STATE OF MICHIGAN

COURT OF APPEALS

JUDY BETH AEBIG, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED February 8, 2005
v	No. 247171 Grand Traverse Circuit Court
GRETCHEN COX and TERRY COX, Defendant-Appellants/Cross-Appellees.	LC No. 02-022039-CK

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

I. Overview

Defendants Gretchen Cox and her husband, Terry Cox, appeal as of right a judgment in favor of plaintiff Judy Beth Aebig.[1] This case arose when Aebig bought a house that Terry Cox, a licensed builder, substantially remodeled and Gretchen Cox, a real estate agent, listed for sale. Aebig sued the Coxes when various structural and electrical problems with the house became evident. The jury found the Coxes liable for breach of contract, violation of the Michigan Consumer Protection Act,[2] and fraud, and the trial court entered a judgment of $190,281.77 plus attorney fees. We affirm.

II. Basic Facts And Procedural History

The house in question was a four-bedroom lakefront cottage that had been built in 1945. The Coxes bought the house in 1994 for $90,000, and began a remodeling project that would include replacing the entire second floor, adding an attached garage, and building a staircase. As a licensed builder since 1987, Terry Cox had built more than ten homes and had bought and sold several others, some in conjunction with Gretchen Cox, who has been a licensed realtor since 1995.

[1] Cross-appeals against Coldwell Banker and against the Coxes were dismissed by stipulation.

[2] MCL 445.901 *et seq*.

On this project, Terry Cox acted as the general contractor, and considered himself responsible for making sure everything was done correctly. He hired subcontractors for the second-floor framing and roofing, but he did the rest of the work, including the electrical wiring, himself. The building permit was obtained and signed by Gretchen Cox, who had a power of attorney that enabled her to sign on Terry Cox's behalf. However, Terry Cox testified that he, not Gretchen Cox, was responsible for the permits, and that he did not discuss the status of those permits with her. Terry Cox also testified that Gretchen did not participate in the construction beyond providing unskilled help.

Mike Schmerl, an electrical contractor, explained at trial that the house had to pass three electrical inspections under the permit: a "service inspection" for the meter and electrical panel, a "rough inspection" that examines the electrical work before it is covered by walls, and a "final inspection" that "proves that everything you did works." According to the permit history for this project, the house passed its service inspection on the second attempt, after the first inspection revealed four violations. Terry Cox requested a rough inspection on August 24, 1995, and that inspection also revealed four violations. Terry Cox requested a second rough inspection five days later; however, that inspection indicated that three violations remained. According to the State of Michigan records, Terry Cox never requested nor received a third rough inspection, which, as the permit indicates, the house was required to pass before he could begin installing the interior walls. Terry Cox also never requested or received a final inspection.

Terry Cox testified that he was confident his work met the building codes that the permit required; however, he acknowledged that the floor would not have been built the same way under current standards. He also acknowledged that the crawl space was likely not up to code, and that it had not been changed since 1945. Nonetheless, Terry Cox made no alterations in the floor system because he felt that, given the shims and props that previous owners had added in the crawl space to support the floor, it was sufficiently strong. The Coxes finished remodeling the house in 1996 and moved in in 1997.

In the spring of 2000, the Coxes listed the house for sale through Gretchen Cox's employer, Coldwell Banker. Both the listing itself and the disclosure statements contained incorrect information. The multiple listing service sheet indicated that the house was built in 1997, and the space for "year remodeled" was left blank, which the Coxes both acknowledged was not correct. The listing stated that the house was "rebuilt from [the] foundation up" and "completed in 1997." The disclosure form also failed to indicate that the foundation and some of the electrical wiring was fifty years old, that the house had failed inspections, or that the building permit was still outstanding.

The listing came to the attention of Aebig, who viewed the property at an open house. After seeing the house, Aebig made an offer of $350,000 contingent on receiving the sellers' disclosure statement. The Coxes accepted the offer within a matter of hours. On May 21, 2000, the parties signed a purchase and sale agreement that gave Aebig ten days to obtain an inspection of the property to provide "independent and unbiased information regarding the condition of the property." The agreement further provided:

> if the purchaser fails to have these inspections, studies or tests performed, or fails to raise matters pursuant to this provision, the purchaser shall be deemed to have accepted the property subject to any material or adverse condition that such

> inspection, study or test would have disclosed. Purchaser further acknowledges that in entering into this agreement, purchaser is not relying upon any representations made by any realtor.

Aebig received the sellers' disclosure statement a few days later. Although the sellers' disclosure statement specified that the seller had no expertise in construction unless otherwise indicated, the Coxes did not disclose on the form that Terry Cox was a licensed builder. Nevertheless, Aebig testified that Terry Cox had told her that he was a licensed builder and, furthermore, that she had therefore relied on his professional expertise, as well as that of Gretchen Cox, when reading the disclosure form.

Pursuant to the right-to-inspect clause in the purchase and sale agreement, Aebig hired Mark Rutter, an inspector from AmeriSpec,. Both Aebig and Terry Cox were present during the inspection, but Aebig did not follow Rutter into the attic or the crawl space, which was only about two feet tall. Aebig felt that Rutter's inspection was largely superficial and not very thorough; for example, she noticed that Rutter did not examine the electrical outlets or switches, but only plugged in a testing device to make sure the outlets worked. Nonetheless, over the course of two hours, Rutter identified several electrical problems, including missing ground fault interruptor (GFI) switches, missing outlet covers, and "double lugging." Rutter also told Aebig that the floor joists were "rotten and shifting" and "needed to be secure."

Rutter later provided Aebig with a twenty-three-page summary report in which he recommended that the floor joists in the crawl space be reviewed by a licensed builder or structural engineer. The written report also indicated that the estimated age of the home was fifty-five years. Terry Cox testified that Aebig was present when he told the inspector that the house was built in 1945; however, Aebig assumed that the report's reference to the house being fifty-five years old was based solely on a small portion of old wall that Terry Cox told her he had left in place so that he could secure the necessary variances to expand the house's square footage. According to Aebig, Terry Cox never told her that the floor system was original to the house, and the Rutter report did not indicate that the house still had the original subfloor. Aebig testified that she did not interpret Rutter's concern about the rotting joists to mean that the floor provided inadequate support, and thus had "no idea" about the magnitude of the problems she would encounter as a result of the unrepaired floor joists. Aebig did not go into the crawl space to examine the floor joists after reading Rutter's report.

Aebig discussed with Terry Cox the issues Rutter had identified. According to Aebig, Cox agreed to fix three things: the "double lugging," the GFI switches, and the floor joists. According to Aebig, Terry Cox told Aebig that the floor joists were "a minor thing," an "easy fix," that he could secure himself. Aebig asked Terry Cox whether he was sure he could do it, and he responded that he could. Gretchen Cox was not present when Terry Cox and Aebig discussed what repairs he would perform, and Aebig testified that although she discussed the general quality of the house with Gretchen Cox, they never specifically discussed the floor joists. Aebig decided to proceed with the purchase and move into the house.

Aebig asked Terry Cox whether he had fixed the floor joists on the night she began moving her belongings into the garage, and, according to Aebig, he responded, "Yes, don't worry about it." According to Aebig, she asked him again whether he had fixed the floor joists on the morning of closing, and he responded that he had. Aebig testified that she did not have

his work checked by an independent inspector because she "totally trusted the builder of the house."

During that fall and winter, cracks appeared in the floor tile and in the ceiling, and water stains began spreading from the eaves down the wall. The carpeting was "bubbling," a bathroom sink cracked in half, there was a small electrical fire, and the floor began to visibly heave when walked on.

Aebig discovered further problems with the house in mid-2001, when she contacted electrical contractor Mike Schmerl to install a central air conditioning unit. After examining the wiring in the house, Schmerl concluded that the person who installed it had little or no electrical training, and that the work violated the building code in several ways that created fire hazards. Schmerl investigated the permit history of the house and discovered that it did not have a certificate of occupancy, and that the building and electrical permits were still open.

Robert Olson, a building code consultant, conducted two inspections of the house at Aebig's request on August 27, 2001, and September 12, 2001. After the first inspection, Olson contacted Roswell Ard, a structural engineer, to help evaluate the structural problems in the house. Olson testified that when he and Ard went into the crawl space beneath the house, they discovered "a forest of temporary supports supporting an inadequate floor system." Olson also discovered that the floor tile on the second floor had been laid over a substance that was not code-approved, and that the roof was not properly insulated. Olson testified that an untrained person could have inspected the support system in the crawl space without knowing that the floor was improperly and inadequately supported.

Ard testified that he was "appalled" by what he found when he viewed the floor support from the crawl space, which was random boards, spliced joists, and pieces of wood resting on concrete blocks extending up to brace the floor. Ard concluded that the floor system was structurally inadequate to support the building. Ard noted that he could not determine what was above the floor system because "everything was covered." Ard agreed with counsel's characterization of the house as a "structurally inadequate nightmare," and testified that while a layman would not be able to see the flaws, a licensed builder should have known that the floor system was inadequate. Ard testified that, had he inspected the house before Aebig bought it, he would have advised her that there was a "very serious" and expensive problem with the floor that would need to be corrected.

Bill Archer, a licensed builder, testified that Aebig called him in November 2001 for an estimate on the problems that Olson and Ard had identified. Archer estimated that because the floor repairs necessitated removing drywall, fixtures, and flooring, the repairs would cost over $165,000 and take about five months, during which time the house would not be habitable.

Aebig filed an eight-count complaint alleging breach of contract, fraudulent misrepresentation, silent fraud, negligent misrepresentation, innocent misrepresentation, negligence, and violation of the Michigan Consumer Protection Act, as well as one count of vicarious liability against Coldwell Banker as Gretchen Cox's employer. The general allegations included claims that no final electrical inspection was made; several light fixtures and other utilities were not grounded, lacked junction boxes, and lacked the proper connectors; the recessed lighting in the bathroom was not rated for contact with insulation although contact

occurred; and the pond pump and sewage pump shared a common circuit, which was also ungrounded. The non-electrical defects included cracking and shifting floors and improperly installed siding, insulation, and roof. Aebig also alleged that the foundation and flooring system were inadequate to support the house.

The Coxes filed a motion for summary disposition under MCR 2.116(C)(10), arguing that Aebig's right to inspect the property precluded her fraud and misrepresentation claims. However, the trial court denied the motion, ruling that the jury could find that the Coxes "knew about the defects in the house, concealed them, misrepresented the condition of the house and intended to defraud Aebig." The trial court further ruled that while it was "possible for a jury to believe that Aebig's reliance was reasonable throughout," it was "possible for a jury to believe that Aebig's reliance became unreasonable in light of the AmeriSpec inspection." However, the trial court reasoned that the jury could also conclude that when Terry Cox agreed to make the necessary repairs, "he was continuing the fraud that he and his wife had already set in motion," and that Gretchen Cox knew Terry Cox had not made the repairs but failed to disclose that fact.

At trial, Aebig testified that she had no reason to expect any of the problems she experienced with the house to occur when she signed the contract, and had no reason to suspect that parts of the house were old. She testified that when she asked Gretchen and Terry Cox how old the house was, they told her it was new "from [the] ground up" in 1997. Aebig assumed that this meant "you went to the bottom and that's where you started fixing things and went up," including the flooring, plumbing, and electrical systems. Aebig specifically testified that Gretchen Cox misled her by telling her that the house was built "much better than it needed to be, that it was a three year old house, new from the ground up, executive built home." Aebig testified that if she had "any idea what was going on behind the walls and the places I couldn't get," she would not have bought the house. Aebig concluded there was "no way" she could have known about the problems with the house before she bought it, stating that a person "couldn't have found a flaw in that house until it had been through its first winter."

Aebig stated that there was nothing in the disclosure form that would have prompted her to hire an electrician, a structural engineer, or to investigate whether there was a certificate of occupancy or whether all the building permits had been closed. Aebig further testified that even if she had inspected the crawl space, she would have needed to know what she was looking for to reach the conclusion that the floor system was unsound.

Terry Cox testified that, when he turned possession of the house over to Aebig, he believed that the floor joists supported the floor because he had no problems while living in the house for six years. According to Terry Cox, after the Rutter inspection, he offered Aebig to fix the floor joists, but she did not take him up on the offer, saying only that she would think about it. Terry Cox stated that he and Aebig discussed the floor joists again three or four days later, and she decided not to have them fixed at that time. Therefore, he did not fix the floor joists.

When asked about Terry Cox's testimony that Aebig wanted to think it over first, Aebig emphatically denied it, explaining that it would not have made sense for her to refuse the builder's offer to rectify a problem in the house. Aebig acknowledged that the agreement was not reduced to writing, but insisted they had a verbal agreement. Aebig testified that she was "positive" that the Coxes had agreed to fix the floor joists before closing the sale, and further

stated that she would have bought a different house if she had known the floor joists were still not fixed.

Gretchen Cox also testified at trial. Gretchen Cox admitted she did not tell Aebig that the floor was fifty years old, and she agreed that Aebig would not have been able to tell the floor's age by looking. Gretchen Cox explained that she did not disclose the existence of a floor defect because she saw no evidence of settling while she lived in the house. Gretchen Cox testified that she was not present at Aebig's inspection, and she did not discuss it with Terry Cox in detail. According to Gretchen Cox, Terry Cox told her he had offered to fix the joists for Aebig, but the last time they discussed it, Aebig had not yet decided what she wanted to do. Gretchen Cox denied that Terry Cox told her he had promised Aebig that he would fix it. Gretchen Cox testified that she did not follow up with Aebig on the matter, but left it to Terry Cox because he was the one who could fix it. Gretchen Cox stated that she never discussed with Aebig whether Terry Cox would repair the floor, and did not herself promise Aebig that the repairs would be made. Gretchen Cox testified that she was not a party to any promises Terry Cox made to fix the property, and stated that she did not think she had ever given Terry Cox the power to make statements on her behalf, although she had "allowed him to use a power of attorney on occasion."

Before instructing the jury, the trial court asked the attorneys whether they had any substantive issues to preserve while the jury was out, and, apart from matters not relevant to this appeal, the attorneys made no objections at that time.[3] With respect to the silent fraud claim, the trial court instructed the jury that Aebig had the burden to prove each of the following elements by clear and convincing evidence:

> First, that the defendants, Terry and Gretchen Cox, failed to disclose one or more material facts about the home.
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> Second, that the defendants, Terry and Gretchen Cox, had actual knowledge of these facts.
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> Third, that the defendants', Terry and Gretchen Cox, failure to disclose these facts caused the plaintiff to have a false impression.
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> Fourth, when the defendants, Terry and Gretchen Cox, failed to disclose these facts they knew the failure would create a false impression.
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> Next, when the defendants, Terry and Gretchen Cox, failed to disclose these facts they intended that the plaintiff rely on the resulting false impression.
>
> Next, that the conditions of the property now complained of by plaintiff could not have reasonably been discovered by a competent inspection.

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[3] For reasons not apparent from the record, the trial court did not entertain objections to the jury instructions until after they had been given.

And, finally, the plaintiff was damaged as a result of her reasonable reliance.

With respect to false representation, the trial court instructed that the jury must find:

First, that the defendants, Terry and Gretchen Cox, made a representation of one or more material facts.

Next, that the representation was false when it was made.

Next, that the defendants, Terry and Gretchen Cox, knew the representation was false when they made it, or they made it recklessly, that is without knowing whether it was true.

Next, that the defendants, Terry and Gretchen Cox, made the representation with the intent that plaintiff rely on it.

And, next, that plaintiff did indeed rely on the representation.

Next, that the conditions of the property now complained of by plaintiff could not have reasonably been discovered by a competent inspection.

And, finally, that plaintiff was damaged as a result of her reasonable reliance.

With respect to innocent representation, the trial court instructed the jury that their verdict would be for Aebig if she proved by a preponderance of the evidence:

First, that the defendants, Terry and Gretchen Cox, made a representation of one or more material facts.

Next, that the representation was in connection with the making of a contract between the plaintiff and the defendants, Terry and Gretchen Cox.

Next, that the representation was false when it was made.

Next, that plaintiff would not have entered into the contract if the defendants, Terry and Gretchen Cox, had not made the representation.

Next, that the conditions of the property now complained of by plaintiff could not have been reasonably discovered by a competent inspection.

Next, that plaintiff had a loss as a result of entering into the contract.

And, finally, that plaintiffs[’] loss benefited the defendants Terry and Gretchen Cox.

With respect to negligent misrepresentation, the trial court instructed the jury to find for Aebig if she proved the following by a preponderance of the evidence:

> First, that the defendants, Terry and Gretchen Cox, made a representation of a material fact.
>
> Next, that the representation was false when it was made.
>
> Next, the plaintiff relied on the representation in entering into the purchase agreement.
>
> Next, that the defendants, Terry and Gretchen Cox, owed the plaintiff a duty of care not to make false representations.
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> Next, that the defendants, Terry and Gretchen Cox, breached this duty of care by making false representations to the plaintiff.
>
> Next, the condition of the property now complained of by plaintiff could not have been reasonably discovered by a competent inspection.
>
> And, finally, as a result of the plaintiff's reasonable reliance on the representations of the defendants, Terry and Gretchen Cox, the plaintiff has suffered damages.

After the trial court dismissed the jury, Aebig's attorney objected to the Coxes' attorney's inclusion of the "competent inspection" requirement in the fraud claims. Aebig's attorney also raised an issue regarding a "reasonable reliance" instruction that had apparently been previously discussed off the record. The trial court responded that it

> had indicated if you wanted something to that effect I would put it in. It didn't get in, so I presumed when you read the report, didn't see it, that it was okay. If you want to draft a line quickly I will try to find a spot to put it and we can have one of these pages re-typed and substituted."

Aebig's attorney replied, "I'll withdraw that objection. I believe reasonable reliance is adequately covered as other causes of action as they are in the verdict form, or in the jury instructions." The Coxes' attorney raised no objection.

The trial court informed the attorneys that it had reached the "preliminary conclusion" that it "did not appear to me to be legally possible for the plaintiff to recover" on the Michigan Consumer Protection Act or breach of contract claims "without also recovery on the claim of fraud subsequent to the inspection report." The trial court indicated that it would address the matter after the jury returned its verdict.

The jury verdict form was divided into ten questions. The first question was whether the Cox defendants violated the Michigan Consumer Protection Act by doing any of the following: (A) representing that the subject house had characteristics and/or approval which it did not have; (B) representing that the subject house was of a standard and a quality of which it was not; (C) failing to reveal material facts regarding the subject house, the omission of which tended to mislead or deceive Aebig regarding a fact that she would not reasonably have known; or

(D) failing to review facts which were material to the sale of the subject house in light of representations of fact made in a positive manner. The jury answered "yes."

With respect to the remaining questions, the jury found that the Coxes breached their contract with Aebig for the sale of the property; committed silent fraud; and were liable for innocent, negligent, or intentional misrepresentation prior to the inspection. The jury specifically found that Terry Cox had agreed to repair the floor joists in the crawl space but had failed to do so, and that he either failed to disclose to Aebig that the repairs had not been made or misrepresented that they had been made. However, the jury also found that Gretchen Cox did not know of the agreement to repair the floor joists and that the repairs had not been made. The jury determined that Aebig had incurred $190,281.77 in damages and $40,227.61 in attorney fees. The trial court entered a judgment against the Coxes, holding them jointly and severally liable for those amounts. The order entering judgment indicated that the jury had rendered a verdict in Aebig's favor on the claims of breach of the Michigan Consumer Protection Act, breach of contract, silent fraud, and fraud.

The Coxes moved for a new trial on the ground that the judgment was "excessive, against the weight of the evidence, and given under the influence of passion or prejudice." However, because the Coxes had already filed their claim of appeal with this Court, the trial court vacated the motion.

III. Gretchen Cox's Liability For Terry Cox's Misrepresentations

A. Standard Of Review

Whether the trial court erred in allowing Gretchen Cox to be held liable for Terry Cox's misrepresentations without stating the legal basis is a question of law; therefore, we review this issue de novo.[4]

B. Preservation Of The Issue

The Coxes did not raise the issue of Gretchen Cox's joint liability before the trial court. Ordinarily, we do not review issues raised for the first time on appeal,[5] and to the extent that we do entertain unpreserved issues, we will reverse only for plain error that affected a party's substantial rights.[6]

The Coxes assert that they need not have raised the issue of joint liability before the trial court because Gretchen Cox was listed separately as to some issues on the jury verdict form.

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[4] See *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004).

[5] See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003).

[6] See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The Coxes speculate that the separate question on the jury verdict form regarding Gretchen Cox's knowledge must have reflected the trial court's view that Gretchen Cox could not be held liable for Terry Cox's post-inspection misrepresentation.

However, the Coxes' own brief indicates that Gretchen Cox was listed separately on the verdict form to determine whether defendant Coldwell Banker could be held vicariously liable, as a matter of law, for Gretchen Cox's misrepresentations in her capacity as a real estate agent. Moreover, the jury instructions for each of the fraud claims clearly refer to both Gretchen and Terry Cox. Finally, although the Coxes moved for a new trial after the jury's verdict was delivered and judgment was entered against them both, they did not argue that Gretchen Cox was improperly found liable for Terry Cox's misrepresentations. In sum, the Coxes had ample notice that they would be treated jointly for purposes of the fraud claims, and also had the opportunity to raise the issue in their motion for a new trial; yet they did not object until this appeal. Accordingly, this issue is waived.[7]

C. Addressing The Merits

The Coxes urge this Court to reach the issue nonetheless, arguing that the trial court plainly erred in holding Gretchen Cox liable for Terry Cox's misrepresentation to Aebig that he had repaired the floor joists in light of the jury's finding that Gretchen Cox did not know of this misrepresentation. Had the damage award been based solely on Terry Cox's misrepresentation that he had repaired the floor joists, we agree that the trial court would have plainly erred in holding Gretchen Cox liable without a finding to support a legal theory by which she should share liability.[8]

In this case, however, contrary to the Coxes' assertion, liability was not predicated solely on the fraud claim relating to Terry Cox's misrepresentation about having repaired the floor joists. Rather, liability was also predicated on Aebig's claims that the Coxes breached their contract and violated the Michigan Consumer Protection Act, and these claims included allegations against both Gretchen Cox and Terry Cox. Moreover, all of Aebig's claims alleged liability based on numerous misrepresentations, including electrical problems and failure to pass a final inspection or obtain a certificate of occupancy.

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[7] See *Booth Newspapers*, *supra* at 234

[8] This is not to say that no valid legal theory for imposing shared liability on Gretchen Cox existed. Although we agree with the Coxes' contention that the marriage relationship itself does not give rise to liability for a spouse's fraud, the Coxes may have had other relationships that gave rise to joint liability, such as an agency relationship or a partnership.[8] See MCL 449.15(a); MCL 449.13; *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 11; 651 NW2d 356 (2002). However, proving the existence of such relationships is a factual matter for the jury, and the trial court did not allow the jury to make this determination. See *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995) (agency); *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978) (partnership).

The Coxes argue that Terry Cox's failure to repair the floor joists constituted Aebig's "only viable claim at trial" because the trial court had stated that Aebig's claims could only be upheld if the jury found evidence of post-inspection fraud. Although the trial court did make this statement on the record, it did so as a "preliminary" matter with the expectation that there would be further briefing on the issue. Such briefing became unnecessary when the jury did, in fact, find evidence of post-inspection fraud, and the trial court never ruled on this issue. It is well established that the trial court speaks through its judgments and orders, not through its oral statements,[9] and the order entering judgment clearly indicates that the judgment was based on the jury's finding against the Coxes on all of Aebig's claims.

Furthermore, the trial court's position that Aebig could only recover if there was post-inspection fraud was predicated on the idea that Aebig's ability to recover was limited by "all these inspection requirements, disclosure statements, that are contained within the documents themselves." However, the jury was required to find with respect to each fraud claim, as well as the MCPA claim, that the defects *could not* have been discovered by a competent inspection. Because the judgment was supported by Aebig's alternative claims, we conclude that no error occurred that affected Gretchen Cox's rights.[10]

IV. Jury Instructions

A. Standard Of Review

We review de novo claims of instructional error.[11]

B. Legal Standards

The trial court must give a jury instruction if a party requests it and if it is applicable to the case.[12] "The trial court's jury instructions must include all the elements of the plaintiffs' claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports."[13] If, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury, no error requiring reversal occurred.[14]

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[9] See *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977).

[10] See *Kern*, *supra* at 336.

[11] *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

[12] MCR 2.516(D)(2); *Lewis*, *supra* at 211.

[13] *Lewis*, *supra* at 211, citing *Case*, *supra* at 6.

[14] *Id*.

C. Joint Liability

"'In order to preserve for appellate review the adequacy of jury instructions in a civil case, a party must make a request for a jury instruction before the instructions are given and must object to the alleged error after the jury has been instructed.'"[15] The Coxes argue that the trial court erred in not giving an instruction on reasonable reliance that specifically related to Terry Cox's representation about having fixed the floor joists; however, they did not request such an instruction at trial. As noted, the Coxes also never argued at trial that Gretchen Cox was not liable for Terry Cox's misrepresentations, and they did not request an instruction to this effect. Because the Coxes failed to request either instruction at trial, they waived the issue for appeal.[16]

The Coxes argue that this Court should nonetheless review the issue because manifest injustice resulted from the trial court's failure to give these instructions.[17] As explained above, however, Gretchen Cox's liability did not stem only from Terry Cox's misrepresentations regarding the floor joists repair; it was also predicated on the jury's finding that she was liable for breach of contract and violation of the Michigan Consumer Protection Act. Because the judgment was supported by these findings, no manifest injustice occurred by failing to instruct the jury on the legal basis for finding her jointly liable based on Terry Cox's misrepresentation about the floor joists.

D. Reasonable Reliance

The Coxes argue that Aebig's reliance on Terry Cox's claim that he fixed the floor joists was not reasonable because she could have discovered otherwise by requesting a second inspection or simply by looking. It is true that reliance is not considered reasonable "where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the plaintiff."[18] However, in this case, the trial court did instruct the jury, with respect to all Aebig's fraud claims, that it could only find fraud if "the conditions of the property now complained of by plaintiff could not have been reasonably discovered by a competent inspection." We must presume that the jurors understood and followed the trial court's instructions.[19] The Coxes offer no reason why the trial court should have had to indicate that the reasonable reliance instructions specifically applied to one particular fraudulent act, when it had repeatedly instructed that reasonable reliance was

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[15] *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000), quoting *Zinchook v Turkewycz*, 128 Mich App 513, 520; 340 NW2d 844 (1983).

[16] *Leavitt*, *supra* at 300.

[17] See *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003); *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997) (waived jury instruction issue may be reviewed for manifest injustice).

[18] *Webb v First of Michigan Corp*, 195 Mich App 470, 473; 491 NW2d 851 (1992).

[19] See *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

required to support a finding of *any* fraud. Under these circumstances, we conclude that no manifest injustice occurred.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Richard A. Bandstra