STATE OF MICHIGAN

COURT OF APPEALS

SANDRA J. STOUT,

Plaintiff-Appellee,

v

CHRISTINA WITHROW,

Defendant,

and

CAROL WILLIAMS-NAKONECZNY and CENTURY 21 REAL ESTATE 217,

Defendants-Appellants,

and

MICHIGAN ASSOCIATION OF REALTORS,

Amicus curiae.

UNPUBLISHED
February 14, 2008

No. 271632
Lapeer Circuit Court
LC No. 02-031737-CH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendants Carol Williams-Nakoneczny and Century 21 Real Estate 217 appeal as of right a judgment entered for plaintiff Sandra J. Stout following a jury verdict in favor of plaintiff on plaintiff's intentional misrepresentation claim against defendants. The judgment awarded plaintiff $120,659.32 in damages, plus costs and interest. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Following a divorce, plaintiff began looking for a home to purchase in the fall of 2001. In December 2001, she met with defendant Williams-Nakoneczny, who was a licensed real estate agent with defendant Century 21 Real Estate 217. Plaintiff desired to locate a home quickly so that she could move out of her parents' home and reside in her own home with her children. Defendant Williams-Nakoneczny showed plaintiff an old farmhouse on Center Road in Millington, Michigan. The farmhouse was owned by defendant Christina Withrow (hereinafter

defendant seller). Williams-Nakoneczny and defendant seller were friends. Williams-Nakoneczny had listed defendant seller's farmhouse from June 1999 to June 2001, and when Williams-Nakoneczny contacted defendant seller regarding showing the house to plaintiff, defendant seller re-listed the house with Williams-Nakoneczny.

Plaintiff liked the farmhouse and made an offer of $85,000; defendant seller accepted the offer. On December 10, 2001, plaintiff executed a purchase agreement for the house for $85,000. The purchase agreement contained a Property Inspection Clause in which plaintiff agreed to purchase the property "[a]s is, with no warranties expressed, written or implied by seller or realtor." The same clause also included language recommending that plaintiff have the house inspected, but noted that "***BUYER [plaintiff] waives a home inspection***." Plaintiff asserted during her deposition and at trial that when she asked defendant Williams-Nakoneczny whether she needed to have a home inspection, Williams-Nakoneczny responded in the negative, advising her not to waste her money on a home inspection because she was friends with the owner of the house, the house was in "top-notch" condition, everything was new, and there had been previous inspections of the home.

Before the closing on plaintiff's purchase of the farmhouse, defendant Williams-Nakoneczny sought plaintiff's signature on a Disclosure Regarding Real Estate Agency Relationship form. This agency disclosure form, which plaintiff signed on December 10, 2001, disclosed that defendant Williams-Nakoneczny was serving as the seller's agent and that she would "not be representing the buyer unless otherwise agreed in writing." Plaintiff testified in her deposition that to her knowledge, she did not sign a buyer's agency agreement with defendant Williams-Nakoneczny, and plaintiff does not assert that she and defendant Williams-Nakoneczny entered into a written agreement regarding Williams-Nakoneczny representing plaintiff.

The closing was held on about January 11, 2002. At the closing, plaintiff signed a Purchaser's Satisfaction document, which contained the following release:

> We hereby state that we have examined the above described property, and accept it in its present condition.
>
> We hereby state that we hold harmless Century 21 Real Estate 217 and cooperating office Century 21 Real Estate 217, if any, and its/their representative(s) for any condition that may occur regarding any structural defect including sewer, septic, well (if any), plumbing, heating, electrical wiring, roof, basement or foundation, or removal by seller of any items listed on the purchase agreement or attached to the sale of the property.

Plaintiff stated that before signing the Purchaser's Satisfaction document, she had the opportunity to read it, actually did read it, and understood it. She further stated that she signed it voluntarily.

At closing, plaintiff also signed a Disclosure and Acknowledgment document. By signing this document, plaintiff acknowledged that she either read all the closing documents or was responsible for her failure to read them.

Before plaintiff purchased the farmhouse, defendant Williams-Nakoneczny provided plaintiff with the multi-listing service datasheet for the house, which Williams-Nakoneczny had prepared. The multi-listing service datasheet stated that the house had a new well in 1994 and a new septic in 1999. Plaintiff also received and signed two Seller's Disclosure Statements before purchasing the farmhouse. The June 4, 2000, seller disclosure form indicated that the septic tank and drain field were new in July 1999 and that they were in working order. The December 9, 2001, seller disclosure form indicated "septic field July 99" and that the septic field was in working order. Both Seller's Disclosure Statements stated: "The following are representations made solely by the Seller and are not the representations of the Seller's Agent(s), if any." Both Seller's Disclosure Statements also advised prospective buyers: "BUYER SHOULD OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY." Plaintiff did not have the house inspected.

Plaintiff moved into the house in February 2002. Shortly after she took possession of the house, plaintiff discovered that the septic system and well were, in her words, "disastrously faulty." Because of the problems with the septic system, sewage backed up into the bathtub and toilet. The toilet would not flush. If plaintiff plunged the toilet, more sewage backed up into the bathtub. The water in the bathroom stopped working, and plaintiff and her family could not take showers. They would generally take showers at plaintiff's mother's house or at friends' houses. Plaintiff was never able to use her clothes washer because of the problems with the septic tank; she did the family's laundry at a Laundromat or at her mother's house. According to plaintiff, the family would sometimes go outside to use the bathroom or they would use the toilet and she would put bleach in the toilet until they could get the septic tank pumped. A neighbor told plaintiff that she knew plaintiff would have problems with the septic tank and that a septic truck was pumping the septic tank at the farmhouse the night before plaintiff moved in. Because of the problems with the septic system, plaintiff was forced to have the septic tank pumped on five different occasions while she lived in the house. Plaintiff and her children were forced to move in and out of the home, sometimes for weeks at a time, because the toilet and shower were not usable. These conditions persisted until plaintiff moved out of the house for good in about January 2003.

Plaintiff filed suit against defendant Williams-Nakoneczny, defendant Century 21 Real Estate 217, and defendant seller.[1] Plaintiff's first amended complaint included claims for intentional misrepresentation, violation of the Michigan consumer protection act (MCPA), MCL 445.901 *et seq*., and negligence.[2] The case went to trial on plaintiff's intentional misrepresentation claim. The jury determined that defendant Williams-Nakoneczny knowingly or recklessly made a false representation of material fact and that plaintiff relied upon the representation and incurred damages as a result. The jury awarded plaintiff $53,000 in economic damages and $200,000 in damages for emotional or mental anguish. The jury apportioned fault

[1] Plaintiff and defendant seller settled before trial. A stipulated order to dismiss defendant seller from the case was entered on July 1, 2005.

[2] The negligence claim was asserted solely against defendant seller.

as follows: 40% fault was assigned to defendants, 50% fault was assigned to defendant seller, and 10% fault was assigned to plaintiff. The trial court's May 22, 2006, judgment against defendants ordered defendants to pay plaintiff $120,659.32, plus costs and interest. It is from this judgment that defendants appeal as of right.

II. ANALYSIS

A. Release

Defendants argue that the trial court erred in denying their motion for summary disposition of plaintiff's intentional misrepresentation claim pursuant to MCR 2.116(C)(7) based on the release in the Purchaser's Satisfaction document. A trial court may properly grant summary disposition on the basis of a valid release pursuant to MCR 2.116(C)(7). *Rinke v Automotive Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997). This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). If the pleadings or documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Holmes*, *supra* at 706. When a plaintiff seeks to affirmatively void a release, the plaintiff has the burden to make out a preponderant case for setting it aside. See *Van Avery v Seiter*, 383 Mich 486, 488; 175 NW2d 744 (1970). However, "[a] plaintiff need not prove that a release is void by a preponderance of the evidence in a hearing on a motion for accelerated judgment. Such a stringent standard is only required when a plaintiff seeks affirmatively to void a release." *Trongo v Trongo*, 124 Mich App 432, 435; 335 NW2d 60 (1983). "Where there is a material issue of fact as to the validity of a release, accelerated judgment is improper." *Id.*

Issues of contract interpretation are also reviewed de novo. *Hall v Small*, 267 Mich App 330, 333; 705 NW2d 741 (2005).

At the closing on plaintiff's purchase of the house and property, plaintiff signed a Purchaser's Satisfaction document. This document contained the following release provision: "We hereby state that we hold harmless Century 21 Real Estate 217 and cooperating office Century 21 Real Estate 217, if any, and its/their representative(s) for any condition that may occur regarding any structural defect including sewer, septic, well . . . ." According to defendants, this release provision bars plaintiff's action against defendants. The trial court, in an opinion that is admittedly lacking in the articulation and application of the law regarding release, nevertheless properly concluded that the release did not bar plaintiff's intentional misrepresentation action against defendants.

A release is valid if it is fairly and knowingly made. *Brooks v Holmes*, 163 Mich App 143, 145; 413 NW2d 688 (1987). In *Brooks*, this Court held that a release is invalid if (1) the releaser 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. *Id.* at 145, citing *Weiser v Welch*, 112 Mich 134, 136; 70 NW 438 (1897). "To warrant recision or invalidation of a contract or release, a misrepresentation must be made with the intent to mislead

or deceive." *Hungerman v McCord Gasket Corp*, 189 Mich App 675, 677; 473 NW2d 720 (1991). It is the third method of invalidating a release articulated in *Brooks* that is at issue in this case. Citing *Brooks*, defendants essentially argue that the release in this case was not invalid because any alleged fraudulent conduct on defendant Williams-Nakoneczny's part related to the condition of the property and did not secure the release.

We agree that defendant Williams-Nakoneczny's fraudulent conduct related to the condition of the property. However, her misrepresentations about the condition of the property helped to secure the release. There was evidence that plaintiff relied on defendant Williams-Nakoneczny's fraudulent conduct regarding the condition of the property in deciding to sign the release. In her deposition, plaintiff asserted that she signed the Purchaser's Satisfaction document in reliance on defendant Williams-Nakoneczny's representations that the well, the septic system and the house were generally fine. Thus, plaintiff's deposition testimony established an issue of fact regarding whether the fraud related to securing the release. Where there is a material issue of fact as to the validity of a release, accelerated judgment is improper. *Trongo*, *supra* at 435. Therefore, the trial court properly ruled that plaintiff's intentional misrepresentation claim against defendants was not barred by release.

Plaintiff argues that the release in the Purchaser's Satisfaction document was invalid due to lack of consideration. According to plaintiff, defendants did not provide consideration for the release because the title company, and not defendants, presented the Purchaser's Satisfaction document for plaintiff's signature at closing and that because defendants did not request that plaintiff sign the document containing the release, there was a lack of consideration on defendants' part. We disagree. In *Hall*, this Court rejected this very argument. In rejecting the *Hall* buyers' argument that there was no consideration for a release, this Court held that there was consideration for the release, reasoning: "'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 . . . .'" *Hall*, *supra* at 334, quoting *Rowady v K mart Corp*, 170 Mich App 54, 59; 428 NW2d 22 (1988). In this case, the Purchaser's Satisfaction document was signed at the closing on defendant seller's sale of her house and property to plaintiff. It was signed as part of a larger contract involving multiple promises, and did not constitute a separate and distinct transaction. The fact that representatives from the title company, and not defendants, may have presented the document for plaintiff's signature at closing is immaterial because defendants were clearly the beneficiaries of the release. Because there was consideration supporting the larger contract for the purchase of the home, there is consideration to support plaintiff's promise to hold defendants harmless. See *Hall*, *supra* at 334.

In sum, there was consideration to support the release signed by plaintiff in the Purchaser's Agreement. However, because defendant made fraudulent misrepresentations regarding the condition of the property and these fraudulent misrepresentations aided in securing the release, there was a question of fact regarding the validity of the release. Therefore, the trial court properly denied defendants' motion for summary disposition based on release.

B. Intentional Misrepresentation

Defendants argue that the trial court erred in denying defendants' motion for summary disposition of plaintiff's intentional misrepresentation claim because plaintiff failed to establish

an issue of fact regarding certain elements of a claim for intentional misrepresentation. This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005).]

The elements of intentional or fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew that it was false or made it 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 on the representation, and (6) the plaintiff suffered damages. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). Fraud can be established by circumstantial evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 458; 559 NW2d 379 (1996).

Defendants first argue that plaintiff failed to establish that defendant Williams-Nakoneczny made a material misrepresentation. According to defendants, even if Williams-Nakoneczny discouraged plaintiff from having the home inspected before purchasing it, the act of discouraging inspection is not a statement of past or current fact, it is a statement of opinion, and a professional recommendation is not actionable as fraud. In *Foreman v Foreman*, 266 Mich App 132, 142; 701 NW2d 167 (2005), this Court observed:

> The general rule is that honest expression of opinion may not be regarded as fraudulent. However, whether a specific representation is classified as an expression of opinion or an actionable statement of fact is contingent upon the circumstances of each case. . . . Representations by an individual who has personal knowledge of the value or condition of land or property cannot be construed as a mere expression of opinion, but rather constitute a statement of fact.

In light of *Foreman*, defendant Williams-Nakoneczny's statements regarding the necessity for an inspection are more than an expression of opinion. Defendant Williams-Nakoneczny was friends with the seller and listed the home when the home was having septic tank problems. Furthermore, Bryan Medrano asserted in his affidavit that defendant Williams-Nakoneczny "did know prior to the sale that the well had serious problems" and also "did know about the faulty septic system[.]" According to Medrano, defendant Williams-Nakoneczny stated that the problem could have been detected by an inspection, but plaintiff was not going to have an inspection done. In light of Medrano's statements, we conclude that it was not Williams-Nakoneczny's honest opinion that an inspection was not necessary; rather, Williams-Nakoneczny told plaintiff that an inspection was unnecessary because it would have disclosed the problems with the septic system and put an end to plaintiff's purchase of the house. This Court must view Medrano's statements regarding Williams-Nakoneczny's knowledge of the problems with the septic system in the light most favorable to plaintiff, as the nonmoving party. *Clerc*, *supra* at 601. Doing so, Williams-Nakoneczny had personal knowledge regarding the condition of the property, and her representations regarding the need for an inspection are not a mere expression of opinion.

Defendants next argue that plaintiff failed to establish an issue of fact regarding whether defendant Williams-Nakoneczny had actual knowledge of the defective septic system before the closing. According to defendants, the trial court erred in relying solely on the affidavit of Bryan Medrano in concluding that defendant Williams-Nakoneczny possessed such knowledge. In fact, Medrano's affidavit does establish an issue of fact regarding whether defendant Williams-Nakoneczny knew about the problems with the well and septic system before plaintiff purchased the house and property. Medrano was the former boyfriend of the seller's daughter and stayed at the house sometimes before the seller sold the house to plaintiff. According to Medrano's affidavit:

> 11) That also, the real estate agent, [defendant Williams-Nakoneczny], did know about the faulty septic system, as revealed by conversations I overheard;
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> 12) That [defendant Williams-Nakoneczny] did also say that the defect could have been detected by an inspection, but that [plaintiff] was not going to do the inspection, and that [defendant Williams-Nakoneczny] indicated that she was not going to reveal the problem to [plaintiff];
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> 13) That regarding the well, [seller] and [defendant Williams-Nakoneczny] did know prior to the sale that the well had serious problems;
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> * * *
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> (19) That after the sale, your affiant did hear [defendant Williams-Nakoneczny] joking about how she had taken advantage of [plaintiff], and that had [plaintiff] known about the problems that [defendant Williams-Nakoneczny] and [seller] had hid from her, they were sure she would not have bought the house.

Defendants suggest that Medrano's affidavit was not credible because in his deposition and at trial, he made statements that contradicted statements in his affidavit, and he admitted that he did not know if defendant Williams-Nakoneczny was aware of the septic problems before the

closing. However, summary disposition is inappropriate and suspect if the credibility of a witness is crucial; the trial court must not usurp a trial jury's right to determine the credibility of an affiant. *Brown v Mayor of Detroit*, 271 Mich App 692, 711; 723 NW2d 464 (2006), vacated in part 478 Mich 589 (2007). If, as in this case, a party submits documentary evidence supporting her position, the jury should decide issues of credibility. *Id.* at 710. Therefore, Medrano's affidavit alone was sufficient to establish an issue of fact regarding whether defendant Williams-Nakoneczny was aware of the problems with the well and septic system before plaintiff purchased the house and property.[3]

Defendants next argue that the trial court erred in denying their motion for summary disposition because plaintiff failed to establish that she reasonably relied on defendant Williams-Nakoneczny's alleged misrepresentations. According to defendants, a purchaser who fails to have property inspected cannot claim reasonable reliance. Plaintiff asserts that the reliance element of intentional or fraudulent misrepresentation requires merely actual reliance, and not reasonable reliance, but that if reasonable reliance is the rule, plaintiff's reliance on defendant Williams-Nakoneczney's misrepresentations was reasonable. The parties' conflicting arguments in this regard reflect a conflict that existed in this Court regarding whether the reliance element of an intentional or fraudulent misrepresentation claim required actual reliance or reasonable reliance. Compare *Phinney v Perlmutter*, 222 Mich App 513, 534-536; 564 NW2d 532 (1997); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). However, this conflict was resolved by this Court's opinion in *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675; 599 NW2d 546 (1999), in which the Court held that reliance on a false representation must be reasonable to support a fraud claim. *Id.* at 689-691.

According to defendants, plaintiff's reliance on any alleged misrepresentations was unreasonable because plaintiff failed to inspect the property. It is true 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.'" *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 501; 686 NW2d 770 (2004), quoting *Webb v First of Michigan Corp*, 195 Mich App 470, 474; 491 NW2d 851 (1992). However, "in the cases where this rule has been applied, the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *Cleary Trust*, *supra* at 501. In this case, none of the written information plaintiff received prior to purchasing the property indicated that there was a problem with the well or septic system. In fact, any written information indicated that the opposite was true. The Seller's Disclosure statements indicated that the septic system was relatively new and in good working order, and the multi-listing service datasheet stated that the house had a new well in 1994 and a new septic in 1999. Furthermore, to the extent that defendants contend that

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[3] We observe that while plaintiff established an issue of fact regarding whether plaintiff had actual knowledge of the septic problems before plaintiff purchased the property, plaintiff was not required to establish an issue of fact regarding whether plaintiff had actual knowledge; it would have been sufficient if plaintiff had established an issue of fact regarding whether defendant Williams-Nakoneczny made a representation recklessly, without knowledge of its truth as a positive assertion. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004).

plaintiff should have had the property inspected, this writer observes that defendant Williams-Nakoneczny explicitly discouraged plaintiff from having the property inspected, telling her to save her money and that she knew the owner and that the property was in "top-notch" shape and had already been inspected. Therefore, this is not a situation in which plaintiff was presented with information she chose to ignore. It was defendant's conduct that caused plaintiff to forego an inspection and thus precluded her from securing knowledge regarding the true condition of the septic system and the truthfulness of defendant Williams-Nakoneczny's representations. Defendant Williams-Nakoneczny's fraudulent misrepresentations directly impacted plaintiff's decision not to have the inspection which defendants now claim would have disclosed the problems that Williams-Nakoneczny attempted to conceal. A seller's agent should not be permitted to misrepresent the condition of a home and then argue that the buyer should have discovered the deceit.

Defendants also argue that a valid merger clause nullifies representations not contained in the written agreement and renders plaintiff's reliance upon such representations unreasonable as a matter of law. The Purchaser's Satisfaction document contained the following integration clause: "We further state that there are no other agreements, oral or otherwise, other than those stated on the Purchase Agreement dated December 10, 2001." Defendants rely on this Court's opinion in *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486; 579 NW2d 411 (1998), to support their argument. In *UAW-GM*, this Court stated: "Here, the merger clause made it unreasonable for plaintiff's agent to rely on any representations not included in the letter of agreement." *Id.* at 504. *UAW-GM* is distinguishable from the instant case, however, because in *UAW-GM*, the merger clause stated that the "agreement constituted 'a merger of all proposals, negotiations and representations with reference to the subject matter and provisions.'" *Id.* at 488. In contrast, the integration clause in the instant case merged only "other agreements, oral or otherwise[.]" In other words, the integration clause in the instant case did not encompass representations like the merger clause in *UAW-GM*. The primary goal in construing or interpreting contracts is to honor the parties' intent. *Id.* at 491. Contractual language is construed according to its plain and ordinary meaning. *Id.* In this case, the merger clause, by its own terms, merged prior "agreements," but not prior "representations." Thus, defendants' reliance on *UAW-GM* is misplaced. Because the integration clause in the instant case did not encompass representations, it does not render plaintiff's reliance on the representations unreasonable.

C. Evidentiary Rulings

Defendants argue that the trial court made numerous erroneous evidentiary rulings. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264 Mich App 77, 84; 689 NW2d 750 (2004). The abuse of discretion standard recognizes "'that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Defendants argue that the trial court abused its discretion in allowing plaintiff to introduce evidence regarding emotional injuries that plaintiff suffered as a result of defendant

Williams-Nakoneczny's misrepresentations about the house. This case involved Williams-Nakoneczny's fraudulent conduct; damages in tort cases generally include compensation for mental distress and anguish. *Phinney*, *supra* at 532. In *Phinney*, this Court held that "[i]n a fraud and misrepresentation action, the tortfeasor is liable for injuries resulting from his wrongful act, whether foreseeable or not, provided that the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated." *Id.* This Court further held in *Phinney* that because the relationship between the parties was not strictly a business relationship, emotional distress reasonably might have been anticipated as a legal and natural consequence of the defendant's actions. *Id.* at 532-533. Similarly, the relationship between plaintiff and defendant Williams-Nakoneczny was not strictly a business relationship. Plaintiff testified that she and defendant Williams-Nakoneczny became friends. Furthermore, defendant Williams-Nakoneczny was aware that plaintiff had just gone through a divorce, that she did not have a lot of money, and that she urgently wanted to purchase a home for herself and her children. Because the relationship between plaintiff and defendant Williams-Nakoneczny was not strictly a business relationship, emotional distress might have been anticipated as a legal and natural consequence of defendant Williams-Nakoneczny's fraudulent conduct. Therefore, the trial court did not abuse its discretion in admitting evidence regarding plaintiff's emotional injuries.

Defendants next argue that the trial court abused its discretion in admitting evidence regarding plaintiff's lost rental income. According to defendants, evidence that plaintiff lost rental income as a result of defendant Williams-Nakoneczny's misrepresentations was speculative because plaintiff did not have a rental agreement with a tenant at the time of closing. Plaintiff's loss of rental income was also a legal and natural consequence of defendant Williams-Nakoneczny's misrepresentations. *Id.* at 532. Plaintiff's monthly payment for the home was approximately $350 per month; at the time, her entire monthly income was less than $500. At trial, plaintiff testified that she was going to rent a room in the house to a girlfriend for $75 per week. According to plaintiff, the girlfriend paid her $150 for two weeks' rent, but then moved out because she could not take showers or use the bathroom in the house. The fact that plaintiff did not have a rental agreement in place at the time of closing is immaterial. Evidence regarding plaintiff's lost rental income was properly admitted into evidence because such damages were the legal and natural consequence of plaintiff's misrepresentations. *Id.*

Defendants also argue that the trial court abused its discretion in admitting evidence that plaintiff lost her house through foreclosure. According to defendants, plaintiff lost her house because she mismanaged her money and failed to pay her mortgage. Evidence that plaintiff lost her house in foreclosure was properly admitted because, like the evidence regarding plaintiff's emotional damages and lost income damages, plaintiff losing her house through foreclosure was a legal and natural consequence of defendant Williams-Nakoneczny's misrepresentations. *Id.* Plaintiff had been recently divorced, and she needed income from a tenant to help cover her house payment. According to plaintiff, because her tenant moved out of the house, she was unable to make the mortgage payment, and she lost her house. The trial court did not abuse its discretion in admitting this evidence.[4]

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[4] Defendants also assert, in a one sentence "argument," that evidence regarding emotional
(continued…)

Defendants also argue that the trial court abused its discretion in refusing to exclude photographic evidence depicting sewage backed up into plaintiff's bathroom toilet and bathtub. According to defendants, such evidence should have been excluded under MRE 401, 402 and 403. The photographic evidence depicting sewage in the toilet and bathtub was relevant to show the effect of the problems with the septic system and well on the house and plaintiff's ability to live in the house; relevant evidence is admissible. MRE 401; MRE 402. According to defendants, the photographic evidence should have been excluded under MRE 403 because it was admitted to inflame the passions of the jury. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, or needless presentation of cumulative evidence. MRE 403. The photographs at issue are undeniably graphic and disgusting; they depict sewage backed up in the toilet and bathtub of plaintiff's bathroom. However, photographs may be used to corroborate a witness' testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). In this case, the photographs were admissible because, while graphic, they accurately depicted the condition of plaintiff's toilet and bathtub and because they corroborated plaintiff's testimony regarding the effect of the problems with the septic system on her toilet and bathtub. The danger of unfair prejudice does not substantially outweigh the probative value of the photographs, and the trial court did not abuse its discretion in admitting them.

Defendants also argue that the trial court abused its discretion in refusing to exclude the testimony of Joan McGuire because it was improper expert opinion testimony and should have been excluded based on surprise. In her Answer to Interrogatories, plaintiff identified McGuire as an expert witness who would give her opinion that plaintiff suffered mental anguish. At trial, however, it was revealed that McGuire was a friend of plaintiff's who had not treated or examined plaintiff. McGuire testified that she had worked as a certified addictions counselor and domestic violence specialist for twelve years. She testified regarding her experience and extensive training in the area of addiction counseling. Specifically, she testified that she was a level two certified addiction counselor and that to obtain this certification, she had completed 6,000 supervised hours working "in areas specific to substance abuse, intake, assessment, treatment, all of those issues." Based on McGuire's testimony regarding her education, experience, training, and her specialized knowledge regarding the area of addiction counseling, McGuire's testimony would assist the trier of fact to understand and make a determination regarding the emotional distress that plaintiff, who acknowledge at trial that she is an alcoholic, suffered as a result of defendant Williams-Nakoneczny's misrepresentations even if she did not treat plaintiff. Therefore, her testimony was admissible under MRE 702.

(…continued)

damages, lost rental income, and foreclosure should have been excluded under MRE 401, 402, and 403. However, beyond citing the rules of evidence, defendants do not develop or elaborate these arguments. It is not enough for an appellant to simply announce a position or assert an error in his brief and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, defendants' MRE 401, 402 and 403 arguments are abandoned. *Id.*

McGuire testified on direct examination that plaintiff reacted emotionally regarding the problems with the septic system and well at her house. According to McGuire, plaintiff was "extremely upset" and "sobbing" and "was deathly afraid she was going to relapse because she, again, felt so out of control, didn't know what to do, wasn't able to get any kind of help, didn't know how to handle the whole thing." According to defendants, McGuire's testimony was the "only 'alleged' clinical testimony regarding Plaintiff's claimed emotional damages[.]" This may be true, but there was other evidence and testimony regarding plaintiff's emotional distress regarding the problems with her house. Plaintiff's medical records from Sacred Heart Rehabilitation Center, Inc., indicated that plaintiff was "undergoing significant stress right now with the purchase of her home and issues related to that." In addition, plaintiff, her children and her father also testified regarding the mental distress she suffered as a result of the problems with her house. Therefore, McGuire's testimony was not the only evidence regarding plaintiff's emotional distress resulting from the problems with the septic system and well in her home. Furthermore, on cross-examination, defense counsel was able to explore and reveal other factors that may have contributed to plaintiff's emotional distress.

The fact that McGuire did not treat plaintiff does not render her testimony irrelevant or otherwise preclude its admission. As plaintiff's friend and an expert in the area of addiction counseling, McGuire's opinions regarding how a problem like the problem plaintiff faced with her house would affect plaintiff was relevant to the issue of plaintiff's emotional distress damages and therefore admissible. MRE 401; MRE 402. Furthermore, defendants' claim of surprise regarding McGuire's testimony is meritless given that plaintiff disclosed McGuire as an expert witness in her answers to defendants' interrogatories in March 2004. In her answers, plaintiff disclosed McGuire's name and address and asserted that McGuire was an expert witness on mental anguish. Given that plaintiff's answers to defendants' interrogatories were dated March 2004, and trial was held almost two years later, in March 2006, defendant can hardly claim to be surprised about McGuire's testimony.

D. Adjournment

Defendants argue that the trial court abused its discretion in denying defendants' motion for adjournment of trial so that defendants could secure the presence of witness Charity Kirbyson, who was defendant seller's daughter and who resided in the house before plaintiff bought it from defendant seller. The grant or denial of a motion for adjournment is within the trial court's discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). An adjournment may be granted on the ground of unavailability of a witness only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence. MCR 2.503(C)(2); *Coy*, *supra* at 18. The trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *Coy*, *supra* at 18-19.

Defendants moved for an adjournment because Kirbyson had scheduled an out-of-state vacation and would be unable to testify at trial. Defendants asserted that Kirbyson was a "vital and indispensable witness" because she "was a participant in a conservation [sic] which serves as the basis of Plaintiff's claim against the Defendants." The trial court held a hearing on the motion, and denied the motion, stating that it was generally very liberal in granting adjournments, but that in this case, there were many witnesses, and it was going to be difficult to schedule a trial when all of the witnesses could be present. The trial court noted that it would

have been more "sympathetic" if it were not possible for defendants to conduct a de bene esse video deposition of Kirbyson, but that it was going to deny the motion for adjournment and allow defense counsel to conduct a de bene esse deposition of Kirbyson on video. Apparently, defense counsel was unable to secure a de bene esse deposition on video from Kirbyson. At trial, defense counsel stated that he subpoenaed Kirbyson, but that she ignored the subpoena and went on vacation. Defense counsel noted that there was a bench warrant for Kirbyson's arrest as a result of her conduct regarding her testimony. In lieu of Kirbyson's live testimony or the playing of a de bene esse video deposition at trial, defense counsel read a synopsis of Kirbyson's discovery deposition testimony into the record.

The trial court did not abuse its discretion in denying defendants' motion for adjournment. At the time of the motion hearing, trial was scheduled to begin in four to five days, and there were many witnesses. The trial was to take place during the middle of March when many families take vacations for Spring Break. Moreover, plaintiff lived out of state and would have possibly forfeited travel fare for transportation tickets that had already been purchased if the trial had been adjourned and rescheduled. Given Kirbyson's apparent aversion to testifying, there was no guarantee that she would have showed up to testify pursuant to a subpoena even if she had not been on vacation. In any event, defendants were not prejudiced by the absence of Kirbyson's live testimony. Defendants assert that they were prejudiced by the absence of Kirbyson's live testimony because plaintiff suggested that Kirbyson knew about the problems with the septic system and well and that defendant Williams-Nakoneczny therefore also must have known about said problems, and defendants were unable to counter plaintiff's evidence with Kirbyson's testimony about what Williams-Nakoneczny knew and when she knew it. Even if Kirbyson's testimony would have tended to show that defendant Williams-Nakoneczny was not actually aware of the condition of the septic system or well, there was circumstantial evidence that, under the circumstances, Williams-Nakoneczny acted recklessly in advising plaintiff not to have the house inspected, and this was sufficient to satisfy the third element of an intentional misrepresentation claim. *Bergen*, *supra* at 382. Therefore, defendants were not prejudiced by the absence of Kirbyson's live testimony.

E. Jury Instructions

Defendants finally argue that the trial court erred in instructing the jury that it could find defendant Williams-Nakoneczny guilty of intentional misrepresentation if she made representations "recklessly." This Court's review of instructional error is as follows:

> We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (internal citations omitted).]

The trial court gave the standard jury instruction for fraud based on false representation. SJI2d 128.01. Defendants specifically object to the trial court's inclusion of SJI2d 128.01(c) in the instruction, which provides: "Defendant knew the representation was false when [*he/she/it*] made it, or defendant made it recklessly, that is, without knowing whether it was true." Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). One of the elements of an intentional or fraudulent misrepresentation claim is that the defendant, when making a false representation, knew that the representation was false or made it recklessly, without knowledge of its truth as a positive assertion. *Bergen*, *supra* at 382. Because intentional misrepresentation can be predicated upon intentional or reckless misrepresentations and the evidence supported the theory that Williams-Nakoneczny made intentional or reckless misrepresentations, the trial court's inclusion of the "reckless" language did not render the instructions improper.

III. Conclusion

For the reasons articulated in this opinion, we reject defendants' claims of error and affirm the judgment in favor of plaintiff.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher