STATE OF MICHIGAN

COURT OF APPEALS

GARY L. BOWMAN and KATHLEEN A. BOWMAN,

Plaintiffs-Appellees/Cross-Appellants,

v

MERYL GREENE, WEBER-SEILER REALTORS, INC, d/b/a COLDWELL BANK WEBER-SEILER REALTORS,

Defendants-Appellants/Cross-Appellees,

and

KIRK P. VANHORN,

Defendant.

UNPUBLISHED
November 5, 2013

No. 308282
Van Buren Circuit Court
LC No. 10-060014-CZ

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendants appeal as of right a $483,195.18 judgment entered pursuant to a jury verdict in favor of plaintiffs on their claims of fraudulent misrepresentation, silent fraud, negligent misrepresentation and violation of the Seller's Disclosure Act (SDA), MCL 565.951 *et seq*. The trial court offset the judgment by $12,500, after defendant Kirk Van Horn accepted case evaluation by that amount before trial. Plaintiffs cross-appeal the offset as of right. For the reasons set forth in this opinion, we affirm.

I. FACTS

This dispute involves a condominium that plaintiffs purchased in 2004 in the Factory Condominium redevelopment project in South Haven. The 100-year-old building was formerly the site of a factory where workers dumped chemicals into the ground including industrial solvents that contained trichloroethylene (TCE), a carcinogen. In order to address unacceptable

TCE levels, Mark Bertorelli, the developer, installed a vapor barrier over the affected ground area. The vapor barrier required constant maintenance and the presence of a blower.

In 2001, Bertorelli hired defendant Meryl Greene, an associate broker and licensed realtor at defendant Coldwell Bank Weber-Seiler Realtors (Weber-Seiler) to market the condos. Greene prepared a marketing brochure, which stated in relevant part: "the property has been addressed under current Michigan cleanup requirements through a grant from the [DEQ]."

In 2002, Van Horn purchased a condo and in early 2004, Van Horn contracted with Greene to sell the condo. At about the same time, plaintiffs Gary and Kathleen Bowman were looking to purchase a residence in South Haven where they often vacationed. Plaintiffs met with Greene at the condo and they agreed to have Greene serve as their realtor. Gary testified that while he was viewing the condo with Greene, he specifically asked Greene if there were any "environmental issues" "ongoing with the building itself," and that Greene assured him that there were none. Gary testified that Van Horn was present and made the same assurance in unison with Greene. Greene did not recall the conversation. In addition, before plaintiffs made an offer on the condo, they reviewed Van Horn's seller's disclosure statement wherein he indicated that there were no "environmental problems" "on the property."

Plaintiffs agreed to purchase the condo for $360,000. However, before closing, the Michigan Department of Environmental Quality (DEQ) sent a letter to Bertorelli, Greene and the condo residents regarding the status of the site and the marketing brochure. In the letter, the DEQ stated that the property remained "highly contaminated with chlorinated solvents in the soil and groundwater, and metals in the near surface soils." The letter also stated that the marketing brochure "does not represent the facts regarding the contamination and is misleading to the reader. The contamination has not been cleaned up." Plaintiffs were not apprised of the letter.

About one year after purchasing the condo, plaintiffs learned of the extensive contamination at the site. At some point, Bertorelli declared bankruptcy and the condo association became responsible for the due care costs associated with monitoring pollution and maintaining the vapor barrier. At the time of the trial, the city reimbursed the condo association for the costs, but there was no guarantee that the reimbursements would continue indefinitely.

On August 3, 2010, plaintiffs commenced this action against Greene, Weber-Seiler, and Van Horn, alleging fraudulent misrepresentation, silent fraud, negligent misrepresentation, and violation of the SDA. Before trial, Van Horn accepted case evaluation of $12,500, and he was dismissed from the action.

The trial court held a jury trial after denying defendants' motion for summary disposition. At trial, plaintiffs testified that they relied on Greene's representations as their realtor, the brochure, and the seller's disclosure statement in making their decision to purchase the condo. Plaintiffs testified that Greene did not give them any reason to suspect the site was contaminated. Plaintiffs testified that they did not try to sell the condo because it was worthless. Marvin Lemmen, a certified appraiser, testified that plaintiffs' condo had a fair market value of zero.

Greene testified that she was present when the vapor barrier was installed and she reviewed documents from Bertorelli regarding the contamination at the site. Some of the

documents described the presence of TCE and other chemicals and heavy metals. Greene testified that she did not provide the documents to plaintiffs, but stated that she would have provided the documentation upon request. Greene testified that she thought that it was safe to live at the condo based on the information she had from the developer and the city.

At the close of plaintiffs' proofs, the trial court granted defendants' motion for directed verdict regarding exemplary damages, but denied the motion in all other respects. The jury returned a general verdict in favor of plaintiffs on all four claims (fraud, silent fraud, negligent misrepresentation, and violation of the SDA). The jury awarded plaintiffs $25,000 each for emotional damages and $364,943.97 in economic damages. Thereafter, the trial court denied defendants' motion for judgment notwithstanding the verdict (JNOV). The court assessed case evaluation sanctions, costs, and interest and offset the judgment by $12,500 pursuant to Van Horn's case evaluation for a final judgment total of $483,195.18. This appeal ensued.

II. STANDARD OF REVIEW

Defendants' arguments concern the trial court's resolution of issues raised in their motions for summary disposition, directed verdict and JNOV. "We review de novo a trial court's ruling on a motion for summary disposition and consider the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine whether there exists any genuine issue of material fact."[1] *Alfieri v Bertorelli*, 295 Mich App 189, 192; 813 NW2d 772 (2012). "When reviewing a ruling on a motion for a directed verdict, we likewise consider the evidence and any reasonable inferences de novo in the light most favorable to the nonmoving party to determine whether there exists a question of fact on which reasonable minds could differ." *Id*. Similarly, we review de novo a trial court's decision on a motion for JNOV, "again considering the evidence and any reasonable inferences in the light most favorable to the nonmoving party to determine whether the evidence fails to establish a claim." *Id*. To the extent issues involve a distinct standard of review those standards will be set forth as necessary.

III. ANALYSIS

A. STATUTE OF LIMITATIONS

Defendants contend that the trial court erred in denying their motions for summary disposition and JNOV because plaintiffs' claims were barred by the three-year limitations period set forth in MCL 600.5805(10). Whether a cause of action is barred by the applicable statute of limitations involves a question of law that we review de novo. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386; 738 NW2d 664 (2007). "In determining whether a statute of limitations applies, this Court looks to the true nature of a complaint, reading the complaint as a

[1] The trial court did not specify the subrule on which it relied on in denying the motion for summary disposition; therefore, because the court considered evidence outside the pleadings, our review is pursuant to MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

whole and looking beyond the parties' labels to determine the exact nature of the claim." *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011).

Chapter 58 of the Revised Judicature Act, MCL 600.101 *et seq*., sets forth limitations periods for specific types of actions. See MCL 600.5801 through MCL 600.5811. MCL 600.5813 is a "catch all" provision that provides:

> All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

Defendants do not dispute that plaintiffs filed their complaint within six years; instead, defendants argue that plaintiffs' claims were governed by the three-year limitations period in MCL 600.5805. MCL 600.5805 governs "injuries to persons or property," and provides in relevant part:

> (1) A person shall not bring or maintain an action to *recover damages for injuries to persons or property* unless, after the claim first accrued to the plaintiff . . . the action is commenced within the periods of time prescribed by this section.
>
> * * *
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> (10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, *or for injury to a person or property*. [Emphasis added.]

Having reviewed the relevant case law, we hold that plaintiffs did not bring claims to recover damages arising from injuries to persons or property. Instead, courts in Michigan have continually applied the six-year limitations period to claims involving fraudulent misrepresentation in a transaction. Specifically, in *Sweet v Shreve*, 262 Mich 432; 247 NW 711 (1933), a real estate developer interested the plaintiffs in a parcel of real property by "misrepresenting its value and earning power." *Id*. at 433. After purchasing the property, the plaintiffs' brought suit and evidence showed that the plaintiffs "were deceived . . . [and] paid for the property an amount far in excess of its real value. . . ." *Id*. at 434. On appeal, one of the defendants argued that the plaintiffs' action was "based on injury to property" and time-barred by the three-year limitations period set forth in [1929 CL 13967(2)] (a predecessor to § 5805). *Id*. at 434-435. Our Supreme Court held that the plaintiff did not allege an injury to persons or property as follows:

> [W]e do not believe that the present action constitutes one for injuries to person or property. *It is a suit brought for the recovery of damages caused plaintiffs as a result of fraudulent representations made by defendants*. Previous Michigan decisions have assumed that actions for fraud are covered by the

> general six-year limitation in [1929 CL 13976[2]] . . . [W]e believe the correct rule to be that, where the damages claimed *are not for injuries to specific property* [1929 CL 13976(2)[3]] does not apply, but the action may be brought within the general six-year provisions. [*Id*. at 435 (citations omitted) (emphasis added).]

Following *Sweet*, this Court applied the six-year limitations period in cases involving fraudulent misrepresentation of a business enterprise, *Case v Goren*, 43 Mich App 673, 681; 204 NW2d 767 (1972), and negligent misrepresentation relating to a real estate transaction, *Coats v Uhlmann*, 87 Mich App 385, 387-388; 274 NW2d 792 (1978). Together, these cases illustrate a "long line of Michigan cases which applied the six-year period of limitations to fraud actions." *National Sand, Inc v Nagel Const., Inc*., 182 Mich App 327, 333-334; 451 NW2d 618 (1990). Indeed, this precedent has continued in more recent cases. See e.g. *Blue Cross & Blue Shield v Folkema*, 174 Mich App 476, 481; 436 NW2d 670 (1988) (holding that the six-year limitations period applies where the damages sought are for injury to "the plaintiff's financial expectations"; *Kuebler v Equitable Life Assur Soc of the U.S*., 219 Mich App 1, 6; 555 NW2d 496 (1996) (holding that "[w]hen a complaint alleges all the necessary elements of fraud" the six-year limitations period applies to the claim).

In this case, like in *Sweet*, 262 Mich at 535, plaintiffs sought to recover damages caused by defendants' fraudulent representations and there was no injury to a specific piece of property. Instead, the alleged injuries were similar to those in *Case*, 43 Mich App 673, in that they involved injuries to plaintiffs' expectation of value, and, although the claims were related to a real property transaction, defendants' conduct did not "invade" any property interest plaintiffs had in the land. *Coats*, 87 Mich App at 392. Rather, the crux of plaintiffs' claim was that defendants' conduct led plaintiffs to "expect more than they received" and the alleged harm went to plaintiffs' expectations in the property. *Id*.

Moreover, although one of plaintiffs' claims was entitled "negligent misrepresentation," the crux of that claim went to the same conduct—that being, defendants' misrepresentation of the nature of the property in an effort to induce plaintiffs to purchase the condo. See *Anzaldua*, 292 Mich App at 631 (this Court must look to the complaint as a whole to determine the applicable statute of limitations); *Coats*, 87 Mich App at 392-393 (holding that a claim of "negligent misrepresentation," was governed by the six-year limitations period).

Defendants contend that *Sweet* and its progeny are not controlling because *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255; 327 NW2d 910 (1982), and *Local 1064 v Ernst &*

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[2] 1929 CL 13976 was a predecessor to MCL 600.5813, and provided in relevant part that "All actions in any of the courts of this state shall be commenced within six [6] years next after the causes of action shall accrue, and not afterward, except as herein after specified."

[3] 1929 CL 13976(2) was a predecessor to MCL 600.5805 and provided: "Actions to recover damages for injuries to person or property shall be brought within three [3] years from the time said actions accrue, and not afterwards[.]"

Young, 449 Mich 322; 535 NW2d 187 (1995), held that *all* traditional common law torts, including fraud, fall within the three-year limitations period under § 5805.

In *Citizens for Pretrial Justice*, 415 Mich at 262, the plaintiffs sued the defendants, bail bondsmen, claiming that defendants charged a fee higher than permitted by statute. Our Supreme Court agreed with plaintiffs that their claims did not involve injuries to "persons or property" for purposes of § 5805, but pecuniary loss was not the determining factor. *Id*. at 269. Instead, the Court noted that § 5805 "*applies to traditional, primarily common-law, torts*." *Id*. (emphasis added). The Court concluded that because the plaintiffs' cause of action was not a "traditional tort," (instead it arose from a statutory right), it was governed by the six-year limitations period under § 5813. *Id*. at 270.

In *Nat'l Sand*, 182 Mich App at 332-337, this Court applied *Citizens for Pretrial Justice* and held that a physical injury was not a prerequisite to applicability of § 5805. However, in doing so, the *Nat'l Sand* Court acknowledged *Sweet* and the "long line of Michigan cases which applied the six-year period of limitations to fraud actions." *Id*. at 333. Subsequently, in *Local 1064*, our Supreme Court again held that § 5805 applies to traditional torts, stating:

> For the reasons stated in [*Nat'l Sand*, 182 Mich App at 332-337], we conclude that *§ 5805 prescribes the limitation periods for traditional common-law torts, regardless of whether the damages sought are for pecuniary or physical injury*. [*Local 1064*, 449 Mich at 328 (emphasis added).]

Although *Citizens for Pretrial Justice* and *Local 1064* contain language that would appear to suggest that all common law tort claims are governed by § 5805, those cases did not expressly hold that fraud actions are governed by that statute nor did they overrule or disavow *Sweet*. Indeed, our Supreme Court is presumed to know the status of its own opinions such that had it intended to overrule or disavow *Sweet*, it could have expressly done so in either of those cases. Instead, in *Local 1064*, our Supreme Court relied on *Nat'l Sand* wherein this Court acknowledged *Sweet* and the longstanding precedent that fraud actions are governed by the six-year limitations period. *Local 1064*, 449 Mich at 328, citing *Nat'l Sand*, 182 Mich App at 333-334. Moreover, defendants do not cite, nor are we aware of any other Michigan Supreme Court case that overruled or disavowed *Sweet*. Therefore, until our Supreme Court holds otherwise, *Sweet* remains good law and is controlling under the rule of stare decisis. *Duncan v Michigan*, 300 Mich App 176, 193; 832 NW2d 761 (2013) (quotation omitted). Contrary to the assertions of defendants, this Court has no power or authority to disregard the plain holding of a decision by our Supreme Court merely because that holding no longer seems valid; only our Supreme Court can do that. *People v Mitchell*, 428 Mich 364, 369-371; 408 NW2d 798 (1987). See, *Tyra v Organ Procurement Agency of Mich*, ___ Mich App ___; ___ NW2d ___ (2013) (Docket No. 298444, issued August 15, 2013, slip op at 8).

Defendants cite *Alfieri*, 295 Mich App at 189, in support of their argument that *Sweet* is inapplicable to the present case. Defendants' argument lacks merit. *Alfieri* involved application of the comparative fault statute, whereas the issue in this case involves the applicable statute of limitations and is therefore governed by *Sweet*.

Defendants contend that plaintiffs claimed, and the jury awarded, damages for embarrassment, humiliation, and mental anguish and that those allegations amounted to "invasions of personal rights and are 'personal injur[ies],'" governed by § 5805.

When plaintiffs' complaint is viewed as a whole, similar to *Sweet*, plaintiffs' injuries flowed from the fraud claims, which did not involve injuries to persons or property. Here, the interest harmed went to plaintiffs' expectation of value. See *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) (noting that "[t]he type of interest allegedly harmed is the focal point in determining which limitation period controls") (quotations omitted). Indeed, in *Coats*, 87 Mich App at 392-393, this Court addressed a similar issue and held that a claim of negligent misrepresentation involving real property did not involve an injury to a person or property even though the plaintiffs alleged punitive damages. Here, similar to *Coats*, although plaintiffs claimed emotional damages, the harm in this instance went to plaintiffs' expectation of value arising from misrepresentation and plaintiffs' claims were governed by the six-year limitations period in MCL 600.5813.

Finally, with respect to the SDA claim, this Court has held that "a civil cause of action arising from a statutory violation is subject to the six-year limitation period found in § 5813, if the statute itself does not provide a limitation period." *DiPonio Const Co, Inc. v Rosati Masonry Co, Inc*, 246 Mich App 43, 56-57; 631 NW2d 59 (2001). Here, the SDA does not proscribe a limitation period; therefore, plaintiffs' SDA claim was governed by MCL 600.5813. *Id*.

In sum, the trial court did not err in holding that plaintiffs' claims were governed by the six-year limitations period set forth in MCL 600.5813.

B. FRAUD AND NEGLIGENT MISREPRESENTATION

Defendants argue that the trial court erred in failing to grant their motions for summary disposition and directed verdict with regard to plaintiffs' fraud and negligent misrepresentation claims. Defendants also contend that the trial court erred in denying their motion for directed verdict on plaintiffs' silent fraud claim.

Defendants contend that plaintiffs' fraud and negligent misrepresentation claims should have been dismissed because plaintiffs did not reasonably rely on the brochure or Greene's representations. In order to prove common-law fraud, a plaintiff must prove:

> [that] a defendant [made] a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. [*Alfieri*, 295 Mich App at 193.]

"Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation." *Id*. "A claim for negligent misrepresentation requires plaintiff to prove that a party justifiably relied to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Unibar Maintenance Servs., Inc. v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009) (citations and quotation marks omitted).

Defendants contend plaintiffs had the means available to uncover facts about the property and therefore did not reasonably rely on any representation. Defendants correctly assert that, in general, "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). However, "[a]s this Court has explained, that general rule is only applied when the plaintiffs were either presented with the information and chose to ignore it or had some other indication that further inquiry was needed." *Alfieri*, 295 Mich App at 195 (quotation and citation omitted). "Furthermore, it has long been the rule that, at least when a defrauded party troubled to examine some extrinsic evidence supporting a false statement, that party owes no duty to . . . exercise diligence to uncover additional evidence disproving the defrauder's representations." *Id*.

Viewed in a light most favorable to the non-moving party, plaintiffs presented sufficient evidence to create a genuine issue of material fact as to whether they reasonably or justifiably relied on the sales brochure and Greene's statements. There was testimony that Greene told plaintiffs that the condo did not have any environmental issues. Gary testified that he relied on Greene as his realtor and both plaintiffs testified that Greene did not give them any reason to believe there was environmental contamination at the site. In addition, Greene prepared the marketing brochure with input from Bertorelli. Plaintiffs testified that they relied on the brochure in deciding to purchase the condo and they thought the property had been cleaned up. The August 2004 DEQ letter supported that the brochure was misleading. Furthermore, plaintiffs testified that they relied on the seller's disclosure statement wherein Van Horn represented that there were no environmental issues on the property. On this record, there was sufficient evidence that would allow a rational jury to conclude that plaintiffs' reasonably relied on the brochure and Greene's statements and the trial court did not err in denying defendants' motions for summary disposition and directed verdict with respect to the fraudulent and negligent misrepresentation claims.

Next, defendants contend that plaintiffs failed to prove a case of silent fraud by clear and convincing evidence.

"Silent fraud or fraudulent concealment has [] long been recognized in Michigan." *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008). However, a plaintiff must show more than mere nondisclosure to establish a claim of silent fraud. *Hord v Environmental Research Institute of Michigan*, 463 Mich 399, 412; 617 NW2d 543 (2000). Instead, "[t]here must be circumstances that establish a legal duty to make a disclosure." *Id*. "[A] legal duty to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id*. Further, "a duty of disclosure may be imposed on a seller's agent to disclose newly acquired information that is recognized by the agent as rendering a prior affirmative statement untrue or misleading." *Alfieri*, 295 Mich App at 194.

Pursuant to M Civ JI 128.02, which was provided to the jury, a plaintiff must prove the following elements by clear and convincing evidence to establish a claim of silent fraud:

(1) Defendant failed to disclose a material fact about the subject matter at issue

(2) Defendant had actual knowledge of the fact

(3) Defendant's failure to disclose the fact caused plaintiff to have a false impression

(4) When defendant failed to disclose the fact, defendant knew that the failure would create a false impression;

(5) When defendant failed to disclose the fact, defendant intended that plaintiff rely on the resulting false impression;

(6) Plaintiff relied on the false impression;

(7) Plaintiff was damaged as a result of her reliance.

Here, there was evidence that would allow a rational jury to conclude that plaintiffs proved all of these elements by clear and convincing evidence. A jury could have concluded that Greene received the DEQ letter and failed to disclose it to plaintiffs to correct her prior assertion that there were no environmental issues on the property. *Alfieri*, 295 Mich App at 194. Testimony showed that the DEQ sent a letter to Bertorelli and Greene informing both individuals that the brochure was misleading. Although Greene testified that she did not recall receiving the letter, Bertorelli agreed that he testified at a deposition that he discussed changing the brochure with Greene immediately after he received the letter. Gary testified that he informed Greene that he was not interested in the property if it had any environmental issues and that Greene assured him there were no issues at the property. Plaintiffs testified that they relied both on Greene's assertions and the brochure in making their decision to purchase the property and that they were not given any information that caused them concern about the property. This evidence would have allowed a jury to conclude that the letter was material information about the property of which Greene had knowledge and failed to disclose to plaintiffs with knowledge and intent to create a false impression.

Additionally, a jury could have concluded that plaintiffs made inquiries about environmental issues on the property and Greene failed to disclose other material information of which she had knowledge. See e.g. *Hord*, 463 Mich at 412 (a legal duty to disclose material information can arise where a buyer makes specific inquires about certain facts and circumstances surrounding a transaction). Finally, plaintiffs testified that they relied on Greene's representations and that they suffered damages as a result.

In short, the trial court did not err in denying defendants' motion for directed verdict with respect to the silent fraud claim where a rational jury could have concluded that plaintiffs proved all of the elements of silent fraud by clear and convincing evidence.

C. SELLER'S DISCLOSURE ACT

Defendants contend that the trial court erred in denying their motions for summary disposition, directed verdict and JNOV on plaintiffs' SDA claim because the SDA applied to Van Horn's condo individually as opposed to the development as a whole. Defendants also contend that the trial court erred in denying their motions for directed verdict and JNOV because there was no evidence that Greene acted in concert with Van Horn to violate the SDA.

Resolution of these issues requires interpretation and application of the SDA, which involves questions of law that we review de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 296. "[U]nless explicitly defined in a statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotations and citations omitted).

Defendants argue that the SDA only applied to Van Horn's condo unit individually as opposed to the condominium development as a whole and therefore the SDA claim should have been dismissed because the form was accurate as to Van Horn's condo.

The seller disclosure requirements of the SDA apply to the "transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units." MCL 565.952. Here, because Van Horn transferred a single-family dwelling by sale, the disclosure requirements under MCL 565.952 applied. When disclosure requirements are triggered the transferor "shall deliver" a seller's disclosure statement to his or her agent or to the prospective transferee or the transferee's agent. *Bergen v Baker*, 264 Mich App 376, 383; 691 NW2d 770 (2004).

MCL 565.957 provides the form for a seller's disclosure statement under the act. The form contains a list of "property conditions." Item 10 on that list concerns "environmental problems" and it provides:

> Are you aware of any substances, materials, or products that may be an environmental hazard such as, but not limited to, asbestos, radon gas, formaldehyde, lead-based paint, fuel or chemical storage tanks and contaminated soil *on the property*. . . . [MCL 565.957 (emphasis added).]

Defendants' argument concerns the scope of the phrase "the property" in this part of the disclosure statement. Defendants contend that Van Horn was not required to disclose information concerning the Factory Condominium project as a whole. Instead, defendants contend that Van Horn was only required to disclose information concerning "environmental problems" associated with his individual condominium unit. We do not agree that the phrase "the property" should be read so narrowly.

As noted above, the disclosure requirements "apply to the transfer of *any interest in real estate* consisting of not less than 1 or more than 4 *residential dwelling units*." MCL 565.952 (emphasis added). The term "property," as used in the disclosure statement necessarily relates back to the "dwelling unit" that initially triggered the disclosure requirements. See *In re Receivership of 11910 South Francis Rd*, 492 Mich 208, 222; 821 NW2d 503 (2012) ("When construing statutory language, [the court] must read the statute as a whole . . ."). However, "property" does not exclusively refer to the dwelling unit in and of itself for purposes of disclosure. Instead, "property" necessarily refers to the dwelling unit and the land on which the unit is situated. Specifically, the statute directs the transferor to disclose the presence of "chemical storage tanks" and "contaminated soil" "on the property." These conditions are necessarily related to the land on which the dwelling unit is situated as it would be nonsensical to conclude that the Legislature intended that a seller need only disclose the presence of

contaminated soil or chemical storage tanks that are located inside of the dwelling unit. See *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (in construing a statute, a court must "avoid an interpretation that would render any part of the statute surplusage or nugatory") (quotation omitted).

Moreover, construing the statute to require disclosure of environmental problems associated with the land on which a dwelling unit is situated is supported by the purpose of the disclosure statement. The disclosure statement contains a paragraph entitled "Purpose of Statement," which provides: "This statement is a disclosure of the *condition and information concerning* the property . . ." and the seller is directed to "Report known conditions *affecting* the property." MCL 565.957 (emphasis added). The word "concerning" is defined as "relating to; regarding; about," while "affecting" is defined in relevant part as "to produce an effect on, to influence in some way. . . ." *Random House Webster's College Dictionary*, 1997. Thus, the statutory text supports broad disclosure of information about, relating to, or regarding, the property including conditions that effect or influence the subject property in some way. Such information includes conditions related to the land upon which a dwelling unit is situated. Certainly, the presence of contaminants in the ground on which a dwelling unit sits relates to, effects, and influences the dwelling unit in some way. Furthermore, where, as in this case, conveyance of a dwelling unit includes conveyance of the legal right to access and use shared areas such as swimming pools, fitness centers and parking garages, environmental problems that affect or concern those areas must also be disclosed. Necessarily, such conditions relate to, regard, effect or influence the dwelling unit itself in that, among other things, they reduce the value of the property interest as a whole.

In summary, the SDA requires the transferor of property to disclose environmental problems that relate to, effect, and influence not only the dwelling unit in and of itself, but also the land upon which the dwelling unit is situated. As discussed below, in this case there was a question of fact regarding whether Van Horn knew about the contaminated soil on the land where his condominium was situated before he delivered the disclosure statement. Therefore, the trial court did not err in denying defendants' motions to dismiss the SDA claim on this basis.

Next, defendants argue that plaintiffs failed to prove that Van Horn and Greene knowingly acted in concert to violate the SDA.

In the event that a seller makes errors, inaccuracies, or omissions in the disclosure statement, "it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement . . . ." *Bergen*, 264 Mich App at 385. Specifically, liability will attach where the plaintiff can prove that a seller's disclosure statement "contained a misrepresentation, error, inaccuracy, or omission" and that the defendant "had personal knowledge" of the misrepresentation, error, inaccuracy, or omission, when it was delivered "or should have had such knowledge by the exercise of ordinary care. . . ." *Id*.

With respect to the liability of an agent of a transferor, the act provides that an agent is not liable for any violation by the transferor "unless any agent knowingly acts in concert with a transferor to violate this act." MCL 565.965. The SDA does not define "acting in concert," however, in the context of a tort case, to prove that multiple defendants acted "in concert," a

plaintiff must prove that "all defendants acted . . . pursuant to a common design." *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013) (quotation omitted). This is similar to the definition of a civil conspiracy, see *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992) ("A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose. . ."), and "conspiracy may be established by circumstantial evidence and may be based on inference." *Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821 (1986).

Having reviewed the record we conclude that when viewed in a light most favorable to plaintiffs, there was an issue of fact regarding whether Greene acted in concert with Van Horn to deliver an inaccurate disclosure statement to plaintiffs and thereby violate the SDA.

Here, at the time defendants' moved for a directed verdict, circumstantial evidence would have allowed a jury to reasonably infer that Greene and Van Horn had knowledge of the contamination. Greene lived down the road from the development for years and she reviewed documents concerning the contamination. Greene drafted several versions of the marketing brochure before settling on the third and final draft that, according to the DEQ, contained misleading language. Bertorelli testified that he discussed the contamination with Greene and Greene was present when concrete was poured over the vapor barrier. With respect to Van Horn's knowledge about the contamination, evidence showed that Van Horn owned his condo during the time when environmental due care activities took place at the condo site including installation of the vapor barrier. Greene testified that Van Horn informed her about air samples that were taken from his condo. In addition, Van Horn was copied on the February 9, 2004 DEQ letter wherein the DEQ expressly referenced the contamination.

In addition to finding that Greene and Van Horn had knowledge of the contamination, a rational jury could have inferred that Greene and Van Horn acted in concert to provide an inaccurate disclosure statement to plaintiffs. Greene testified that she knew Van Horn for over 18 years. She referred business to Van Horn. A jury could have concluded as was argued by plaintiffs, that Van Horn contacted Greene to sell his condo because he knew that he could work with her to provide an inaccurate disclosure statement and conceal information about the contamination. Further, Greene reviewed the disclosure form after Van Horn filled it out.

Other evidence showed that both Greene and Van Horn were aware that plaintiffs were concerned about contamination. This supported the inference that they acted in concert to conceal the contamination by providing an inaccurate disclosure statement. Gary testified that Van Horn was present when Greene showed the condo to plaintiffs. According to Gary, when he asked Greene if there were any environmental issues with the property, Greene responded that there were no issues and Van Horn responded in the same manner in unison with Greene. Kathleen also testified that at some point, Van Horn affirmed Greene's statement that there were no environmental issues with the property. Given there was evidence that Van Horn and Greene were present when Gary asked about environmental problems, a rational trier of fact could have inferred that Greene subsequently acted in concert with Van Horn to conceal the contamination by providing an inaccurate seller's disclosure statement to plaintiffs.

In sum, when the evidence is viewed in a light most favorable to plaintiffs, there was a question of fact regarding whether Greene acted in concert with Van Horn to violate the SDA and the trial court did not err in denying defendants' motions for directed verdict and JNOV.

D. OFFSET OF JUDGMENT

Finally, plaintiffs' argue on cross-appeal that the trial court erred in offsetting the judgment by $12,500—the amount of Van Horn's case evaluation. Specifically, the trial court held that MCL 600.2956, the statute abolishing joint liability in most instances, did not apply in this case and that therefore the common law setoff rule applied. Interpretation and application of a statute involve questions of law that we review de novo. *Klooster*, 488 Mich at 295.

Defendants cited MCL 600.2956 in support of their motion to offset the judgment; that statute provides in relevant part that "in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." Defendants maintained that plaintiffs argued successfully earlier in the proceedings that this was not an action for personal injury, property damage, or wrongful death (i.e. with respect to comparative fault and the statute of limitations), and therefore defendants were jointly liable for the damages. The trial court agreed, holding that the offset was proper under the common law.

This Court has described the common-law setoff rule as follows:

> where a negligence action is brought against joint tortfeasors, and one alleged tortfeasor agrees to settle his potential liability by paying a lump sum in exchange for a release, and a judgment is subsequently entered against the non-settling tortfeasor, the judgment is reduced *pro tanto* by the settlement amount. [*Markley v Oak Health Care Investors of Coldwater, Inc*, 255 Mich App 245, 250-251; 660 NW2d 344 (2003) (quotation and citations omitted).]

However, "[u]nder the current statutory scheme, [MCL 600.2956] abolished joint liability in most circumstances." *Id.* at 252. MCL 600.2956 applies to actions "based on tort or another legal theory seeking damages for personal injury, property damage or wrongful death. . . ."

In this case, because the trial court had previously determined that this action did not involve an action to recover damages for personal injury, property damage or wrongful death, the trial court did not err in holding that MCL 600.2956 was inapplicable and the common law setoff rule applied in this case. As noted, under the setoff rule, where one alleged tortfeasor "agrees to settle his potential liability by paying a lump sum in exchange for a release" subsequent judgments must be offset by the settlement amount. *Markley*, 255 Mich App at 250-251. Accordingly, the trial court did not err in offsetting the judgment.

Affirmed. Neither party having prevailed in full, neither may tax costs. MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello