

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

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A. D. TRANSPORT, INC., and M & G  
DEVELOPMENT, INC.,

UNPUBLISHED  
September 30, 2010

Plaintiffs-Appellees/Cross-  
Appellants,

v

MICHIGAN MATERIALS & AGGREGATES  
COMPANY, INC., and MICHIGAN PAVING &  
MATERIALS COMPANY,

No. 290236  
Wayne Circuit Court  
LC No. 07-703403-CE

Defendants-Appellants/Cross-  
Appellees.

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A. D. TRANSPORT, INC., and M & G  
DEVELOPMENT, INC.,

Plaintiffs-Appellants,

v

MICHIGAN MATERIALS & AGGREGATES  
COMPANY, INC., and MICHIGAN PAVING &  
MATERIALS COMPANY,

No. 290250  
Wayne Circuit Court  
LC No. 07-703403-CE

Defendants-Appellees.

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Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

This case arises out of the 2005 sale of alleged contaminated real property in Van Buren Township, Michigan by defendant Michigan Materials & Aggregates Company (“MMAC”) to plaintiff A. D. Transport, Inc. (“ADT”), pursuant to a written contract containing an “as is” provision. After the contract was executed, ADT assigned its contract rights to plaintiff M & G Development, Inc. (“MG Development”). In Docket No. 290236, MMAC and its parent company, defendant Michigan Paving & Materials Company (“Michigan Paving”), appeal as of right the trial court’s order granting plaintiffs summary disposition on their claims for fraud,

negligent misrepresentation, negligence, and violation of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq.*, and awarding plaintiffs a judgment of \$1,691,791.14. Plaintiffs cross appeal, challenging the trial court's dismissal of their additional claims for unjust enrichment and restitution, and common-law indemnification. In Docket No. 290250, plaintiffs appeal as of right the trial court's postjudgment order denying their motion for costs and attorney fees. In Docket No. 290236, we affirm in part, reverse and vacate in part, and remand for further proceedings. In Docket No. 290250, we affirm in part, vacate in part, and remand for further proceedings regarding plaintiffs' request for sanctions pursuant to MCR 2.114(E).

## I. BACKGROUND

Michigan Paving and its subsidiary, MMAC, are part of the same asphalt-paving business in southern Michigan. The business maintained an office on approximately 22 acres of property in Van Buren Township until July 2005, when MMAC accepted ADT's offer to purchase the property "as is" for approximately \$1.4 million. In August 2005, ADT assigned its rights under the contract to MG Development. MMAC then executed a warranty deed conveying the property to MG Development.

In February 2007, plaintiffs filed this action against defendants. Plaintiffs' second amended complaint alleged that, contrary to representations made by defendants' agents before the sale, defendants were aware that contaminated waste was buried or hidden on the property. Plaintiffs sought recovery of remediation costs from defendants under various common-law and statutory theories of liability, including common-law fraud, negligent misrepresentation, negligence, trespass, nuisance, unjust enrichment, common-law indemnification, and the NREPA.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted defendants' motion with respect to plaintiffs' claims for trespass, nuisance, unjust enrichment, and common-law indemnification, but granted summary disposition in favor of plaintiffs with respect to their claims for fraud, negligent misrepresentation, negligence, and the NREPA. The court thereafter awarded plaintiffs a judgment on their claims in the amount of \$1,691,791.14. Plaintiffs' postjudgment motion for an award of costs and attorney fees under various theories was denied.

## II. DOCKET NO. 290236 (DEFENDANTS' APPEAL)

Defendants challenge the trial court's decision granting plaintiffs summary disposition on their claims for fraud, negligent misrepresentation, negligence, and the NREPA.<sup>1</sup>

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<sup>1</sup> Defendants assert in a footnote in their brief on appeal that MG Development and MMAC are the only real parties in interest in this case. The record does not disclose that this issue was raised below and defendants have not properly raised it as an issue on appeal, nor do they otherwise address it in their brief. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 (continued...)

We review a trial court's decision on a motion for summary disposition de novo. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim based on the substantively admissible evidence. MCR 2.116(G)(6); *Adair v Mich*, 470 Mich 105, 120; 680 NW2d 386 (2004); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). The moving party has the initial burden of supporting its position with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b) and (4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to show a genuine issue of material fact for trial. *Id.*; *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison*, 481 Mich at 425.

Defendants argue that the trial court's decision granting plaintiffs summary disposition on their fraud, negligent misrepresentation, negligence, and NREPA claims was based on its erroneous determination that defendants had a duty under the NREPA to disclose that the property was a "facility" as defined in that act before transferring an interest in the property. We agree that the trial court erred in finding that the property was a facility for which defendants had a duty of disclosure under the NREPA, and that this error requires reversal of the trial court's decision with respect to each of the four claims for which the court granted plaintiffs summary disposition. The statutory duty of disclosure was not material to each cause of action. Further, there is a genuine issue of material fact whether the property was a "facility," which thereby precluded summary disposition in favor of either plaintiffs or defendants.

The NREPA is a recodification, with some amendments, of the former Michigan Environmental Response Act (MERA), MCL 299.601 *et seq.* See *Cairns v East Lansing*, 275 Mich App 102, 108; 738 NW2d 246 (2007); *Farm Bureau Mut Ins Co v Porter & Heckman, Inc*, 220 Mich App 627, 629 n 1; 560 NW2d 367 (1996); *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 36; 539 NW2d 526 (1995). The MERA was originally enacted in 1982, but was extensively amended in 1990. See *Farm Bureau Mut Ins Co*, 220 Mich App at 629 n 1. The NREPA became effective March 30, 1995. *Id.* Part 201 of the NREPA encourages the prompt cleanup of hazardous substances by authorizing administrative and private actions, and assigning financial liability for the cleanup. *Cairns*, 275 Mich App at 108. It provides for retroactive application of remedies for "facilities"<sup>2</sup> posing a threat to public health, safety, or welfare, or to

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Mich App 186, 197; 602 NW2d 834 (1999). Accordingly, this issue is not properly before this Court. Therefore, for purposes of our review, we shall treat both plaintiffs as having a potential right of recovery and both defendants as having potential liability.

<sup>2</sup> MCL 324.20101(1)(o) defines a "facility" as:

. . . any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been

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the environment, MCL 324.20102(h), although not all amendments to the MERA as set forth in the NREPA have retroactive effect. See *Cipri*, 213 Mich App at 37-38.

In this case, plaintiffs' complaint alleged entitlement to response activity costs under the NREPA. Plaintiffs' claim was based on MCL 324.20126a, which provides, in pertinent part:

(1) Except as provided in section 20126(2), a person who is liable under section 20126 is jointly and severally liable for all of the following:

(a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this part.

(b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this part.

(c) Damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release.

\* \* \*

(7) The costs recoverable under this section may be recovered in an action brought by the state or any other person.

MCL 324.20126(1) provides that persons subject to liability under the NREPA include the following:

(a) The owner or operator of a *facility* if the owner or operator is responsible for an activity causing a release or threat of release.<sup>3</sup>

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released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use.

The "cleanup criteria for unrestricted residential use under part 213" was added by 1996 PA 115, effective March 6, 1996. "Facility" was originally defined in the NREPA, MCL 324.20101(1)(k) (emphasis added), as "any area, place, or property where a hazardous substance has been released, deposited, stored, *disposed of*, or otherwise comes to be located." This definition was also contained in the former MERA, MCL 299.603(m). See *Farm Bureau Mut Ins Co*, 220 Mich App at 640.

<sup>3</sup> "Owner" is defined as "a person who owns a facility." MCL 324.20101(1)(z). "Operator" means "a person who is in control of or responsible for the operation of a facility." MCL (continued...)

(b) The owner or operator of a *facility* at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release.

(c) An owner or operator of a *facility* who becomes an owner or operator on or after June 5, 1995, unless the owner or operator complies with both of the following:

(i) A baseline environmental assessment is conducted prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure. For purposes of this section, accessing property to conduct a baseline environmental assessment does not constitute occupancy.

(ii) The owner or operator discloses the results of a baseline environmental assessment to the department and subsequent purchaser or transferee if the baseline environmental assessment confirms that the property is a facility. [Emphasis added.]

The NREPA also establishes a duty of disclosure for persons transferring property that qualifies as a “facility.” MCL 324.20116(1) provides:

A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a *facility* shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release. [Emphasis added.]

Although both the disclosure duties and the liability provisions of the NREPA are linked to the property constituting a facility, the disclosure duties are not material to whether a person may file a private action under the NREPA to recover response activity costs. However, the statutory duty of disclosure is material to plaintiffs’ silent fraud claim, which is based on defendants’ failure to disclose that the property was a facility under the NREPA.

Plaintiffs’ fraud claim was based on both a fraudulent misrepresentation and silent fraud. Where there is a contract between parties, an independent tort action, such as a claim for fraud, is permissible as long as it is based on duties distinct from the contract. See *Cooper v Auto Club Ins Ass’n*, 481 Mich 399, 410; 751 NW2d 443 (2008). Fraud in the inducement is a species of fraud in a contract setting that “renders a contract voidable at the option of the defrauded party.” *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995). However, the defrauded party may elect to proceed under the contract and recover damages.

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324.20101(1)(y). To apply MCL 324.20126(a), the person must be the current owner or operator. See *Farm Bureau Mut Ins Co v Porter & Heckman, Inc*, 220 Mich App 627, 642-643 n 11; 560 NW2d 367 (1996) (discussing liability provisions under the former MERA). Because defendants are not current owners, MCL 324.20126(a) does not apply.

*Nowicki v Podgorski*, 359 Mich 18, 25; 101 NW2d 371 (1960). A claim of silent fraud requires a suppression of material facts and a legal or equitable duty to make the disclosure. *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000); *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004); *M & D, Inc v McConkey*, 231 Mich App 22, 35-36; 585 NW2d 33 (1998). Here, the existence of a statutory duty of disclosure under the NREPA is material to the silent fraud claim because it would give rise to a legal duty of disclosure.

With respect to plaintiffs' claim of fraudulent misrepresentation, the relationship between parties may give rise to a duty sufficient to permit fraud to be predicated on a misrepresentation. *Cooper*, 481 Mich at 409. A claim of fraudulent misrepresentation requires proof that (1) the defendant made a material misrepresentation, (2) the representation was false, (3) the defendant knew that the representation was false, or made it recklessly, without knowledge of its truth and as a positive assertion, (4) the defendant intended that the plaintiff would act on it, (5) the plaintiff acted in reasonable reliance on the false representation, and (6) damages. *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009). Here, the trial court did not determine whether defendants made a false representation; rather, it only determined that the statutory duty of disclosure under the NREPA was not satisfied. Thus, the court substantively resolved the fraud claim by relying only on the concept of silent fraud.

Plaintiffs' complaint also alleged negligent misrepresentation, which requires proof that that the plaintiff justifiably relied to its detriment on information prepared without reasonable care by one who owes a duty of care to the plaintiff. *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006). This theory of relief is a means for holding a party liable for the negligent performance of a contract to third parties who are foreseeably injured by the negligent performance. See *Williams v Polgar*, 391 Mich 6, 20-23; 215 NW2d 149 (1974). Although negligent misrepresentation is distinguishable from a claim of fraudulent misrepresentation and silent fraud, the trial court here relied on the same statutory duty of disclosure under the NREPA, not a separate duty of care owed by defendants to any plaintiff, to resolve this claim in favor of plaintiffs. Further, plaintiffs' allegations in support of this cause of action in their complaint were based on the same alleged statements and statutory duty of disclosure that were the basis for their general fraud and silent fraud claims. Thus, the trial court erred to the extent that it found that plaintiffs were independently entitled to summary disposition on their negligent misrepresentation claim without an independent basis for finding a negligent misrepresentation. Substantively, the court only found silent fraud.

Similarly, plaintiffs' negligence claim presupposes the existence of a legal relationship between the parties giving rise to a duty of care. *Id.* at 18. Here, plaintiffs alleged that they were owed a duty of disclosure under the NREPA, as purchasers of the subject property, and other duties under the NREPA as adjoining property owners. In granting plaintiffs summary disposition on this claim, the trial court did not determine that defendants owed plaintiffs any duty of care based on their status as adjoining property owners. Rather, its resolution of the negligence count is likewise indistinguishable from its resolution of the silent fraud claim. Thus, our analysis of the silent fraud claim is dispositive of the negligence claim as well.

As previously indicated, both the NREPA and the silent fraud claims depend on whether the property in question was a "facility" under the NREPA at the time it was sold, meaning "any area, place, or property where a *hazardous substance* in excess of the concentrations which

satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located.” MCL 324.20101(1)(o) (emphasis added).

MCL 324.20120a refers to both generic and site-specific cleanup criteria for property. The statute provides, in relevant part:

(1) The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection. The cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:

(a) Residential.

\* \* \*

(2) The department may approve a remedial action plan based on site specific criteria that satisfy the applicable requirements of this part and the rules promulgated under this part. The department shall utilize only reasonable and relevant exposure pathways in determining the adequacy of a site specific criterion. Additionally, the department may approve a remedial action plan for a designated area-wide zone encompassing more than 1 facility, and may consolidate remedial actions for more than 1 facility.

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(17) A remedial action plan that relies on categorical cleanup criteria developed pursuant to subsection (1) shall also consider other factors necessary to protect the public health, safety, and welfare, and the environment as specified by the department, if the department determines based on data and existing information that such considerations are relevant to a specific facility. These factors include, but are not limited to, the protection of surface water quality and consideration of ecological risks if pertinent to the facility based on the requirements of R 299.5717 of the Michigan administrative code.

The “department” refers to “the director of the department of environmental quality or his or her designee to whom the director delegates a power or duty by written instrument.” MCL 324.20101(1)(f). The cleanup criteria is promulgated in various rules set forth in the Michigan Administrative Code (AC), R 299.5701 *et seq.* Like the NREPA, the rules address the availability of both generic and site-specific cleanup criteria:

(1) A remedial action plan which relies on cleanup criteria other than the generic cleanup criteria provided for in section 20120a(1)(a) to (e) of the act and these rules shall be based on either limited category cleanup criteria or on site-specific cleanup criteria that are documented in a remedial action plan. It is the responsibility of the person proposing the plan to adequately document the basis for limited or site-specific cleanup criteria in any remedial action plan.

(2) Limited or site-specific cleanup criteria may be based on reliable exposure control measures, including work schedule limitations and personal protective equipment used by workers at a facility to prevent exposure to hazardous substances. . . . [AC, R 299.5732.]

The generic cleanup criteria for various soil and water mediums are summarized in AC, R 299.5706a by reference to other rules. For instance, subject to certain exceptions, generic soil cleanup criteria for residential and “commercial i” categories are expressed as values in a table contained in R 299.5746. See AC, R 299.5706a(2). Pursuant to R 299.5718:

(1) The generic cleanup criteria for soil at a facility shall be the most restrictive of the applicable criteria developed under R 299.5720 to R 299.5728, considering those pathways that are reasonable and relevant at the facility and the category of remedial action being proposed or implemented.

(2) If a generic soil cleanup criterion developed under R 299.5720 to R 299.5726 is greater than the Csat concentration for that hazardous substance, then the Csat concentration shall be the generic criteria for that pathway, unless a facility-specific Csat concentration is established using facility-specific soil characteristics.<sup>4</sup>

A “relevant pathway” is defined in Part 1 (general provisions) of the department’s rules as follows:

“Relevant pathway” means an exposure pathway that is reasonable and relevant because there is a reasonable potential for exposure to a hazardous substance to occur to a human or nonhuman receptor from a source or release. The components of an exposure pathway are a source or release of a hazardous substance, an exposure point, an exposure route, and, if the exposure point is not the source or point of release, a transport medium. The existence of a municipal water supply, exposure control measure, exposure barrier or other similar feature does not automatically make an exposure pathway irrelevant. [AC, R 299.5103(h).]

Various definitions of a “hazardous substance” are contained in MCL 324.20101(1)(t), but the only specific definition that plaintiffs’ expert, James Murray, identified in his affidavit as applying to the property is the definition in subpart (iv), “[p]etroleum as described in part 213.”<sup>5</sup> Specifically, Murray averred:

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<sup>4</sup> Csat is defined in AC, R 299.5101(f), as “the concentration in soil at which the solubility limits of the soil pore water, the vapor phase limits of the soil pore air, and the absorptive limits of the soil particles have been reached. As used in these rules, Csat is a theoretical threshold above which a free phase liquid hazardous substance may exist.”

<sup>5</sup> Part 213 of NREPA (leaking underground storage tanks) describes petroleum in its definition of  
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The presence in 2006-2007 of significantly elevated levels of petroleum-based compounds such as VOCs and SVOCs set forth in the attached laboratory analytical results, when considered in conjunction with the results of other soil sample analyses conducted at the Subject Site, leads to the conclusion that, at the time of the 2005 transfer of the Subject Site to the Plaintiffs in this case, as well as the time of the NAR Report issued in 1999, the Subject Site was a “facility,” based on the presence of petroleum-based material, including No. 6 Fuel Oil, in subsurface strata at the Subject Property.

At an earlier deposition, Murray testified regarding a January 2006 report prepared by his company, Canopus Environmental Group (CEG), in which it was concluded that test results were unlikely to qualify the site as a “facility” because “there may be no pertinent exposure pathways for contaminants of concern whose detectable levels exceed NREPA Part 201 Residential Criteria (i.e. 1,3-dichlorobenzene in soil and pentachlorophenol in groundwater).” When addressing why he did not prepare a baseline environmental assessment for the property, Murray explained:

A. That’s a good question. I’m glad you asked that question. We did identify some contamination slightly above the applicable residential criteria. Therefore, the site may qualify as a facility; however, it’s incumbent upon us to be able to demonstrate that there’s some exposure pathway for these contaminants of concern. Because if there’s really no exposure pathway for contamination above residential criteria, the site may not qualify as a facility in any event.

We felt that what we found, though it was contamination at the time, based on our limited sampling out there, we felt there was no pertinent exposure pathway that contamination in that particular area that we drilled.

Q. The criteria identified as being exceeded related to drinking water, is that right?

A. Yes.

Q. In both instances?

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a “regulated substance” as follows:

Petroleum, including crude oil or any fraction of crude oil that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute). Petroleum includes but is not limited to mixtures of petroleum with de minimis quantities of other regulated substances and petroleum-based substances composed of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, or finishing such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, and petroleum solvents. [MCL 324.21303(d)(ii).]

A. Yes.

Q. And the groundwater at the site is not used for drinking; is that right?

A. Correct. And aside from that, we did not identify in any of those borings—I think there was six, right—we didn’t identify any real groundwater, a true aquifer . . . .

In addition, Murray testified that CEG provided services during the excavation work on the property. He indicated that most of the petroleum products that were encountered were within two feet of the surface and that they would “ooze” out when driven over by heavy equipment. He also indicated that drums full of compounds were located during the excavation work.

We find merit to defendants’ argument that it is improper for a party to submit a witness’s affidavit that contradicts the witness’s prior deposition testimony in an attempt to establish the absence of a genuine issue of material fact for purposes of summary disposition. In general, “a witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition.” *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Although this case involves cross-motions for summary disposition, the same rationale applies to preclude a party from presenting a witness’s contradictory affidavit to provide the necessary substantively admissible evidence to support their own motion for summary disposition.

Considering that Murray’s deposition was taken on October 12, 2007, after a laboratory analyzed additional samples in July 2007 and the excavation activities disclosed the “oozing” product, that Murray did not conclude at that time that the property qualified as a “facility,” and that Murray’s affidavit ignored the “exposure pathway” consideration that was the basis for his deposition testimony that the site might not qualify as a facility, we agree with defendants that Murray’s affidavit could not be used to contradict his earlier opinion. To the extent that plaintiffs suggest that exposure pathways are not relevant to determining whether the property qualifies as a facility under the NREPA, they have failed to substantiate their position.

Regardless, we are convinced that summary disposition was inappropriate with respect to whether the property was a facility because MRE 703 requires that “facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.” The proponent of expert testimony must show that every aspect of the expert’s testimony, including the data underlying the opinion, is reliable. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-782; 685 NW2d 391 (2004). Here, the only apparent additional information acquired after Murray’s deposition that might have affected his opinion is the 1999 report prepared by North American Reserve (“NAR”) for “Oldcastle-Materials Group,” which indicated that number six fuel oil was placed between layers of earth, and a 2008 opinion from a laboratory that samples taken in 2007 were consistent with number six fuel oil.

Even assuming that these documents are substantively admissible, Murray’s change in his opinion was based on an inference that fuel oil was placed in the ground, as claimed in the 1999 NAR report. But it is clear from the face of that report that no testing was conducted to verify the presence of the fuel oil. Further, while defendants’ vice president, James Lindstrom, was

identified as the representative for defendants who was interviewed by NAR to prepare the report, Lindstrom denied being the source of the information.

Summary disposition is not appropriate where the truth of a matter depends on a credibility determination. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 365; 480 NW2d 275 (1991). Because the credibility dispute here affects the trustworthiness of information in the 1999 NAR report regarding the fuel oil, there is a material question whether Murray had sufficient facts and data to provide a reliable change in his opinion regarding whether the property was a facility.

Accordingly, the trial court erred in finding that there was no genuine issue of material fact with respect to the NREPA claim. There is a genuine issue of fact whether defendants knew or had information that the property was a facility when the property was sold in 2005. Further, because there is a genuine issue of material fact regarding whether the property was a facility, and the property's status as a facility is the basis for the duty of disclosure underlying plaintiffs' silent fraud claim, summary disposition of that claim was likewise improper.<sup>6</sup>

Defendants also argue that the trial court erred by failing to enforce the "as is" provision in the purchase agreement when granting summary disposition in favor of plaintiffs. Because an "as is" provision in a contract does not allocate the risk of loss to the purchaser where fraud in the inducement is alleged, the trial court correctly found that the parties' "as is" contract was ineffective to preclude the silent fraud claim. See *Clemens v Lesnek*, 200 Mich App 456, 460-461; 505 NW2d 283 (1993). In addition, while the NREPA does not preclude private parties from allocating cleanup costs between themselves, see MCL 324.20130, the contract at issue here only obligates the purchaser to take the property "as is"; it does not allocate responsibility for statutory cleanup costs under the NREPA. Therefore, the "as is" clause provides no defense to plaintiffs' NREPA action. Thus, summary disposition in favor of plaintiffs was proper under MCR 2.116(C)(10) with respect to this contract issue.

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<sup>6</sup> We also note that defendants have failed to demonstrate that the doctrine of imputed knowledge could not be applied to impute to them the knowledge of their past president, Robert Thompson, regarding filling activities on the property in the 1960s and 1970s. Under this doctrine, the combined knowledge of a corporation's officers and agents, acting within the scope of their authority, is imputed to the corporation. *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197, 214; 476 NW2d 392 (1991). Even where there is a change in corporate personnel, the corporation continues to be affected by knowledge gained through the former personnel. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 125; 440 NW2d 907 (1989), rev'd in part on other grounds 438 Mich 488 (1991). Here, defendants have insufficiently briefed their position that Thompson was acting outside the scope of his employment, or should be treated as having been employed by a different company, when he acquired his knowledge. Thus, we do not consider this claim. An appellant may not merely announce a position and leave it to this Court to discover and rationalize its basis, or give an issue only cursory treatment, with little or no citation to supporting authority. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009).

Defendants also present additional arguments in which they contend that summary disposition of plaintiffs' fraud claims should have been granted in their favor. To the extent that defendants raised these arguments below, but they were not decided by the trial court, we shall consider them pursuant to our authority to consider issues of law for which the necessary facts have been presented.<sup>7</sup> See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Defendants have failed to establish that they were entitled summary disposition in their favor with respect to the silent fraud claim. Silent fraud requires reasonable reliance by the defrauded party. See *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998). There must be a material influence on the mind of the party claiming fraud. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 121; 313 NW2d 77 (1981).

Weighing against plaintiffs' contention that they reasonably relied on the nondisclosure regarding the alleged "facility" status of the property is the contract itself, which indicates that defendants were not making environmental claims. Further, the contract imposed an affirmative duty on the purchaser to conduct an investigation as may be necessary to satisfy itself as to the condition of the property. There is also evidence, though minimal, that plaintiffs actually investigated the property. "There can be no fraud when a person has the means to determine that a representation is not true." *Cooper*, 481 Mich at 415, quoting *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). In addition, claims of silent fraud generally involve circumstances where a seller responds to a specific inquiry from a purchaser in an incomplete or misleading manner. *M & D, Inc*, 231 Mich App at 31. Indeed, silent fraud is actionable where action or conduct is intended to create a misimpression in the opposing parties. *Id.* at 33. Here, however, the record contains no evidence that plaintiffs made a specific inquiry regarding the environmental conditions of the property during negotiations for the 2005 contract. At most, there is evidence that plaintiffs' president, Gary Percy, made a generalized inquiry to defendants' president, Dennis Rickard, concerning whether there was anything wrong with the property and that he received a negative response.

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<sup>7</sup> But we decline to consider the parties additional arguments' regarding the negligent misrepresentation claim because they are outside the scope of defendants' statement of the question presented, contrary to MCR 7.212(C)(5), and the issue is insufficiently briefed. See *McIntosh*, 282 Mich App at 485. We also decline to consider plaintiffs' argument regarding their unpleaded innocent misrepresentation claim that was raised in their motion for summary disposition. Although plaintiffs are free to argue alternative grounds for affirmance without filing a cross appeal, see *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), plaintiffs failure to address why their unpleaded innocent misrepresentation theory warrants consideration precludes appellate relief. See *McIntosh*, 282 Mich App at 485; see also *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). We also decline to consider plaintiffs' silent fraud claim based on an equitable or good-faith duty of disclosure. Fraud must be pleaded with particularity. MCR 2.112(B)(1); *Cooper*, 481 Mich at 414; *Cummins*, 283 Mich App at 695. The second amended complaint only alleged a claim of silent fraud based on a statutory duty of disclosure. Plaintiffs have not established any justification for this Court to consider their unpleaded claim.

On the other hand, assuming that defendants knew from their collective knowledge that the property was a facility, a trier of fact could reasonably conclude that Rickard made a false statement of fact to Percy when he denied that there was anything wrong with the property. See *Foreman v Foreman*, 266 Mich App 132, 142; 701 NW2d 167 (2005). In addition, assuming a duty of disclosure, plaintiffs could expect defendants to follow the law by providing them with the statutorily required disclosure if it was known that the property was a facility. The evidence also supports an inference that such an expectation would be reasonable because the disputed property is a large parcel and there was evidence that the environmental contamination was not visible from the surface. Because reasonable minds could differ on whether plaintiffs reasonably relied on defendants' alleged failure to satisfy a statutory duty of disclosure, or whether plaintiffs should have exercised greater diligence to investigate the possibility of environmental contamination, neither plaintiffs nor defendants were entitled to summary disposition with respect to the reasonable reliance element of the silent fraud claim. See *Allison*, 481 Mich at 425.

Turning to the fraudulent misrepresentation claim, defendants argue that plaintiffs' claim based on Rickard's response to Percy's inquiry is not actionable because the response was mere sales talk or "puffery." Whether a specific representation is an actionable statement of fact is dependent upon the circumstances of each case. *Foreman*, 266 Mich App at 142. In this case, the inquiry whether there was something wrong with the "as is" property goes hand-in-hand with plaintiffs' claim that defendants knew that the property was a facility. Therefore, given our prior conclusion that a genuine issue of material fact existed with respect to that issue, summary disposition of the fraudulent misrepresentation claim was likewise unwarranted under MCR 2.116(C)(10).

Plaintiffs also argue that their fraudulent misrepresentation claim is supported by a statement by Thompson to Percy regarding his disbelief that someone would dump anything on their property. Plaintiffs have not shown that this theory was raised in the trial court. Thus, it is not properly before us. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). Furthermore, we are not persuaded that this remark by Thompson constitutes an actionable statement of fact. See *Foreman*, 266 Mich App at 142. Even assuming that the statement could be actionable, the evidence indicated that Thompson left the business in 2002, three years before the property was sold. Although he was involved in prior negotiations to sell the property, Thompson testified in his deposition that a decision was made to not sell the property at that time. There was no evidence that Thompson was involved in the negotiations for the 2005 contract that ultimately resulted in the property transfer. Although defendants might be chargeable with Thompson's knowledge regarding the condition of the property and the contamination that allegedly took place before Thompson left, it would not be reasonable for plaintiffs to rely on Thompson's past statements to enter into the 2005 contract. Therefore, plaintiffs have not established any basis for upholding the trial court's summary disposition ruling based on Thompson's remarks. Similarly, plaintiffs have not shown any basis for

affirming the trial court's liability ruling based on evidence that Thompson provided a past response to Percy about there being nothing wrong with the property.<sup>8</sup>

In sum, neither plaintiffs nor defendants were entitled to summary disposition under MCR 2.116(C)(10) with respect to plaintiffs' claims for silent fraud, fraudulent misrepresentation, negligent misrepresentation, negligence, and the NREPA. Accordingly, we vacate the trial court's judgment for plaintiff and remand for further proceedings with respect to those claims.

In light of our decision, it is unnecessary to address defendants' challenge to the trial court's decision, on summary disposition, determining the amount of plaintiffs' damages. But because this issue may arise again on remand, we shall briefly address it.

In an action for fraud and misrepresentation, "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." *Cooper*, 481 Mich at 409 n 4, quoting *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). By contrast, MCL 324.20126a specifies the costs and damages recoverable in an action under the NREPA. MCL 324.20126a(1)(b) allows for the recovery of "necessary costs of response activity incurred . . . consistent with rules relating to the selection and implementation of response activity promulgated under this part."

Here, the trial court applied the same measure of damages for plaintiffs' NREPA and tort claims without distinguishing between the claims. For purposes of a NREPA claim, the court failed to consider whether the costs were necessary or consistent with departmental rules. The trial court also relied on a conclusory averment in an affidavit from plaintiffs' president, Percy, concerning the accuracy of expenses listed in a spreadsheet to establish the basis for its decision to award approximately \$1.7 million in damages to plaintiffs. The spreadsheet listed items dated between August 26, 2005, and January 23, 2008, with brief "name" descriptions such as "D5" or "truck," some purported invoice numbers or hours, and "memos" such as "clay" and "testing." The most recent items consisted of the 2007 summer property taxes and 2008 winter property taxes.

We conclude that the trial court erred in determining plaintiffs' damages based on the affidavit and spreadsheet. Even assuming, without deciding, that the same measure of damages was appropriate for both the tort and statutory claims, plaintiffs, in addition to having the burden of establishing the amount of their damages with reasonable certainty, had the initial burden of supporting their position that determination of damages by summary disposition was appropriate. MCR 2.116(G)(3)(b) and (4); *Quinto*, 451 Mich at 362. Conclusory averments in an affidavit are insufficient to satisfy a party's burden under MCR 2.116(C)(10). *SSC Assoc Ltd Partnership*, 192 Mich App at 364. In view thereof, and considering that the determination of the amount of

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<sup>8</sup> Plaintiffs also refer to an alleged statement that the property was suitable for a truck staging facility, but do not sufficiently address whether this statement may support an actionable claim for fraud. Therefore, we decline to consider this theory. See *McIntosh*, 282 Mich App at 485.

damages rested entirely on the credibility of Percy's conclusory affidavit, it was inappropriate to determine damages on summary disposition. See *id.* at 365.

Next, defendants argue that the trial court erred by denying their motion for leave to file a counterclaim to assert a claim for contribution under the NREPA. We agree.

Leave to file an amended pleading "should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility." *In re Kostin Estate*, 278 Mich App 47, 52; 748 NW2d 583 (2008); MCR 2.118(A)(2). We review a trial court's decision denying leave to amend pleadings for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "An 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).

The record discloses that the trial court denied defendants' motion for leave to file a counterclaim for contribution under the NREPA on the ground that it would be futile. The court agreed with plaintiffs' argument that the proposed amendment was unnecessary because defendants had already raised the affirmative defense of mitigation of damages. A proposed amendment is futile where it merely restates allegations already pleaded. See *Dukesherer Farms, Inc v Dir of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988). Further, a "court may treat a cross-claim or counterclaim designated as a defense, or a defense designated as a cross-claim or counterclaim, as if the designation had been proper and issue an appropriate order." MCR 2.110(C)(3). "An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993); see also MCR 2.111(F)(3). The right to contribution under the NREPA is not an affirmative defense, but rather a distinct remedy that depends on an inequitable distribution of common liability among liable parties. See *United States v Atlantic Research Corp*, 551 US 128, 138-139; 127 S Ct 2331; 168 L Ed 2d 28 (2007) (addressing 42 USC 9613(f)(1), a comparable provision in the Comprehensive Environmental Response, Compensation, and Liability Act<sup>9</sup>); see also MCL 324.20129(3)(b) (equitable principles apply to contribution).

In the absence of an appropriate court order treating any of defendants' affirmative defenses, in whole or in part, as a counterclaim for contribution under the NREPA, defendants' assertion of such a counterclaim cannot be deemed futile. Therefore, the trial court abused its discretion in denying defendants' motion for leave to file the counterclaim.

Defendants lastly argue that the trial court erred by denying their motion to strike from plaintiffs' brief a reference to information regarding settlement negotiations. While we agree

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<sup>9</sup> Federal cases construing the Comprehensive Environmental Response, Compensation, and Liability Act have been considered by Michigan courts as persuasive in construing part 201 of the NREPA. See *Genesco, Inc v Mich Dep't of Environmental Quality*, 250 Mich App 45, 50-51; 645 NW2d 319 (2002).

that the referenced matter involved inadmissible evidence, the trial court expressly indicated that the information was “not important to me in terms of making a decision.” Thus, even if it would have been appropriate to strike the information from plaintiffs’ brief, the failure to do so was harmless because it did not affect the disposition of the parties’ respective motions for summary disposition. See MCR 2.613(A).

### III. DOCKET NO. 290236 (PLAINTIFFS’ CROSS APPEAL)

On cross appeal, plaintiffs argue that the trial court erred in granting defendants summary disposition on plaintiffs’ claims for unjust enrichment and restitution, and common-law indemnification, pursuant to MCR 2.116(C)(10). We disagree.

As this Court observed in *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003), a claim for unjust enrichment requires that the plaintiff establish:

(1) the receipt of a benefit by defendant from plaintiff, and (2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. If this is established, the law will imply a contract in order to prevent unjust enrichment. However, a contract will be implied only if there is no express contract covering the same subject matter. [Citations omitted.]

Because plaintiffs’ unjust enrichment claim is based on defendants’ sale of the property pursuant to a written purchase agreement, the trial court correctly granted defendants’ motion for summary disposition with respect to this claim. We agree with plaintiffs that unjust enrichment remains a viable cause of action when a contract is void or unenforceable. See *Biagini v Mocnik*, 369 Mich 657, 658-659; 120 NW2d 827 (1963). Here, however, plaintiffs were not seeking to void the contract. Rather, they sought to retain the property and recover damages. Thus, plaintiffs waived any claim that the contract should be voided. See *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

Common-law indemnification is an equitable action, which entitles a party to restitution when it is held liable based on another party’s wrongful act. *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 229; 556 NW2d 180 (1996). The party seeking indemnification must be free of active or causal negligence. *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1982). The equitable right to indemnification “can only be enforced where liability arises vicariously or by operation of law from the acts of the party from whom indemnity is sought.” *Id.* at 601. Further, as a general equitable principle, equitable relief is not available where a party has an adequate remedy at law. See *Mich Bean Co v Burrell Engineering & Constr Co*, 306 Mich 420, 424; 11 NW2d 12 (1943).

Plaintiffs waived their claim that their liability arose by operation of law by failing to present this claim to the trial court. See *Walters*, 481 Mich at 387. In any event, even assuming that the property was a facility, there is no merit to plaintiffs’ argument because their liability under the NREPA, as a purchaser of a facility, does not arise by operation of law. A purchaser may avoid liability by conducting a baseline environmental assessment, and disclosing the results if the property is a facility. See MCL 324.20126(1)(c). Regardless, plaintiffs have not demonstrated that they have an inadequate remedy at law in light of the comprehensive scheme provided in the NREPA for establishing and litigating a person’s liability. The adequacy of

plaintiffs' remedies at law formed a basis for defendants' motion for summary disposition. Thus, plaintiffs have not established that the trial court erred in dismissing their claim for common-law indemnification.

#### IV. DOCKET NO. 290250

Plaintiffs argue that the trial court erred in denying their postjudgment motion for attorney fees under MCR 2.114(E) and (F).

MCR 2.114(E) provides that if a document is signed in violation of the court rule, the trial court shall impose an "appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 2.114(D) provides that the signature of an attorney constitutes a certification that he or she has read the document, that the document is not interposed for an improper purpose, and that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Whether a document was signed in violation of the court rule is a question of fact, which is reviewed by an appellate court for clear error. MCR 2.613(C); *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Here, plaintiffs rely on the "reasonable inquiry" standard to argue that an answer to an allegation in their second amended complaint warranted sanctions under MCR 2.114(E). Plaintiffs have failed to establish that they preserved this specific argument by presenting it to the trial court. See *City of Riverview*, 270 Mich App at 633 n 4; *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998). Further, the trial court did not render specific factual findings with respect to any of the documents relied upon by plaintiffs, or the arguments raised in plaintiffs' motion for sanctions under MCR 2.114(E), so we are left to speculate as to the basis for the court's decision. Therefore, we vacate the portion of the trial court's order denying sanctions under MCR 2.114(E) and remand for specific findings with respect to plaintiffs' motion. See *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 72-73; 512 NW2d 49 (1993).

Plaintiffs also argue that the trial court erred in denying their motion for sanctions under MCR 2.114(F), on the ground that defendants pleaded a frivolous defense. In light of our decision to reverse the trial court's summary disposition decision and vacate the judgment for plaintiffs, and to remand for further proceedings, plaintiffs have not demonstrated that they are entitled to sanctions under MCR 2.114(F). Any sanctions would be premature because a prevailing party has not yet been determined. See *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002); MCL 600.2591(3)(b) (defining "[p]revailing party" as "a party who wins on the entire record").

#### V. CONCLUSION

In Docket No. 290236, we affirm the trial court's dismissal of plaintiffs' claims for unjust enrichment and common-law indemnification, reverse the trial court's decision granting plaintiffs summary disposition on their claims for fraud, negligent misrepresentation, negligence, and violation of the NREPA, vacate the judgment for plaintiffs, and remand for further

proceedings on plaintiffs' remaining claims. We also reverse the trial court's order denying defendants' motion to file a counterclaim to allege a claim for contribution under the NREPA. In Docket No. 290250, we affirm the trial court's denial of sanctions under MCR 2.114(F), but vacate the portion of the trial court's order denying sanctions under MCR 2.114(E) and remand for specific findings with respect to plaintiffs' request for sanctions under that rule.

Affirmed in part, reversed and vacated in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering