STATE OF MICHIGAN

COURT OF APPEALS

BILL G. ELLIOTT and MARIE L. ELLIOTT, Individually and as Next Friend of IAN A. ELLIOTT, a Minor,

Plaintiff-Appellees,

v

DANIEL L. THERRIEN and MARY ANN THERRIEN,

Defendant-Appellants,

and

WIST, INC., d/b/a SERVICEMASTER PRIORITY CARE, AMY COVAULT, and HALLMARK-WEST REALTY, INC.,

Defendants.

UNPUBLISHED
January 26, 2010

No. 288235
Oakland Circuit Court
LC No. 2005-069174-CK

Before: Murphy, C.J., and Zahra and Jansen, JJ.

PER CURIAM.

Defendants Daniel and Mary Ann Therrien ("Therriens") appeal as of right final judgments totaling $303,814 entered by the trial court in favor of plaintiffs Bill and Marie Elliott ("Elliotts") and their son Ian in this action arising out of fraud allegations associated with the conveyance of a mold-contaminated house by the vendor Therriens to the vendee Elliotts. The judgments, one for the Elliotts and one for Ian, were predicated on a jury verdict. The jury found that the Therriens were liable under the theory of fraudulent concealment, or silent fraud, for failing to disclose information concerning the presence of mold in the home, which sickened the Elliotts and Ian and required extensive remediation efforts. The jury rejected the Elliotts' claim of fraudulent misrepresentation, and a claim of innocent misrepresentation was dismissed on a motion for directed verdict. The jury verdict on the silent fraud claim awarded damages that totaled $441,700. The judgments reflect consideration of the jury's allocation of fault, the taxation of costs, prejudgment interest, and setoffs arising from settlements with defendant Wist Inc., d//b/a ServiceMaster Priority Care ($40,000), and defendants Amy Covault and Hallmark-West Realty, Inc. ($20,000). ServiceMaster was employed to do the remediation work, and

Covault and Hallmark-West were, respectively, the Therriens' realtor and realty company. On appeal, we affirm the judgments.

I. Facts

Before turning our attention to the arguments presented by the Therriens on appeal, we shall review the evidence in order to give context to the analysis of the appellate issues. Prior to the Elliotts making an offer on the home, a prospective purchaser made an offer on the house that was accepted; however, the ensuing home inspection revealed extensive mold in the home's attic and no sale transpired. The Therriens were residing in Florida while their vacant home was on the market, and Dan Therrien asked his brother Jim Therrien, who lived in Michigan, to check into the mold problem and to have mold testing conducted so that the presence of mold, if it actually existed, could be confirmed. Jim hired Mold Free to conduct an inspection and testing, and Dr. Mark Banner, a certified mold inspector employed by Mold Free, inspected the property and tested for mold. On the basis of his findings, Dr. Banner prepared a Mold Free Report (MFR), which was sent to the Therriens and Covault. Banner checked and tested for mold only in the home's attic and master bedroom, which was where the attic entryway was located.

The MFR revealed the presence of mold in the attic and master bedroom. The laboratory results as to air tests in the master bedroom indicated a "high level of contamination." With respect to spore counts in the master bedroom and particular types of mold, the laboratory results provided, in part, that Basidiospores measured 11,659 and that the Penicillium-Aspergillus group measured 11,286. These numbers were listed as "high" under the MFR's section on "Interpreting Laboratory Results." That same section of the MFR stated that, among other fungi, Aspergillus and Penicillium "can produce potent mycotoxins," which "are fungal metabolites that have been identified as toxic agents," and "[e]ven low levels of these species should be remediated." In regard to the attic, the dominant mold found there was Stemphylium. With respect to Stemphylium, the MFR provided, "Stemphylium sp. – *Allergenic*. Commonly considered a contaminant. No toxic or invasive diseases documented to date." The MFR noted the various health effects that can occur when one is exposed to mold or inhales mold spores, which include allergic reactions, infections, toxic effects, runny nose, eye irritation, cough, congestion, asthma aggravation, headache, and fatigue. The MFR set forth extensive recommendations with respect to decontamination and remediation, and it called for clearance testing after the work was performed to make sure occupancy was safe. The nature of the remediation recommendations made the need for professional services and qualified personnel quite evident. Mold Free gave an estimate of nearly $9,000 to have Mold Free take care of the remediation work, but the Therriens declined to hire the company.

Instead of hiring a professional remediation company, the Therriens had a general roofing contractor remove the attic's insulation and the roof. Thereafter, Jim Therrien, who had no training and experience in construction or mold testing and remediation, sanded and scrubbed all of the trusses, using bleach or Lysol, and he then added new attic insulation.[1] The roofing

[1] Jim did not testify at trial as he was able to evade service of a subpoena by the Elliotts. The Therriens testified that Jim indeed purposely evaded service, but they did not assist him in his (continued…)

company returned and put on a new roof. On the stand, Dan Therrien could not state one way or the other whether Jim had complied with Banner's remediation recommendations, and Dan knew that clearance testing was not performed. Because the first seller's disclosure statement executed when the house was initially put on the market did not mention mold, a second disclosure statement was executed. The second statement spoke only of the discovery of mold "on" the home's roof. There was no mention of mold in the master bedroom, nor did the statement expressly indicate that there was mold in the attic. The statement further provided that the entire roof and insulation were replaced.

Eventually, the Elliotts saw the home, became interested in purchasing it, and made an offer that was accepted. The evidence reflected that the Elliotts were never given the MFR. A home inspection conducted by the Elliotts' inspector did not reveal any mold problems. A day before the scheduled closing, the parties and their realtors held a meeting at the house, which meeting they refer to as the "powwow." The powwow occurred because the Elliotts became concerned with whether the Therriens were being truthful about problems with the house after discovering that the Therriens had made four homeowner's insurance claims over the last few years, including one that was denied (the other claims were paid) around the time that mold was discovered by the previous prospective purchaser. Two versions of an insurance report, which were actually handwritten statements made by, for the most part, realtor Covault, were admitted into evidence. The insurance report referenced the four insurance claims, and one version of the report had the notation "mold" written in next to the language addressing the denied claim. None of the witnesses knew who added the "mold" reference, although it was speculated that it was done by the Therriens' attorney on the day of the closing. Marie Elliott called the insurer during the powwow to ask about the claims. At the powwow, the parties also discussed the Elliotts' concerns regarding electrical and plumbing issues, including a leaking trap to an upstairs bathtub, and compliance with township codes, matters the Elliotts believed should have been taken care of by that point in time.

There was evidence that, at the powwow, the Therriens were asked about the mold referred to in the second disclosure statement, and the Therriens responded that the mold had been "on" the roof of the house, that it was nontoxic, and that the entire roof had been replaced. According to Marie Elliott, when she asked Dan Therrien whether there was any mold inside the home, "Dan adamantly denied that there was ever mold inside that structure and it was never an issue." There was also testimony that the Elliotts, especially Marie, repeatedly demanded at the powwow that the Therriens disclose any and all problems related to the condition of the home.

The day after the powwow, a lengthy closing took place. Because of the contention in the air at the powwow, the Therriens now had an attorney representing them; the Elliotts lacked counsel. After an initial impasse over ongoing issues, the Elliotts signed a couple of "as is" and "hold harmless" documents, i.e., a purchasers satisfaction and a closing agreement, and the Therriens executed a third seller's disclosure statement. This disclosure statement again indicated that mold had been discovered "on" the roof, that the roof, shingles, and insulation had been replaced, and that the joists had been scrubbed. The statement now also made mention of

(…continued)

efforts. The Therriens stayed in Jim's home during the trial; however, they had no idea of his whereabouts.

the insurance claims and directed attention to an attached report. The Elliotts and their realtor, Margaret Heller, adamantly denied ever seeing an insurance report attachment to the disclosure statement at the time of closing and certainly not one referencing mold. About a month after the closing, Heller discovered the insurance report containing the mold reference in her office with other documents from the closing, and this, according to Heller and the Elliotts, was the first time that they became aware of the document and the mold language. Some additional documents were executed at the closing that provided for the escrowing of money by the Therriens to cover electrical and plumbing repairs that still needed to be completed. The closing concluded, and the house was effectively conveyed to the Elliotts.

Shortly after the Elliotts moved into the house, they and Ian became ill, experiencing such symptoms as runny nose, coughing, sneezing, puffy eyes, rashes, breathing and respiratory difficulties, bowel problems, asthma, fatigue, migraines, memory loss, seizures, and an overall malaise. According to the Elliotts, testing by doctors, including blood tests that revealed the presence of Penicillium and Aspergillus, suggested mold as the culprit and cause of their ill health. The Elliotts were told by the family doctor to vacate the house and not to return until after it was tested for mold and declared safe. On June 1, 2005, Marie Elliott had a confrontation with Dan Therrien at the house,[2] in which, as testified to by Marie, Dan stated that there was mold in the house, that it was toxic, that the house had been examined for mold, and that the MFR existed. Marie testified that this was the first time she was made aware of these matters. She asserted that Dan Therrien proceeded to walk with her through the home, pointing out mold. Dan's account of this meeting or confrontation was in complete conflict with Marie's testimony.

The Elliotts had the house inspected and tested for mold by Sanit-Air. Connie Morbach, an environmental scientist employed by Sanit-Air, conducted the inspection and testing, which revealed dangerous levels of mold spores and growth throughout the entire home, not just the attic and master bedroom. Morbach's report indicated that there were "[v]ery high concentrations of culturable fungi, predominantly species of *Penicillium*[, which] were identified in air sample[s] collected throughout the home." According to the report, the house should not be occupied until remediation was effectively completed. Morbach testified at trial that there were extensive water stains and damage, along with rotted wood and mold, throughout the house. And she additionally testified that carpeting, fresh paint, insulation, and outer walls concealed the water stains and mold. According to Morbach, the evidence of water intrusion indicated that, for the most part, it was not an ongoing problem but rather reflected past instances of water intrusion. She opined that there was evidence of water in the home long before her testing was done in June 2005. Morbach testified that there were significantly elevated levels of Penicillium and Aspergillus. Indeed, the Penicillium levels exceeded detection limits in certain areas. There were also elevated levels of Chaetomium, which meant that the water intrusion had been significant because that particular bacteria is the last to grow in a wet environment, needing substantial moisture. That bacteria is a subgenus of Penicillium and was measured at a level of 47,000; mold experts, according to Morbach, do not like to see this number at higher than 50

[2] Dan was there to inspect property stakes, as the Therriens also owned adjacent property that was being sold.

indoors. Morbach provided additional testimony concerning the other varieties of mold found in the home. The mold contamination was so extensive that there was cross-contamination throughout the interior of the house. Morbach was greatly concerned with anyone living in a house with the contamination levels found in the home. Morbach indicated to Bill Elliott that it was one of the sickest houses she had ever encountered. Per Morbach's recommendations, the Elliotts discarded a large amount of personal property.

With respect to whether the Elliotts' home inspector should have found evidence of water damage and mold, Morbach opined that she was not surprised that he missed the evidence because home inspectors do not generally pull back carpeting and insulation, and they certainly do not punch holes in walls to look inside wall cavities. The signs of mold were not visible on cursory inspection, and home inspection protocol would not entail an inspector sampling the air. Morbach expressed her concern that the mold in this case was covered up and made difficult to discover; visible mold was painted over. She opined that a past owner living in the house since 1991, which was when the Therriens moved in, should and would have known about the water and mold problems. With respect to the MFR, Morbach stated that the spore counts indicated therein far exceeded acceptable levels. In Morbach's report, she set forth remediation recommendations. ServiceMaster was hired to do the work, and Morbach returned to the home a few times to perform follow-up testing, which revealed the discovery of more mold problems as more hidden areas of the house were being exposed. At a certain point, the Elliotts were facing remediation costs exceeding $100,000, the house was essentially gutted, and the Elliotts were living in a trailer park. They eventually stopped making mortgage payments on the home and discontinued remediation efforts, and the house was later foreclosed on and sold at auction.

II. Analysis

A. Overview of Appellate Arguments

On appeal, the Therriens contend that there was insufficient evidence for a reasonable jury to conclude that the elements of silent fraud had been proven by clear and convincing evidence; therefore, the trial court erred in denying the Therriens' motions for directed verdict and for judgment notwithstanding the verdict (JNOV). The Therriens additionally argue that the jury verdict was against the great weight of the evidence. We disagree.

B. Standards of Review

We review de novo a trial court's ruling on a motion for directed verdict as well as a court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). With respect to both motions, the evidence and all legitimate inferences are examined in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* If reasonable jurors could have honestly reached different conclusions, we cannot interfere with the jury's verdict, which must be allowed to stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

In *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006), this Court, addressing a claim that a verdict was against the great weight of the evidence, stated:

> We review for an abuse of discretion a trial court's denial of a motion for new trial. When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" "'[E]very attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.'" [Citations omitted.]

C. Silent Fraud – Governing Principles

Silent fraud, also referred to as fraudulent concealment, has long been recognized as a cause of action in Michigan. *Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009). Our courts have not hesitated to sustain damage recoveries when the truth has been suppressed with an intent to defraud, given that a fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood. *Id.* Mere nondisclosure is insufficient to support a claim of silent fraud. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 412; 617 NW2d 543 (2000); *Roberts*, *supra* at 404 ("silent fraud requires more than proving that the seller was aware of and failed to disclose a hidden defect"). In order for the suppression of information to constitute silent fraud, there must be circumstances that establish a legal or equitable duty to make a disclosure. *Hord*, *supra* at 412. A duty "to make a disclosure will arise most commonly in a situation where inquiries are made by the plaintiff, to which the defendant makes incomplete replies that are truthful in themselves but omit material information." *Id.* A vendor's duty to disclose material facts exists when the purchaser expresses some particularized concern or makes a direct inquiry relative to or touching on the condition at issue and the parties engage in a general discussion on the topic. *M&D, Inc v McConkey*, 231 Mich App 22, 29, 36; 585 NW2d 33 (1998).

To prove a claim of silent fraud, a plaintiff must establish that the defendant made some type of representation, by words or actions, that was false or misleading and was intended to deceive. *Roberts*, *supra* at 404; *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004); *M&D*, *supra* at 31-32, 36. Pursuant to M Civ JI 128.02, which was given to the jury here, a plaintiff must prove the following elements by clear and convincing evidence to establish a claim of silent fraud: (1) the defendant failed to disclose a material fact about the subject matter at issue; (2) the defendant had actual knowledge of the fact; (3) the failure to disclose the fact gave the plaintiff a false impression; (4) when the defendant failed to disclose the fact, he or she knew that the failure to disclose would create a false impression; (5) when the defendant failed to disclose the fact, he or she intended that the plaintiff rely on the resulting false impression; (6) the plaintiff indeed relied on the false impression; and (7) the plaintiff suffered damages resulting from his or her reliance. Fraud in general must be pleaded with particularity and is not to be

lightly presumed, but must be proven by clear, satisfactory, and convincing evidence. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008).

A claim of silent fraud, like claims for fraudulent misrepresentation and innocent misrepresentation, requires proof of reliance on the inadequate or unforthcoming representation. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998); *M&D, supra* at 29 (buyer must detrimentally rely on the misdirection resulting from the seller's failure to disclose material facts). Silent fraud is a recognized exception to the common-law rule of *caveat emptor* in real estate transactions. *Roberts, supra* at 403. With respect to "as is" clauses in real estate documents, as existed in the instant case, this Court has stated that, generally speaking, such clauses transfer the risk of loss to the purchaser of real property, where a defect should have reasonably been discovered on inspection, but was not found. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994). However, "as is" clauses do not transfer the risk of loss to a purchaser when a seller engages in fraud before the purchaser executes an agreement. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 32 n 16; 331 NW2d 203 (1982); *Popielarski v Jacobson*, 336 Mich 672, 686-687; 59 NW2d 45 (1953) (seller's commission of fraud before purchaser executes binding agreement renders "as is" clause ineffective); *Bergen, supra* at 390; *M&D, supra* at 32; *Lorenzo, supra* at 687; *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993) ("as is" clause does not preclude fraud action).

D. The Seller Disclosure Act

Playing a role below and in the appellate arguments is the Seller Disclosure Act (SDA), MCL 565.951 *et seq.* In *Bergen, supra* at 382-385, this Court thoroughly examined the SDA in relation to claims of fraud arising from a real estate transaction in which the plaintiffs purchased a home from the defendants, after which the plaintiffs discovered a significant water leak in the roof of a sunroom. The *Bergen* panel construed the various sections of the SDA and reached the following conclusion:

> Reviewing collectively the language of the relevant statutes that comprise the SDA, it is evident that the Legislature intended to allow for seller liability in a civil action alleging fraud or violation of the act brought by a purchaser on the basis of misrepresentations or omissions in a disclosure statement, but with some limitations. . . . The SDA clearly creates a legal duty of disclosure relative to the transaction in this case. [*Bergen, supra* at 385 (citations omitted).]

Addressing the limit to a vendor's exposure to liability under the SDA in conveying information to a prospective purchaser, MCL 565.955(1) provides:

> The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information. It is not a violation of this act if the transferor fails to disclose information that could be obtained only through inspection or observation of

> inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor.

Furthermore, MCL 565.956 addresses occurrences after delivery of a disclosure statement, along with unknown or unavailable information, providing:

> If 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. If at the time the disclosures are required to be made, an item of information required to be disclosed under this act is unknown or unavailable to the transferor, the transferor may comply with this act by advising a prospective purchaser of the fact that the information is unknown. The information provided to a prospective purchaser pursuant to this act shall be based upon the best information available and known to the transferor.

All disclosures made under the SDA must be made in good faith, which "means 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. MCL 565.957 is the actual disclosure form mandated by the SDA, and this Court in *Bergen, supra* at 383, discussed the language therein:

> The statutory form requires and provides, in part, that the seller answer all questions and report known conditions affecting the property. The form reads, "This statement is a disclosure of the condition and information concerning the property, known by the seller." MCL 565.957(1). The statutory form also provides that the disclosure "is not a warranty of any kind by the seller or by any agent representing the seller in [the] transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain." *Id.*

We shall examine other SDA provisions below when implicated by the Therriens' appellate arguments.

E. Discussion of the Therriens' Appellate Arguments

The Therriens construct their appellate argument by presenting a variety of grounds in support of reversal, all falling under the umbrella of their broad assertions that there was insufficient evidence to submit the case to the jury on the silent fraud claim, thereby warranting a directed verdict or a JNOV, and that the jury's verdict was against the great weight of the evidence, requiring a new trial. We shall address each of the components of the insufficiency and great weight arguments posed by the Therriens. However, as an overview, we find that, viewing the evidence in a light most favorable to the Elliotts and giving substantial deference to the jury's verdict and its role in assessing credibility and weighing the evidence, the record was sufficient to conclude that all of the elements of a silent fraud claim were established.

There was competent and sufficient evidence showing that the Therriens failed to disclose material facts, where they did not provide the MFR to the Elliotts, did not reveal in the

disclosure statements or in direct communications with the Elliotts that mold was present in the master bedroom and inside the attic, and where they did not disclose information about water damage and mold throughout other areas of the home, which finding is supported by Connie Morbach's testimony. The existence of mold was certainly material, especially at the levels revealed in the MFR and later determined by Morbach. Next, there was competent and sufficient evidence showing that the Therriens had actual knowledge of these facts, where they had seen and reviewed, to some extent, the MFR,[3] had been informed that a previous home inspector discovered mold in the attic, and where Morbach's testimony indicated that the Therriens had to have been aware of the extensive water damage and mold, which she opined was concealed. Further, there was competent and sufficient evidence showing that the undisclosed facts left the Elliotts with a false impression, where they proceeded with the sale, reasonably believing that there was no history of mold inside the house, as opposed to on the roof, nor a current problem with mold. Additionally, there was competent and sufficient evidence, plus reasonable inferences, showing that the Therriens knew that their failure to disclose accurate information about mold and its history in the home would create the false impression, where there was testimony that the Elliotts expressed concerns about mold to the Therriens at the powwow, which concerns were alleviated by the Therriens' deceptive and incomplete responses. Next, there was competent and sufficient evidence showing that the Therriens intended for the Elliotts to rely on the resulting false impression, where all of the surrounding circumstances regarding the contentious powwow and closing circumstantially established intent, where the Therriens lost a prior sale due to the presence of mold, and where another prospective purchaser made a low offer after learning of the mold problem and reviewing the MFR. Also, there was competent and sufficient evidence showing that the Elliotts relied on the false impression, where they testified that they proceeded with the sale because of assurances that the mold had only been "on" the roof,[4] and where Marie Elliott testified that they would not have closed on the house had they been made aware of the MFR and information contained therein. Furthermore, there was competent and abundant evidence showing that the Elliotts suffered damages as a result of their reliance on the false impression, where they bought the house and became ill, had to throw out personal property, incurred remediation costs, and ultimately lost the house to foreclosure. Finally, there was competent and sufficient evidence establishing a duty to make disclosure, where the SDA demanded disclosure, and where the Elliotts expressed particularized concerns and made direct inquiries relative to mold. The holding in this paragraph effectively dispenses of and rejects many of the Therriens' appellate arguments, but we will nonetheless address the specific points raised on appeal.

The Therriens argue that they fully complied with the SDA in delivering the third disclosure statement to the Elliotts. We agree that disclosure statements were provided to the

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[3] We note that no mold expertise was necessary to ascertain from a review of the MFR that mold was discovered in the master bedroom and that the mold was toxic.

[4] We do not view a declaration that mold was "on" the roof as being the same as saying that mold was in the attic; claiming it was on the roof clearly suggests the presence of mold on the top of the roof regardless of Dan Therrien's assertions to the contrary. Moreover, assessing Dan Therrien's credibility regarding his intentions and claims was for the jury.

Elliotts; there is no dispute that the Elliotts received and reviewed the statements. However, the information in the second and third disclosure statements said nothing about mold in the master bedroom, which was clearly delineated in the MFR, and the reference to mold "on" the roof was a deceptive and incomplete statement, considering that the mold was actually inside the attic. We appreciate that the efforts undertaken by the Therriens to correct the mold contamination, as reflected in the disclosure statements, might suggest that the mold was not only on top of the roof but also in the attic. However, viewing the evidence in a light most favorable to the Elliotts, there was testimony that the Therriens denied that there was mold anywhere inside the house, which would include the attic, when asked at the powwow. Further, had the Therriens disclosed the MFR, the Elliotts would have become aware of the mold inside the attic, as well as the mold in the master bedroom, and they would have learned of the extensive remediation recommendations, the need for professional assistance, and of the fact that some of the mold was toxic. And, aside from the MFR, Morbach's testimony indicated that the Therriens had to have been aware of water intrusion and extensive mold and that there was an effort to conceal these matters. Finally, even assuming compliance with the SDA, 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. Failing to disclose the MFR could support the silent fraud claim under the common law regardless of the SDA.

The Therriens contend that disclosure of mold was made by way of the insurance information and report. Although the Therriens provided some information about the four prior insurance claims and recommended calling the insurer, these communications occurred only after Marie Elliott accidentally discovered the existence of the claims and confronted the Therriens. Regardless, the relevant aspect of the insurance claims was the "mold" notation on the report, but no more detail was provided and thus it said nothing more than the information already provided in the disclosure statements. Accordingly, assuming the Elliotts observed the mold notation before the conveyance, a reasonable conclusion would be that it pertained to the mold "on" the roof as stated in the disclosure statements, providing confirmation. Moreover, the Elliotts and their realtor Heller denied seeing the insurance document with the "mold" notation until after the closing.

The Therriens claim that delivery of the MFR to their own realtor Covault satisfied any duty to disclose, citing MCL 565.954(1), which provides:

> The transferor of any real property described in section 2 shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act. If the written statement is delivered to the transferor's agent, the transferor's agent shall provide a copy to the prospective transferee or his or her agent. A written disclosure statement provided to a transferee's agent shall be considered to have been provided to the transferee. . . .

This argument lacks merit because MCL 565.954(1) addresses the delivery of a *seller's disclosure statement* by a transferor of real property to the transferor's agent, not a separate document such as the MFR. And, again, there is no dispute that the disclosure statements were delivered to the Elliotts. Also, Covault testified that it was her decision alone whether or not to deliver the MFR to the Elliotts, which is not the case with a disclosure statement, MCL 565.954(1), yet she also testified that delivery of the MFR was dependent on authorization from the Therriens. There was no evidence that the Therriens directed Covault to disclose the MFR to

the Elliotts or Heller.[5] Furthermore, given the questioning by the Elliotts at the powwow regarding mold, it would have been clear that they had not seen the MFR, and the Therriens, who were being directly questioned about mold inside the home, would then have had a duty or obligation to release the MFR to the Elliotts, or at least make them aware of the document or the information contained therein.

As to the Therriens' contention that they advised the Elliotts in the third disclosure statement of their lack of knowledge concerning existing environmental hazards, it is true that the space for "unknown" is checked under the category of "environmental problems." However, while this issue would implicitly encompass mold, it also expressly encompassed asbestos, radon gas, formaldehyde, lead-based paint, fuel or chemical storage tanks, and contaminated soil. And it is under this category that the Therriens wrote about mold being "on" the roof and that it had been corrected, thereby suggesting that the checked "unknown" space pertained to other hazards. Checking the "unknown" space did not absolve the Therriens from liability, where they did not turn over the MFR, nor provide information regarding mold in the attic and master bedroom, as well as the rest of the house, even though requested.

The Therriens next argue that if one accepts the Elliotts' testimony of what transpired at the powwow as true, outside the issue of the MFR, the testimony constituted accusations of fraudulent misrepresentation, not silent fraud, and the misrepresentation claim was rejected by the jury. Contrary to the Therriens' argument, the circumstances supported the claim of silent fraud. First, we note that, to prove a claim of silent fraud, a plaintiff must establish that the defendant made some type of representation, by words or actions, that was misleading and was intended to deceive. *Roberts*, *supra* at 404; *Bergen*, *supra* at 382. There was evidence that the Therriens made incomplete representations, concealing information about the true extent of mold issues and history, and there was also the failure to disclose the MFR. Reversal is unwarranted.

The Therriens also argue that there could be no liability because of their lack of knowledge and expertise in regard to mold testing and remediation; they did not understand the MFR. There is no merit to this argument. The MFR clearly stated that there was mold in the attic and in the master bedroom, and it was easy to ascertain by reading the MFR that the mold in the bedroom was present at high levels and was, in part, toxic. Moreover, the Therriens' lack of understanding of the MFR would support a greater need for them to disclose the MFR to a prospective purchaser, so the unknowns could be delved into and evaluated by experts in the field. Furthermore, the Therriens proceeded as if they understood the MFR, given that they found it acceptable to have Jim Therrien take care of the mold, despite having no training or experience in mold remediation. In conjunction with this argument, the Therriens maintain that, pursuant to MCL 565.955(3), the delivery of Dr. Banner's MFR to Covault, which dealt with matters within Banner's expertise, was sufficient to implicate the liability exemption provided in

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[5] In regard to the Therriens' argument that, during trial, the Elliotts waived any vicarious liability claim against the Therriens for Covault's failure to disclose the MFR, our review of the transcripts shows no such waiver. Rather, when Covault prepared to take the stand, the Therriens agreed to waive any claim they may have had against Covault. Regardless, our ruling is not based on vicarious liability.

MCL 565.955(1). MCL 565.955(1) indicates, in part, that a transferor of property is not liable for an omission in information delivered in a statement if the omission was based entirely on information provided by other persons specified in MCL 565.955(3). Subsection (3) provides that delivery of a report prepared by a professional or expert "is sufficient compliance for application of the exemption provided by subsection (1) if the information is provided upon the request of the prospective transferee[.]" First, the omission in the disclosure statements about the full extent of the mold could not reasonably have been based on the MFR, where the MFR clearly stated that there was mold in the attic and master bedroom. Second, Banner's MFR was not provided or delivered to the Elliotts, and nothing in MCL 565.955 suggests that delivery to Covault would be sufficient.

The Therriens additionally argue that there was enough information about the possibility of mold made known to the Elliotts, such that the Elliotts had an obligation to check into the matter themselves and assess and verify the truthfulness and completeness of the information provided by the Therriens by way of inspections and testing. Viewing the evidence in a light most favorable to the Elliotts, the only information provided to them was that there was mold on the roof and that the roof was replaced, and then at the powwow the Elliotts sought confirmation and were given confirmation that there had been no mold in the home, only on the roof, which was corrected. There were no outwardly visible signs of mold growth that might have triggered further inquiry. The insurance information only revealed, at best, past claims regarding some frozen pipes, a broken water heater, some wind damage, the roof replacement, and mold associated with the roof replacement, assuming the Elliotts were even aware of the mold aspect of the fourth claim. This insurance information was not sufficient to alert a prospective purchaser of potential mold damage throughout the house. Under these circumstances, we cannot fault the Elliotts for not pursuing mold testing and obtaining verification that there was no mold present in the home. Had they been told of the mold in the master bedroom, inside the attic, and in other areas of the home, or simply given the MFR, it would have been prudent to obtain testing and seek professional assistance. The Elliotts did have a home inspection, but it revealed nothing relative to mold, and Morbach opined that the typical home inspection would not have revealed the water damage and mold and that testing the air for mold is not part of a home inspector's training and protocol. The home inspection contract did not cover mold testing. Reversal is unwarranted. Furthermore, the jury did in fact place some of the blame on the Elliotts, allocating 30 percent of the fault to them. The Therriens fail to properly frame this argument in a manner that recognizes this allocation of fault.

Next, the Therriens argue that they did not violate the SDA because the mold information could "be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the transferor," MCL 565.955(1). This argument neglects the fact that the Therriens had the MFR, giving them the knowledge that mold was present, and, again, Morbach's testimony indicated that the Therriens had to have known about the water intrusion and damage, along with the mold. She opined that water stains and mold had been covered up and concealed. Further, the post-closing confrontation between Marie Elliott and Dan Therrien, according to Marie, reflected that Dan was capable of identifying mold growth.

For the many reasons stated above, we also reject the Therriens' argument that it was unreasonable for the Elliotts to conclude, on the basis of the disclosure statements, that the home

was free of mold, given the representations in the statements. The evidence, viewed in a light most favorable to the Elliotts, supports a conclusion that their reliance on the disclosure statements was reasonable. Next, the trial court did not err in denying the motion for directed verdict on the silent fraud claim, where, for the reasons stated above, there was sufficient evidence to show an intent to deceive, even if the court mistakenly indicated that intent to deceive was not an element of silent fraud. Further, there is no merit to the argument that the trial court erred in denying the motion for JNOV for the reason that the jury's rejection of the fraudulent misrepresentation claim necessarily defeated the silent fraud claim. The two types of claims are distinguishable, and the finding that the Therriens made no affirmative fraudulent misrepresentations does not preclude a finding that the Therriens failed to disclose and fraudulently concealed material facts relative to mold; a finding which was supported by competent and sufficient evidence. Finally, the "as is," "hold harmless," and integration language in the documents executed by the Elliotts did not preclude liability, where fraud was established, and where the disclosure statements themselves reflected material omissions. See *Lenawee Co, supra* at 32 n 16; *Popielarski, supra* at 686-687; *Bergen, supra* at 390. We emphasize that the Elliotts only signed the "purchaser's satisfaction" and "closing agreement" documents containing the "hold harmless" and "as is" language after the Therriens agreed to execute the third seller's disclosure statement. Indeed, the "purchaser's satisfaction" and "closing agreement" both provided that they were subject to the third disclosure statement. And yet, even in this third disclosure statement, the Therriens continued the deception by not revealing the discovery of mold in the master bedroom, in the attic, and in other areas of the home and by once again stating that the mold was "on" the roof. As stated by our Supreme Court in *Lenawee Co, supra* at 32 n 16, "[a]n 'as is' clause does not preclude a purchaser from alleging fraud or misrepresentation." Such clauses are ineffective against fraud, *Popielarski, supra* at 686, and do not insulate a seller from liability where the seller engages in making misrepresentations or fraudulent concealment, *Bergen, supra* at 390. Reversal is unwarranted.

III. Conclusion

There was competent and sufficient evidence to support the jury's verdict with respect to the claim of silent fraud. The Therriens' arguments to the contrary lack merit and do not warrant interference with the verdict.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra