

STATE OF MICHIGAN  
COURT OF APPEALS

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ELAINE A. HAAS and CHARLES J. BANNON,

Plaintiffs-Appellants,

v

WADE H. DEAL, SARAH J. DEAL, TRACEY L.  
DEAL, AND J.A. DELANEY & CO.,

Defendants-Appellees.

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UNPUBLISHED

October 22, 2002

No. 230490

Wayne Circuit Court

LC No. 99-918983-CH

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order granting summary disposition to defendants. Plaintiffs sued defendants for fraud and consumer protection violations after defendants<sup>1</sup> sold plaintiffs a home next to a cemetery that planned to expand into property adjoining the home. We affirm in part and reverse and remand in part.

Plaintiffs' Allegations and the Trial Court's Ruling

There are three basic theories of fraud: (1) traditional intentional fraud, (2) innocent misrepresentation, and (3) silent fraud. *M & D, Inc v McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998), modified on other grounds by *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 689-691; 599 NW2d 546 (1999). In their complaint, plaintiffs raised all three theories, as well as violations of MCL 445.903(1), a provision of the Michigan Consumer Protection Act (MCPA). The trial court granted defendants summary disposition because it concluded that plaintiffs knew enough about the cemetery such that they could have stopped the purchase if they had so desired.

Standard of Review

We review de novo a trial court's decision to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court stated that it was granting summary disposition under MCR 2.116(C)(8), it appears that the trial court

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<sup>1</sup> Defendants Wade and Sarah Deal were the sellers of the home in question. Defendants Tracey Deal and J.A. Delaney & Co. acted as brokers.

looked beyond the pleadings in analyzing the motion. Accordingly, we will treat the motion as having been granted under MCR 2.116(C)(10). *Gibson v Neelis*, 227 Mich App 187, 189-190; 575 NW2d 313 (1997). Under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition is appropriate if there is no genuine issue with regard to any material fact. *Id.* The court must not make its own determinations concerning witness credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

### Traditional Fraud

The elements of traditional fraud are the following: (1) the defendant made a material representation, (2) that representation was false, (3) the defendant knew that it was false or made it with reckless disregard for its truth or falsity, (4) the defendant intended to make the plaintiff rely on the statement, (5) the plaintiff did rely on the statement, and (6) the plaintiff suffered damages as a result. *M & D, Inc, supra* at 27; *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Further, the plaintiff's reliance must have been reasonable. *Novak, supra* at 689-691; *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464-465; 517 NW2d 235 (1994).

Plaintiffs alleged and provided testimony that defendant Tracey falsely told them that the cemetery expansion was planned to occur away from the home in question and would not be seen from the home. Plaintiffs further alleged and provided testimony that defendant Wade falsely told them that the adjoining property was owned by the township and would not be developed. We conclude that there were questions of fact regarding whether these representations were false and material and whether defendants made the statements with reckless disregard for their truth or falsity.<sup>2</sup> Additionally, it is reasonable to assume that defendants intended to make plaintiffs rely on the statements, that plaintiffs did rely on the statements,<sup>3</sup> and that plaintiffs suffered damages as a result.

It is a more difficult question whether plaintiffs *reasonably* relied on the statements, when they could have determined the facts concerning the adjacent property by themselves. Reliance can be unreasonable as a matter of law. See, e.g., *Novak, supra* at 691. However, unlike the defendants in *McMullen v Joldersma*, 174 Mich App 207, 216; 435 NW2d 428 (1988), defendants in the present case allegedly made actual misstatements, and unlike the plaintiffs in *Nieves, supra* at 464-465, plaintiffs in the present case did not have the correct information in hand. Given this distinguishing case law, we conclude in this de novo review that under the circumstances of the present case, the reasonableness of plaintiffs' reliance was more

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<sup>2</sup> While plaintiffs did not offer direct proof of defendants' knowledge that their statements were false, there were public meetings regarding the expansion of the cemetery, and plaintiffs claimed the sellers' neighbors were aware of it. Moreover, an earlier prospective buyer of the house in question testified that she told Tracey that the cemetery planned to expand onto the land near the home. Plaintiffs adequately raised a question of fact regarding this element of fraud.

<sup>3</sup> While Wade's alleged misstatement (but not Tracey's alleged misstatements) occurred after the purchase agreement was signed, plaintiffs nonetheless acted further to their detriment by going through with the closing.

appropriately a jury question. While we are sympathetic to the trial court's feelings regarding the reasonableness of plaintiffs' reliance, we conclude that a jury should be the ultimate arbiter of this question.

Defendants contend that Tracey's alleged misrepresentations could not constitute fraud because they related to a future event. See *Kamalnath, supra* at 554 ("an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact"). In making this argument, defendants rely on *McMullen, supra* at 216. However, Tracey allegedly made *material misstatements* regarding the planned location of the expansion and regarding whether graves would be visible from the home under the planned expansion. We thus find this case sufficiently distinguishable from the situation in *McMullen*, because Tracey allegedly made affirmative false statements regarding the existing cemetery plans, whereas in *McMullen*, the defendants merely failed to inform the plaintiffs about a possible highway bypass project. Given the distinguishing characteristics, we do not believe that the *McMullen* case is ultimately controlling with regard to the instant issue.

We conclude that plaintiffs sufficiently set forth a case of traditional fraud against both the agents and the sellers.

#### Innocent Misrepresentation

Innocent misrepresentation differs from traditional fraud because the defendant need not have intended to defraud the plaintiff. *M & D, supra* at 27-28. However, the misrepresentation must have benefited the defendant, and the parties must be in privity of contract. *Id.* Accordingly, we conclude that plaintiffs presented a sufficient case of innocent misrepresentation with regard to Wade's alleged misstatement but not with regard to Tracey's alleged misstatements, because Tracey was not a party to the contract.

#### Silent Fraud

Plaintiffs additionally claimed silent fraud, which occurs when a defendant has a duty to disclose information and fails to do so. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000). In the present case, Tracey did not have a duty to disclose all information to plaintiffs because she was acting as a dual agent. See MCL 339.2517(2). Moreover, under *McMullen, supra* at 216, no silent fraud occurred with regard to Tracey's alleged misrepresentations.

Plaintiffs claim that the sellers are liable for silent fraud because they had a duty to disclose the cemetery's location in the seller's disclosure statement. This statement must disclose any "[f]arm or farm operation in the vicinity; or proximity to a landfill, airport, shooting range, etc.[]" MCL 565.957. Under the doctrine of *ejusdem generis*, a general word following specific items is presumed to include only items of the same kind, class, character, or nature as those listed. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 242; 615 NW2d 241 (2000). Although a cemetery is sometimes considered an undesirable residential neighbor, it does not rise to the level of offense generated by farms, landfills, airports, and shooting ranges, all of which present potential problems of odor or noise pollution not attendant to the cemetery here. Sellers cannot be required to disclose any neighboring use that might be considered unpleasant. We conclude that the term "etc." was not intended to include cemeteries. Therefore,

the sellers in the present case did not have a disclosure duty under MCL 565.957, and the trial court properly dismissed the silent fraud claim against them.

#### The MCPA

Finally, plaintiffs claimed that defendants violated MCL 445.903(1), part of the MCPA, by engaging in unfair, unconscionable, or deceptive practices while conducting trade or commerce. This statute applies to Tracey and her company. See *Price v Long Realty, Inc*, 199 Mich App 461, 471; 502 NW2d 337 (1993). Given plaintiffs' establishment of a prima facie case of traditional fraud against Tracey, we conclude that summary disposition of this claim was inappropriate with regard to Tracey and her company. We further conclude, however, that the statute in question does not apply to the sellers' isolated sale of their home because they were not engaging in trade or commerce as defined by MCL 445.902(d). Therefore, summary disposition with regard to the sellers was appropriate on this claim.

#### Judicial Misconduct

Plaintiffs also argue that the trial court improperly took judicial notice of the desirability of embalmed bodies as neighbors and made findings regarding plaintiffs' credibility. Plaintiffs request that this case be assigned to a different judge on remand. Judicial notice is appropriate when a fact is either generally known within the jurisdiction or can be accurately determined from sources whose accuracy cannot be reasonably questioned. MRE 201. The desirability of embalmed bodies as neighbors does not meet this test; however, this Court notes that the circuit court was apparently speaking in jest when it made this statement. We note, however, that the statements regarding plaintiffs' credibility were inappropriate because the court was ruling on a summary disposition motion. Nevertheless, we cannot agree with defendants that this case must be assigned to a different judge on remand. Indeed, there is a strong presumption of judicial impartiality, see *B & B Investment Grp v Gitler*, 229 Mich App 1, 17; 581 NW2d 17 (1998), and we do not find that the judge in this case exhibited actual bias toward or a settled disposition for one party. *Id.*; *Kiefer v Kiefer*, 212 Mich App 176, 183; 536 NW2d 873 (1995).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

/s/ Richard A. Bandstra  
/s/ Michael S. Smolenski  
/s/ Patrick M. Meter