

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY BORDER,

Plaintiff-Appellee,

v

DAVID E. HENNING and SUSAN L. HENNING,

Defendants-Appellants.

UNPUBLISHED

September 25, 2007

No. 270423

Genesee Circuit Court

LC No. 2004-079230-NZ

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment entered in favor of plaintiff following a bench trial on her claims that defendants defrauded her in connection with the sale of their home. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

On June 7, 2003, plaintiff purchased a home from defendants. On June 18, 2004, she initiated an action against defendants alleging, in part, that they falsely represented to her that the roof did not leak and that there were hardwood floors throughout the home.¹ Following a bench trial, the trial court awarded \$14,070 in damages and \$14,056 in case evaluation sanctions to plaintiff.

Defendants contend that the trial court erred in denying their motion for a directed verdict concerning plaintiff's fraud claims. We disagree.

Following a bench trial, we review a trial court's factual findings for clear error and review de novo its conclusions of law. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous

¹ Plaintiff also alleged that defendants fraudulently misrepresented that the basement leaked only under certain conditions and that there were no settling, flooding, drainage, structural, or grading problems on the property. The trial court granted defendants' motion for a directed verdict on these claims and plaintiff has not filed a cross appeal challenging the trial court's decision. Thus, these issues are not before this Court.

when, although there is evidence to support the finding, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* We review de novo a trial court's decision regarding a motion for a directed verdict. *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 11; 730 NW2d 29 (2006).

Pursuant to the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*, sellers have a legal duty to disclose, in "good faith," certain conditions of their home to prospective buyers. See MCL 565.957 and MCL 565.960. In the event that the disclosures are fraudulently made, a buyer may maintain an action for fraud against the sellers. *Bergen v Baker*, 264 Mich App 376, 385; 691 NW2d 770 (2004). "There are essentially three theories to establish fraud: (1) traditional common-law fraud, (2) innocent misrepresentation, and (3) silent fraud." *M & D, Inc v W B McConkey*, 231 Mich App 22, 26-27; 585 NW2d 33 (1998).

The evidence in this case supported the trial court's finding that defendants defrauded plaintiff by representing to her that the roof on their home did not leak.

As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Id.* at 27.]

Under the SDA, defendants were specifically required to disclose whether the roof leaked. MCL 565.957(1). The SDA places no time limitation on disclosures of leaks. Defendants represented on the disclosure statement that the roof did not leak. However, they admitted at trial that their neighbor informed them that their roof had leaked on one occasion in 2002 or 2003, while they were residing in Florida for the winter. Thus, the evidence was sufficient to establish that defendants made a material representation concerning the condition of the roof, that the representation was false, and that, when defendants made the representation, they knew that it was false. Given the purpose of the disclosure statement, it was reasonable for plaintiff to rely upon defendants' representation that the roof did not leak. See *Le Roy Const Co v McCann*, 356 Mich 305, 308; 96 NW2d 757 (1959), and *Bergen*, *supra* at 389-390. The fact that plaintiff read the disclosure statement before she signed the purchase agreement reflects that she acted in reliance upon the representations made therein. Moreover, plaintiff established that she suffered damages as a result of defendants' representations regarding the roof; namely, she incurred the cost of a new roof.

Not only were defendants liable to plaintiff for the misrepresentations regarding the roof under a common law fraud theory, defendants were liable to plaintiff under an innocent misrepresentation theory.

A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation. The innocent misrepresentation rule represents a species of fraudulent misrepresentation but has, as its distinguished characteristics, the elimination of the need to prove a

fraudulent purpose or an intent on the part of the defendant that the misrepresentation be acted upon by the plaintiff, and has, as added elements, the necessity that it be shown that an unintendedly false representation was made in connection with the making of a contract and that the injury suffered as a consequence of the misrepresentation inure to the benefit of the party making the misrepresentation. Thus, the party alleging innocent misrepresentation is not required to prove that the party making the misrepresentation intended to deceive or that the other party knew the representation was false. [*M & D, Inc, supra* at 27-28 (citations omitted; emphasis in original).]

Before plaintiff purchased the home, defendants' real estate agent told her that the roof did not leak. It is well established that the actions of an agent bind a principal when the agent acts with either actual or apparent authority. *Meretta v Peach*, 195 Mich App 695, 697-698; 491 NW2d 278 (1992). Defendants were liable for their agent's representation regarding the roof, even if the agent did not know that the representation was false. *M & D, Inc, supra* at 27-28; *Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996).

Defendants argue that they did not have a duty to warn plaintiff of defects that could have been reasonably discovered upon inspection. This Court has recognized that a seller does not violate the SDA "where undisclosed and unknown information could be obtained only through inspection or observation of inaccessible areas of the home or could only be discovered by a person with expertise beyond the knowledge of the seller." *Bergen, supra* at 385 n 4. However, the information regarding the roof leak was not unknown. Defendants admittedly knew about the leak. Furthermore, the fact that plaintiff could have obtained a home inspection before purchasing the property was not fatal to her fraud claim. An inspection does not necessarily preclude a showing of reliance upon a seller's representations. See *Le Roy Const Co, supra* at 308, and *Bergen, supra* at 389-390. Moreover, defendant failed to present any evidence that the leaking, as disclosed to defendants by the neighbor, would have been discovered by a home inspector. The trial court properly denied defendants' motion for a directed verdict concerning plaintiff's roof-related fraud claim.

The trial court also properly denied defendants' motion for a directed verdict concerning plaintiff's claim that defendants committed fraud by representing that there were hardwood floors throughout the home. Plaintiff testified at trial that she had severe asthma and needed to live in a dust-free environment. When she toured the home with defendants' real estate agent, there were carpeting and vinyl floor coverings throughout the home, except in one bedroom, which had the original, oak hardwood floor. Plaintiff testified that she told defendants' agent that she needed a home with hardwood floors and that, when they looked at the hardwood floor in the bedroom, he told her that "it's through the whole house and this is what it looks like." Nothing in the record indicated that plaintiff could ascertain the condition of the floors underneath the existing flooring at that time. Thus, it is reasonable to conclude that, when plaintiff purchased the home, she relied upon the agent's representations that there were hardwood floors throughout the house. Additionally, plaintiff established that she suffered damages as a result of the agent's representations. After she purchased the home, she discovered that there were no hardwood floors in the home, except in the one bedroom. She incurred the cost of having hardwood floors installed in the living area of the home. Assuming *arguendo* that the agent did not know that the representations regarding the floors were false, defendants were

liable for the agent's representations regarding the floors under the innocent misrepresentation theory. *M & D, Inc, supra* at 27-28; *Meretta, supra* at 697-698.

Viewing the evidence in the light most favorable to plaintiff, factual questions existed upon which reasonable minds could differ regarding whether defendants defrauded plaintiff by representing that the roof did not leak and by representing that there were hardwood floors throughout the home. Accordingly, the trial court properly denied defendants' motion for a directed verdict with regard to plaintiff's fraud claims. *Dykema Gossett, supra* at 11.

Defendants argue that they were not liable to plaintiff for the condition of the roof or the floors because the house was sold "as is." This argument is without merit. It is "well-established . . . that if a seller makes fraudulent representations before a purchaser signs a binding agreement, then an 'as is' clause may be ineffective." *M & D, Inc, supra* at 32; *Clemens v Lesnek*, 200 Mich App 456, 460; 505 NW2d 283 (1993). The "as is" clause in the purchase agreement did not insulate defendants from liability in this case because they made fraudulent representations in connection with the sale of the property. *Bergen, supra* at 390 n 5; *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994).

Defendants next contend that plaintiff failed to prove, with reasonable certainty, that she sustained damages as a result of defendants' misrepresentations regarding the hardwood floors.

We review a trial court's award of damages following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). In reviewing a trial court's finding with regard to the amount of damages, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995).

"In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). In a case such as this, where a buyer acquires real property and the seller has made a material misrepresentation regarding the quality or condition of the property, the proper measure of damages "is the difference between the actual value of the premises as of the time of contract and the value thereof had same been as represented." *Gross v Morosky*, 366 Mich 114, 116; 113 NW2d 863 (1962); see also *Hubert v Joslin*, 285 Mich 337, 346; 280 NW 780 (1938). Plaintiff had the burden of proving her damages "with reasonable certainty." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Plaintiff testified at trial that she paid "very close to \$10,000, just under" to have hardwood floors installed in the living area of the home. She agreed that defendants were not liable for the cost incurred in removing the existing carpeting and vinyl flooring because she would have removed the existing flooring regardless of whether there were hardwood floors underneath. However, she did not know how much she paid to remove the existing flooring because she did not receive an itemized invoice for the work. Plaintiff did not present any documentary evidence at trial to support her claim of damages relating to the hardwood floors. The trial court awarded plaintiff \$9,000 in damages for the hardwood floors, finding that she would have paid no more than ten percent of the \$10,000 for the removal of the existing flooring.

The trial court found that the award of \$9,000 was reasonable, given that plaintiff had approximately 600 square feet of hardwood floor installed, and given that she thought that she was buying a home with hardwood floors that were installed in 1966 and were in good condition.

Contrary to defendants' assertion, plaintiff was not required to present any independent documentary evidence to support her testimony. With regard to fraud in general, this Court in *Tek-Ni-Kal Emp Credit Union v Atkins*, 12 Mich App 1, 4; 162 NW2d 299 (1968), stated:

[I]t is clear that fraud can be established by the testimony of but one interested witness if such evidence be not counterbalanced by equally convincing proof. Since interest in a witness only goes to his credibility and hence the weight of his evidence, the effect of his testimony is for the trier of the fact.

Defendants did not present any evidence to rebut plaintiff's assertion that she paid approximately \$10,000 to have new hardwood floors installed. Because the amount of damages asserted by plaintiff was undisputed, we conclude that her testimony, alone, was sufficient to provide a reasonable basis for the computation of the damages that she sustained as a result of defendants' misrepresentations regarding the flooring. See *Brooks v Culver*, 168 Mich 436, 443; 134 NW 470 (1912) (concerning fraud in general). Cf. *In re the Matter of the Dissolution of F Yeager Bridge & Culvert Co*, 150 Mich App 386, 406; 389 NW2d 99 (1986), and *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 801-802; 286 NW2d 34 (1979). It was up to the trial court to judge the credibility of plaintiff's assertions. *Hofmann, supra* at 99. Moreover, the trial court did not err in approximating the amount of damages that plaintiff sustained. *Everton v Williams*, 270 Mich App 348, 351; 715 NW2d 320 (2006); *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). As noted in *Berrios, supra* at 478-479, "[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof [of damages]. We do the best we can with what we have" (internal citations and quotation marks omitted). Thus, the trial did not clearly err in awarding plaintiff \$9,000 for the hardwood floors.

Defendants also contend that the trial court erred in awarding plaintiff \$5,070 in damages for their representations that the roof did not leak because plaintiff indicated that she intended to replace the roof within two or three years after purchasing the house. This argument is without merit. Plaintiff was "entitled to the benefit of the bargain as set forth in the agreement." *Ferguson, supra* at 54. Plaintiff bargained for a roof that did not leak. The trial court's determination of the amount of damages sustained by plaintiff as a result of defendants' representations that the roof did not leak was based upon an invoice submitted by plaintiff. Defendants did not present any evidence to rebut the amount of the damages asserted by plaintiff. Thus, the trial court did not clearly err in awarding plaintiff \$5,070 in damages for the roof.

Finally, defendants contend that the trial court erred in awarding plaintiff \$13,500 in attorney fees as case evaluation sanctions under MCR 2.403(O).²

² Defendants do not take issue with the \$356 awarded to plaintiff as "costs taxable in any civil (continued...)"

We review de novo a trial court's decision to grant case evaluation sanctions under MCR 2.403. *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006). "The amount of sanctions imposed by the trial court is reviewed for an abuse of discretion." *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

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. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

"The purpose of this rule 'is to encourage settlement, deter protracted litigation, and expedite and simplify the final settlement of cases' by placing the burden of litigation costs on the party who demands a trial by rejecting the case evaluation award." *Rohl v Leone*, 258 Mich App 72, 75; 669 NW2d 579 (2003) (citation omitted). In this case, it is undisputed that defendants were required to pay plaintiff's actual costs under MCR 2.403(O). "Actual costs" include "a reasonable attorney fee based on a reasonable hourly rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b).

Defendants argue that the trial court erred in awarding \$13,500 in attorney fees to plaintiff because the number of hours was excessive and because plaintiff requested attorney fees that were incurred before the deadline for the acceptance or rejection of the case evaluation. It is well established that, "under MCR 2.403(O), there must be a 'causal nexus between rejection and incurred expenses' to justify the award of case evaluation sanctions." *Allard, supra* at 402, quoting *Haliw v Sterling Heights*, 471 Mich 700, 711 n 8; 691 NW2d 753 (2005). "Attorney fees incurred before the deadline for the acceptance or rejection of a mediation evaluation are not taxable costs pursuant to MCR 2.403(O)." *J C Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 431; 552 NW2d 466 (1996).

Defendants also argue that the hourly rate of \$300 an hour was excessive. "A reasonable attorney fee must be based on a reasonable hourly or daily rate for services necessitated by the rejection of the evaluation." *Zdrojewski v Murphy*, 254 Mich App 50, 71-72; 657 NW2d 721 (2002).

In determining a reasonable hourly rate, the trial court should consider relevant criteria, including "the professional standing and experience of the attorney; the skill, time and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client." *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990).

(...continued)

action" under MCR 2.403(O)(6)(a).

Reasonable fees are not equivalent to actual fees charged. *Cleary v Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1993). [*Zdrojewski, supra* at 72.]

“The burden of proving fees rests upon the claimant of those fees.” *Campbell, supra* at 201 (internal citations and quotation marks omitted).

In this case, plaintiff requested \$16,800 in attorney fees, which represented 56 hours of representation at \$300 an hour. Defendants challenged plaintiff’s motion and requested an evidentiary hearing on the reasonableness of the fees. Without holding an evidentiary hearing, the trial court awarded plaintiff \$13,500 in attorney fees. It is clear that the trial court did not accept plaintiff’s counsel’s billing on its face. However, the trial court did not make any factual findings regarding the attorney fees and did not explain the basis for the award on the record. Thus, we cannot determine whether the trial court abused its discretion in determining the reasonableness of the attorney fees. Accordingly, we vacate that portion of the judgment awarding \$13,500 in attorney fees to plaintiff and remand the case “for an evidentiary hearing regarding the reasonableness of the attorney fees, following which the court shall make findings of fact regarding this issue.” *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996). See also *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).

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

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter