

COA Opinion: A Seller's Agent May Have A Duty To Disclose New Information That Renders A Prior Affirmative Statement Untrue Or Misleading

January 12, 2012 by Kristina Araya

On January 10, 2012, the Court of Appeals vacated its earlier order and issued a new opinion in *Alfieri v Bertorelli*, No. 297733. In *Alfieri*, the plaintiffs purchased condominiums at a site that had previously been an abandoned factory. After reading a sales brochure and a newspaper article that indicated that chemical contamination at the site had been cleaned up, plaintiffs did not obtain an independent environmental inspection. After discovering that the chemical contamination was in fact still present, the plaintiffs brought a suit against the defendants, the seller's agents, for negligent misrepresentation and silent fraud. At different stages of the trial, the defendants moved for summary disposition, directed verdict, and JNOV, each time arguing that as the seller's agents, they owed no duty to plaintiffs.

The Court of Appeals disagreed. While the court acknowledged that silent fraud and negligent misrepresentation both require the defendants to owe a duty to the plaintiffs, the court found that a duty of disclosure may be imposed on a seller's agent to disclose new information that renders a prior affirmative statement untrue or misleading, especially if a buyer has expressed a concern about that subject. Since the plaintiffs expressed their concerns about the contamination before the sale, the court found that the trial court was correct in deciding there was a genuine question of fact as to whether defendants owed plaintiffs a duty. The court went on to reject the defendants' next appeal, in which the defendants argued that there cannot be fraud if the defrauded party had the means to independently determine the truth of the matter. While the plaintiffs failed to obtain their own environmental inspection, the court found that plaintiffs' reliance on the newspaper article and sales brochure was reasonable. The court also rejected the defendants' final appeal, in which the

defendants argued that the trial court should have applied a contributory negligence standard, by simply noting that contributory negligence has long since been abandoned in Michigan.

The Court of Appeals also rejected an appeal brought by the plaintiffs, in which the plaintiffs argued that the trial court should not have instructed the jury on comparative negligence because the plaintiffs' negligent misrepresentation claim did not involve a claim for personal injury, property damage, or wrongful death, as set out in MCL 600.2959. The court disagreed, finding that an "invasion of a personal right" qualifies as a personal injury under the language of the statute, and that Michigan case law supports comparative negligence when there is sufficient evidence for the jury to find negligence on the part of the injured plaintiff. Given that the plaintiffs failed to obtain their own environmental inspection, the court found that the comparative negligence instruction was proper, and affirmed the trial court.