

**[J-87-2013] [MO: Eakin, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

JANET S. MILLIKEN,	:	No. 48 MAP 2013
	:	
Appellant	:	Appeal from the order of the Superior
	:	Court dated December 26, 2012 at No.
	:	2731 EDA 2010 affirming the Order of the
v.	:	Court of Common Pleas of Delaware
	:	County, Civil Division, entered August 9,
	:	2010 at No. 08-15684
KATHLEEN JACONO AND JOSEPH	:	
JACONO AND CASCIA CORPORATION,	:	ARGUED: November 19, 2013
TRADING AS RE/MAX TOWN &	:	
COUNTRY AND FRAN DAY AND	:	
THOMAS O'NEILL AND FOX & ROACH	:	
LP, TRADING AS PRUDENTIAL FOX &	:	
ROACH REALTORS AND JOHN	:	
RESTREPO,	:	
	:	
Appellees	:	

CONCURRING OPINION

MADAME JUSTICE TODD

DECIDED: July 21, 2014

I concur with the majority that the Superior Court's order must be affirmed, as I conclude the occurrence of a murder or suicide in a house does not constitute a material defect in the property under the Real Estate Seller Disclosure Law ("RESDL"), 68 Pa.C.S.A. §§ 7301 *et seq.* Therefore, I agree that Appellant failed to state a claim against Appellees for fraud, negligent misrepresentation, or violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-2(4)(xxi). I write separately to explain the legal basis for my conclusion.

In order to prevail on a claim of fraud or intentional misrepresentation in a real estate transaction,¹ a plaintiff must establish the following: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 729 A.2d 555, 560 (Pa. 1999).

In order to prevail on a claim of negligent misrepresentation, a plaintiff must prove: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known of its falsity; (3) with an intent to induce another to act on it; and (3) which results in injury to a party acting in justifiable reliance on the misrepresentation. Id. at 561. In addition, as in any negligence action, there must be a duty owed by one party to the other. Id.

Finally, in order to maintain a private cause of action for deceptive conduct under Section 201-2(4)(xxi) of the UTPCPL, which prohibits, *inter alia*, a person from “[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding,” 73 P.S. § 201-2(4)(xxi) (amended 1996),² a plaintiff must show that he justifiably relied on the defendant’s wrongful conduct or

¹ Traditionally, under the doctrine of *caveat emptor*, a seller was not required to disclose any information about a property. However, protection of a seller under the doctrine has gradually been eroded by judicial application of common law fraud principles. See, e.g., Robert M. Morgan, The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It’s Not Just for Sellers Anymore, 68 Fla. B.J. 28 (Feb. 1994).

² The 1996 amendment expanded Section 201-2(4)(xxi) to prohibit “deceptive,” as well as fraudulent, conduct. Under the amended version of the UTPCPL, the Superior Court has determined that a plaintiff is no longer required to prove the elements of common law fraud in order to establish fraudulent or deceptive conduct under Section 201-2(4)(xxi). See Bennett v. A.T. Masterpiece Homes at BROADSPRINGS, LLC., 40 A.3d 145, 154-55 (Pa. Super. 2012).

representation, and that he suffered harm as a result of that reliance. Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 438 (Pa. 2004).

In support of her fraud and negligent misrepresentation claims, Appellant contends Appellees “made a misrepresentation and intentionally concealed the Murder/Suicide” by indicating on the Seller’s Property Disclosure Statement that the home had no “material defects.” Appellant’s Brief at 21. As noted by the majority, the Seller’s Property Disclosure Statement cites the RESDL and parrots the definition of “material defect” set forth in 68 Pa.C.S.A. § 7102. See Majority Opinion at 3 (quoting Seller’s Property Disclosure Statement, 6/17/07) (“A Material Defect is a problem with a residential real property or any portion of it that would have a significant adverse impact on the value of the property or that involves an unreasonable risk to people on the property.”). Appellant makes the same allegation and reference to the Seller’s Property Disclosure Statement with regard to her UTPCPL claim. See Appellant’s Brief at 32-33 (asserting that Appellees “conceal[ed] the Murder/Suicide,” and “affirmatively misrepresented that the Home had no material defects having a substantial adverse impact on the value of the Home”). It is undisputed that Appellant did not specifically inquire whether there had been any previous murders or suicides on the property, and Appellant makes no allegation as to how Appellees, the intervening owners, “concealed” the same apart from their failure to disclose it on the Seller’s Property Disclosure Statement.³ Accordingly, the only way in which Appellant can demonstrate that Appellees made a misrepresentation of material fact is to prove that Appellees misrepresented that there were no material defects in the property. In short, all of

³ It is likewise undisputed that the murder/suicide, which occurred over a year prior to the sale, was a matter of public record, easily uncovered by an internet search.

Appellant's claims rise or fall depending on whether the murder/suicide was a "material defect" under the RESDL.⁴

As noted by the majority, the issue of whether a psychological impact, such as the occurrence of a murder or suicide, on a property constitutes a material defect which must be revealed to potential buyers is an issue of first impression for this Court. Majority Opinion at 5.⁵ The RESDL provides that "[a]ny seller who intends to transfer any interest in real property shall disclose to the buyer any *material defects* with the property known to the seller by completing all applicable items in a property disclosure statement which satisfies the requirements of section 7304." 68 Pa.C.S.A. § 7303 (emphasis added). For purposes of the RESDL, the term "material defect" is defined as "[a] problem with a residential real property or any portion of it that would have a significant adverse impact on the value of the property or that involves an unreasonable risk to people on the property." See 68 Pa.C.S.A. § 7102 (definitions provided in Section 7102 extend to all of Part III of Title 68).

⁴ I recognize that this Court did not grant review of Appellant's claimed violation of the RESDL; however, as I have noted, the claims on which we granted review are inextricably tied to Appellant's allegation that Appellees misrepresented on the Seller's Property Disclosure Statement that the house had no "material defects," and, thus, directly implicate the definition of "material defect" contemplated by the RESDL.

⁵ As the majority observes, however, in Bukoskey v. Palombo, the trial court held that the occurrence of a suicide in a house, which had left a blood stain on the carpet but which the sellers covered up with a matching piece of carpet, was neither a material fact nor "a legal issue that would interfere with the use and enjoyment of the property." 1 Pa. D. & C. 5th 456, 467 (Pa. Com. Pl. 2007). The trial court in Bukoskey cited, *inter alia*, the Superior Court's decision in Colaizzi v. Beck, 895 A.2d 36 (Pa. Super. 2006), *superseded by statute*, wherein the court held that the existence of a group home for mentally-challenged adults in close proximity to the home purchased by the plaintiff was not a "legal issue" as contemplated by 68 Pa.C.S.A. § 7304(b)(16) that would affect the plaintiff's title to or use and enjoyment of the property, and, therefore, was not required to be disclosed by the sellers.

Section 7304 sets forth the subjects a seller is obliged to address in a property disclosure statement, which include: (1) seller's expertise in contracting, engineering, architecture or other areas related to the construction and conditions of the property and its improvements; (2) when the property was last occupied by the seller; (3) roof; (4) basement and crawl spaces; (5) termites/wood destroying insects, dry rot and pests; (6) structural problems; (7) additions, remodeling and structural changes to the property; (8) water and sewage system or service; (9) plumbing system; (10) heating and air conditioning; (11) electrical system; (12) other equipment and appliances included in the sale; (13) soils, drainage and boundaries; (14) presence of hazardous substances; (15) condominiums and other homeowners associations; (16) legal issues that affect the title or that would interfere with use and enjoyment of the property. 68 Pa.C.S.A. § 7304. Notably, all of the subjects relate to physical or legal aspects of the property.

Further, Section 7502 of the Home Inspection Law, 68 Pa.C.S.A. §§ 7501 *et seq.*, which expressly adopts the definition of "material defect" set forth in Section 7502, defines "Home inspection" as, *inter alia*, "[a] noninvasive visual examination of some combination of the mechanical, electrical or plumbing systems or the structural and essential components of a residential dwelling designed to identify material defects in those systems and components." See 68 Pa.C.S.A. § 7502. Section 7508 further provides, *inter alia*, that all home inspection reports must be in writing and shall include:

(1) A description of the scope of the inspection, including without limitation an identification of the structural elements, systems and subsystems covered by the report.

(2) A description of any material defects noted during the inspection, along with any recommendation that certain experts be retained to determine the extent of the defects and any corrective action that should be taken. A "material defect" as defined in section 7102 (relating to definitions)

that poses an unreasonable risk to people on the property shall be conspicuously identified as such.

68 Pa.C.S.A. § 7508(a)(1) and (2). Thus, the focus of the Home Inspection Law is on inspecting for physical defects.

In my view, the legislature's consistent use and construction of the term "material defect" to refer to physical or structural problems with a property that pose an unreasonable risk to people on the property, or legal impediments to its use or enjoyment, supports a conclusion that the occurrence of a murder or suicide on a property is not a "material defect" a seller is obliged to disclose to a buyer under the RESDL. As Appellant's claims were dependent on such an interpretation, I agree with the majority's conclusion that Appellant failed to establish the elements necessary to prevail on either her common law claims, or her UTPCPL claim.

Mr. Justice Stevens joins this opinion.