STATE OF MICHIGAN

COURT OF APPEALS

HOME SWEET HOME INVESTMENTS, LLC, 3P INVESTMENTS, LLC, NEPHNE ASSOCIATES LIMITED PARTNERSHIP, LYLE PROPERTIES LIMITED PARTNERS HIP, MWP, LLC, TRG INVESTMENTS, LLC, and SANFORD H. PASSER,

Plaintiffs-Appellants,

v

WEBER & MONY, P.C., LM HOLDING COMPANY, LONNY MORGANROTH, and MICHAEL MORGANROTH,

Defendants-Appellees.

UNPUBLISHED
December 4, 2003

No. 237918
Wayne Circuit Court
LC No. 99-933562-CZ

HOME SWEET HOME INVESTMENTS, LLC, 3P INVESTMENTS, LLC, NEPHNE ASSOCIATES LIMITED PARTNERSHIP, LYLE PROPERTIES LIMITED PARTNERS HIP, MWP, LLC, TRG INVESTMENTS, LLC, and SANFORD H. PASSER,

Plaintiffs-Appellants,

v

WEBER & MONY, P.C., LM HOLDING COMPANY, LONNY MORGANROTH, and MICHAEL MORGANROTH

Defendants,

and

LM HOLDING COMPANY,

Defendant-Appellee.

No. 240468
Wayne Circuit Court
LC No. 99-933562-CZ

HOME SWEET HOME INVESTMENTS, LLC, 3P INVESTMENTS, LLC, NEPHNE ASSOCIATES LIMITED PARTNERSHIP, LYLE PROPERTIES LIMITED PARTNERS HIP, MWP, LLC, TRG INVESTMENTS, LLC, and SANFORD H. PASSER,

Plaintiffs-Appellants,

v

WEBER & MONY, P.C.,

Defendant,

and

LONNY MORGANROTH, LM HOLDING COMPANY, and MICHAEL MORGANROTH,

Defendants-Appellees,

No. 241041
Wayne Circuit Court
LC No. 99-933562-CZ

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

In Docket No. 237918, plaintiffs appeal as of right the trial court's orders granting summary disposition to defendants under MCR 2.116(C)(7) (claim barred by release) and (10) (no genuine issue of material fact). In Docket No. 240468, plaintiffs appeal the trial court's award of case evaluation sanctions to defendant LM Holding Company (LM) and in Docket No. 241041 appeal orders awarding case evaluation sanctions to defendant Michael Morganroth under MCR 2.403, and awarding Lonny Morganroth sanctions under MCR 2.114. We reverse the award of deposition costs in Docket No. 240468. In all other respects, we affirm.

This action arises from plaintiffs' purchase of a home improvement company, Home Window Replacement and Construction, Inc. (Home Window).

I. Docket No. 237918

A. Claims against Weber & Mony, P.C.

Plaintiffs argue that the trial court erred in granting summary disposition to defendant Weber & Mony, P.C. (W & M), on its claims for fraudulent misrepresentation and silent fraud. We disagree.

The trial court granted summary disposition to defendant W & M pursuant to MCR 2.116(C)(10). In reviewing such a motion, we consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion to determine whether a genuine issue regarding any material fact exists. *Candelaria v Horizon Cablevision, Inc,* 252 Mich App 681, 685; 653 NW2d 630 (2002). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is proper. *Id.* at 685-686. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Id.* at 685.

Defendants successfully argued below that plaintiffs failed to establish the reasonable reliance element of the tort of fraudulent misrepresentation. The trial court agreed and granted W & M summary disposition.

Plaintiffs argue that the trial court erroneously granted W & M's motion based on a mistaken belief that plaintiffs' reliance on Deloitte & Touche's due diligence study precluded any reliance on W & M or the other defendants. However, the record discloses that the trial court actually based its decision on the premise that plaintiffs' alleged reliance on W & M's representations was unreasonable in light of the "red flags" identified by Deloitte & Touche. W & M also argues that plaintiffs could not have reasonably relied on the financial compilations because of the disclaimer on the cover sheets. Plaintiffs' argue that they did not rely on the financial compilations per se, but on Michael Mony's oral assurances and representations that the financial statements were accurate.

Michigan law requires that a plaintiff prove *reasonable* reliance to establish a claim for misrepresentation. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999). In *Nieves v Bell Industries, Inc*, 204 Mich App 459, 463-464; 517 NW2d 235 (1994), this Court held that a plaintiff's reliance on his employer's oral assurance of just-cause employment was unreasonable because his written employment contract expressly provided that his employment was terminable at will. This Court reasoned that "[t]here can be no fraud where a person has the means to determine that a representation is not true." *Id.* at 464. Noting that the plaintiff chose to believe his supervisor rather than the signed contract, the Court commented, "a plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore." *Id.* at 465. Similarly, in *McMullen v Joldersma*, 174 Mich App 207, 214; 435 NW2d 428 (1988), this Court held that buyers of real property could not prove that they reasonably relied on the sellers' representations where there was a public record of a planned highway construction that would diminish the value of the property. *Id.* at 213-214. In that case, the plaintiffs-buyers' agents failed to discover that the state planned to build a highway that would divert traffic away from the party store the plaintiffs bought. *Id.* at 210-211.

Other jurisdictions have addressed the reasonable reliance requirement. For example, in *Vigortone AG Products v PM AG Products, Inc*, 316 F3d 641, 645 (CA 7, 2002), the Seventh Circuit approved the trial court's jury instruction on justifiable reliance, stating:

> The term "justifiable reliance" is pretty vague. In an effort to clarify it for the jury, the district judge instructed that reliance is unjustifiable only if reckless, and he further explained that what "reckless" means in this context is, as we said in one of our cases interpreting Illinois fraud law, not that the victim was careless but, worse, that *he closed his eyes to a known or obvious risk. Mayer v Spanel*

> *Int'l Ltd*, 51 F3d 670, 676 (CA 7 1995). As we put it in another fraud case governed by Illinois law, *AM-PAT/Midwest, Inc v Illinois Tool Works, Inc*, 896 F2d 1035, 1042 (CA 7, 1990), "the potential victim of a fraud may not ignore a manifest danger." . . . This incidentally is the general rule, e.g., 2 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts*, 7.8 pp 423-424 (2d ed 1986), not anything peculiar to Illinois. [*Id.* (emphasis added).]

The Seventh Circuit explained that "the reason or at least a reason for barring the reckless fraud plaintiff from obtaining relief is that when a person or firm, especially (we add) a large sophisticated commercial enterprise with relevant experience, closes its eyes to a manifest danger, suspicion arises that it wasn't actually fooled by the false representations of which it is complaining." *Id*. at 646. The court held that the plaintiff, a highly sophisticated agricultural enterprise that contracted to buy three million pigs, could not have reasonably relied on the seller's representations that the contracts were "hedged," or protected against the fluctuations of the animal market, when the seller never produced documents to corroborate this representation. *Id.* at 643-646. The court concluded that, under these circumstances, the far more probable scenario was that the plaintiff did not rely on any representations at all, but willfully accepted all the risks of the transaction. *Id.* at 646.

Also, in *Nielson v Scott*, 53 P3d 777 (Colo App, 2002), the plaintiffs, buyers of an RV park, sued the seller for misrepresenting the seriousness of a waste water problem in the park. The seller verbally assured the buyers that problems with the park's septic system could be solved with a $15,000 upgrade. *Id.* at 778. However, the buyers' attorney learned that the park needed a groundwater discharge permit from the state Department of Health Water Quality Control Division (WQCD), and that this agency suspected that the RV park was not in compliance with state water quality laws. *Id.* at 778-779. Despite the attorney's warnings, the buyers proceeded with the purchase, and acknowledged in the sales contract that their "due diligence inspection," including environmental and water issues, had been completed to their satisfaction. *Id.* When the buyers learned that the septic system was not in compliance with WQCD regulations, and that the problem could not be solved merely by expanding the septic system, the plaintiffs sued the sellers for fraudulent misrepresentation. *Id.* The trial court granted the sellers' motion for summary judgment, and the Colorado Court of Appeals affirmed on the ground that any reliance on the sellers' representation was not justifiable because the buyers knew there were problems and should have investigated further. *Id.* at 779-780. The court stated:

> If the circumstances surrounding a transaction would arouse a reasonable person's suspicion, then equity will not relieve a party from the consequences of inattention and negligence in failing to pursue an investigation. . . .
>
> Here, even if the attorney's knowledge did not completely illuminate the alleged misrepresentation concerning the septic system and concealment of its regulatory problems, we conclude the information obtained by the attorney clearly showed a need for further investigation. . . .
>
> Buyers should have acted on the information that the attorney obtained by investigating thoroughly. Hence, they are charged with all knowledge that they

might have obtained about the RV park if they had pursued an investigation with diligence and completeness. [*Id.* at 780 (citations omitted).]

In many respects, *Vigortone* and *Nielson* are analogous to this case. Both involve the question whether a plaintiff acted reasonably in relying on a sellers' representations when other sources of information identified potential problems or concerns. Like the present case, in both of these decisions, the courts decided that there was no question of fact regarding reasonableness because the buyers failed to investigate the "red flags," i.e., the non-production of hedging contracts in *Vigortone*, and the warning of environmental violations in *Nielson.*

In the present case, the trial court also determined that there was no question of reliance because plaintiffs were sophisticated investors and because W & M issued disclaimers along with its financial compilations. We agree with the trial court that a buyer's sophistication can negate a question of fact regarding reliance, because sophisticated investors are unlikely to act in reliance on a seller's representations. *Vigortone*, *supra* at 646.

In sum, we conclude that plaintiff failed to establish a genuine issue of material fact regarding the reasonable reliance element of the tort of fraudulent misrepresentation and therefore the trial court correctly granted W & M's motion for summary disposition regarding this claim.

We also affirm the trial court's grant of summary disposition with regard to plaintiffs' silent fraud claim. To establish a claim of silent fraud, a plaintiff must establish that there was some type of representation that was false or misleading, and that the defendant had a legal or equitable duty to disclose the truth. *M & D Inc v McConkey*, 231 Mich App 22, 31; 585 NW2d 33 (1998). A claim of silent fraud requires that the plaintiff allege that the defendant intended to induce him to rely on its nondisclosure and that the defendant had an affirmative duty to disclose. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995). Plaintiffs tacitly withdrew their contention that W & M and Lonny Morganroth had an agreement that W & M would produce financial statements for plaintiffs' benefit during negotiations of the sale of Home Window. Plaintiffs have not, however, raised any other evidence or theory that would establish W & M's duty. W & M was not a party to the sales agreement. Although we have concluded that Mony's own statements during the negotiations created circumstances sufficient to establish a question of fact regarding the reasonableness of plaintiffs' reliance on those representations, it does not follow that Mony's presence at the meeting imposed on him a duty to disclose matters concealed or withheld by Lonny Morganroth. Without any evidence establishing any direct relationship between plaintiffs and W & M, we conclude that W & M's role in the transaction was in the nature of an agent to the Morganroths. In *McMullen, supra,* this Court held that a real estate agent could not be held liable for silent fraud for failing to disclose the planned highway bypass. *Id.* at 212. This reasoning applies to W & M as well. W & M was not a party to the transaction; it was Home Window's CPA firm. There is no reason why a seller's CPA firm should have any greater obligation to disclose the alleged financial problems. We therefore conclude that the trial court correctly granted W & M summary disposition on the silent fraud claim.

B. Claims against Michael Morganroth

Plaintiffs' fraudulent misrepresentation claim against Michael Morganroth is based on his alleged statements that the business was highly profitable (and had earned more than $3 million so far in 1997), and there was no notable problem with warranty liability or customer complaints. These allegations arise from a lunch meeting between Michael Morganroth and Keith Pomeroy on August 2, 1997, and from a casual meeting between Michael Morganroth and Gerald Reinhart at the time Deloitte & Touche was conducting the due diligence study.

Unlike the alleged fraudulent statements by Mony and Lonny Morganroth, which were made after the due diligence study, at a time when the parties were seriously negotiating the business sale, Michael's alleged statements were made during the early phases of the negotiations. While these statements might have served to induce plaintiffs to seriously consider buying Home Window, a reasonable trier of fact could not find that plaintiffs actually relied on them in making the final decision. That decision came after Deloitte & Touche completed its due diligence study, following which both Lonny Morganroth and Mony assured plaintiffs that the "red flags" were not indicative of serious problems. By this time, any comfort or inducement plaintiffs had received from Michael was inconsequential in comparison.

Plaintiffs also claim that Michael Morganroth made fraudulent misrepresentations with his comments that the window business was "a great business" and that "you make tons of money in this business." Such expressions of opinion, or "salesmen's talk in promoting a sale," are mere "puffing," and not actionable as a misrepresentation. *Van Tassel v McDonald Corp*, 159 Mich App 745, 750; 407 NW2d 6 (1987). Plaintiffs do not raise any arguments on appeal that Michael Morganroth is also liable on a silent fraud theory.

For these reasons, the trial court properly granted summary disposition to Michael Morganroth.

C. Claims against Lonny Morganroth

The trial court granted summary disposition to defendant Lonny Morganroth pursuant to MCR 2.116(C)(7) (claim barred by release). We review de novo a trial court's grant or denial of a summary disposition motion under MCR 2.116(C)(7). *Limbach v Oakland Co Bd of Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). We consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, unless contradicted by documentary evidence. *Novak, supra,* 681.

At issue is whether the following provision in the parties' release precludes plaintiffs' claims under MCL 450.1551 and for fraudulent conveyance:

> Purchaser and Shareholders hereby fully release and discharge Lonny of and from any and all claims including fraud or misrepresentation, liability, and/or

> obligations, whatsoever, that Lonny[1] [sic] may have under the Purchase Agreement . . . .

The scope of a release is governed by the intent of the parties as expressed in the release. *Adair v Michigan*, 250 Mich App 691, 707; 651 NW2d 393 (2002). If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. *Id.* A release is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Id.* at 707-708. The fact that the parties offer competing interpretations of a release does not, in itself, establish an ambiguity. *Id.* at 708.

Here, the release is not ambiguous. It clearly releases Lonny Morganroth "from any and all claims including fraud or misrepresentation, liability, and/or obligations whatsoever, that Lonny [sic] may have under the Purchase Agreement," subject to certain exceptions, none applicable here. The question is not one of interpreting the contract, but in determining whether the fraudulent conveyance claims arise under the contract.[2] Plaintiffs contend that they do not because they arise from Lonny's conduct after the purchase agreement was consummated.

Plaintiffs' counts V and VI against Lonny Morganroth and LM arise from their allegations that Lonny created LM to replace Home Window after plaintiffs acquired Home Window, and that he then distributed the assets retained by LM (including the proceeds from the sale) to himself and Michael Morganroth. We recognize that there is some facial merit to plaintiffs' argument. The dissolution of LM and the distribution of its assets can be viewed as distinct events or transactions that occurred separately from the execution of the purchase agreement. However, plaintiffs' argument collapses under closer scrutiny. But for the purchase

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[1] Plaintiffs acknowledged in their brief for the consolidated cases that the first sentence should read, "Purchaser and Shareholders hereby fully release and discharge Lonny of and from any and all claims . . . that *the purchasers and shareholders* may have under the Purchase Agreement." (Emphasis supplied.)

[2] The trial court found no ambiguity, but indicated that if there was an ambiguity, it would have to be construed against the drafter, in this case, plaintiffs. This statement of law is only partly correct. Our Supreme Court recently held in *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003), that the rule of "contra proferentem," "is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean." Therefore, "if the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or nondrafter's view of the contract." *Id.* It logically follows from these rules that a trial court cannot resolve a contract ambiguity by granting summary disposition to the nondrafter; rather, the question of interpretation is left to the trier of fact, which should apply the contra proferentem rule only if the meaning cannot be determined from conventional means of contract interpretation and relevant extrinsic evidence. See *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991), holding that when contract terms are subject to two or more reasonable interpretations, "a factual development is necessary to determine the intent of the parties and summary disposition is inappropriate."

agreement, plaintiffs would have no interest in this distribution, and no cause to claim that it violated their rights. We therefore conclude that the trial court correctly granted Lonny Morganroth's motion for summary disposition.

D. Claims against LM Holding Company

Plaintiffs' appellate briefs do not raise any argument regarding reinstatement of their fraud claims against LM. As a corporation, of course, LM could commit fraud only through the acts of its agents. *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 156; 324 NW2d 782 (1982). The only means for plaintiffs to achieve reinstatement of their claims against LM would be to persuade this Court that LM's agents committed fraud, and that this fraud should be imputed to LM. *Id.* However, the trial court properly dismissed the fraud claims against Michael Morganroth, and plaintiffs have not argued that W & M was LM's agent whose fraud should therefore be imputed to LM. Nor do plaintiffs request reinstatement of the claim on the ground that Lonny Morganroth committed fraud, which can still be imputed to LM.[3] Consequently, we conclude that plaintiffs have waived any issue that the trial court erred in granting LM's motion.

Because we conclude that the trial court properly granted Lonny and Michael Morganroths' motions for summary disposition, it is unnecessary to address any of the alternate arguments they raise for affirmance.

II. Docket No. 240468

The trial court awarded LM mediation sanctions (now known as case evaluation sanctions) and included the costs for depositions that had not been filed in the clerk's office. Plaintiffs argue that this was improper. We agree.

MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's *actual costs* unless the verdict is more favorable to the rejecting party than the case evaluation. . . . [Emphasis added.]

MCR 2.403(O)(6) provides that actual costs are "those costs taxable in any civil action," and a reasonable attorney fee.

MCL 600.2549 provides:

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[3] Plaintiffs have, however, argued that the release does not apply to LM, and that the release does not apply to its claim for piercing the corporate veil in order to hold Lonny Morganroth personally responsible for LM's alleged wrongs. Lonny argues that the release does apply to LM, either by its own terms or by virtue of an alter ego theory. However, because plaintiffs failed to present an argument for reinstating the claim against LM, it is unnecessary to address these arguments.

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

In *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000), this Court held that under the plain and unambiguous language of this statute, deposition costs cannot be taxed unless the depositions are filed in the court clerk's office. *Id.* at 380-381. Accordingly, in the present case the trial court clearly erred in discounting the filing requirement as "ministerial" and unimportant. LM acknowledges that *Elia* supports plaintiffs' position, but maintains that it satisfied the filing requirement by attaching excerpts of the depositions to motions filed with the court clerk in accordance with MCR 2.302(H)(1). However, this Court rejected this argument in *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 607; 554 NW2d 591 (1996). Thus, the trial court improperly awarded LM costs for depositions that had not been filed in the clerk's office. We therefore reverse the award of deposition costs.

III. Docket No. 241041

Finally, plaintiffs argue that the trial court erred in granting Lonny Morganroth sanctions under MCR 2.114. We review a trial court's decision regarding the imposition of sanctions under MCR 2.114(E) for clear error. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). The trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id.*

MCR 2.114(E) mandates sanctions against a party or attorney who has signed a pleading knowing that it is devoid of legal merit or that it is intended for an improper purpose, such as to harass the opposing party. MCR 2.114(D) and (E). In the present case, the trial court explained that it was awarding the sanction because there was no possible legal merit to plaintiffs' argument that their claims against Lonny Morganroth were not barred by the release, and because they had a "less than honest" motive. While we agree with plaintiffs that there was no evidence on the record to support the trial court's finding of a malevolent motive, the court's determination that the claim was devoid of legal merit is not clearly erroneous. We therefore affirm the award of sanctions.

In summary, we reverse the award of deposition costs in Docket No. 240468. In all other respects, we affirm.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette