STATE OF MICHIGAN

COURT OF APPEALS

A & E HOLDING, INC., a/k/a AIRLINES PARKING, INC., WENDELL FLYNN, and MARGARET FLYNN,

Plaintiffs/Counterdefendants-Appellants,

v

CONSUMERS PETROLEUM PROFIT SHARING TRUST, CONSUMERS PETROLEUM EMPLOYEES RETIREMENT TRUST, C & F HOLDING CORPORATION, C & F LIQUIDATING TRUST, FRANK J. CARROLL and WILLIAM FELDMAN,

Defendants/Counterplaintiffs-Appellees.

UNPUBLISHED
June 8, 2001

No. 214874
Wayne Circuit Court
LC No. 97-722962-CZ

A & E HOLDING, INC., a/k/a AIRLINES PARKING, INC., WENDELL FLYNN, and MARGARET FLYNN,

Plaintiffs-Appellants,

v

CONSUMERS PETROLEUM PROFIT SHARING TRUST, CONSUMERS PETROLEUM EMPLOYEE RETIREMENT TRUST, C & F HOLDING CORPORATION, C & F LIQUIDATING TRUST, FRANK J. CARROLL and WILLIAM FELDMAN,

Defendants-Appellees.

No. 220990
Wayne Circuit Court
LC No. 99-907466-CZ

Before: Saad, P.J., and Griffin and R.B. Burns,* JJ.

PER CURIAM.

I. Facts and Proceedings

These consolidated cases arise out of a written agreement which gave plaintiffs the option to purchase a parcel of land near Detroit Metropolitan Airport. Plaintiffs initially owned the parcel, but granted a mortgage to defendants in 1988 to secure a loan. In 1991, after plaintiffs failed to timely repay the loan, defendants foreclosed on the mortgage and acquired the property by sheriff's deed.

In December 1996, plaintiffs and defendants signed an agreement that gave plaintiffs an option to repurchase the parcel upon repayment of the underlying loan, plus interest, an amount totaling approximately $6.25 million.[1] The agreement provides that plaintiffs must exercise the option on or before December 31, 1998. The agreement also contains a rider which provides, among other things, (1) that plaintiffs will pay "all property taxes and assessments accruing during the option period," (2) that the agreement contains handwritten changes to be initialed by the parties, and (3) that:

> During the term of the Option Agreement, if Seller receives a bona fide offer which it wishes to accept, it shall provide a copy of the offer to API, executed by Seller and the purchaser sent certified mail, return receipt requested. API shall have thirty (30) days from the time of its receipt of the offer to equal such bona fide offer, and Seller shall be obligated to sell the premises to API upon such terms and conditions if API gives written notice by certified mail, return receipt requested, to Seller of its intention to purchase said premises within said thirty (30) day period. Any listing or advertisement of the premises for sale shall inform prospective purchasers of this condition.
>
> In the event Seller desires to sell the Land and API does not wish to purchase same, this Option Agreement shall terminate.

Pursuant to the terms of the agreement, plaintiffs paid defendants $600,000 on the note and an additional $600,000 designated for the payment of delinquent property taxes on the land. Thereafter, plaintiffs continued to pay property taxes on the parcel. Six months after the parties entered the agreement, defendants notified plaintiffs about an alleged "offer to purchase" the property by DeMattia Investments, LLC. Defendants told plaintiffs they could match the offer within thirty days or forfeit their interest in the property, pursuant to the right of first refusal clause in the agreement.

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[1] Plaintiffs and defendants acknowledge that the market value of the property far exceeds the option contract price.

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

Instead, plaintiffs filed a complaint on July 24, 1997, asserting that defendants promised them an absolute right to repurchase the property at any time prior to December 31, 1998. Plaintiffs alleged that defendants inserted the right of first refusal rider after plaintiffs' counsel approved the agreement, when Wendell Flynn was ill and unable to read the document, and at a time when plaintiffs needed to sign many documents under pressure of time. Accordingly, plaintiffs sought reformation of the agreement, alleging that defendants obtained plaintiffs' signatures on the rider through fraud and unethical conduct, that the rider is contrary to their written and oral agreement, and that plaintiffs relied on their exclusive right of redemption by paying property taxes after the foreclosure. In answer, defendants asserted that plaintiffs paid the property taxes to avoid further debt collection actions by defendants and that plaintiffs entered the agreement with full knowledge of the right of first refusal clause.[2]

Defendants filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10) and, following oral argument, the trial court granted the motion. The trial court ruled that the terms of the document controlled the agreement between the parties, including the rider, and that parol evidence was not admissible to modify the unambiguous terms of the agreement. The court further ruled that plaintiffs had notice that defendants made changes to the agreement, including the addition of the rider. Moreover, the court denied plaintiff's estoppel claim, finding that, even if Wendell Flynn was ill when he signed the agreement, plaintiffs failed to present a claim that he was incompetent to enter into a contract.[3]

Following the trial court's ruling, plaintiffs argued that, even if the rider was valid, the third-party offer from DeMattia did not constitute a bona fide offer to purchase the property under the terms of the agreement, and asked for an opportunity to amend their complaint to include that claim. The trial court denied the request, finding that DeMattia was a bona fide purchaser.

On March 12, 1999, plaintiffs filed a new complaint in which they alleged that the DeMattia offer constituted a mere option to buy the property and did not qualify as a bona fide offer under the terms of the agreement. Defendants again filed a motion for summary disposition, arguing that plaintiffs' suit was barred by res judicata because the trial court ruled on the issue in the previous action. The trial court agreed and entered an order granting defendants' motion on res judicata grounds on June 17, 1999.

II. Analysis

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[2] Defendants also filed a countercomplaint in which they alleged that plaintiffs filed a notice of *lis pendens* on the property, but had no right to block the sale of the property to a third party. Defendants requested a declaratory judgment allowing them to sell the property and also claimed damages for breach of contract and slander of title.

[3] The trial court also ruled that the contract did not constitute a redemption agreement and that the money and taxes plaintiffs paid were merely consideration for the option to purchase. However, the trial court awarded plaintiffs a pro rata refund of the taxes when plaintiffs failed to match DeMattia's offer and the option to purchase terminated. The trial court also ordered that the *lis pendens* be removed because plaintiffs had no interest in the property.

A. Fraud Claim

Plaintiffs contend that, in granting defendants' motion for summary disposition, the trial court erroneously failed to consider extrinsic evidence relating to plaintiffs' fraud claim. Specifically, the trial court ruled that parol evidence is inadmissible to support plaintiffs' fraud claim and that the agreement controls the rights and obligations of the parties.[4]

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).[5]

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v Chrysler Corp*, 445 Mich 109, 127, n 28, 517 NW2d 19 (1994). To this end, courts must determine the intent of the parties from the words used in the document itself and courts may not "make a different contract for the parties or … look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998) (citations omitted). As this Court observed in *UAW-GM*:

> The parol evidence rule may be summarized as follows: "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." This rule recognizes that in "[b]ack of nearly every written instrument lies a parol agreement, merged therein." "The practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his obligation by testifying that a

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[4] The trial court also ruled that plaintiffs failed to establish a genuine issue of material fact regarding their fraud claims, even in light of parol evidence concerning negotiations just before plaintiffs signed the agreement, an issue we discuss *infra*.

[5] A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek*, *supra*, at 337. Under this rule, "[t]he court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id*. As our Supreme Court articulated in *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Id*. (citations omitted).]

> contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." In other words, the parol evidence rule addresses the fact that "disappointed parties will have a great incentive to describe circumstances in ways that escape the explicit terms of their contracts." [*Id*. at 492 (citations omitted).]

Before applying the parol evidence rule, courts must find that the parties intended the written instrument to constitute a final and complete expression of the agreement concerning the matters covered. *Farm Credit Services of Michigan's Heartland, PCA v Weldon,* 232 Mich App 662, 669; 591 NW2d 438 (1998). The contracting parties may express that intent by including a merger or integration clause in the writing that explicitly states that the document represents the full and accurate agreement of the parties. *UAW-GM, supra,* at 493.

Here, the disputed agreement contains the following clause:

> No Oral Agreements. This Agreement constitutes the entire agreement between the parties with respect to the sale of the Land and all prior to contemporaneous oral or written agreements, understandings, representations and statements are merged into this Agreement. Neither this Agreement nor any provisions hereof may be waived, modified, amended, discharged or terminated, except by an instrument in writing signed by the party against which enforcement is sought and then only to the extent set forth in such instrument.

This clause evidences an intent by plaintiffs and defendants that the agreement constitutes a complete expression of their understanding. Accordingly, our task is to determine whether the trial court should have considered parol evidence in deciding plaintiffs' fraud claim, in light of the integration clause. While, generally, parol evidence is admissible to demonstrate fraud,[6] "in the context of an integration clause, which releases all antecedent claims, only certain types of fraud would vitiate the contract." *UAW-GM, supra*, at 503. The only assertion of fraud that may be supported by parol evidence to vitiate a contract "is fraud that would invalidate the merger clause itself, i.e., fraud relating to the merger clause or fraud that invalidates the entire contract including the merger clause." *Id*.

Plaintiffs do not allege fraud regarding the merger clause itself and do not assert that any alleged fraud invalidates the entire agreement. Rather, plaintiffs say that the trial court should

[6] To prove a claim of fraud, a plaintiff must show:

> (1) defendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996), quoting *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).

have reformed the contract or should have applied equitable principles of promissory estoppel to exclude the rider because defendants never negotiated for a right of first refusal clause and failed to disclose that they inserted the rider containing that clause.

The effect of a valid integration clause is to prevent the introduction of parol evidence of other, contemporaneous agreements by the parties that are not contained in the contract. Here, on the other hand, plaintiffs argue the absence of any outside agreement regarding a right of first refusal, a term which is explicitly written into the contract. Therefore, plaintiffs' essential claim is not that the agreement is not fully integrated, but that it contains *additional* terms to which the parties did not agree. Thus, although the integration clause expresses an intent that the agreement is a complete and final embodiment of their understanding and, therefore, is non-modifiable following execution, plaintiffs argue that defendants surreptitiously "slipped in" the right of first refusal clause, knowing Wendell Flynn was ill and that plaintiffs were under pressure of time to sign numerous contracts.

Where, as here, the terms of the agreement are clear and unambiguous and the parties express an intent that the agreement constitutes their final understanding through a valid integration clause, parol evidence of negotiations surrounding the execution of the document is not admissible unless, as noted above, the claim constitutes fraud that would invalidate the integration clause itself or fraud that invalidates the entire contract including the integration clause. *UAW-GM, supra,* at 503.

We decline to find an additional fraud exception to the parol evidence rule for the allegations made by plaintiffs here. Not only does the merger clause preclude resort to parol evidence regarding the parties' intent and agreement, the contract itself negates plaintiffs' claims of fraud.[7] Plaintiffs (1) signed the agreement containing a valid merger clause, (2) initialed the handwritten reference to the rider in the body of the agreement and (3) executed a separate signature page acknowledging receipt and acceptance of the rider. We find the initials particularly significant because, despite plaintiffs' claim that they were unaware of the rider, Wendell Flynn followed an instruction therein by initialing each handwritten change throughout the agreement. The initials and signatures constitute a manifestation of assent to the agreement, to the rider and to each change made by defendants. Thus, even if plaintiffs' allegations are true that defendants inserted the rider without verbal notification, they indicated a specific awareness and acceptance of the terms of the agreement, including the terms of the rider.

Moreover, regardless whether the parties explicitly discussed the right of first refusal clause, plaintiffs' allegations of fraud are insupportable because, as a matter of law, "[t]he stability of written instruments demands that a person who executes one shall know its contents or be chargeable with such knowledge." *Christy v Kelly*, 198 Mich App 215, 217 (1992); 497 NW2d 194, quoting *Sponseller v Kimball*, 246 Mich 255, 260; 224 NW 359 (1929).

[7] Plaintiffs raise a cursory argument that the trial court should have ruled that plaintiffs have a viable claim of promissory estoppel. However, plaintiffs' claim that they relied on defendants' promise of an absolute right to redeem the property is also contradicted by the clear and unambiguous terms of the agreement and evidence of any contemporaneous agreements to the contrary is not admissible.

Accordingly, "[i]t is well established that a person cannot avoid a written contract on the ground that he did not attend to its terms, did not read it, supposed it was different in its terms, or that he believed it to be a matter of mere form." *Rowady v K Mart Corp*, 170 Mich App 54, 60; 428 NW2d 22 (1988).[8] To that end, case law has established that "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant." *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). Furthermore, notwithstanding Wendell Flynn's illness, it is well settled that, if a person is unable to read a document, "he should have a reliable person read it to him." *Christy, supra*, at 217 quoting *Sponseller, supra*.

We further observe that, in addition to the valid merger clause, the terms of the agreement and rider are unambiguous and the changes are clearly noted. There is no allegation that the rider was obscured or that the other two signers, Margaret Flynn and Brigid Flynn Godvin, listed as vice-presidents of Airlines Parking, could not understand (or read for themselves or for Wendell Flynn) the terms of the agreement or the changes clearly marked therein. Moreover, because plaintiffs were represented by sophisticated transactional counsel, plaintiffs' claim that they were "fooled" into signing the agreement rings hollow. Based on the expressed intent of the parties through their acknowledgment and authorization of the changes, in addition to the integration clause, plaintiffs' claim of fraud is precluded as a matter of law based on the agreement itself.[9]

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[8] Indeed, a party may not avoid a contract claiming an inability to read it because, in such a case, "he should have a reliable person read it to him." *Christy, supra*, quoting *Sponseller, supra*.

[9] Were we to consider the parol evidence offered by plaintiffs under a "fraud in the execution" theory, we would conclude, as did the trial court, that plaintiffs failed to established an issue of material fact to overcome defendants' motion for summary disposition under MCR 2.116(C)(10).

Fred Gordon, the attorney who negotiated the agreement for plaintiffs, was unavailable to communicate with defendants' attorneys on the day the agreement had to be signed. Rather, Gordon was with James Simpson of Bloomfield Acceptance Corporation, working on other contracts for plaintiffs. Therefore, Gordon instructed defendants to direct any questions regarding his draft of the agreement to Henry Mitchell, a tax lawyer who also represented plaintiffs. The parties agree that defendants' attorneys told Mitchell about some of their revisions to Gordon's draft. Mitchell, in turn, testified that he told Gordon that defendants' attorneys made changes to the agreement and that a copy was faxed to Simpson's office for Gordon's review. Gordon testified that he chose not review the agreement before Simpson took the documents to plaintiffs for execution because the revisions Mitchell described did not constitute a material change to the agreement.

Some time later, Simpson took the agreement, including the rider, to plaintiffs' home for their signatures. Wendell Flynn testified that he was unable to read any documents he signed that night because he suffered from pneumonia and Legionnaires disease. Accordingly, Wendell Flynn testified that he relied on Gordon to finalize the agreement, though Gordon was not present at the closing. Wendell Flynn initialed the changes throughout the agreement, signed the agreement and the separate rider as president of Airlines Parking, Inc. Also, Margaret Flynn and Brigid Flynn Godvin, listed as vice-presidents of Airlines Parking, both signed the agreement and rider.

While the parties dispute whether defendants told Mitchell about the rider, the plaintiffs

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B. Motion to Amend Complaint

Plaintiffs also argue that, after granting defendants' motion for summary disposition, the trial court abused its discretion by denying plaintiffs' motion to amend their complaint to add a claim that the DeMattia offer was not a bona fide offer under the agreement that would trigger the right of first refusal. We agree.

This Court reviews a trial court's decision to grant or deny a motion to amend pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Doyle v Hutzel Hospital*, 241 Mich App 206, 212; 615 NW2d 759 (2000). The trial court may allow amendment of the complaint after summary disposition has been granted to the opposing party. *Formall v Community Nat'l Bank of Pontiac (After Remand)*, 166 Mich App 772, 783; 421 NW2d 289 (1988); *Midura v Lincoln Cons Schools*, 111 Mich App 558, 561; 314 NW2d 691 (1981). "If a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless amendment would be futile." *Doyle, supra* at 212, citing MCR 2.116(I)(5) and *Weymers, supra* at 658.

Here, the trial court held that the amendment of plaintiffs' complaint would be futile. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

When presented with a dispute over a contract term, this Court must enforce the parties' agreement as written, giving its language its ordinary and plain meaning. *G & A, Inc v Nahra*, 204 Mich App 329, 330-331; 514 NW2d 255 (1994). The disputed clause provides that, if defendants receives a bona fide offer, plaintiffs have thirty days after receiving notice of the offer

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specifically acknowledged the changes on the agreement itself. Further, Gordon admitted that, had he simply read the document, any allegations of fraud would have been averted. Even assuming plaintiffs' assertions are true, that Wendell Flynn suffered from illnesses that prevented him from reading the agreement, no evidence suggests that Margaret Flynn or Brigid Flynn Godvin, both officers of the corporation, could not read the agreement for themselves or could not inform Wendell Flynn of the changes explicitly set forth therein. We decline to vitiate or reform a clear and unambiguous agreement, duly executed by the parties, based on plaintiffs' own inattentiveness or that of their attorneys.

We also find that plaintiffs failed to establish a genuine issue of material fact regarding their claim that defendants made the changes at the eleventh hour, giving plaintiffs insufficient time to review the revisions. The parties began negotiating the agreement just two days before plaintiffs had to sign it. Accordingly, all the negotiations, drafts and alterations to the agreement took place under pressure of time. Further, while time was of the essence, no evidence suggests that time was so limited that plaintiffs could not read the agreement or its changes before signing it.

Moreover, as defendants point out, despite their alleged lack of knowledge about the rider, plaintiffs followed a clause therein which required them to pay property taxes throughout the term of the option. Accordingly, plaintiff failed to establish a genuine issue of material fact with regard to plaintiffs' fraud claim and request for reformation.

to match it. This Court has defined an offer as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to the bargain is invited and will conclude it." *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997), citing Restatement of Contracts, 2d, § 24. Plaintiffs argue that the DeMattia "offer" constituted an offer to enter into an option contract not an offer to purchase the parcel. Further, plaintiffs correctly note that the right of first refusal clause requires that the offer constitute an bona fide offer to purchase and not merely an offer to enter into an option contract.

Under the *Eerdmans* definition of an offer, the DeMattia "purchase agreement" certainly constitutes a manifestation of a willingness to enter into a bargain. *Eerdmans, supra* at 364. However, this Court must also determine whether plaintiffs and defendants intended that the right of first refusal would be triggered only by an offer to purchase and whether the DeMattia "purchase agreement" constitutes an offer to purchase. *G & A, Inc, supra* at 330-331.

The first part of the right of first refusal provision, referring to defendants' receipt of "a bona fide offer which it wishes to accept" and which plaintiffs must equal under "the same terms and conditions as the offer," suggests that *any* offer qualifies to trigger plaintiffs' right of first refusal. More importantly, however, the provision also requires plaintiffs to inform defendants of their "intention to purchase said premises within said thirty (30) day period." Clearly, an *option* contract offer would be inconsistent with the language directing plaintiffs to match the terms and conditions of the offer by purchasing the land. If plaintiffs bound themselves to the same terms and conditions as an offer to enter into an option contract, plaintiffs would not inform defendants of an intent to purchase as the rider contemplates; rather plaintiffs would merely have to inform defendants of an intent to retain the right to purchase at a later date. Because an offer to enter an option contract is inconsistent with the language of the right of first refusal clause, the offer contemplated by the agreement must be a bona fide offer to purchase to trigger the right of first refusal.

It is well established that "[a]n option is a preliminary contract for the privilege of purchase and not itself a contract of purchase." *Twp of Oshtemo v Kalamazo*o, 77 Mich App 33, 37; 257 NW2d 260 (1977). This Court further observed:

> An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. An option is, in effect, only an offer which requires strict compliance with the terms of the option both as to the exact thing offered and within the time specified. Failure to so comply results in loss of the rights under the option.[*Id*. (citations omitted).]

Here, we find that the disputed "purchase agreement" offered to DeMattia by defendants constitutes an offer to enter an option contract. The "purchase agreement" allows DeMattia the right to buy the property, but allows DeMattia to refuse to purchase it at its "sole and absolute discretion" if the property is unsatisfactory or if DeMattia cannot obtain certain rezoning or variances for its intended use. Accordingly, the "purchase agreement" is not a bona fide purchase offer received by defendants; rather, it constitutes defendants' offer to enter a contract for DeMattia to purchase the property at its option and within a certain period of time.

The agreement between plaintiffs and defendants requires a bona fide, third-party offer to purchase the property to trigger the right of first refusal, not an offer to enter into an option contract. Because defendants' offer to DeMattia did not constitute a bona fide purchase offer, the right of first refusal clause was not triggered to require plaintiffs to match the terms of the offer. For that reason, plaintiffs' requested amendment to the complaint would not be futile because it would not merely restate the allegations already pleaded. Therefore, we find that the trial court abused its discretion in denying plaintiffs' motion to amend their complaint.[10]

Accordingly, we affirm the trial court's grant of summary disposition to defendants on plaintiffs' fraud claims, reverse the trial court's order denying plaintiffs leave to amend their complaint and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns

[10] In light of this Court's resolution of these issues, we decline to address plaintiff's claim that the trial court erred by granting defendants' motion for summary disposition on res judicata grounds.