STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL A. HUHTASAARI and PHYLLIS H. HUHTASAARI,

Plaintiffs-Appellants,

v

BRUCE A. STOCKEMER, RITA J. STOCKEMER and HJH INC., d/b/a REMAX 100 COMMERCE,

Defendants-Appellees,

and

MECK REALTY, INC., d/b/a CENTURY 21 MECK,

Defendant.

UNPUBLISHED
December 20, 2005

No. 256926
Oakland Circuit Court
LC No. 2003-047206-CK

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiffs Michael and Phyllis Huhtasaari (the Huhtasaaris) appeal as of right the trial court's grant of summary disposition in favor of defendants, Bruce and Rita Stockemer (the Stockemers), on the Huhtasaaris' claims of fraud and misrepresentation pertaining to their purchase of a residence from the Stockemers. The Huhtasaaris also contest the grant of summary disposition in favor of defendant, HJH, Inc., d/b/a Remax 100 Commerce (HJH), regarding the same real estate transaction. We affirm.

I. Basic Facts And Procedural History

In July 1978, the Stockemers purchased a residence and appurtenant acreage, located in White Lake, Michigan. On May 6, 2002, in preparation for sale of the home, the Stockemers completed a seller's disclosure statement. They specifically indicated that the home's roof was approximately three years old and that it did not leak.

Within approximately two weeks of listing the property, the Stockemers' listing agent, Janet Stockton of HJH, obtained prospective buyers for the Stockemers' home. Stockton

brought the prospective buyers to the home, resulting in the submission of an offer to purchase. In mid-May 2002, Rush Home Inspections conducted a home inspection, but the inspector terminated the inspection upon finding mold in the Stockemers' attic. The inspector indicated to Stockton's son, Steven Stockton, who was present in the home for the inspection, that "there was black mold in the attic." The prospective buyers withdrew their offer to purchase the Stockemers' property. Stockton advised the Stockemers to take "the house off the market" and recommended that they have an environmental study conducted. The Stockemers' withdrew their home from the market on June 12, 2002.

The Stockemers' home was relisted on July 31, 2002, following the Stockemers' remediation of the mold condition in the attic. The Stockemers reported to Stockton that they had soda blasting performed in the attic and that they had been informed that the mold in the attic was harmless and not black mold. Stockton advised her clients to revise their seller's disclosure statement, but the Stockemers believed it was unnecessary and refused.

In August 2002, the Huhtasaaris viewed the Stockemers' home on at least two separate occasions, after which they submitted an offer of purchase through their agent, Paul Mecklenborg of Meck Realty, Inc. (Meck Realty). The seller's disclosure statement that the Stockemers provided to the Huhtasaaris was the same form, without alteration, that was submitted to the previous prospective buyers in May 2002.

Although Michael Huhtasaari was a journeyman carpenter, before closing on the property, the Huhtasaaris retained the services of a home inspector, Derek Place, who was recommended by Mecklenborg. The Huhtasaaris and Mecklenborg were present for the home inspection. Place noted water stains in the basement of the home, opining that it appeared to be a prior leak that had "been taken care of." Place suggested that the water may have entered the home from the outside due to poor drainage, a condition that could be corrected by adding or regrading the soil around the home's foundation. Place also observed that new wood was present in areas of the basement ceiling. Place noted the necessity of securing "loose flashing" and "visible rot and decay" on fascia boards on the exterior of the home. Place observed new wood and evidence of prior water intrusion near the interior front door and "underneath the two doorwalls in the rear of the house."

During the inspection, Place and Michael Huhtasaari went into the attic of the home and were surprised to note that all of the insulation and wood in that location appeared to be new. Place opined that a problem must have existed in the attic but that it appeared to have been "taken care of." The Huhtasaaris asked Mecklenborg to inquire about the treatment of the attic wood. Stockton informed Mecklenborg of the withdrawal of a prior offer to purchase the home due to mold and the remediation of the area through soda blasting. Stockton told Mecklenborg, based on the Stockemers' representations to her, that the mold found in the attic was not black mold. Stockton offered to provide Mecklenborg with a copy of the environmental report conducted on the Stockemers' behalf when it became available to her. And she requested, on several occasions, that the Stockemers provide her with a copy of the environmental report for the attic. Despite several requests, however, the Stockemers never provided Stockton, the Huhtasaaris, or Mecklenborg with a copy of the environmental report. They believed it was unnecessary to "volunteer it."

The closing on the Huhtasaaris' purchase of the Stockemers' home was conducted in early September 2002. The Huhtasaaris never met or spoke directly with either the Stockemers or Stockton, and the parties executed the closing documents at separate times. The Huhtasaaris elected to proceed with the closing, despite their failure to receive the promised environmental report regarding the work performed on the attic.

Within weeks of the closing, Phyllis Huhtasaari initiated planned renovations on the home. In preparation for removal of wallpaper in the kitchen, she removed a baseboard and noted mold on the back. When Phyllis Huhtasaari began stripping the wallpaper off the kitchen wall, she observed a two-inch-by-four-inch hole in the drywall near a baseboard and black "tentacles sticking out" on the back of the wallpaper removed. A drywall contractor, who was present at the home to provide an estimate to repair a damaged section of drywall in the living room, also observed the problem. The kitchen's interior wall insulation, in the damaged area, was black and discolored. Phyllis Huhtasaari immediately contacted Mecklenborg and Stockton regarding the condition in the kitchen. Michael Huhtasaari cut an expanded opening in the damaged kitchen drywall, discovering that the wall studs were "deteriorated" and that "[t]he plywood that the bricks were laid on was gone." At this same time, the Huhtasaaris observed water entering into the home down the interior of the dining room wall and into the basement area, resulting in water on the dining room plywood subflooring extending "about six to 12 inches."

After receiving testing reports indicating the presence of various types of mold, the Huhtasaaris contracted to have remediation work performed on the home to remove areas and construction materials impacted by mold. The Huhtasaaris had also reported the problems with the home to their insurance carrier, which hired Egerer Forensic Engineering, LLC (Egerer), to inspect the property and prepare a report. Egerer's report indicated that "[t]he mold growth and related structural damage" in the kitchen was "a direct result of long-term water leakage from the flashing area between the lower roof and the house wall." Egerer also opined that, "[t]he severe level of decay of the framing clearly indicates that ongoing leakage has occurred over a period of at least 10 years." The Huhtasaaris filed a complaint against the Stockemers, HJH, and Meck,[1] alleging fraudulent concealment, misrepresentation, failure to disclose known defective conditions of the property, and violation of the Michigan Consumer Protection Act.[2]

HJH moved for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). The trial court ruled that there was no evidence that the Huhtasaaris did not fairly and knowingly execute the release of liability that was contained in their purchase contract. The trial court further held that there was no ambiguity in the terms of the release. Accordingly, the trial court granted HJH summary disposition, pursuant to MCR 2.116(C)(7), on the ground that there had been a valid release of the claims against the realty company.

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[1] Meck settled with the Huhtasaaris and was voluntarily dismissed from the action.

[2] MCL 445.901 *et seq*.

The Stockemers then moved for summary disposition under MCR 2.116(C)(8) and (C)(10), asserting that the Huhtasaaris failed to sustain their fraud claim. The Stockemers noted that they made no representations pertaining to mold within the house, noting that the seller's disclosure statement did not even provide for such comments, and, further, that they were not required to amend the seller's disclosure statement. The Stockemers noted that the prior existence of mold in the attic was disclosed and that any representations made to the Huhtasaaris regarding remediation of the condition had not been proven to be false. The Stockemers argued that the Huhtasaaris could not demonstrate reliance given their hiring of an inspector and election to ignore problems observed or disclosed regarding the home by proceeding with closing. The Stockemers further pointed to a merger clause in the purchase agreement, claiming that it vitiated any claim of fraud regarding the seller's disclosure statement. The Stockemers asserted that the Huhtasaaris' negligence claim also failed based on the sale of the home "as is" and their failure to demonstrate that the Stockemers knew or could have discovered the home's hidden defects.

The trial court issued a written opinion and order granting the Stockemers summary disposition pursuant to MCR 2.116(C)(10). The trial court ruled that the Huhtasaaris had failed to sustain their "burden to show false representation." The trial court specifically found that the Huhtasaaris failed to provide any evidence regarding any material misrepresentations by the Stockemers or their agent. However, the trial court noted, there was evidence that the Huhtasaaris had knowledge that mold had previously existed in the attic but that the Stockemers had remediated said mold. The trial court further ruled that "no evidence exists that [the Stockemers] made any misrepresentation on the Seller's Disclosure Statement." Noting that MCL 565.957 did not require amendment of the seller's disclosure statement, the trial court observed that (i) the form does not contain any provision for disclosures pertaining to mold, (ii) the attic condition was discovered subsequent to completion of the form by the Stockemers, and (iii) the condition had been remediated prior to relisting of the home and purchase by the Huhtasaaris. Based on the "absence of any evidence that [the Stockemers] made a misrepresentation," the trial court dismissed the Huhtasaaris' claims of common law fraud and innocent misrepresentation.

With regard to the Huhtasaaris' claim of silent fraud, the trial court concluded that they had failed to meet the burden of proof, noting that they had failed to demonstrate "suppression of a material fact." The trial court reasoned that sufficient evidence had been presented to show that the Huhtasaaris had knowledge of the prior existence of mold in the attic, and although the Huhtasaaris intimated that the Stockemers knew that the remediation of the attic mold was ineffective, they failed to present any evidence to substantiate that claim. Further, the trial court concluded that the Huhtasaaris had presented no evidence to support their assertion that the Stockemers had knowledge of any mold in the kitchen.

The trial court also rejected the Huhtasaaris' claim that the Stockemers committed fraud by failing to disclose, prior to closing, the environmental inspection report that they had commissioned. The trial court noted that the Huhtasaaris were aware of the report but elected to proceed with the closing, despite a failure to obtain the document. Further, they did not present any statutory or case law compelling the disclosure of such a report. The trial court concluded,

pursuant to MCR 2.116(C)(10), that summary disposition was appropriate with respect to all three theories of fraud and misrepresentation and with respect to the Huhtasaaris' claim for violation of the Michigan Consumer Protection Act.[3]

II. Release From Liability

A. Standard Of Review

The Huhtasaaris assert that the trial court erred in releasing the Stockemers' realtor, HJH, from liability based on language contained in the purchase agreement and subsequent addendums. The Huhtasaaris contend that the language of the release is unclear and ambiguous because of the failure to identify HJH specifically within the release language, and they assert that the release is not contractually valid for lack of consideration. We review de novo the trial court's ruling on a motion for summary disposition.[4]

Under MCR 2.116(C)(7), a party may move for dismissal of a claim on the ground that a claim is barred because of a release. Neither party is required to file supportive material,[5] but any documentation that is provided to the court must be admissible evidence and must be considered by the court.[6] The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[7]

B. Interpreting The Release

(1) Plain Language Of The Release

The validity of a release is dependent on the parties' intent.[8] When the release language is clear and unambiguous, the parties' intent is determined from the plain and ordinary meaning of the language.[9] "A release is valid if it is fairly and knowingly made," but is "invalid if (1) the releasor was acting under duress, (2) there was misrepresentation as to the nature of the release agreement, or (3) there was fraudulent or overreaching conduct to secure the release."[10] To

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[3] On appeal, the Huhtasaaris have abandoned any claimed violation of the Michigan Consumer Protection Act.

[4] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[5] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[6] MCR 2.116(G)(6).

[7] MCR 2.116(G)(5); *Maiden*, *supra* at 119.

[8] *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4; 624 NW2d 903 (2001).

[9] *Id*.

[10] *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987).

require rescission or invalidation of a release, a representation must have been made with the intent to deceive or mislead.[11]

The language of the contract and its incorporated addendums clearly evidence the intent to release HJH from liability. Contracts are to be construed as a whole, with writings that are incorporated by reference to be given effect.[12] When one contract refers to another, the parties' intent is discerned from both instruments being read together.[13] When additional terms or provisions are made part of a contract by reference, the parties are bound by those additional terms.[14] A party's failure to obtain an explanation of a contractual term is deemed ordinary negligence and estops that party from avoiding the contract on the ground that they were ignorant of the provision.[15] "'It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.'"[16]

The offer to purchase specifically identified "Century 21 Meck," followed by a reference that "[t]his is a co-operative sale with REMAX 100 COMMERCE." The contract stated:

> 19. This agreement supersedes any and all understandings and agreements and constitutes the entire agreement between the parties hereto and Broker (other than the listing/commission agreement) and no oral representations or statements shall be considered a part hereof.
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> * * *
>
> 23. Purchaser and Seller acknowledge that no representations, promises, guaranties, or warranties of any kind, including, but not limited to, representations as to the condition of the premises were made by the Broker, his/her sales persons, other cooperating sales persons or persons associated with Broker.

Additional conditions for the sale were incorporated by reference to two addendums. Addendum A provides:

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[11] *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991).

[12] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003); *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922).

[13] *Forge v Smith*, 458 Mich 198, 207, n 21; 580 NW2d 876 (1998); *Whittlesey*, *supra* at 627.

[14] *Forge*, *supra* at 207, n 21; *Whittlesey*, *supra* at 628-629.

[15] *Scholz v Montgomery Ward & Co*, 437 Mich 83, 92; 468 NW2d 845 (1991).

[16] *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999), quoting *Zurich Ins Co v CCR & Co* (*On Rehearing*), 226 Mich App 599, 604; 576 NW2d 392 (1997).

> WE THE UNDERSIGNED FURTHER HOLD CENTURY 21 MECK AND IT'S [sic] COOPERATING OFFICE AND THEIR SALESPERSONS, BROKER AND EMPLOYEES RESPECTIVELY, HARMLESS REGARDING THE ACCURACY OF THE ABOVE REPRESENTATIONS.

Addendum B, in addition to an "as is" provision, recites, in relevant part:

> WE FURTHER HOLD CENTURY 21 MECK AND ITS COOPERATING OFFICE AND THEIR SALESPERSONS, BROKERS, AND EMPLOYEES, RESPECTIVELY HARMLESS AND DO HEREBY INDEMNIFY THEM AGAINST ALL CLAIMS, ACTIONS, OR SUITES [SIC] FOR DAMAGE OF ANY NATURE WHATSOEVER, ARISING FROM THEIR ACTIONS LEADING TO THIS SALE AND FROM OUR DECISION NOT TO AVAIL OURSELVES OF ANY OR ALL OF THE INSPECTIONS.

When read as a whole, the documents comprising the contract are clear and unambiguous regarding both the scope of the release and the individuals covered. The fact that the Huhtasaaris offer a competing interpretation of the release does not, in itself, establish the existence of an ambiguity.[17]

The Huhtasaaris' suggestion that the release provision is invalid, based on fraudulent misrepresentations and disclosures, and their reliance thereon, is not viable. The specific language contained in the contract negates any assertion by the Huhtasaaris that fraudulent misrepresentations serve to negate the release.[18] In signing the contract, the Huhtasaaris acknowledged that "no representations, promises, guaranties, or warranties of any kind, including, but not limited to, representations as to the condition of the premises were made by the Broker, his/her sales persons, other cooperating sales persons or persons associated with Broker." This language serves to foreclose the Huhtasaaris from asserting that their execution of the release was in reliance on representations made by either realtor with regard to the condition of the property.

(2) Consideration

The Huhtasaaris also assert invalidity of the release based on a lack of consideration. "'Where there is no specific recitation of separate consideration for the release, but it is part of a larger contract involving multiple promises, the basic rule of contract law is that whatever consideration is paid for all of the promises is consideration for each one[.]'"[19] The release was incorporated into the closing documents for the sale of the home and did not comprise a separate

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[17] *Cole v Ladbroke Racing Mich, Inc*, 241 Mich App 1, 14; 614 NW2d 169 (2000).

[18] *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292, 298; 553 NW2d 387 (1996).

[19] *Hall v Small*, 267 Mich App 330, 334; ___ NW2d ___ (2005), quoting *Rowady v K Mart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988).

or distinct transaction. Accordingly, the Huhtasaaris' other promises served as the requisite consideration for the Huhtasaaris' promise for the release of liability of the brokers.

III. Concealment And Failure To Disclose

A. Standard Of Review

The Huhtasaaris contend that the trial court erred in granting summary disposition because the Stockemers fraudulently or negligently concealed, or failed to disclose defective conditions within the home. Specifically, the Huhtasaaris assert that the Stockemers purposefully related false information on the seller's disclosure statement by indicating an absence of roof leaks. The Huhtasaaris further allege that the Stockemers' failure to disclose the environmental report concerning remediation of the attic mold, and their verbal assertions that the condition had been alleviated, comprised knowingly false or negligent statements that the Huhtasaaris relied on to their detriment. The Huhtasaaris also allege violations of the Michigan Seller Disclosure Act.[20]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues, and support its position with documentary evidence.[21] The court must consider all the documentary evidence in the light most favorable to the nonmoving party.[22]

B. Common Law Fraud

Common-law fraud necessitates evidence that (1) a material representation was made by the defendant; (2) the representation was false; (3) the defendant knew the representation was false when made, or made the representation recklessly, without knowledge of its truth and as a positive assertion; (4) the representation was made by the defendant with the intention that the plaintiff would act in reliance upon it; (5) the plaintiff did act in reliance; and (6) as a result, the plaintiff suffered an injury.[23]

Here, an inherent problem exists with regard to the Huhtasaaris' fraud claim. The Stockemers made no representations pertaining to the existence of mold within the kitchen or other areas of the home, with the exception of the attic. The Huhtasaaris' assertion that the Stockemers knew or should have known that the attic mold condition had not been fully remediated is not supported by evidence. The environmental report obtained following the attic remediation specifically indicated that, "[t]he purpose of this assessment was to confirm that

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[20] MCL 565.951 *et seq*.

[21] MCR 2.116(G)(3)(b); *Maiden, supra* at 120.

[22] MCR 2.116(G)(4); *Maiden, supra* at 120.

[23] *Hord v Environmental Research Inst* (*After Remand*), 463 Mich 399, 404; 617 NW2d 543 (2000).

abatement and remediation of water damaged building materials was effective in removing mold impact caused by a water damage event." The report affirmatively stated that the home "has been adequately cleaned and is ready for final reconstruction and re-occupancy." The Huhtasaaris have failed to provide evidence that the information provided in the charts attached to the abatement report contradict the written conclusions within the report or that the data contained in the tables placed the Stockemers on notice of a failure to adequately abate the attic mold condition.

Further, the attic condition was not hidden. The Huhtasaaris' inspector observed an anomaly regarding the work done in the attic, which resulted in inquiries to the Stockemers' realtor, who testified that she reported the withdrawal of the prior purchase offer due to mold, remediation of the attic, and the Stockemers' averment that the condition was not black mold. The Huhtasaaris have provided no evidence that the representations they received pertaining to the attic were false. Further, the Huhtasaaris have failed to substantiate their assertion that the mold condition in the attic was the result of roof leaks. Indeed, no evidence has been presented of active leaks or water intrusion within the attic. The only indication of visible water intrusion was within the home's basement. And this condition was not hidden because the Huhtasaaris inspector observed evidence of water leakage, which was not demonstrated to be the result of observable roof leaks rather than other defects caused by the absence of gutters, or sheathing and flashing problems that allowed water to seep into the home within the walls and constituted a hidden defect.

C. Silent Fraud And Fraudulent Concealment

To establish a claim of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.[24] Duty has been defined as comprising a "'question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person.'"[25] The Huhtasaaris assert that the Stockemers and their realtor had an affirmative duty to disclose defects within the home and that this duty was breached when they failed to disclose the existence of mold or water incursion that they knew, or should have known, existed. The Huhtasaaris, thereby, assert a claim for silent fraud or fraudulent concealment.[26]

The recognized common-law rule in the sale of lands is caveat emptor, which provides that "a land vendor who surrenders, title, possession, and control of property shifts all responsibility for the land's condition to the purchaser."[27] However, in *M & D, Inc v McConkey*, this Court stated that while neither a land vendor nor their agent retains a general duty to disclose material defects in property to a potential buyer, their silence may constitute fraud when there

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[24] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

[25] *Christy v Prestige Builders, Inc*, 415 Mich 684, 693; 329 NW2d 748 (1982) quoting *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

[26] See *M & D, Inc v McConkey*, 231 Mich App 22, 28-36; 585 NW2d 33 (1998).

[27] *Christy*, *supra* at 694.

exists either a legal or equitable duty for disclosure. But a plaintiff is required to establish more than just an awareness by the vendor of the existence of a hidden defect.[28] To prove a silent fraud claim, "a plaintiff must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure."[29] Specifically, "a claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. . . . [T]here must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud."[30]

Here, the Stockemers' realtor owed no duty of disclosure to the Huhtasaaris.[31] The Stockemers' realtor merely served as a conduit to convey information from the Stockemers to the Huhtasaaris. The Huhtasaaris obtained an independent inspection that revealed, and placed them on notice, that a prior problematic condition existed in the attic and of water incursion in the basement. The Huhtasaaris were made aware of the existence of an environmental remediation report pertaining to the attic but failed to condition the closing of the property on receipt of the report. Fraud is not actionable when a plaintiff has available the means of discovering the truth and is not precluded from employing them.[32] The Huhtasaaris failed to demonstrate active concealment of any material information.

D. The Seller Disclosure Act

A seller's disclosure statement specifically recommends that any buyer seek "professional advice and inspections of the property" along with the following provisions, which indicate, in relevant part:

> [U]nless otherwise advised, the Seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. This statement is not a warranty of any kind by the Seller or by any Agent representing the Seller in this transaction, and is not a substitute for any inspections or warranties the Buyer may wish to obtain.
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> * * *
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> The following are representations made solely by the Seller and are not the representations of Seller's Agent(s), if any. This information is a disclosure only and is not intended to be a part of any contract between Buyer and Seller.

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[28] *McConkey*, *supra* at 31-32.

[29] *Id*. at 31.

[30] *Id*. at 35-36.

[31] *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988).

[32] *Webb v Malmquist*, 195 Mich App 470, 474; 491 NW2d 851 (1992).

The Seller Disclosure Act imposed a legal duty on the Stockemers to disclose to the Huhtasaaris the existence of certain known conditions affecting the home.[33] The inclusion of an "as is" clause in the purchase agreement does not preclude liability on the basis of fraud.[34] The Stockemers complied with the requirements of MCL 565.954 and provided the Huhtasaaris with a seller's disclosure statement.[35] The Huhtasaaris contend that the Stockemers violated the Seller Disclosure Act by omitting any reference to the attic mold condition and by indicating "no" when referring to whether there were roof leaks. However, the Huhtasaaris failed to provide evidence that the Stockemers' statement regarding roof leaks was false, or known to be false. Additionally, the Huhtasaaris failed to demonstrate that the Stockemers knew of the existence of mold within the kitchen or other areas of the home other than the attic. The mere fact that water incursion was evident on opening the interior walls does not demonstrate that the Stockemers knew of the condition and failed to disclose it or that the source of the condition was a roof leak.[36]

Importantly, the report relied on by the Huhtasaaris to infer that the Stockemers had knowledge of defects in the home does not support their assertions or demonstrate a violation of MCL 565.955(1). Egerer's report refers to "leakage around the base of the front entry door." This leakage is asserted to be related to "a flashing problem over the area" and not specifically a roof leak. Statements that "[w]ater stains were observed on the plywood subflooring along the main entry door" and were described as "appear[ing] to indicate that a long-term leakage has occurred in this area," do not serve to substantiate the Huhtasaaris' claims. Evidence of water leakage on the subflooring would not be visible and hence not observable to the Stockemers because of inaccessibility to those areas. Although the report indicated "severe decay of the framing members and plywood sheathing," these conditions existed within the "wall cavity" and, like the subflooring, were neither readily accessible nor observable to the Stockemers. The report attributed problems with possible mold development to the "excessive" brick mortar that had effectively "blocked the airspace between the backside of the brick and the plywood sheathing." Again, this condition was not observable to the Stockemers and cannot comprise a violation of MCL 565.955(1).

The seller's disclosure statement indicates that it is not a "warranty of any kind" and does not indicate that the sellers actively made any inspections prior to completion of the form. The form specifically indicates that the information is only "a disclosure" and merely states that "the

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[33] MCL 565.957(1).

[34] *McConkey*, *supra* at 32.

[35] See MCL 565.957.

[36] See MCL 565.955(1), which states:

> It is not a violation of this act if the transferor fails to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor.

information in this statement is true and correct to the best of Seller's knowledge as of the date of Seller's signature." The date of the disclosure form is May 6, 2002, before the Stockemers' receipt of the first offer to purchase, which was subsequently withdrawn due to observation of attic mold, disputing any suggestion that the Stockemers were aware of the mold condition when they completed the form.

It is certainly true that MCL 565.960 mandates that disclosures be made in "good faith," with "good faith" defined as "honesty in fact in the conduct of the transaction." In addition, "[t]he specification of items for disclosure in this act does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions."[37] The Huhtasaaris argue that a proviso on the seller's disclosure statement indicating the seller's responsibility to "immediately disclose" the occurrence of "any changes . . . in the structural/mechanical/application systems of this property from the date of this form to the date of closing," demonstrates the Stockemers' silent fraud by failing to amend the form after the discovery of attic mold. However, this is not sufficient to sustain their silent fraud claim. The attic mold condition was shown to be remediated and not an active or current problem. Further, there is no evidence that the attic mold resulted in a "structural/mechanical/application systems" change, necessitating disclosure.

E. Innocent Misrepresentation

The Huhtasaaris' claim of innocent misrepresentation is also flawed and does not constitute a sustainable cause of action. "A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation."[38] A claim of innocent misrepresentation can only be asserted by a plaintiff against a defendant when a privity of contract exists.[39] Hence, any claim of innocent misrepresentation by the Huhtasaaris against HJH must fail based on the lack of a contractual relationship.

Additionally, the claim cannot be sustained against the Stockemers. The Huhtasaaris acknowledge that they had no direct contacts with the Stockemers. The only representations the Huhtasaaris may rely on are contained within the seller's disclosure statement, which have not been demonstrated to be false. The form contained no representations pertaining to mold, and the denial of roof leaks on the seller's disclosure statement has not been shown to be false, since the Huhtasaaris' own experts refer to unobservable or inaccessible structural defects that existed within the home and water incursion from areas other than the roof. Because there is no evidence that representations regarding the attic mold or roof condition were false, the Huhtasaaris' innocent misrepresentation claim is unsubstantiated.

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[37] MCL 565.961.

[38] *McConkey*, *supra* at 27.

[39] *Id*. at 28.

F. Material Facts

The Huhtasaaris contend that, consistent with this Court's prior ruling in *Bergen v Baker*,[40] summary disposition should be reversed based on the existence of genuine issues of material fact. While both this case and *Bergen* involve a residential home sale with damage attributable to water incursion, the cases are factually dissimilar. Specifically, *Bergen* involved interpretation of positive averments made in a seller's disclosure statement regarding the rectification of prior roof leakage by installation of a new roof. The seller's disclosure statement in *Bergen* made broad references to roof leaks but did not specifically refer to leaks in the sunroom roof, and the plaintiffs were able to provide evidence that the condition "was active before the sale."[41] In addition, the defect in *Bergen* was readily observable and, thus, "[i]n light of the considerable extent of the leak, a reasonable fact-finder could also infer that defendants knew about the leak yet proceeded in bad faith by impermissibly failing to disclose the condition."[42] In contrast, while some evidence of water incursion existed in the Stockemers' home, a demonstration of the pervasiveness and extent of the intrusion and resultant damage would only have been discernable with a professional investigation of the unexposed and inaccessible areas of the home. Hence, the Huhtasaaris' reliance on *Bergen* is misplaced in this case.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[40] *Bergen v Baker*, 264 Mich App 376; 691 NW2d 770 (2004).

[41] *Id*. at 378-379, 387.

[42] *Id*. at 388.