

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

RICHARD LOCH and PATRICIA LOCH,

Plaintiffs-Appellants,  
Cross-Appellees,

v

FRED BERAKOVICH and HELEN  
BERAKOVICH,

Defendants-Appellees,  
Cross-Appellants.

UNPUBLISHED

September 24, 1996

No. 176207

LC No. 93-003418-CK

---

Before: Gribbs, P.J., and Hoekstra and C. H. Stark,\* JJ.

PER CURIAM.

In this action involving fraudulent misrepresentation in a land contract, plaintiffs appeal and defendants cross-appeal as of right the trial court's judgment following a bench trial. We affirm in part and reverse in part.

In the early 1980s, plaintiffs began to seek a motel to purchase and operate in their retirement. Plaintiffs targeted defendants' motel, and nearly every fall for a three or four year period, they inquired as to whether defendants were selling. In mid-1988, defendants listed the motel for sale at \$525,000, but Helen Berakovich testified that defendants canceled the listing approximately one month later. When plaintiffs approached defendants in late 1988, defendants indicated that the motel was for sale for \$485,000. At trial, Fred Berakovich testified that the asking price was based on \$3000 a lakefront foot.

Richard Loch testified that Fred Berakovich told him that the property was selling for \$1200 a lakefront foot and that Helen Berakovich told him that the gross income on the property was in the low \$70,000 range. In actuality, during the six years before the sale, the gross income was in the range of approximately \$29,000 to \$43,000. Plaintiffs initially offered \$350,000 for the motel and property.

---

\* Circuit judge, sitting on the Court of Appeals by assignment.

This amount was arrived at by multiplying the represented gross income of \$70,000 by five, which was purportedly an accepted method. This offer was rejected, and plaintiffs ultimately paid \$457,000 for the land, buildings and personal property. According to Richard Loch, plaintiffs were willing to pay the increased amount because he believed the vacant lot that was part of the purchase could be improved to increase the value of the property. The purchase agreement provided that the selling price of the real estate was \$407,000 and that for the business and personal property was \$50,000.

At the time of the sale, plaintiffs did not hire an appraiser or examine the property tax statements to determine the assessed value, and they did not consult an accountant regarding the property's value. Although they consulted an attorney, the consultation did not extend to the purchase price. Defendants refused to permit plaintiffs to examine bookkeeping records. Helen Berakovich testified that she never told plaintiffs that the gross income was \$70,000, but that she indicated that the potential gross income was between \$40,000 and \$70,000. Plaintiffs asserted that they relied on the statement of Helen Berakovich when they determined the amount they would offer and pay for the motel property and that if Helen Berakovich had indicated that the gross income was less than \$70,000, they would not have pursued the purchase of the motel property. Helen Berakovich testified that during defendants' ownership of the motel, between 1982 and 1988, it never grossed more than \$43,000.

Plaintiffs made improvements at a cost of \$120,000 between 1989 and 1991, but their gross income for each of those years and 1992, was less than \$60,000. In 1993, the gross income was nearly \$71,000. Plaintiffs' business has admittedly been affected by the increase of rental properties available in Mackinaw City, as well as the weather conditions. Plaintiffs' improvements included the addition of rooms for rent.

At trial, a real estate appraiser testified that the property was appraised in late 1993 and that he determined that its value in 1989 as an operating motel was \$225,000. However, he also indicated that the highest and best use of the property was redevelopment as a modern motel, under which circumstance the property would be valued at \$300,000. This estimate was based on a value of \$2000 a lakefront foot. The witness testified that the existing improvements were at the end of their life in 1989 and added no value to the land. Another witness testified that one hotel in an exceptional situation was sold in 1988 for \$6000 a lakefront foot and a second sold for \$3500 a lakefront foot. However, because of its location, at the south end of Mackinaw City and south of the US-23 interchange, he believed that in 1991, the value of the subject motel was \$2000 a lakefront foot. At the time of the sale, the property was assessed at \$142,000, which is one-half the market value of the property.

The trial court found that plaintiffs suffered no damages with regard to the amount paid for the real estate because its market value was within the range of the assessment and comparable sales. Plaintiffs assert that this conclusion was erroneous. We disagree.

The trial court's findings of fact are reviewed for clear error. MCR 2.613(C). We may not substitute our "judgment for that of the trial court unless the facts 'clearly preponderate in the opposite direction.'" *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410; 531 NW2d 168 (1995), on remand 215 Mich App 633; 546 NW2d 709 (1996). We must defer to those findings

of the trial court that are based on an assessment of the credibility of witnesses, MCR 2.613(C); *Arco Industries, supra*, and should conclude that a finding is clearly erroneous only where, although evidence to support it exists, we are left with a definite and firm conviction that the trial court made a mistake. *Hofmann v Auto Club Ins*, 211 Mich App 55, 99; 535 NW2d 529 (1995).

According to the assessed value at the time of the sale, \$142,000, the market value of the property was \$284,000. Plaintiffs' expert appraiser testified that, at the time of the purchase, the property was valued at \$225,000 for an operating motel and \$300,000 for redevelopment purposes. The redevelopment appraisal was based on a value of \$2000 a lakefront foot. However, this expert admitted that he could not place a value on the property where the transaction involved an anxious buyer and reluctant seller. The trial court also reflected on the sale of property in a nearby location, albeit with higher traffic, at \$3500 a lakefront foot. Defendants testified that, based on the sale of properties for \$6000 and \$3500 a lakefront foot, they determined that \$3000 was appropriate for their property. An accountant testified that he was involved with two sales of properties at \$3000 and at \$3300 or \$3400 a lakefront foot. He also indicated that determining a price based on the gross income multiplied by five is a starting point for the sale of a motel business; other factors may figure in to raise the price. The purchase price reflects a cost of approximately \$2700 a lakefront foot.

Considering the evidence presented, we find that the trial court's conclusion that plaintiffs suffered no injury in paying the \$407,000 purchase price because it reflected a value within the range of other sales in the area was not clearly erroneous. The cost of nearly \$2,700 a lakefront foot clearly falls within the range of purchase prices of \$2000 to \$3500. Plaintiffs sought the property out and were clearly willing to pay more for the property based on its development potential. We cannot say that we are convinced that the trial court made a mistake when it concluded that plaintiffs suffered no damages with respect to the purchase price paid for the real estate.

Moreover, in order to establish a claim for misrepresentation, there must exist reasonable reliance on a false representation. *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Where there are means through which a person may determine that the representation is false, there can be no fraud. *Id.* Here, although defendants refused to disclose the business records, plaintiffs could have hired an appraiser or reviewed property assessment records. Plaintiffs' failure to utilize means through which they could determine the market value of the property supports the finding of the trial court that there were no damages associated with the purchase price of the real estate.

Plaintiffs' argument that the trial court's decision was against the great weight of the evidence is not properly before this Court. Plaintiffs neither cited authority in support of their position, *Roberts v Vaughn*, 214 Mich App 625, 631; 543 NW2d 79 (1995), nor made a timely motion for a new trial, *Buckeye Marketers, Inc v Finishing Services, Inc*, 213 Mich App 615, 616-617; 540 NW2d 757 (1995).

Next, in the cross-appeal, defendants argue that the trial court erred in using an incorrect standard in deciding the merits of plaintiffs' fraud claim. The trial court found that plaintiffs established their claim of fraud with regard to defendants' representation of the gross income of the motel business

by the preponderance of the evidence. Although plaintiffs concede that the trial court's decision was based on the incorrect burden of proof, they assert that under the correct clear and convincing evidence standard, they satisfied their burden. We agree with defendants.

The plaintiff bears the burden of proving fraud by clear and convincing evidence. *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976); *Gorman v Soble*, 120 Mich App 831, 840; 321 NW2d 119 (1982). We may not substitute our judgment for that of the trial court, particularly where witness credibility and factual determinations are at issue. Accordingly, we make no determination as to whether plaintiffs have satisfied their burden; this responsibility is that of the trial court. Therefore, it is necessary to remand this matter to the trial court for review of the evidence under the correct evidentiary standard to determine whether plaintiffs have established their claims.

Affirmed in part and reversed in part. Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gibbs  
/s/ Joel P. Hoekstra  
/s/ Charles H. Stark