

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

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JOHN E. McAVOY and ROSALIE A. McAVOY,

Plaintiffs/Cross-Defendants-Appellees,

v

DENNIS DUBUC,

Defendant-Appellant,

and

CAROL DUBUC,

Defendant/Cross-Plaintiff,

and

WENDELL CONSTRUCTION, INC., LAUREL  
ROOT, d/b/a, J & T CONTRACTING, and  
COUNTY OF KALKASKA

Defendants.

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Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

Defendant Dennis Dubuc (hereafter “defendant”) appeals as of right the circuit court’s entry of judgment in favor of plaintiffs following a jury verdict that awarded plaintiffs \$25,000 damages on their claim of fraudulent misrepresentation in the sale of a home. We affirm.

I

Plaintiffs John and Rosalie McAvoy (hereafter “McAvoy” and “Rosalie,” respectively) purchased a new home in Williamsburg from defendant and his wife, Carol. Defendant served as the general contractor for the construction of the home, subcontracting with defendant Wendell Construction for the rough carpentry work, and with defendant Laurel Root for installation of the

plumbing and heating system. Building inspectors for defendant Kankaska County conducted building inspections of the home and issued an occupancy permit.<sup>1</sup>

Plaintiffs subsequently experienced problems with the home's heating system. On January 30, 1994, a water pipe in an upstairs bathroom ruptured, flooding the home with thousands of gallons of water and causing major damage to the home. In moving the furnishings from the home into storage, McAvoy suffered a back injury, which disabled him and eventually required surgery. Because of the extensive water damage, the drywall came off the interior walls of the home. Subsequent inspections revealed major structural deficiencies in the home. Plaintiffs filed the instant action to recover damages for more than \$15,000 in repair costs and for pain and suffering.

## II

Following a two-day trial, the jury returned a verdict in favor of plaintiffs against defendant and Root; however, the jury awarded no damages against Root, and awarded \$25,000 damages against defendant: \$15,000 for structural repairs and \$10,000 for stress. The court denied defendant's motion for judgment notwithstanding the verdict (JNOV) or for a new trial. During the lower court proceedings, the trial court sanctioned defendant \$200 for interfering with settlement negotiations between plaintiffs' counsel and defendant Root and \$600 for failing to appear for a hearing.

## III

In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate; the question of law is subject to de novo review on appeal. *Id.* "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998), quoting *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

## A

Defendant first claims that the trial court abused its discretion in denying his JNOV motion because there was insufficient evidence to support plaintiffs' claims of fraud. We disagree. In general, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made 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 upon it; and (6) the plaintiff suffered damage. *M & D, Inc v W B McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Defendant contends that plaintiffs failed to show that he made a material representation because the statements attributed to him were merely opinion or puffing and cannot form the basis of a misrepresentation claim. Further, defendant contends that there was no evidence that he knew his representations were false or that he made them without factual basis.

Plaintiffs presented testimony and other evidence that defendant made various representations about the quality of the home and the heating system. McAvoy testified that when plaintiffs negotiated with defendant to purchase the home, there were discussions that it was “a good sound house” and that the heating system “was a safe system,” would adequately heat the home, and that they should not have any problems. Rosalie testified that “Dubuc assured us that [the home] was the best, highest quality.”

A letter from plaintiffs to defendant, admitted at trial, evidenced in detail some of the numerous problems with the home and that it was not of the highest quality or as otherwise represented by defendant. Plaintiffs presented evidence indicating that the heating system was inadequate to heat the home and hot water, given its design and size, and that the home was not structurally sound, nor up to code when constructed. Plaintiffs also presented testimony discrediting defendant’s claim that he had no way of knowing that the work on plaintiffs’ home was substandard and did not meet the code. The jury could reasonably infer from the evidence that defendant made statements about the home which were made recklessly or without knowledge of their truth as positive assertions.

“Whether a given representation is an expression of opinion or a statement of fact depends on the circumstances of the particular case.” 12 Michigan Law and Practice, Fraud, § 3, p 395. “Representations as to the value or location of land, made by one who claims personal knowledge and is seeking to sell or exchange it, cannot be considered mere opinion.” *Id.* at 395-396, citing *Groening v Opsata*, 323 Mich 73; 34 NW2d 560 (1948). Here, defendant was a licensed builder who served as general contractor for the construction of plaintiffs’ home. He was in a position to have special knowledge of the quality of the home. His representations in selling the home were expressions of fact rather than statements of his opinion.

Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller, Canfield, Paddock, & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). Although there was conflicting evidence in this case, there was sufficient evidence to submit the issue of fraudulent misrepresentation to the jury.

## B

Defendant next contends that the trial court abused its discretion in denying defendant’s JNOV motion because plaintiffs presented insufficient evidence to support the award of \$10,000 damages for stress and that damages for emotional distress are not available in the ordinary commercial context. We conclude that there was sufficient evidence of mental distress to submit this issue to the jury. The court did not abuse its discretion in denying defendant’s JNOV motion.

Mental distress damages are recoverable in a fraud and misrepresentation case where the damages are the legal and natural consequences of the wrongful act and might reasonably have been anticipated. *Phinney v Perlmutter*, 222 Mich App 513, 530-532, n 2; 564 NW2d 532 (1997). In this case, the jury found in favor of plaintiffs on the claim of fraudulent misrepresentation. Thus, damages for mental distress were not barred.

Throughout the trial, plaintiffs described the problems with their home as a “nightmare.” McAvoy testified about his worries concerning his injuries and the home, and that the home cost plaintiffs a lot of time, money, effort, and grief. Rosalie testified in detail about her difficulties in caring for her husband during his year-long recuperation and that she was exhausted. Further, she constantly worried whether he would be all right; she had suffered because of her husband’s injury and still fears that there is something wrong with the house. A letter from plaintiffs to defendant, admitted into evidence, also explicitly referenced plaintiffs’ distress. There was sufficient evidence of emotional and mental distress to submit this issue to the jury.

#### IV

Defendant claims that there was no basis for proceeding with trial because the court previously granted defendant Wendell Construction’s motion for partial summary disposition and limited plaintiffs’ damages. This Court reviews questions of law de novo. *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

The trial court granted Wendell Construction’s motion for partial summary disposition as to damages, ruling that plaintiffs’ claims against Wendell Construction were limited to \$250. In granting the motion, the court noted that Wendell Construction was not alleged to be a defendant in the misrepresentation count, and the court found that joint and several liability did not attach with regard to the claims against Wendell Construction. Plaintiffs subsequently settled with Wendell Construction for \$250 and released Wendell Construction from further liability.

Plaintiffs’ claim against Wendell Construction was based on negligence, whereas their claim against defendant, at trial, was based on a theory of misrepresentation. The claim against defendant was independent of the claim against Wendell Construction. Contrary to defendant’s argument, the Michigan contribution act, MCL 600.2925d; MSA 27A.2925(4), and the doctrine of res judicata are inapplicable. Defendant’s claim that his damages should have been limited to \$250 is without merit.

#### V

Defendant claims that the jury verdict is inconsistent because the jury found Root negligent, but awarded no damages against Root, and nevertheless awarded economic damages against defendant based on Root’s work. We decline to review this issue because defendant failed to raise the issue before the trial court. Generally an issue is not preserved for appeal if it is not raised before and addressed by the trial court. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

#### VI

Defendant claims that the imposition of contempt sanctions against him on two separate occasions was procedurally and substantively defective. We disagree.

#### A

The issuance of a contempt order is within the sound discretion of the trial court and is reviewed only for abuse of discretion. *Schoensee v Bennett*, 228 Mich App 305, 316; 577 NW2d 915 (1998). This Court also reviews a trial court's award of sanctions for an abuse of discretion. *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997).

## B

The trial court sanctioned defendant on two occasions; however, the court did not refer to "contempt" in ordering either sanction. It is unclear whether the court viewed either sanction as a contempt matter. Nonetheless, we find that the trial court did not abuse its discretion in awarding sanctions in either instance.

Contempt of court is a wilful act, omission or statement which tends to impair the authority or impede the functioning of a court. *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). Courts have inherent independent authority to punish a person for contempt. *Id.* When a contempt occurs outside the presence of the court, the accused must be advised of the charges against him and given a reasonable opportunity to defend the charges by explanation. *Id.* at 438.

On October 20, 1997, the trial court sanctioned defendant \$200 for interfering with settlement negotiations between plaintiffs' counsel and defendant Root, finding that defendant, an in propria persona litigant gave legal advice to Root, an in propria persona co-defendant.

In this instance, the parties were before the court for a settlement conference. Before sanctioning defendant, the court heard testimony on the matter from all parties. The court provided defendant an opportunity to defend himself in this matter. The court did not abuse its discretion in awarding sanctions.

On November 17, 1997, the court sanctioned defendant \$600, the amount of plaintiffs' reasonable attorney fees, for noticing a hearing on his motion, failing to appear for the hearing, and failing to notify plaintiffs that he would not be appearing. Under MCR 2.119(E)(4)(b) and (c), a moving party who fails to appear for a motion hearing is subject to the assessment of costs by the court, including reasonable attorney fees for appearing at the hearing:

Unless excused by the court, the moving party must appear at a hearing on the motion. A moving party who fails to appear is subject to assessment of costs under subrule (E)(4)(c); in addition, the court may assess a penalty not to exceed \$100, payable to the clerk of the court. [MCR 2.119(E)(4)(b).]

If a party violates the provisions of subrule (E)(4)(a) or (b), the court shall assess costs against the offending party, that party's attorney, or both, equal to the expenses reasonably incurred by the opposing party in appearing at the hearing, including reasonable attorney fees, unless the circumstances make an award of expenses unjust. [MCR 2.119(E)(4)(c).]

According to the record following trial, the motion hearing was scheduled on the court docket, but defendant failed to appear because he thought it was not scheduled, apparently either because he did not pay a motion fee or because the matter was partially resolved. Defendant was properly subject to sanctions under MCR 2.119(E)(4)(c).

Affirmed.

/s/ Michael R. Smolenski

/s/ Richard Allen Griffin

/s/ Janet T. Neff

<sup>1</sup> Before trial, all defendants other than defendant and Root either settled with plaintiffs or were dismissed from the action.