at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars for the sale of Crooked Island;

- d. Defendants Andrew Bone and William Bone, individually and on behalf of Defendant [Auction Group], stated that they would not sell Crooked Island for less than Eight Hundred Fifty Thousand (\$850,000.00) Dollars;
- e. Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated that he would withdraw Plaintiffs' property, Crooked Island, from the auction if the sale price was not at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars;
- f. Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated that he would purchase and resell Crooked Island for at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars if they failed to obtain a high bid of \$850,000.00 or more at the auction;
- g. Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated that Plaintiffs would obtain millions of dollars for the sale of Crooked Island since Albany Island, a less desirable and much smaller island, sold for One Million Two Hundred Thousand (\$1,200,000.00) Dollars;
- h. Defendant William Bone, individually and on behalf of Defendant [Auction Group], stated to George Rose that "you will be a wealthy man" after Crooked Island is sold at auction;
- i. Defendant [Auction Group's] employee and/or agent, Doug Gallimore, and Defendant [Auction Group's] auction brochure, stated that the auction would take place via "satellite hook-up" between Mackinac Island and Troy, Michigan;
- j. Defendant William Bone, individually and on behalf of Defendant [Auction Group], and Defendant [Auction Group's] auctioneer(s), Defendants Eddie Haynes and Eddie Haynes, Inc., stated that they could not announce and impose a minimum upset price for the sale of Crooked Island at the auction, and that they could not withdraw the property from the auction, because they are unauthorized to do so and will be sued by the bidders;
- k. Defendants [Auction Group], Andrew Bone and William Bone omitted to state to Plaintiffs that it is necessary to adequately and aggressively market and advertise Crooked Island for sale to obtain the sale price of at least Eight Hundred Fifty Thousand (\$850,000.00) Dollars anticipated by Plaintiffs;
- l. Defendants [Auction Group], Andrew Bone and William Bone failed to state to Plaintiffs the substantial risk involved in selling Crooked Island "without reserve" and without a minimum upset price;

m. Defendants [Auction Group], Andrew Bone and William Bone failed to state to Plaintiffs that conducting the auction on a weekend would most likely yield a depressed purchase price for Crooked Island;

n. Defendants [Auction Group], Andrew Bone and William Bone failed to state to Plaintiffs that conducting the auction on Labor Day weekend, a national holiday weekend, would most likely yield a depressed price for the sale of Crooked Island; and

o. Defendants [Auction Group], William Bone, Eddie Haynes and Eddie Haynes, Inc. stated to Plaintiffs that Plaintiffs would go to jail and that Plaintiffs would be sued if they failed to sign the Rose Purchase Agreement.

⁵ In particular, Count IV, ¶ 170 of plaintiffs' first amended complaint alleged that "Defendants [Auction Group], Andrew Bone, William Bone, Eddie Haynes and Eddie Haynes, Inc. breached their fiduciary duties owed to Plaintiffs by committing, performing and/or failing to perform the following actions:

a. Failing to advise Plaintiffs of the need to adequately market and advertise Crooked Island for sale;

b. Failing to actually market and advertise Crooked Island in an adequate and commercially reasonable manner to obtain the greatest number of bidders for the auction of Crooked Island;

c. Failing to advise Plaintiffs adequately and reasonably of the substantial risks involved in selling Crooked Island without reserve and without a minimum upset price, including without limitation the risks of selling the property for a depressed price, not being guaranteed any minimum price, and having no ability to reject the highest bid at the auction;

d. Selling Crooked Island at auction without reserve and with no minimum upset price;

e. Failing to conduct the auction of Crooked Island via satellite hook-up between Mackinac Island and Troy, Michigan;

f. Advertising incorrectly that Plaintiffs' two (2) mainland lots in Alpena, Michigan were included with the auction of Crooked Island;

g. Failing to advise Plaintiffs that conducting the auction of Crooked Island on a weekend would most likely yield a depressed purchase price for Crooked Island;

h. Failing to advise Plaintiffs that conducting the auction of Crooked Island on Labor Day weekend, a national holiday weekend, would most likely yield a depressed purchase price for Crooked Island;

- i. Conducting the auction of Crooked Island on a weekend when [the Auction Group] Defendants . . . knew or should have known that the auction at such time would most likely yield a depressed purchase price for the sale of Crooked Island;
- j. Conducting the auction sale of Crooked Island during Labor Day weekend, a national holiday weekend, when [the Auction Group] Defendants . . . knew or should have known that conducting the auction at such time would most likely yield a depressed purchase price for Crooked Island;
- k. Encouraging Plaintiffs to sell Crooked Island without reserve and without a minimum upset price when [the Auction Group] Defendants . . . knew or should have known that such a sale would most likely yield a depressed purchase price for Crooked Island, and would otherwise result in the inability of Plaintiffs to withdraw Crooked Island from the auction or reject the high bid;
- l. Intimidating, cornering, physically impeding travel and imposing duress upon Plaintiffs in attempting to force them to sign the Rose Purchase Agreement;
- m. Misrepresenting facts and law to Plaintiffs regarding the alleged inability of [the Auction Group] Defendants . . . to withdraw Crooked Island from the auction, which is contrary to the explicit reservations and statements contained in Preliminary Terms & Conditions of Sale[,] Michigan Island Properties . . . and their advertisement. . . ;
- n. Making misrepresentations and omissions of material facts to Plaintiffs as particularly set forth in Paragraph 138 of this Complaint and incorporated herein.
- o. Advertising for sale Plaintiffs' two (2) lots located on the mainland in Alpena, Michigan, as included with the auction of Crooked Island, when, in fact, Plaintiffs never authorized or intended for same[;]
- p. Auctioning Crooked Island without reserve, in contravention of the explicit terms of the New Agreement[;]
- q. Rushing through the auction of Crooked Island, at the expense of Plaintiffs, in order to save enough time for [the Auction Group defendants] to auction other real property owned by a third party and scheduled to take place on the same afternoon as the auction of Crooked Island[;]
- r. Telling Plaintiffs that they would go to jail and that they would be sued if they fail to sign the Rose Purchase Agreement, and otherwise verbally assaulting Plaintiffs[;]
- s. Threatening Plaintiffs by verbally stating to them that if the Plaintiffs go to the press "you will regret it for the rest of your lives," and otherwise placing Plaintiffs in fear of suffering bodily and property harm to themselves and their family members[;]

t. Cornering Plaintiffs at the auction of Crooked Island and impeding their ability to leave the auction and inflicting duress upon Plaintiffs in an effort to force them to sign the Rose Purchase Agreement.

⁶ Count XII, ¶¶ 219-220 of plaintiffs' complaint alleged:

219. [The Auction Group] Defendants . . . breached their duty of care owing to Plaintiffs by making numerous misrepresentations, omissions and threats to Plaintiffs as previously alleged in this Complaint, as well as acting and/or failing to act in violation of their fiduciary duties as previously alleged in this Complaint.

220. Further, in breach of [the Auction Group] Defendants['] . . . duties of care owing to Plaintiffs, said Defendants violated [various] statutes and ordinances. . . .

⁷ Given that the parties were not in privity of contract at this stage, plaintiffs' innocent misrepresentation claim fails as a matter of law.

⁸ In particular, we order the allegations in ¶¶ 170c and 170k stricken, as well as any pre-agency allegations incorporated in ¶¶ 170n, 219, and 220.

⁹ See, e.g., *Swinebroad-Denton, Inc v Hornback* 744 SW2d 429 (Ky App, 1987) (noting that a seller may withdraw from an auction sale contract anytime before the beginning of the auction, but the seller is bound much more stringently by an exclusive listing agreement which contractually binds the seller to the selling agent for the duration of the term of the agreement.

¹⁰ A contract for the payment of a commission upon the sale of an interest in real estate must be in writing and signed by the parties to be charged. MCL 566.132(1)(e); MSA 26.922(1)(e).

¹¹ It is illegal to use a "booster," "shiller," or other false bidder at any auction sale of personal property. MCL 446.58; MSA 19.565(8). As plaintiffs note, the statutory prohibition is not directly applicable to this case given that it does not apply to auctions of real property.

¹² Given our holding that the parties' oral agreement was void, we need not reach the issue whether the agreement was void in light of the unambiguous integration clause of the parties' written contract, which expressly prohibited oral modifications.

Furthermore, we note, in passing, that the trial court was in error in finding that the parties' oral agreement violated the parol evidence rule. The parol evidence rule does not bar proof of oral modifications occurring after the parties have reduced their obligations to writing. "The swath of the parol evidence rule is not so broad as to prevent a showing of subsequent oral modifications." *Michigan Nat'l Bank of Detroit v Holland-Dozier-Holland Sound Studios*, 73 Mich App 12, 14; 250 NW2d 532 (1976).

¹³ We note that, in *Phinney v Perlmutter*, 222 Mich App 513, 534-537; 564 NW2d 532 (1997), a panel of this Court expressed disagreement with the holding in *Nieves* that reliance must be reasonable. The *Phinney* panel stated its opinion that reliance need only be actual, not reasonable, and further indicated that it did not consider itself bound to follow *Nieves* under Administrative Order No. 1996-4 because opinions had been issued before and after *Nieves* that negated the reasonableness requirement. *Phinney*, *supra* at 536. Recognizing that this specific issue has not been raised by the parties in this matter, we decline at this time to express an opinion on the issue other than to state that we consider ourselves bound, pursuant to MCR 7.215 (the successor to Administrative Order No. 1996-4), to follow *Nieves* for the reasons stated by the panel in *Novak*, *supra* at 689-690.

¹⁴ As was noted previously, a claim of innocent misrepresentation does not require a showing that the plaintiff knew the challenged representation by a contracting party was false. *M & D, Inc*, *supra*. Plaintiffs here have alleged a prima facie case of innocent misrepresentation.

¹⁵ The Auction Group defendants erroneously asserted in their brief in support of their motion for summary disposition that plaintiffs' breach of fiduciary duty claim was based in contract.

¹⁶ See *In the Matter of Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988) (noting that, in the absence of evidence of bad faith, unfair dealings, or a conflict of interest, the liability of a trustee may be limited by the terms of the trust instrument).

¹⁷ Plaintiffs' first amended complaint alleged that, as part of the oral agreement, defendant William Bone proposed that "[i]f after the recess, the bidding did not reach a level that was sufficient to Plaintiffs, . . . [the Auction Group], itself, would make the final bid on Crooked Island." Plaintiffs further alleged that "[b]ased upon the terms and conditions of the New Agreement offered by William Bone, Plaintiffs agreed to proceed with the auction."

¹⁸ In fact, the trial court's written opinion indicated that plaintiffs' "fraud" claims against defendant Hall were frivolous. However, plaintiffs' complaint did not specifically allege fraud or misrepresentation against Hall. Instead, based on the trial judge's statements on the record, it is clear that the judge meant to find plaintiffs' conspiracy and intentional infliction of emotional distress claims against Hall to be frivolous.

¹⁹ See *Septer v Tjarksen*, 233 Mich App 694, 705-707; 593 NW2d 589 (1999), to determine the liability of counsel's law firm with regard to the payment of sanctions.