

STATE OF MICHIGAN  
COURT OF APPEALS

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JUAN PENA and CAROL MJOSETH,

Plaintiff-Appellants,

v

PAUL ELLIS and MARY ELLIS,

Defendants-Appellees.

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UNPUBLISHED

April 18, 2006

No. 257840

Washtenaw Circuit Court

LC No. 03-001080-CH

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

In this action involving claims under the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*, plaintiffs appeal as of right an order granting summary disposition to defendants, pursuant to MCR 2.116(C)(8) and (10). We affirm in part and reverse in part.

Plaintiffs and defendants entered into a contract for the sale and purchase of defendants' home. Prior to the execution of the contract, defendants delivered to plaintiffs a seller disclosure statement. The disclosure statement made certain representations, notably that no evidence of water had been observed in the home's basement, that the roof was replaced in 1993, that defendants were unaware of any firing ranges in proximity to the property, and that defendants were unaware of any major damage to the property from fire, wind, flood, or landslides. Prior to closing, plaintiffs had various independent inspections performed, none of which indicated any relevant problems with or conditions of the property. The parties thereafter closed on the contract and title was transferred to plaintiffs. Subsequently, plaintiffs experienced various problems relating to the information disclosed. This litigation ensued.

I

Plaintiffs first argue that the lower court erred in granting summary disposition to defendants, pursuant to MCR 2.116(C)(8), on their claim under the SDA. We disagree. We review rulings on motions for summary disposition de novo. *McClements v Ford Motor Co*, 473 Mich 373, 380; 702 NW2d 166 (2005). In reviewing a motion pursuant to MCR 2.116(C)(8), we "assume that all factual allegations in the nonmoving party's pleadings are true and determine if there is a legally sufficient basis for the claim." *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Our review is limited to the pleadings. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). Also, we review questions of statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875

(2005). “Clear and unambiguous statutory language is given its plain meaning and is enforced as written.” *Id.* at 716. “Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.” *Sun Valley Food Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). “An ambiguity can be found only where the language of a statute as used in its particular context has more than one common and accepted meaning.” *McGhee v Helsel*, 262 Mich App 221, 224; 686 NW2d 6 (2004).

Generally, when a statute creates a new right or imposes a new duty, the remedy provided by the statute to enforce the right, or for nonperformance of the duty, is exclusive. Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. [*Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998)(citations omitted).]

The SDA mandates that prior to the execution of a contract for the sale of residential real property, a vendor must disclose to the purchaser, in a written seller disclosure statement, certain information concerning the condition of the premises. MCL 565.954(1), .957. In the event that disclosures are made after the execution of the purchase agreement, or not at all, the SDA permits a purchaser to terminate the otherwise binding purchase agreement. MCL 565.954(3)-(4), .957. By its terms, the SDA provides no other remedies. MCL 565.954-966.

At common law, the general rule of *caveat emptor* prevailed in land sale agreements, and no general duty to disclose existed. See *Christy v Glass*, 415 Mich 684, 695 n 7; 329 NW2d 748 (1982). The SDA modified the common law, imposing a new duty to disclose certain enumerated information. MCL 565.954(1), .957. The SDA does not expressly authorize a cause of action for violation of its provisions. It does, however, provide a remedy for violations of the duty it imposes (the failure to timely disclose): termination of an otherwise binding purchase agreement. MCL 565.954(3). This remedy is only available prior to the transfer of title, however. MCL 565.954(4). Nevertheless, it is aptly suited to enforcement of the SDA provisions *compelling* disclosure because if a seller fails to disclose, the purchaser need not consummate the transaction. A legal exit is afforded from an otherwise binding obligation. Presumably, the Legislature regarded this as generally providing sufficient incentives to encourage compliance with the SDA’s terms. Where those terms are not complied with, it is presumably of no consequence, as purchasers protected by the SDA may simply walk away from the transaction at issue. MCL 565.954(3)-(4), .957.

In the event that disclosures are *fraudulently made*, the common law provides a remedy. *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Disclosures made pursuant to the SDA are required to be made in “good faith,” meaning “honesty in fact in the conduct of the transaction.” MCL 565.960. “The specification of items for disclosure in . . . [the SDA] does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions.” MCL 565.961. If, upon the consummation of a transaction under the purview of the SDA, a purchaser discovers that statements within the seller’s disclosure statement were fraudulent or misrepresentations, a

common law cause of action for fraudulent misrepresentation is available as an avenue of relief. *Id.*; *Bergen v Baker*, 264 Mich App 376, 385-390; 691 NW2d 770 (2004).

Citing sections 5, 6 and 14, plaintiffs argue that the SDA “contains language that implies that there is an independent cause of action for violations . . .” of its provisions. Section 5 immunizes transferors and their agents for disclosure statement inaccuracies and omissions if the same were “not within the personal knowledge of the transferor . . .” MCL 565.955(1). Section 6 provides that information that becomes inaccurate by virtue of circumstances subsequent to disclosure “does not constitute a violation of . . .” the SDA. MCL 565.956. Section 14 prohibits the invalidation of transfers subject to the SDA solely for violation of the act’s provisions. MCL 565.964. Each of these provisions, however, must be read in the context of the entire SDA. See *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 425; 565 NW2d 844 (1997). Plaintiffs correctly argue that sections 5, 6 and 14 contemplate liability in some form. As we have recognized, liability for misrepresentations in a disclosure statement may attach under common law fraud. *Bergen, supra* at 385.<sup>1</sup> The SDA creates no express cause of action. MCL 565.954-.966. Yet, it recognizes the continuing vitality and pertinence of the “law regarding fraud, misrepresentation, or deceit in transfer transactions.” MCL 565.961. Because the SDA contemplates that liability may attach for violation of its provisions, MCL 565.955-.956, .964, but fails to provide a statutory mechanism for pursuit of such claims, MCL 565.954-.966, while explicitly acknowledging existing common law mechanisms, MCL 565.961, we conclude that the Legislature intended common law causes of action in fraud to operate as the SDA enforcement mechanisms. *Ayar, supra* at 715; *Orhanen, supra* at 425. Because no factual development could possibly justify plaintiffs’ recovery under their SDA claim, summary disposition pursuant to MCR 2.116(C)(8) was proper. *Salinas, supra* at 317.

## II

Plaintiffs next argue that the circuit court improperly dismissed their claim for fraudulent misrepresentation, under the SDA. We agree in part. We review rulings on motions for summary disposition de novo.<sup>2</sup> *McClements, supra* at 380. In reviewing a motion pursuant to MCR 2.116(C)(8), we “assume that all factual allegations in the nonmoving party’s pleadings are true and determine if there is a legally sufficient basis for the claim.” *Salinas, supra* at 317. In reviewing a motion pursuant to MCR 2.116(C)(10), we consider whether genuine issues of material fact remain and whether the moving party was entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

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<sup>1</sup> Indeed, this Court expressly recognized that section 5(1) limits liability for error and omissions not within the seller’s personal knowledge, *Bergen, supra* at 385, precluding “innocent misrepresentation” claims under the SDA, see *Forge v Smith*, 458 Mich 198, 211-212; 580 NW12d 876 (1998).

<sup>2</sup> The circuit court did not indicate which subrule it relied on in granting defendants’ motion for summary disposition on plaintiffs’ claim of fraud under the SDA. Because defendants argue that summary disposition was proper under both 2.116(C)(8) and (10) as alternative grounds for affirming the disposition, our review is under both subrules. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

Fraudulent misrepresentation requires that a plaintiff establish the following:

“(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,” [*Bergen, supra* at 382, quoting *M & D, Inc, supra*, at 27.]

We have recognized that the SDA “allow[s] for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentation or omissions in a disclosure statement, but with some limitations.” *Id.* at 385.

We conclude that plaintiffs have stated claims upon which relief can be granted on three of the four grounds of misrepresentation they allege. We likewise conclude that defendants were not entitled to judgment as a matter of law on these three grounds, pursuant to MCR 2.116(C)(10).

As the first ground of alleged misrepresentation, the disclosure statement delivered to plaintiffs represented that no grading problems existed and no evidence of water had been detected in the home’s basement, while in defendants’ possession. Plaintiffs claim, however, that defendants failed to disclose grading problems behind the home causing water to flood the basement, and they failed to disclose signs of water damage allegedly concealed with recent paint. Plaintiffs have alleged damages in the cost of repair. Inasmuch as they relate to disclosure statement representations concerning grading and flooding, these allegations are sufficient to state a claim for fraudulent misrepresentation. *Bergen, supra* at 382; *Salinas, supra* at 317.

Subsequent discovery demonstrated that defendants were not entitled to summary disposition, pursuant to MCR 2.116(C)(10), regarding plaintiffs’ allegations regarding flooding of the basement. Defendants admitted, via affidavit, that the basement flooded when they first purchased the home. They argue that, because the flooding occurred 26 years prior to plaintiffs’ purchase of the property, they were not required to disclose its having happened. But the SDA places no time limitation on disclosures of past flooding. Rather, it requires that defendants disclose whether there *has been* evidence of water—at any time in the past. MCL 565.957. Cf. *Bergen, supra* at 386 (discussing a specific question in the disclosure statement referring only to “present” circumstances). Moreover, defendants likewise admit that they failed to disclose evidence of intermittent window leakage occurring as recently as five years previously. This most recent leakage had been concealed, prior to purchase, by fresh coats of paint in the basement. This is sufficient to establish that defendants misrepresented information on the disclosure statement, relating to water leaking in the basement. Defendants were not entitled to judgment as a matter of law. *Miller, supra* at 246.

As the second ground of misrepresentation, defendants’ disclosure statement represented that the home had no roof leaks and that the roof had been replaced in 1993. Plaintiffs allege that, subsequent to purchase, they discovered that the roof had been repaired after 1993, but prior to their acquisition of the home. This repair was allegedly undertaken by defendants to correct mold-related problems in the attic. Plaintiffs further alleged damages for the cost of repair.

Inasmuch as they relate to disclosure statement representations concerning the roof, these allegations are sufficient to state a claim for fraudulent misrepresentation. *Bergen, supra* at 382; *Salinas, supra* at 317.

Subsequent discovery demonstrated that defendants were not entitled to summary disposition, pursuant to MCR 2.116(C)(10), regarding plaintiffs' allegations concerning roof repair. The SDA requires that "[i]f any changes occur in the structural/mechanical/appliance systems of th[e] property from the date of th[e] disclosure statement] form to the date of closing, seller will immediately disclose the changes to buyer." MCL 565.957. Silent fraud may arise where a party suppresses a material fact "under circumstances where there was a legal duty of disclosure." *M & D, Inc, supra* at 29 (citations omitted). Defendants completed the disclosure statement, delivered it to their realtor, and subsequently performed roof repair. In addition to the roof repair, Paul Ellis personally treated the mold in the attic with a mixture of bleach and water. Defendants' disclosure statement was not amended to reflect these changes. This is sufficient to establish silent fraud, given the duty to amend disclosures. *Id.*; MCL 565.957.

Defendants argue that, by virtue of section 6 of the SDA they did not violate that act. Section 6 provides that "[i]f information disclosed in accordance with this act becomes inaccurate as a result of any action, occurrence, or agreement after the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation of this act." MCL 565.956. This section must be interpreted in harmony with section 7, however. *Nowell v Titan Ins Co*, 466 Mich 478, 482 n 5; 648 NW2d 157 (2002). By its plain meaning, section 6 indicates that inaccuracies resulting from changed circumstances do not constitute violations of the SDA. It does not address a seller's duty of amendment in the event of such circumstances. Section 7, conversely, addresses such updates, requiring them in the event circumstances affect the "structural/mechanical/appliance" systems of the home. MCL 565.957. Read together, these sections indicate that inaccuracies resulting from changed circumstances, subsequent to tender of a disclosure statement, are not themselves SDA violations, but failure to update such inaccuracies, where they relate to "structural/mechanical/appliance" systems, is a violation. Further, in the event of an ostensible statutory conflict, section 7 limits section 6, as specific statutory provisions control conflicting general ones. *Halloran v Bhan*, 470 Mich 572, 578 n 6; 683 NW2d 129 (2004).

As the third ground of misrepresentation, defendants' disclosure statement represented that the home was not in "proximity" to a firing range. Plaintiffs claim that a firing range is, in fact, 6/10 of a mile from their home. They claim to hear gun blasts from within their home. Inasmuch as they relate to disclosure statement representations concerning such nearby ranges, these allegations are sufficient to state a claim for fraudulent misrepresentation. *Bergen, supra* at 382; *Salinas, supra* at 317.

Defendants were likewise not entitled to summary disposition, pursuant to MCR 2.116(C)(10), on the alleged firing range misrepresentation. "Proximity" is not statutorily defined in the SDA. In common parlance, it indicates "nearness in place, time, relation, etc." *Random House Webster's College Dictionary* (1997). Defendants argue that plaintiffs failed to establish that this representation was false because the shooting range is 6/10 of a mile away "and across two major county roads," and therefore not in proximity to plaintiffs' home. Yet deposition testimony indicated that gunfire can be heard from inside the residence. Because reasonable minds could differ on whether 6/10 of a mile is proximate in this instance, this

remains a question of fact. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).<sup>3</sup> Defendants were therefore not entitled to summary disposition pursuant to MCR 2.116(C)(10), inasmuch as plaintiffs' claims relied upon defendants' misrepresentations concerning the property's proximity to a firing range.

As the final ground for misrepresentation, plaintiffs complain that the disclosure statement was further fraudulent because, although defendants indicated that no "major damage [had occurred] to the property from fire, wind, flood, or landslides," the home was, in fact, previously struck by lightning. This allegation plainly fails to establish the second element in an action for fraud: that the representation was false. *Bergen, supra* at 382. The question at issue requested specific information relating to fire, wind, flood or landslides; no mention was made of lightning. To the extent plaintiffs' claim relies on this representation, summary disposition was properly granted. *Salinas, supra* at 317; *Maiden, supra* at 119.

Defendants argue generally that plaintiffs failed to establish that defendants had personal knowledge of the various misrepresentations at issue, as is required to establish fraud. *Bergen, supra* at 382. This argument is belied by the record. Defendants admitted that they knew of the replaced roof; indeed, defendant Paul Ellis worked on the attic himself. They admitted that they were aware of past evidence of water in the basement. Defendants claim they never heard gunshots from the firing range while inside the house. However, they also indicated that they did not consider the firing range to be in proximity to the house, given its distance. "Circumstantial evidence can be evaluated and utilized in regard to determining whether . . ." summary disposition is appropriate. *Bergen, supra* at 387. These admissions circumstantially suggest that defendants were aware of the existence of the firing range, belying their claim that plaintiffs failed to demonstrate knowledge.

Defendants also argue that plaintiffs did not reasonably rely on the disclosure statement, as is required to establish fraud, because they hired independent contractors to provide assessments examining the representations made in the disclosure statement. *Bergen, supra* at 382. In *Bergen*, this Court addressed reasonable reliance in the context of the SDA. The defendants' disclosure statement indicated that "there had once been a problem with a leaking roof, but it was rectified with a new roof in 1998." *Id.* at 378. An independent contractor's inspection of the home, ordered by the plaintiffs, revealed nothing indicating an active leak, although there was evidence of a past leak. *Id.* at 378-379. We concluded that the plaintiffs had created a question of fact, by virtue of this evidence, as to "whether they actually and reasonably relied on the seller's disclosure statement, when both the disclosure statement and the inspection report failed to identify any active leakage problem affecting the property." *Id.* at 389-390.<sup>4</sup>

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<sup>3</sup> Defendants likewise argue that plaintiffs did not rely on the disclosure statement, in this regard, because they repeatedly drove past the sportsman's club before purchasing the home. Plaintiffs admitted driving by the sportsman's league, but claimed they did not know what it was. Therefore, a question of fact remains.

<sup>4</sup> We decline defendants' request to declare a conflict with *Bergen* under MCR 7.215(J)(2) regarding whether a buyer having obtained an independent inspection precludes reasonable  
(continued...)

As in *Bergen*, plaintiffs in this dispute procured an independent contractor to examine the home, including the basement and roof. The contractor concluded that the basement was in very good condition and the attic was in excellent to good condition, neither showing signs of water. This was in accord with defendants' disclosure statement. Moreover, viewed in a light most favorable to plaintiffs, defendants repainting the water damaged areas of the basement and treating the mold in the attic with bleach and water could be construed as acts of concealment, making it less likely that plaintiffs' inspector would discover the conditions. As in *Bergen*, a genuine issue of material fact remains regarding whether plaintiffs' reliance on the disclosure statement was reasonable, because "both the disclosure statement and the inspection report failed to identify" water leaks in the basement or roof repair in the attic. *Bergen, supra* at 389-390; *Miller, supra* at 246.

We affirm the circuit court's grant of summary disposition to defendants on plaintiffs' claim brought directly under the SDA. We also affirm the grant of summary disposition on plaintiffs' claim of fraud as it related to defendants' representation concerning major property damage from fire, wind, flood, or landslides. But we reverse the grant of summary disposition on plaintiffs' claims of fraud or misrepresentation as they relate to representations concerning basement water leakage, roof repair, and proximity to a firing range, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Michael J. Talbot

I concur in result only.

/s/ Kathleen Jansen

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(...continued)

reliance on a seller's disclosure statement because we agree with the conclusion in *Bergen* on this point.