JEFFREY L. and JUDITH A. EDMONDSON, Plaintiffs/Appellants,
vs.
THOMAS E. COATES, KATHLEEN FAYE COATES, MARY NEELEY, ACTION PROPERTIES, and PROGRESSIVE REALTY,
Defendants/Appellees

No. 01-A-01-9109-CH-00324
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
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APPEALED FROM THE CHANCERY COURT OF MAURY COUNTY AT COLUMBIA, TENNESSEE.
No. 89-437. THE HONORABLE JIM T. HAMILTON

COUNSEL

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JUDGES

CANTRELL, TODD, KOCH
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OPINION

This is an appeal from a grant of summary judgment in an action for rescission of a contract for the purchase and sale of residential real estate, and for damages, including treble damages under the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101, et seq.

I. Facts and Procedural History

In March of 1988 the plaintiffs, Jeffrey and Judy Edmondson, came to Columbia, Tennessee, to look for a home to purchase in connection with a job transfer from southern California. The Edmondsons contacted defendant Action Properties, and defendant Mary Neeley, an affiliate broker, arranged to show them several properties, including the property they ultimately purchased from the defendants Thomas and Kathleen Coates.

Tom Coates is a licensed real estate agent. From 1983 through May of 1987, he was an affiliate broker with Action Properties. From January 14 through May 14, 1987, he had a listing agreement with Action Properties for the purpose of obtaining a buyer for the home he and his wife owned on Campbellsville Pike in Columbia. As both seller and agent, Tom Coates prepared the information from which a listing was compiled and published in the Maury County Board of Realtors Multiple Listing Service.

In June of 1987, Tom Coates left Action Properties and affiliated with defendant Progressive Realty, a/k/a Norman Dean Land and Auction. He then executed a listing agreement with Progressive Realty on the Campbellsville Pike property. As with the Action Properties listing agreement, Tom Coates was both seller and agent, and he prepared the listing information. The listing agreement expired by its own terms September 19, 1987, and Ron Bishop, principal broker of Progressive Realty, testified in his deposition that the Coates took the property off the market at that time. Thereafter, the property was shown by various real estate agents who knew that it was a "pocket listing," i.e., a property which the owners were not actively marketing but would sell if the right offer came along.

Tom Coates was still affiliated with Progressive Realty when the contract with the Edmondsons was executed. Between then and the closing, he moved back to Action Properties. Ron Bishop accepted a commission on behalf of Progressive Realty, and Tom Coates was paid one-half of that commission. Action Properties also received a commission, from which Mary Neeley received the agent's share.

The Edmondsons made an offer on the Coates property after the first time Mary Neeley showed it to them. On the first visit to the property, plaintiffs walked down to the creek at the rear of the property. Jeff Edmondson testified that he asked Mary Neeley "if they had any problems with overflowing of the creek," and that she told him either that they had not had any problems, or that she did not know of any flooding problems. Mr. Edmondson later testified that he thought the conversation about flooding probably took place on their second visit to the property, after they had already signed the contract. Judy Edmondson testified that she discussed the water level of the creek with Mary Neeley on the first visit, and that Mary Neeley told her the

water never got very high.

The Edmondsons made no further inspection of the property before moving in. Several months after they moved in, the creek overflowed its banks during heavy rains and flooded the lower portions of the property.

After moving in, the plaintiffs also began to discover numerous defects in the house. One of the chimneys was pulling away from the house. The resulting gaps had been covered with caulking. They also found cracks in the foundation walls. The cracks had been painted over with a sealant paint, and were partly hidden by wood stacked in the basement. Tom Coates testified that he had tried to repair these defects. There was also a leak around a shower on the first floor, and the floorboards there were rotten. This condition would have been visible from the basement, but that area of the underside of the first floor had been covered with insulation.

Jeff Edmondson testified in his deposition that he had seen some water damage during the first visit to the property. He says he asked Ms. Neeley whether the roof had been leaking, and she responded that the leak had been fixed. The roof was thirty-five feet high, and plaintiffs did not have a ladder. Plaintiffs presented evidence of extensive damage caused by the leaky roof. Jeff Edmondson also testified that Ms. Neeley said a pot-bellied stove in the kitchen could heat the whole house. The flu pipe appeared to be connected to the chimney, and a basket of wood was there. In fact, that stove was strictly decorative and had never been connected to the chimney. The house had also been freshly painted shortly before the Edmondsons first saw it. Soon after they moved in, a rotten window frame that had been painted over fell out, and other rotten wood came to light.

After discovering these defects and experiencing a major flash flood, the Edmondsons brought this suit. They assert that the Coates and Neeley intentionally or negligently made misrepresentations about the susceptibility of the property to flooding and fraudulently concealed significant defects in the structure of the house.

The lower court ordered the case bifurcated for trial. The claims involving flooding were to be tried first against all the defendants, followed by a separate trial on the concealment of defects claims against the Coates only. Then the trial court granted the Coates' motion for summary judgment, dismissing all claims against them. This had the effect of also dismissing the vicarious liability claim against Progressive Realty for the acts of its alleged agent, Tom Coates. Summary judgment motions filed by the remaining defendants were denied.

Appellants have voluntarily non-suited those remaining defendants in order to bring this appeal from the order of bifurcation and the order granting summary judgment for the Coates. For the reasons stated below, we reverse both of those orders.

II. The Claims Involving Flooding

A. Fraudulent Misrepresentations

"The general principles for determining what constitutes fraud in a legal sense are applied in suits for cancellation of instruments on the ground of fraud." 13 Am. Jur. 2d **Cancellation of Instruments** § 18, pp. 511-512 (1964). Fraudulent misrepresentation must be established by proof of the following seven elements: (1) a representation was made regarding a fact, as opposed to an opinion or conjecture about future events; (2) the representation was false; (3) the false representation was made knowingly or with reckless disregard for whether it was true or false; (4) the fact to which the representation pertained was ~~of~~ material importance to the plaintiff; (5) the plaintiff actually relied on the misrepresentation about the material fact; (6) such reliance was reasonable under the circumstances; and (7) as a result of such reliance, the plaintiff suffered damage. **Holt v. American Progressive Life Ins.**, 731 S.W.2d 923, 927 (Tenn. App. 1987); **Edwards v. Travelers Insurance Co.**, 563 F.2d 105 (6th Cir. 1977).[1]

If the record shows that, as to any one of these seven elements, there is no genuine factual dispute, and the facts on that element are in the defendants' favor, then summary judgment is proper on this claim. Rule 56.03, Tenn. R. Civ. P.

1. Was a representation made by the sellers to the buyers?

The trial court found that "there was never any conversation, representation or misrepresentation made because the Coates and the plaintiffs never met to discuss anything until after the closing." While it is true that the Coates never had any direct conversation with the Edmondsons before the sale was closed, they did sign a contract containing representations.

Tom and Kathleen Coates signed the purchase and sale contract, which includes preprinted paragraph 5(h). That paragraph states that "the property has not been damaged or affected by flood or run-off water," and the box indicating that the property "is not in flood area" is checked.

This is unquestionably a written representation that the property is not susceptible to flooding.

The Coates assert that they did not read the contract word for word and did not specifically notice which box was checked in 5(h). However, as they do not allege that they were prevented from reading the contract or were victims of fraud, the law regards them as having adopted all the representations contained in the contract they signed. **Beasley v. Metropolitan Life Ins.**, 190 Tenn. 227, 232, 229 S.W.2d 146, 148 (Tenn. 1950).

2. Was the representation false?

Part of the subject property, which encompasses over thirteen acres, is in fact located in a federally designated flood zone. Both Tom and Kathy Coates testified in their depositions that the creek which cuts through the back portion of the property had overflowed on several occasions in the nine years they lived there. It is clear that both of the statements in paragraph 5(h) of the contract were false.

3. Was the misrepresentation made knowingly or with reckless disregard for the truth?

The trial court found that "there is no evidence of knowledge or intent on the part of the defendants Coates to defraud plaintiffs." We disagree. The record shows a genuine dispute as to whether the Coates knew the representation contained in paragraph 5(h) were not true.

In their depositions, Tom and Kathy Coates admit that they had personally seen the creek overflow and flood the lower section of this property. They say that they assumed the word "property" in paragraph 5(h) meant the house and yard only, and that since the flood waters had never crested above the bank separating the house and yard from the bottom land, they did not think the "property" had been "damaged or affected by flood or run-off water." They say they thought the term "flood area" meant "flood zone," as in a federally designated flood zone, and assert that they never knew their property lay partly in a federal flood zone. They also assert that the did not actually read the contract, since Tom was so familiar with the form, and that they therefore do not know how paragraph 5(h) was marked.

We note that the evidence in support of the defendants' denial of fraudulent intent consists exclusively of their own testimony as interested parties. In addition, the circumstantial evidence contradicts their testimony. Clearly, a jury question persist.

Moreover, assuming arguendo that the Coates' assertions are credible, and they did not knowingly misrepresent the facts about flooding, the plaintiffs would still be entitled to have a jury decide whether the defendants acted with reckless disregard for the truth in adopting the misrepresentations in paragraph 5(h).

4. Did the misrepresentation pertain to a material fact?

The Coates contend that the question of whether the subject property was susceptible to flooding was not a material factor in the Edmondson's decision to buy. They point out that, in making an offer to purchase the adjacent property from another party, the Edmondsons used a contract form identical to the form contract they signed for the Coates property, and the box in paragraph 5(h) on that contract was checked to indicate that the property **was** in a flood area. The Edmondsons both testified that neither box in paragraph 5(h) had been checked when they signed the offer to purchase this adjacent property. The Coates testified that the adjacent property is very similar in topography to the subject property.

The Coates' argument on this point is that any reasonable jury would deduce that susceptibility to flooding was not a material factor in the Edmondson's decision to make an offer on the adjacent property. From that deduction, they argue, logic would dictate an inference that the Edmondsons also were not concerned with the content of paragraph 5(h) in the contract to purchase the subject property.

Considered along with the testimony of the plaintiffs, we do not find defendants' argument so compelling that no reasonable jury could reject it. The record shows that, on their first visit to the property, the Edmondsons walked back to the creek with Mary Neeley and observed water standing in the field there. They insist that they talked with her about whether the creek ever got out of its banks. Judy Edmondson testified that she told Mary Neeley a major reason they were attracted to this property was the considerable acreage, which they thought would enable them to raise animals and build a barn. The Edmondsons assert that, had they known the creek would overflow to the extent that it does, they would not have bought the house, or at least not for the price they paid.

The appellees also point to an appraisal of the subject property which, they say, was conducted between the time the parties executed the contract for purchase and sale and the time of closing. This document states in three separate places that a portion of the subject property is

located in a federally designated flood zone. The Coates assert that this appraisal was available to the Edmondsons before the closing, and that they could have and would have examined it if flooding had been a material consideration for them.

At one point, Jeff Edmondson conceded that the appraisal was included in the buyers' packet of documents at the closing. Later on in his deposition, however, he retracted that statement and testified that the appraisal was not among their papers at the closing. According to the Edmondsons, when they inquired about an appraisal later at the bank, they were told that there was no appraisal in their file, and then the one introduced into evidence in this case was retrieved from the bank's file on Tom Coates.

In the light most favorable to the party opposing summary judgment, plaintiffs' testimony is sufficient to make a jury question concerning the availability of this appraisal prior to closing. Moreover, the questions of whether plaintiffs had constructive notice of susceptibility to flooding, or were negligent in not seeking further information on that subject, are relevant to the issues of actual reliance and reasonableness of reliance, not to the issue of whether susceptibility to flooding was a material fact to the Edmondsons.

We think a genuine issue of fact exists as to whether susceptibility to flooding was a material fact that would have influenced the Edmondsons' decision to buy the subject property had they known about it.

5. Did the purchasers actually rely on the misrepresentation?

In arguing that appellants did not actually rely on any misrepresentation about flooding, appellees again point primarily to the Edmondsons' offer on the adjacent property. The argument is that, if the Edmondsons had been relying on the statements contained in paragraph 5(h) of the contract on the Coates property, they would have assumed that there would be no problem with building a barn on the Coates property. Therefore, they would not have been looking at the adjacent property for higher ground on which to build their barn. In other words, appellees argue that only one inference could reasonably be drawn from the fact that the Edmondsons made an offer on the adjacent property, namely that the Edmondsons knew or assumed the lower portion of the subject property was susceptible to flooding and would not be a suitable location for a barn.

The trial court found that the plaintiffs became aware, on the day after execution of the contract on the subject property, that the property "was in a flood zone . . . or potentially in a flood zone." The court drew this inference from its finding of fact that the Edmondsons saw the box in paragraph 5(h) checked "in a flood area" on the offer sheet for the adjacent property. The Edmondsons both testified in their depositions that neither box was marked when they signed the offer sheet on the adjacent property. Jeff Edmondson insists that he did not learn about the federal flood zone affecting these properties until after the closing on the subject property.

Considering all the evidence in the light most favorable to the party opposing summary judgment, we think the issue of whether the Edmondsons actually relied on paragraph 5(h) remains a dispute to be resolved by a jury.

6. Was such reliance reasonable under all the circumstances?

Initially, the requirement that reliance on a misrepresentation must be reasonable appears to be a weak point in appellants' claim of fraudulent misrepresentation. The Edmondsons saw the creek which cuts through the rear portion of the property, and they observed water standing in the field beside the creek. This would seem to suggest at least a potential problem with rainwater run-off or absorption. Yet, the Edmondsons did not make any independent inquiries about flooding during the three months between execution of the contract and the closing. They testified that they did not think anything about the water standing in the field, because even though it had been raining for several days, there was very little water in the creek.

The record contains an appraisal which estimates the value of the property as of April 15, 1988, two weeks after the contract was executed. The appraisal states in three separate places that part of the subject property lies in a flood plain, and a flood map is attached to it. We note, however, that the record is silent as to the date this appraisal was completed, and at whose behest. Again, the Edmondsons insist that they never saw this appraisal until after they had taken possession and experienced a major episode of flooding.

Interestingly, Tom Coates testified that there had been no flood map in the buyers' packet of papers when he and his wife purchased the subject property nine years earlier. Unlike the Edmondsons, however, he and his wife were told at that time that the creek overflows. Moreover, Mrs. Coates grew up in the Columbia area.

We agree that anyone familiar with rainfall patterns in this part of the country, and the related

phenomenon of flash flooding, should have been alerted to the likelihood of the lower parts of this property being susceptible to flooding. However, Jeff and Judy Edmondson both testified that the only places they had ever lived prior to this move to Tennessee, were Michigan and California, and that they had never encountered flash flooding. They both testified that they never dreamed the trickle of water they saw in the creek bed could ever develop into a raging torrent, much less sweep over this large property to within 25 feet of the house.

Appellants point to Jeff Edmondson's description of the creek as a "river" in a video he made, on their second visit to the property, to take back to California and show friends and family. We think such a description is subject to varying interpretations.

The key issue here is whether it was reasonable for the purchasers to unquestioningly rely on the vendors' representations about flooding, rather than investigating the matter themselves.

In the case of **Pakrul v. Barnes**, 631 S.W.2d 436 (Tenn. App. 1981), the vendor's real estate agent expressed to the purchasers her opinion that there would be no problem with the purchasers using the subject property as an office for their carpet and janitorial services business. The property did not have a parking lot, and the owner had told the purchasers that he had not been allowed to use the property for a retail establishment. Nevertheless, the plaintiffs made an offer of purchase, inserting a provision that the sale was conditioned on their intended use being allowed by the zoning laws. Then they went ahead and closed the sale without checking the zoning regulations, thereby waiving the condition.

In addition to observing that the agent's statement to the purchasers was in the nature of an opinion, rather than a statement of fact, the Eastern Section of this court found the following:

> "Plaintiffs were on notice of possible zoning problems for their intended use and had ample opportunity to determine from the proper officials whether their intended use would be in compliance with the zoning laws prior to accepting the deed and closing the transaction, but they proceeded to close without inquiry."

Pakrul v. Barnes, 631 S.W.2d at 438. The court quoted the following rule from 91 C.J.S. **Vendor and Purchaser**, § 68, at 945-946:

> Where the means of information are at hand and equally accessible to both parties so that, **with ordinary diligence**, they might rely on their own judgment, generally they must be presumed to have done so, or, **if they have not informed themselves, they must abide the consequences of their own inattention and carelessness**.
>
> Unless the representations are such as are calculated to lull the suspicions of a careful man into a complete reliance thereon, it is commonly held, in the absence of special circumstances, that, where the means of knowledge are readily available, and the vendor or purchaser, as the case may be, **has the opportunity by investigation or inspection to discover the truth with respect to matters concealed or misrepresented**, without prevention or hindrance by the other party, of which opportunity he is or should be aware, **and where he nevertheless fails to exercise that opportunity, he cannot thereafter assail the validity of the contract for fraud, misrepresentation or concealment with respect to matters which should have been ascertained**, particularly where the sources of information are furnished and attention directed to them, for example, where the source of accurate information is indicated or referred to in the contract.

Id. (emphasis added); **see also Winstead v. First Tenn. Bank N.A., Memphis**, 709 S.W.2d 627, 633 (Tenn. App. 1986).

A jury may or may not deem the Edmondsons' assertions of ignorance about flash flooding credible. The jury could very well consider such lack of knowledge to be a "special circumstance" material to the determination of whether the susceptibility to flooding was a matter which, in the exercise or ordinary diligence, the Edmondsons should have ascertained, despite the alleged misrepresentations by the Coates and Mary Neeley. The court pointed out in **Pakrul v. Barnes** that the purchasers there were on notice of possible problems with their intended use. Here, the Edmondsons' background and experience is an important factor in determining whether they were on notice of possible flooding problems.

The Western Section of this court has stated the rule on reasonable reliance this way:

> If one who is in possession of all material facts, **either actually or constructively**,

> proceeds with a purchase of realty, notwithstanding such knowledge, such a person cannot thereafter recover on the basis of fraud, misrepresentation, or concealment of the information to which all parties had equal access.

Winstead v. First Tenn. Bank N.A., Memphis, 709 S.W.2d 627, 633 (Tenn. App. 1986) (emphasis added).

Taking the evidence in the light most favorable to the party opposing summary judgment, we cannot say that a reasonable jury would have no choice but to conclude that the Edmondsons had either actual or constructive knowledge of the flooding problem. Consequently, summary judgment is not appropriate on the issue of whether it was reasonable and justifiable for the Edmondsons to rely unquestioningly on the misrepresentation in paragraph 5(h) and the alleged misrepresentation by Mary Neeley rather than investigating the matter themselves or hiring someone to do so.

7. Did the buyers suffer damage as a result of relying on the misrepresentation?

Appellees insist that appellants have failed to show pecuniary loss and therefore are not entitled to rescission. They make much of the fact that the property was appraised, as of April 15, 1988, at $ 178,000, which is exactly the price appellants paid for it. This appraisal acknowledges the fact that portions of the property are in a flood plain. Appellees also point out that, when the Edmondsons decided to try to sell the property after learning of the flooding and other problems, they hoped to obtain $ 200,000 for it. In light of the appraised price and the Edmondsons' own tentative asking price, appellees argue that appellants have failed to show any damages as a result of the misrepresentation about flooding. We cannot agree.

Appellants allege that they were attracted to the subject property in part by the amount of land that would be available for raising animals and constructing a barn. They also allege that, because of the flooding problem, that use of the property is precluded. We think that their testimony could be sufficient proof of damage to warrant the equitable remedy of rescission, if the jury finds the alleged misrepresentations about flooding were made knowingly or with reckless disregard for the truth.

B. Negligent Misrepresentation

The elements of negligent misrepresentation are the same as those of fraudulent misrepresentation, except the element of knowledge of falsity or reckless disregard for the truth is replaced by a duty of reasonable care to ascertain the truth before making a representation. **Haynes v. Cumberland Builders**, 546 S.W.2d 228 (Tenn. App. 1976). Tennessee courts have adopted the following position from the **Restatement (2d) of Torts**, § 552:

> (1) One who, in the course of his business profession or employment, or a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon such information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) The liability in subsection (1) is limited to loss suffered
>
> (a) By the person or one of the persons for whose benefit and guidance he knows the information to be intended; and
>
> (b) Through reliance upon it in a transaction in which it is intended to influence his conduct.

See, e.g., Tartera v. Palumbo, 224 Tenn. 262, 453 S.W.2d 780 (1970); **Keller v. West-Morr Investors, Ltd.**, 770 S.W.2d 543 (Tenn. App. 1988); **Chastain v. Billings**, 570 S.W.2d 866 (Tenn. App. 1978); **Hunt v. Walker**, 483 S.W.2d 732 (Tenn. App. 1971).

Obviously, the Coates had a pecuniary interest in the sale of their property. They knew or should have expected that the information contained in paragraph 5(h) of the contract for purchase and sale would be read by potential purchasers and would influence their decision to

execute the contract. Tom Coates admits as much in the context of explaining that he tried to tell all the real estate agents who would be showing the house that the lower part of the property was susceptible to flash-flooding. He stated in his deposition that he made this effort because he considered the flooding situation to be "something that a potential buyer should know."

Despite Tom Coates' random efforts to inform real estate agents about the flooding problem, the information that was conveyed to the Edmondsons on that point was false. We think a jury question remains as to whether or not the Coates exercised reasonable care in communicating information about the flooding situation.

The appellees emphasize that a claim of negligent misrepresentation is subject to the defense of contributory negligence. "The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying." **McElroy v. Boise Cascade Corp.**, 632 S.W.2d 127, 136 (Tenn. App. 1982) (quoting **Restatement (2d) of Torts**, § 552A (1977)). It seems clear to us that negligence in relying on a misrepresentation is the equivalent of unreasonable reliance. We therefore see no reason to address the appellees' assertion of contributory negligence as an additional, separate issue. As previously stated, we think the reasonableness of the Edmondsons' alleged reliance on the misrepresentation in paragraph 5(h) of the contract and the alleged statements of Mary Neeley remains a disputed issue to be decided by a jury.

III. The Claims Involving Defects in the House

A. Fraudulent Concealment of Non-disclosure

In order to avoid summary judgment on their fraudulent concealment or non-disclosure claim, the plaintiffs must produce evidence sufficient to place two issues in dispute: (1) whether the sellers had knowledge of defects then in existence; and (2) whether the sellers had a duty to disclose such defects. **Lonning v. Jim Walter Homes, Inc.**, 725 S.W.2d 682, 685 (Tenn. App. 1986) (citing **Dozier v. Hawthorne Development Co.**, 37 Tenn. App. 279, 292, 262 S.W.2d 705, 711 (1953)). As we pointed out in a recent opinion, the exceptions which Tennessee courts have recognized to the rule of **caveat emptor** "have practically displaced the rule itself." **Westmoreland v. Tolbert**, No. 89-125-II (Tenn. Ct. App., M.S. at Nashville, filed Apr. 11, 1990), slip op. at 8.

The plaintiffs have presented considerable proof tending to show that the Coates knew about the various defects in the house. The cracks in the foundation walls had been painted with sealant paint, but that did not keep the water out in periods of heavy rainfall. Also, wood was stacked in front of the cracked walls. In addition, the underside of the first floor had been partially covered with insulation, and the covered portion included the flooring that had rotted as a result of a leak around the shower on the first floor. This may or may not be an innocent coincidence. Also, one of the chimneys was pulling away from the house, and someone had covered the gaps with caulking. A jury could view that as concealment rather than repair. There are other items that could be regarded as concealed rather than repaired, such as the rotten window sills that were freshly painted and the porch roof that was patched with sealant.

This court has held that a plaintiff purchaser must show that the seller actually knew of the defect, not merely that he or she should have known. **Akbari v. Horn**, 641 S.W.2d 506, 507 (Tenn. App. 1982). In its order granting summary judgment for the defendants Coates on the fraudulent concealment claim, the trial court stated that "Thomas Coates' affidavit makes it clear that the knew of no defects in the house." The trial court concluded that "none of the depositions contain any evidence of fraud on the part of defendants Coates." We cannot agree.

Fraud, "always conceived in cunning and difficult of proof," may be proved by circumstantial evidence. **Parrott v. Parrott**, 48 Tenn. (1 Heisk.) 681, 687 (Tenn. 1870). **See also Wry v. Miller** (Tenn. Ct. App., E.S., filed Aug. 17, 1982). In light of the plaintiffs' evidence mentioned above, Tom Coates' assertion that he did not know about the defects does no more than create a dispute of fact to be resolved by a jury.

Appellees next argue that, since the contract contains an "as is" clause, the Edmondsons agreed to take the property "with all of its faults." Appellees cite the case of **Atkins v. Kirkpatrick**, 823 S.W.2d 547 (Tenn. App. 1991), as authority for the proposition that appellants cannot prevail on their fraudulent concealment claim because the "as is" clause assigns to the buyers the risk of any and all defects. The court did not so hold in **Atkins**, and appellees' argument has no support in the law.

In **Atkins**, the purchasers of a residential lot sued the sellers and their real estate agent for rescission after learning that the lot had been a landfill site and was not stable enough to support a building. Affirming the judgment for the defendants, the court expressly noted that there was "absolutely no evidence that either [the sellers' real estate agent] or the [sellers] possessed

knowledge of the defective condition of the property." **Atkins**, 823 S.W.2d at 552. As we have already pointed out, the same cannot be said of the sellers in this case.

The **Atkins** case involved a mutual mistake of fact; there was no finding that the sellers knew about the landfill and failed to disclose it. Although the courts will enforce "as is" clauses allocating the risk of **unknown** defects to the buyers, to do so where the sellers **knew** about the defects and withheld that material information would be to blindly enforce a contract obtained by fraud. Justice would be poorly served if that were the law in Tennessee. Happily, it is not. Rather, the law is as follows:

> Each party to a contract is bound to disclose to the other party all he may know respecting the subject matter materially affecting a correct view of it, unless common observation would have furnished the information.

Simmons v. Evans, 185 Tenn. 282, 285-286, 206 S.W.2d 295, 296 (1947) (quoting **Perkins v. McGavock**, 3 Tenn. 415, 417 (1813)); **Lonning v. Jim Walter Homes**, 725 S.W.2d 682 (Tenn. App. 1986).

Appellees point out, as did the trial court, that paragraph 8 of the preprinted contract states that "Buyer has inspected," among other things, the structure and roofing. Of course, the Edmondsons concede that they really did not "inspect" these items in any detailed manner. Along this same line, appellees point to the last sentence of paragraph 20, the "disclaimer" clause, which recites that "Seller and Buyer both acknowledge that if such matters have been of concern to them, they have had the opportunity to seek and obtain independent advice relative thereto." Here again, the Edmondsons concede that they did not seek an independent opinion before closing the deal. Such concessions do not, however, preclude recovery for fraudulent concealment, because disclaimers cannot shield the vendor from liability for fraud. **Westmoreland v. Tolbert**, slip op. at 7, n. 4. **See also Houghland v. Security Alarms & Services, Inc.**, 755 S.W.2d 769, 773 (Tenn. 1988); **Adams v. Roark**, 686 S.W.2d 73, 75 (Tenn. 1985); **Hunt v. Walker**, 483 S.W.2d 732, 735 (Tenn. App. 1971).

Appellees suggest that appellants are asking this court to find an implied warranty on a used home. We do not understand appellants' argument as even remotely suggesting such an unprecedented expansion of the exceptions to the rule of **caveat emptor**. The Edmondsons simply contend that the Coates were aware of major defects in the house, that the Coates took steps to conceal these defects rather than repair them, and that the Coates violated their duty to disclose these defects to the purchasers.

Even if appellants cannot prove that the Coates intentionally concealed defects, they may nonetheless recover if they show that the Coates knew of the defects and that, more probably than not, the defects would have gone undetected despite the exercise of ordinary diligence. **Simmons v. Evans**, 185 Tenn. at 286, 206 S.W.2d at 296; **Lonning v. Jim Walter Homes**, 725 S.W.2d at 685.

On this point, appellees argue at length that the Edmondsons are barred from recovering because they did not exercise due diligence. It appears from the record that the Edmondsons did not make a detailed inspection of the house in the manner that a trained construction contractor or real estate appraiser might. However, the record also shows that apparently neither Mary Neeley nor the person who prepared the appraisal noticed the defects of which appellants complain. At a minimum, a factual dispute exists as to whether these defects were readily discoverable. Moreover, there is evidence from which a jury could conclude that appellees simply did an effective job of hiding the defects.

We have little doubt that, in hindsight, the Edmondsons wish they had hired an expert to inspect the house for defects before the closing. While we agree that such precautionary measures are certainly to be recommended, we find no support in the case law for the proposition that ordinary diligence necessarily requires obtaining an expert inspection. It may be that a jury of the parties' peers would find that ordinary diligence does so require, but it should not be assumed as a matter of law at the summary judgment stage.

We note that in **Westmoreland v. Tolbert**, the buyers lacked expertise in construction matters. In addition, the crawl space under the house, which was the only vantage point from which the problem could really have been detected, was not easily accessible. This court considered those facts to be pursuasive support for the purchasers' argument that the rotten girders and sub-flooring were not reasonably discoverable by the purchasers. Slip op. at 9. The record shows that similar factors are present in the instant case.

The issue of whether plaintiffs should have discovered the defects in the house in the exercise of ordinary diligence remains a jury question.

IV. Breach of Contract

The trial court's memorandum is unclear as to why the breach of contract claim was dismissed at summary judgment. It is hornbook law that a contract is breached when a party fails to perform a promise in return for which he or she has agreed to accept money or some other consideration from the other party. Here, by virtue of the representations in paragraph 5(h) of the contract they signed, the Coates were obligated to deliver title to a property that had not been damaged or affected by flood or run-off water and was not located in a flood area. It seems the trial court must have concluded that the Edmondsons: (1) found out, in the process of offering to buy the adjacent property, that the subject property was, or at least might be, located in a flood zone; and (2) by virtue of not informing the Coates, in a prompt manner before closing, that they intended to rescind the contract, they waived their right to hold the Coates to the promises embodied in paragraph 5(h). The appellees assert that the Edmondsons "went ahead and ratified the contract, in spite of its technical breach."

We have already stated that the issue of when the Edmondsons first became aware of the flood zone designation, or even of a potential flooding problem, remains a dispute of fact to be resolved by the jury. Accordingly, if indeed the trial court concluded that the Edmondsons had acquiesced and ratified the contract despite knowing that the Coates had breached it, such a finding was inappropriate at the summary judgment stage. Genuine issues of material fact remain on the breach of contract claim.

V. Tennessee Consumer Protection Act

The trial court's analysis in support of disposing of the claim against Tom Coates for violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101, **et seq.**, consists of the following two sentences:

> The Coates are entitled to judgment as a matter of law on all theories alleged by the plaintiffs. Therefore, they are entitled to a judgment as a matter of law on the issue of a violation of the Tennessee Consumer Protection Act.

We have already concluded that the Coates are not entitled to summary judgment on any of the causes of action discussed above. We now conclude that the trial court erred in granting the Coates summary judgment on the consumer protection claim, because genuine factual disputes on each element of that cause of action remain to be resolved by a jury.

The elements plaintiffs must prove in order to recover on their consumer protection claim are contained in the statute:

> Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually, but not in a representative capacity, to recover actual damages.

Tenn. Code Ann. § 47-18-109(a)(1).[2]

At the time relevant to the acts complained of in this lawsuit, the Act provided that "unfair or deceptive acts or practices affecting the conduct of any trade or commerce are hereby declared unlawful." Tenn. Code Ann. § 47-18-104(a).[3] The definition section provides:

> "'Trade,' 'commerce,' or 'consumer transaction' means the advertising, offering for sale, lease or rental, or distribution of any goods, services, or property, tangible or material, real personal or mixed, and other articles, commodities, or things of value wherever situated."

Tenn. Code Ann. § 47-18-103(9). In addition, the definition of "services" in the Act includes "services furnished in connection with the sale or repair of goods or real property or improvements thereto." Tenn. Code Ann. § 47-18-103(8). The Act encompasses a homeowner putting his or her home up for sale. **See Klotz v. Underwood**, 563 F. Supp. 335 (E.D. Tenn. 1982).

Purchasers of real property clearly come under the definition of "consumer" and are intended to be protected by the Act. The term "consumer" is defined as follows:

> "any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed. . . ."

Tenn. Code Ann. § 47-18-103 (2).

As our discussion of the common law causes of action indicates, the question of whether the actions of the Coates were "unfair or deceptive acts" remains in dispute. Accordingly, the Edmondsons are entitled to have a jury trial on their consumer protection claim.

If the jury finds for the Edmondsons on the consumer protection claim, then the court shall consider whether the Coates' violation of the Act was "willful or knowing." Tenn. Code Ann. § 47-18-109(a)(3). If the court finds that it was, then "the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper." **Id.** A non-exclusive list of factors the judge may consider in determining whether to award such treble damages is provided at Tenn. Code Ann. § 47-18-109(a)(4).

VI. Separate Trials

The trial court found that there are "two distinct and separate issues regarding possible liability on the part of the defendants, and neither are related." The court found that only the Coates had any possible liability on the concealment of defects claim. Therefore the court ordered separate trials. All the defendants were to be included in the first trial, which was to deal with the flooding issues only. The second trial would resolve the issues of fraudulent concealment of defects, and the Coates would be the only defendants in that trial.

We cannot agree with the fundamental assumption the trial court made in deciding to bifurcate the case. Defendant Tom Coates was a licensed real estate agent at the time of this sale. He was affiliated first with defendant Action Properties, then with defendant Progressive Realty, and then again with Action Properties. Both brokerages received commissions on the sale, as did Tom Coates himself. Of course the individual agent who brokered the deal, Mary Neeley, also took a percentage of the commission. There is evidence from which a jury could conclude that Tom Coates had knowledge of both the flooding problem and the defects in the house. There is also evidence from which a jury could conclude that Mary Neeley made intentional or at least negligent misrepresentations to the Edmondsons about both the flooding and the defects. At a minimum it appears uncontroverted that both of the defendant brokerages allowed Tom Coates to prepare the listing information on his own home without any restraints or attempts to corroborate that information. We think a reasonable jury could find each of the defendants liable on both categories of claims, those involving defects in the house as well as those related to flooding.

The rule governing bifurcation of trial, Rule 42.02, Tenn. R. Civ. P., provides as follows: "The court for convenience or to avoid prejudice may in jury trials order a separate trial of any one or more claims. . . ." The wording of the rule indicates the decision whether to order separate trials is left to the discretion of the trial judge. The only guideline articulated in the rule is "for convenience or to avoid prejudice." The Tennessee Supreme Court has, however, given somewhat more detailed directions for determining whether to order separate trials. **See Ennix v. Clay**, 703 S.W.2d 137 (Tenn. 1986).

The **Ennix** court emphasized that "the interests of justice will warrant a bifurcation of the issues in only the most exceptional cases and upon a strong showing of necessity." 703 S.W.2d at 139. Factors the trial court should consider include "the possibility of juror confusion, the risk of prejudice to either party, and the needs of judicial efficiency." **Id.** The Court did emphasize one factor that is to be the premier consideration: "Above all, the issues at trial must not be bifurcated unless the issue to be tried is so distinct and severable from the others that a trial of it alone may be had without injustice." **Id.** (citing **Gasoline Products Co., Inc. v. Champlin Refining Co.**, 283 U.S. 494, 500, 51 S.Ct. 513, 75 L.Ed. 1188 (1931).

The issues that had been bifurcated by the trial court **Ennix** were liability and the nature and amount of damages. The Court concluded that, on the facts of that case, these issues were so interwoven that separate trials would deny the plaintiffs the opportunity to present to the jury evidence relevant not only to damages but also to the credibility of witnesses who testified on the liability issues. **Ennix**, 703 S.W.2d at 140.

In the instant case, the Edmondsons are saddled with a house and thirteen acres that, they allege, are very different from and inferior to what the Coates and Mary Neeley led them to believe. They have produced evidence that the allegedly concealed defects in the house would cost as much as $ 50,000 to repair. They have testified that the land is unsuited for building a barn and raising animals, which was one of the main reasons they were attracted to the Coates

property. In light of these alleged facts, and given the nature of the relief plaintiffs seek, we cannot say that the flooding and defects issues are "so distinct and separable" from one another that separate trials may be had "without injustice" to the plaintiffs. **Id.** at 139.

Routinely applied procedures exist to protect the various defendants from prejudice while affording the plaintiffs a full opportunity to have their alleged injuries redressed. Both of these ends can be achieved without detracting from judicial efficiency. Any potential for confusion of the jurors can be sufficiently addressed by clear and proper jury instructions on the elements of each of appellants' several causes of action. Therefore, on remand all of the plaintiffs' claims against all of the defendants are to be resolved in a single trial.

VII. Conclusion

For all the foregoing reasons, we conclude that the defendants Coates are not entitled to summary judgment on any of the causes of action asserted by appellants. We also reverse the trial court's dismissal of the claims against Progressive Realty relative to the concealment of defects. As we have noted, there is evidence upon which to base a finding that Progressive Realty is vicariously liable for the alleged acts of Tom Coates, including the alleged concealment of defects.

We therefore reverse the judgments of the trial court and remand the case to the Chancery Court of Maury County for such other proceedings as are appropriate in conformance with this opinion. Tax the costs on appeal to the appellee.

BEN H. CANTRELL, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE

WILLIAM C. KOCH, JR., JUDGE

DISPOSITION

REVERSED AND REMANDED

OPINION FOOTNOTES

1 The **Edwards** opinion refers to "the six elements" of fraudulent misrepresentation. We think the element of "reasonable reliance" requires answers to two separate questions: Did the plaintiff **actually** rely on the misrepresentation, and, if so, was such reliance **reasonable** under the circumstances?

2 The phrase "but not in a representative capacity" was deleted by a 1991 amendment, which has no effect on our analysis here.

3 The Act has been amended since 1988, and this subsection now provides as follows: "Unfair or deceptive acts or practices affecting the conduct of any trade or commerce are Class B misdemeanors." Tenn. Code Ann. § 47-18-104(a). Of course, the applicable version is the one that was in effect when the cause of action arose. We do note that the amendment to this subsection would not alter the analysis in cases of this nature.
