# STATE OF MICHIGAN

# COURT OF APPEALS

JULIA ANN PILCHER,

Plaintiff-Appellant,

v

JAMES J. BENOIT, DONNA J. BENOIT, DAN ROSEBOHM, and ENERGETICS HOME INSPECTION, INC.,

Defendants-Appellees.

UNPUBLISHED
December 17, 2020

No. 351151
Chippewa Circuit Court
LC No. 18-015256-CH

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

In this real estate transaction dispute, plaintiff, Julia Anne Pilcher, appeals by right the trial court's order granting summary disposition in favor of defendants, James and Donna Benoit, Dan Rosebohm, and Energetics Home Inspection, Inc. We affirm the trial court's decision in all respects except for that portion addressing plaintiff's septic-tank-covering claim against the Benoits. A genuine issue of material fact was established with respect to whether the Benoits knew that the septic tank covering was inadequate and intentionally hid this information from plaintiff.

## I. BACKGROUND

Plaintiff purchased the property at issue in this case from the Benoits for $89,400. The Benoits had never lived at the property, choosing instead to utilize it as an investment property. As part of the purchasing process, the Benoits gave plaintiff a Seller Disclosure Statement in which they made representations regarding the condition and status of numerous aspects of the property, such as the septic system, electrical system, and plumbing. Plaintiff signed a sales contract in which she agreed to purchase the property in an "AS IS present condition." Plaintiff personally visited the property on December 6, 2017, but only stayed for about an hour before returning to

work. She hired Energetics to perform an inspection on her behalf.[1] The home inspection agreement, which plaintiff signed, contained a clause that sought to protect Energetics from liability for any defective conditions in the property. The inspection report provided that the house was satisfactory in most aspects but also had aspects that needed to be addressed. Plaintiff, who was evidently satisfied with the inspection report, proceeded with the sale.

According to plaintiff, she began discovering numerous defects with the house soon after purchasing it, including drafts, unsealed windows and improper duct work, leaning floors, and bad-smelling water. Additionally, on May 3, 2018, while she was weeding in her yard, the ground collapsed underneath her and she found herself in the septic tank, which had only been covered by a rotting wood board with ground and weeds on top. Plaintiff had a second home inspection completed by a different home inspection company, and she claimed that this inspection found these additional defects and supported her complaint. Plaintiff alleged numerous counts but, for purposes of this appeal, the relevant counts involve fraud against the Benoits and negligence and fraud against Energetics. According to plaintiff, the Benoits made fraudulent representations on the Seller Disclosure and, by failing to disclose defects that they were aware of, committed silent fraud against plaintiff. Regarding Energetics, plaintiff alleged that the home inspection was negligently performed and missed numerous defects that made the house unsuitable for habitation. She requested rescission of the property sale and various monetary damages.

Defendants filed motions for summary disposition under MCR 2.116(C)(8) and (10). The Benoits argued that the "as is" clause in the sales contract, as well as the doctrine of *caveat emptor*, barred plaintiff's claims. The Benoits maintained that they had made no false representations about the property prior to plaintiff's purchase. Energetics contended that the liability limitation clause in the inspection agreement protected it from liability and barred plaintiff's claims against it. The trial court heard oral arguments and granted both motions. Plaintiff appeals.

## II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

Because the trial court did not specify under which subrule it granted summary disposition, but it clearly relied on evidence beyond the pleadings, we treat the motion as having been brought and decided pursuant to MCR 2.116(C)(10). *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206-207; 920 NW2d 148 (2018). "This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010) (footnote citations omitted). A motion is properly granted pursuant to MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 415. This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from

[1] Rosebohm worked at Energetics, and, for ease of reference, we will refer to these parties collectively as "Energetics."

the evidence." *Id*. at 415-416 (footnote citations omitted). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

Additionally, this Court reviews de novo questions involving the proper interpretation of a contract. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). A contract "must be interpreted according to its plain and ordinary meaning." *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 386; 835 NW2d 593 (2013) (quotation marks and citation omitted). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory*, 473 Mich at 468 (emphasis in original). Competent individuals "shall have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Id*. (quotation marks and citations omitted). Indemnity clauses are construed in the same way as contracts, with the goal of determining and effectuating the intent of the parties. *Badiee v Brighton Area Schs*, 265 Mich App 343, 351-352; 695 NW2d 521 (2005). "Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses." *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014). "An indemnity contract creates a direct, primary liability between the indemnitor and the indemnitee that is original and independent of any other obligation." *Id*. When interpreting such a clause, the focus must be on the parties' intent, which is determined by examining the plain, contractual language. *Id*. at 174.

## III. ENERGETICS

Plaintiff contends that the trial court erred by granting Energetics' motion for summary disposition because the liability provision in the inspection agreement did not cover ordinary negligence and was against public policy. We disagree.

The gravamen of plaintiff's argument is that the indemnity clause in her contract with Energetics, which limited the inspector's liability to the cost of the inspection, should be deemed unenforceable. She argues that she needed a home inspection, but she had no bargaining power and no alternative means to obtain a home inspection. However, the mere fact that parties have unequal bargaining power does not preclude enforcement of a contract, especially where the party of lesser power has some options. See *Allen v Mich Bell Tel Co*, 18 Mich App 632, 637-638; 171 NW2d 689 (1969). Plaintiff did ultimately obtain another home inspection from a different inspector, which undermines her argument that Energetics was her only option. Contractual provisions limiting or releasing liability for negligence are generally upheld. See *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 384; 525 NW2d 891 (1994). A release might be found invalid if it was not knowingly made, but such a scenario generally requires the signing party to be impaired or the drafting party to have engaged in fraud or similar misconduct. See *Paterek v 6600 Ltd*, 186 Mich App 445, 449; 465 NW2d 342 (1990). Plaintiff has advanced no such claims or defenses, either below or on appeal. Furthermore, plaintiff acknowledged that she understood that Energetics did not warrant the condition of any part of the premises.

Plaintiff also argues that the indemnity clause was unreasonable, because the cost of the inspection would likely be substantially less than the cost of repairing unreported defects and conditions. A substantively unreasonable contractual provision will not be enforced irrespective of the parties' relative bargaining positions. See *Allen*, 18 Mich App at 637-638. However, although plaintiff is probably correct about the relative costs of inspection and repair, she does not

provide any explanation for why that discrepancy renders the indemnity clause unreasonable. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).[2]

Under the circumstances, we are unable to conclude that the indemnity provision in the contract with Energetics should not be enforced.

## IV. THE BENOITS

Plaintiff also argues that the trial court erroneously granted the Benoits' motion for summary disposition because there were issues of material fact regarding the Benoits' knowledge of the septic tank covering and whether they concealed this information from plaintiff. We agree in part.

In general, an "as is" clause absolves sellers of any responsibility for defects that were unknown but should have reasonably been discovered upon conducting an inspection. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). An "as is" clause will not, however, protect a seller if the seller made fraudulent misrepresentations before a binding agreement was signed. *Id*. Under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*., two kinds of fraud actions may be maintained on the basis of a seller disclosure statement: common-law fraud, i.e., fraudulent misrepresentation, and silent fraud. *Roberts v Saffell*, 280 Mich App 397, 414; 760 NW2d 715 (2008). Similarly, there are exceptions to the doctrine of *caveat emptor*. *Lorenzo*, 206 Mich App at 685-686. Ordinarily, "[c]aveat emptor prevails in land sales, and the vendor . . . is not liable for any harm due to defects existing at the time of sale." *Id*. (quotation marks and citation omitted). However, in relevant part, the seller has a "duty to disclose to the purchaser any concealed condition known to him which involves an unreasonable danger." *Id*. (quotation and citation omitted). "Failure to make such a disclosure or efforts to actively conceal a dangerous condition render the vendor liable for resulting injuries." *Id*. (quotation and citation omitted).

The SDA does not permit an innocent misrepresentation claim because the statute explicitly provides that "that the transferor 'is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor' and ordinary care was used in transmitting the information." *Roberts*, 280 Mich App at 413 (citation omitted). For a claim of either common-law fraud or silent fraud to proceed under the SDA, the elements must be proven, which include a showing "that the transferor possessed personal knowledge about the item but failed to exercise

[2] We note, without purporting to address any particular scenario, that a contractual provision purporting to insulate the drafter from liability for fraud might be deemed unenforceable. See *Klann v Hess Cartage Co*, 50 Mich App 703, 709; 214 NW2d 63 (1973). Plaintiff only makes vague references on appeal to Energetics having engaged in fraudulent conduct. In her complaint, she alleged that Energetics's employee was wrong about the condition of the foundation and electrical system, but she alleged no facts in support of any fraud on his part, and indeed alleged that he might have simply been reckless. Based on the employee's deposition, it seems he was inexperienced and conducted only a limited review of the premises. Even if plaintiff had properly alleged fraud, the evidence would not support such a claim.

'good faith' by disclosing that knowledge." *Id*. at 414. The elements of common-law fraud, also known as fraudulent misrepresentation, are:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Id*. at 403.]

On the other hand, "[a] fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud." *Id*. (quotation marks and citations omitted). However, in order "for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure." *Id*. at 404. To prove silent fraud, a plaintiff must do "more than proving that the seller was aware of and failed to disclose a hidden defect"; rather, the "plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive." *Id*.

Reviewing the record, we are convinced that most of the alleged defects in the house were covered by the "as is" clause from the sales contract because plaintiff failed to produce evidence demonstrating that the Benoits had knowledge of these defects. In order to overcome the "as is" clause, plaintiff was required to demonstrate an issue of material fact regarding whether the defects were *known* to the Benoits. She failed to do so. There was no indication from Donna Benoit's deposition that she and her husband were aware of the defects plaintiff complained of. Even plaintiff's own deposition included no testimony about statements made by the Benoits indicating that they possessed such knowledge. Moreover, the Seller Disclosure listed "unknown" for many of the house's conditions, and, even for those that stated "no," Donna Benoit explained that these answers were based on their limited knowledge. The disclosure explicitly provided that the Benoits had never lived on the property; their knowledge of the house's conditions was, therefore, greatly limited. Additionally, we find it noteworthy that plaintiff's own real estate agent created the sales contract and included the "as is" language.

However, we conclude that the trial court erred in granting summary disposition as to the septic tank covering. The evidence indicates that it was not possible to visually observe anything wrong with the septic tank covering. Falling into an open septic tank because of collapsing ground would seem obviously to constitute an unreasonable danger. Indeed, plaintiff testified that she could have lost her life if her son had not pulled her out, and she required medical treatment in any event. In Donna Benoit's deposition, she testified that, when they purchased the property, the septic tank had a concrete cover. Plaintiff provided messages between herself and a former resident of the property. The former resident stated that, during his time residing on the property, the Benoits were aware of the inappropriate and unsafe wood cover but refused to remedy the situation because doing so would cause "the health dept" to require parts of the septic system to be changed.

Although the Benoits made no affirmative representation regarding the covering of the septic tank, these messages create a genuine issue of material fact regarding whether the Benoits

perpetrated silent fraud through their failure to disclose to plaintiff prior to the purchase the allegedly insufficient septic tank covering. These messages created a credibility issue, and such an issue is improperly resolved at the summary disposition stage. See *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, and Merrill, Inc*, 267 Mich App 625, 653; 705 NW2d 549 (2005). Therefore, we reverse the trial court's decision as it relates to this specific claim against the Benoits. On remand, the trial court must address and resolve this remaining claim.

We reverse the trial court's grant of summary disposition as to plaintiff's claim against the Benoits for fraud arising out of the allegedly improper septic tank cover, and we remand that issue for further proceedings. In all other respects, we affirm. Energetics may tax costs, being the only party to have prevailed in full, and the remaining parties shall bear their own costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello