

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

EVERETT EDWARDS and wife,
KAREN EDWARDS,

Appellees,

Vs.

Sumner Chancery No. 94C-101
C.A. No. 01A01-9510-CH-00458

ROY BRUCE and wife,
JOANNE BRUCE,

Appellants.

FROM THE SUMNER COUNTY CHANCERY COURT

THE HONORABLE TOM E. GRAY, CHANCELLOR

FILED

July 10, 1996

**Cecil W. Crowson
Appellate Court Clerk**

Arthur E. McClellan
of McClellan, Powers, Ehmling & Dix
of Gallatin, For Appellants

Ronald B. Buchanan of Hendersonville
For Appellees

AFFIRMED AS MODIFIED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This appeal involves a suit alleging claims of negligent misrepresentation, fraudulent misrepresentation, and violation of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 (1995), *et seq.*, arising out of the sale of certain improved real property in Gallatin, Tennessee. The facts are as follows.

In 1978, defendants-appellants, Roy Bruce and Joanne Bruce, purchased a new home located in Gallatin, Tennessee. Shortly after moving into their new home, the Bruces discovered water leaking into the basement, and an 88 foot-long crack which extended along the east wall of the basement. Mr. Bruce attempted to alleviate the water problem by painting the crack with a water sealant, but the basement continued to leak. In December of 1983, Mr. Bruce dug trenches at the intersection of the basement walls and the concrete floor, and he installed a drainage system in the trenches in an attempt to remove the water from the basement. The drainage system consisted of pipes along the walls of the basement and drain holes which were cut in the floor. The water that collected along the walls and drained into the holes in the floor was supposed to drain into a pipe that exited the garage.

In 1991, the Bruces listed their home for sale through Martin Realty House and realty agent Nancy Jo Martin. At the time of the listing, Mr. Bruce described the house's water problem to Ms. Martin, and Ms. Martin noted the problem in her real estate folder. Ms. Martin's notes contained the following underlined phrase: "basement leaking has been definitely controlled." The defendants contend that they never told Ms. Martin that the leaking problem had been "controlled," rather, they contend that Ms. Martin concluded on her own that the leaking problem had been controlled.

In April of 1993, the defendants again listed their home for sale through Ms. Martin. At the time of the new listing, Ms. Martin did not obtain any new information on the home, she simply relied upon the information she obtained on the home when it was listed for sale in November of 1991.

In October of 1993, plaintiffs-appellees, Everett Edwards and Karen

Edwards, contacted realtor Mary Mingle, an affiliate with Beck & Beck realtors, and informed Ms. Mingle that they were interested in purchasing a home in the Nashville area. Ms. Mingle contacted Ms. Martin and the two set up an appointment on October 6, 1993, for the plaintiffs to look at the defendants' home. In the afternoon of October 6th, Ms. Martin walked the plaintiffs through the Bruces' home, and the plaintiffs inspected the home for approximately one and one-half hours. The Edwardses inspected the exterior and interior of the home including the basement. During their inspection the Edwardses noticed the crack in the basement wall, the holes cut in the basement floor, and at least some of the drain pipes which were installed along the basement floor and walls.¹ The Edwardses also noticed that the crack in the east wall had been

¹Mr. Edwards testified that when he met with the Bruces on the afternoon of October 6, he asked Mr. Bruce about the drain holes which were cut in the basement floor. Mr. Edwards testified, "And we also discussed those two drain holes, and I asked him, 'Are those drain holes for any water that comes out from under the front porch, so that if it runs out into the basement that will divert it outside?' And he said yes." Mr. Edwards testified that this conversation was in regard to water leaking on the west wall, and that he did not see the pipe running to the east wall of the basement which connected with one of the holes cut in the floor. Mr. Edwards also testified that on the afternoon of the 6th, he also did not see the "ditches" which had been cut along the east wall. However, prior to the closing, Mr. Edwards saw the "ditches" which had been cut along the north and west walls, but he testified, " I did not, at that time, realize what I was looking at." Mr. Edwards testified that he did not know the "ditched out areas" were part of the drain system, he simply thought "that was just the way the concrete floor had been paved--laid." Mr. Edwards testimony was conflicting as to exactly how much of the drainage system he saw, and whether or not he knew that what he was observing was in fact a drainage system. At one point he testified that he was aware of the pipe running to the west wall, and then at another point in his testimony, he stated that he was not aware of any of the pipes. On cross examination, Mr. Edwards testified,

Q. So before closing you were aware of the existence of the drainage system?

A. I was aware of this portion of the drainage system (Indicating), from the holes in the floor out to the drainpipe.

Q. How could you have possibly been aware of the holes in the floor and not been aware of the pipe running to the east wall and aware of the pipe running to the west wall?

A. I just didn't see that part of it. It was covered up

painted with water sealant, and that the frame to one of the basement doors was rotting.

Following the Edwardses' inspection of the home, Ms. Mingle telephoned Ms. Martin from the Bruces' home to inquire about the status of the water problem. Ms. Mingle testified that Ms. Edwards was present in the room when she called Ms. Martin, and that she (Ms. Mingle) related her conversation with Ms. Martin to Ms. Edwards. With respect to the conversation between her and Ms. Martin, Ms. Mingle testified as follows:

Q. Did you have occasion to call Ms. Martin from the home?

A. Yes, I did.

Q. Why did you call Ms. Martin?

A. Well, when we went down into the basement there were squares cut into the floor, and there was some question could it possibly be that water comes into the basement. And I told the Edwards at the time, I said, what we need to do is call Nancy Jo Martin and see what the reason is for the squares

* * *

Q. Ms. Mingle, what did Ms. Martin tell you about the basement?

A. She said yes, that at one time they did have a water problem, and that he, that Roy was very particular and very meticulous and that he had spent a great deal of time and money to repair this and that if water did come into the basement it should go out of the holes. In essence, that it was fixed.

* * *

THE COURT: That's a question that the witness will have to state whether or not she's putting her own conclusion or is that what --

THE WITNESS: No, Nancy Martin told me that the basement was fixed, that Roy had fixed it, was I believe the correct word.

with concrete and I didn't have any idea there was a pipe in that.

Q. Did she make any representations to whether any water had gotten into the basement after the repairs had been made?

A. No, she did not say that.

Q. Did you tell Mrs. Edwards verbatim, the best you -- what Ms. Martin told you in that conversation?

A. Yes, I did. She was standing beside me and part of the conversation, as it was coming to me I was repeating it, and Karen was standing there by me and I would say things and Karen would kindly say ask her this. So Karen was hearing a great deal of it as I was repeating it back on the phone.

Ms. Martin testified that she did not remember telling Ms. Mingle that there had only been standing water in the basement on one occasion. Ms. Martin testified that she did tell Ms. Mingle that Mr. Bruce was a perfectionist and that he had taken "elaborate steps" to "control" the water problem, but that she never told Ms. Mingle that the problem had been "fixed or stopped." Ms. Martin also testified that the statement in her real estate folder that the "basement leaking ha[d] been definitely controlled" was her conclusion based upon her inspection of the home and Mr. Bruce's explanation of the drainage system.

The Edwardses left the Bruce home that afternoon still concerned about the basement, so Ms. Martin arranged a meeting between the Edwardses and the Bruces in order for the Edwardses to ask questions regarding the house and to inquire about the drainage system which Mr. Bruce had installed in the basement. Mr. Edwards testified that prior to the meeting, he and Ms. Edwards returned to Ms. Mingle's office at which time they were shown Ms. Martin's real estate notes on the house which contained the underlined words, "basement leaking has been definitely controlled."

The meeting was held at the Bruces' home at 5:30 p.m. on October 6th, and the Bruces, Edwardses, Ms. Martin and Ms. Mingle were present at the meeting. At the meeting, Mr. Edwards specifically asked Mr. Bruce whether the basement leaked. On direct examination Mr. Edwards testified regarding the

conversation between him and Mr. Bruce as follows:

During my conversations with Mr. Bruce I had asked him--I had asked him about the basement. I said that I had noticed some evidence that there had been some water leakage on the wall, on the rear wall, also there was a crack in that wall; and I had mentioned that I had seen the two rectangular drain holes in the floor of the basement.

And I asked him about that, and he stated that they had worked on the basement and that there had been a water leakage problem in the past but that had been taken care of and the only area that I had to be concerned about was the front porch area. And he said that area still experienced some leakage under heavy rain conditions and that if I put anything on the floor in that area it could get wet.

* * *

Q. And that's the only area he represented could have some water in it?

A. That's correct. And when I asked him what the drain holes in the floor were for he stated that that was to catch any overflow from this area (Indicating)[front porch area], if it ran out of this area it would run over here (Indicating) and then there was a drainpipe that ran out to the outside of the house, out to the end of the garage.

Q. And what--were there any other comments that he made concerning the condition of the basement or water in the basement?

A. He said that since he had worked on it it had remained "bone dry," and that there was no concern except for the area under the front porch.

Q. And was that exception acceptable to you?

A. Yes.

Q. You also mentioned --was that all the conversation concerning the water in the basement?

A. I believe that was all, that was all we talked about. Once he told me that I was no longer concerned about it.

Mr. Edwards also testified that he asked Mr. Bruce about the 88 foot-long crack in the wall, and that Mr. Bruce told him that the crack had been in the wall since the Bruces bought the house and had remained unchanged for the last fifteen years. Mr. Edwards further testified that he discovered that this

representation was false when he discovered that the crack had been remortared in 1991.

Mr. Bruce, on the other hand, testified that when Mr. Edwards asked him about the leakage problem, he specifically told Mr. Edwards, "Let me just put it to you like this, If I have anything I didn't want to get wet I would not put it in the basement." Mr. Bruce testified that he never told Mr. Edwards that the leakage problem was confined to the area under the front porch; rather, he told Mr. Edwards that the entire basement leaked. Ms. Bruce and Ms. Martin also testified that Mr. Bruce did in fact tell Mr. Edwards that the entire basement leaked, and that Mr. Bruce clearly informed Mr. Edwards that the leakage was not confined to the area under the front porch.²

The Edwardses allege that Mr. Bruce's explanations regarding the water problem were satisfactory, thus, at 8 p.m. on October 6, 1993, they made the Bruces an offer to purchase the house. The parties executed a Contract for the Sale of Real Estate whereby the Edwardses purchased the property from the defendants for the sum of \$169,900.00.

The real estate closing occurred on November 30, 1993. During the course of the closing, Mr. Edwards and Mr. Bruce again discussed the leakage problem in the basement. Mr. Edwards testified that he and Mr. Bruce discussed the leakage problem for about five minutes, and that Mr. Bruce again assured him that the basement had remained "bone dry" during recent heavy rains. Mr. Edwards testified that he did not have the basement inspected by a professional engineer, because he had been assured by Mr. Bruce that the water problem had been corrected. Mr. Bruce, on the other hand, testified that he discussed the water problem with Mr. Edwards for approximately one and one-half hours, and that he never represented that the basement had been or

²Ms. Mingle testified that she could not remember Mr. Bruce ever telling Mr. Edwards that the entire basement leaked. Ms. Edwards was not called as a witness at trial, thus, there is no testimony from her as to whether Mr. Bruce informed Mr. Edwards that the entire basement leaked.

would be dry. Mr. Bruce also testified that Mr. Edwards asked him about another crack in the garage which he (Edwards) had not previously noticed. Mr. Bruce testified that he informed Mr. Edwards that the crack had always been there and that nothing more was said about the crack.

Shortly after the closing, the plaintiffs assumed possession of the property. On December 3, 1993, the entire basement flooded after a heavy rain. On December 9, 1994, the basement flooded again, and it continued to flood on numerous occasions thereafter. Mr. Edwards testified that sometime during this period, he discovered that a board which was attached to some garage shelves concealed some of the worst cracks in the basement's rear wall.

After the initial flooding, Mr. Edwards contacted Dr. Ronald Jones, a contractor who holds a Ph.D. in geotechnical engineering, and asked Dr. Jones to inspect the basement, determine the cause of the flooding, and estimate the cost of repairing the basement. Dr. Jones inspected the basement and determined that the rear wall of the basement was in a state of "active failure," meaning that the wall was no longer structurally capable of supporting the weight of the house. Dr. Jones opined that the weakening of the wall was caused by excessive pressure from the earth and ground water pushing against the wall. Dr. Jones testified that the wall had buckled about four inches along the 88 foot-long horizontal crack, and that repairs were absolutely necessary. Dr. Jones also testified that the 88 foot-long crack had been remortared in the past, and that the reopening of the crack in 1993 indicated that the wall had been continuously moving and that the problem was worsening.³

On December 7, 1994, a year after Dr. Jones inspected the house, Mr. Edwards contracted with Dr. Jones to begin making repairs to the basement. While Dr. Jones was working on the east wall of the basement, a portion of the

³This testimony was offered to impeach Mr. Bruce's alleged statements to Mr. Edwards that the crack had remained "unchanged" since the Bruces owned the home.

wall collapsed. The total cost of rebuilding and waterproofing the east and north basement walls was \$20,350.00. Mr. Edwards testified that although he had not had the house appraised, he estimated that the diminution in value of the house was approximately \$20,000.00, therefore, the house was only worth approximately \$149,900.00

The Edwardses filed this suit against the Bruces on March 31, 1994, in the Chancery Court for Sumner County. A non-jury trial was held on June 1-2, 1995, and by order entered June 12, 1995, the chancellor ruled in favor of the Edwardses and awarded them \$40,000.00 in damages. In his memorandum opinion, the chancellor concluded:

There is conflicting testimony in this case but not between the agents. It is clear to the Court that Mary Mingle and Nancy Jo Martin are credible. Each has been called to testify as to what each individually said and to relate what she heard the parties or other agent say. Both were asked questions to which the answer was "I don't recall." Failure of a recollection is a common experience; innocent misrecollection is not uncommon.

The Edwards were satisfied with their agent's explanation on the water, but wanted to meet the owners and discuss basement water and other matters. Arrangements were made between the agents for the parties to meet on the evening on the 6th day of October, 1993.

Mary Mingle took the Edwards by the office of Nancy Jo Martin on the afternoon of October 6. While there a copy of handwritten notes of the listing agent was made for Mary Mingle and the Edwards. In the handwritten notes was the statement "basement leakage has been definitely controlled" (See Exhibit 2).

When the parties met, Mr. Edwards and Mr. Bruce discussed water in the basement. Mr. Bruce told Mr. Edwards that water did come into the room underneath the front porch (west wall). Mr. Bruce never told Mr. Edwards that water leaked in along the east wall. Mr. Edwards related to Mr. Bruce that in Huntsville he had had a house with a problem of leakage in the basement in a room under the porch and of work done to correct the problem.

During the course of conversation, Mr. Bruce told Mr. Edwards, "if you don't want it to get wet, don't put it

down there.” This statement was made when they were discussing the water coming into the room underneath the front porch and Mr. Edwards took the statement to mean, don’t put anything that you don’t want to get wet in the room under the front porch.

On the evening of October 6, 1993, the Edwards made an offer and the Bruces accepted.

On the 30th day of November, 1993, the parties met at closing. Because of a heavy rain in November, 1993 in Huntsville, Mr. Edwards inquired if it had rained in Gallatin. He was informed that there had been a heavy rain and he asked if there had been any problems with water leakage in the basement. Mr. Bruce told him there were not any. The plaintiffs became the owners of improved real property known as 231 Graystone Drive, Gallatin, Sumner County, Tennessee.

On the 3rd day of December, 1993, there was a rain in the Gallatin community and water entered the basement at 231 Graystone Drive by leaking through the blocks along the east wall. Water also came into the basement on the west side. Mr. Edwards informed Mr. Bruce about the water leakage, and Mr. Bruce expressed surprise.

Immediately following discovery of the water leakage problems, plaintiffs called some companies to give estimates on repair and correction of the problem.

Dr. Ron Jones, licensed professional civil engineer with GEC, Inc., inspected 231 Graystone Drive on or about the 7th day of December, 1993. He gave Mr. Edwards an oral report and followed up with a letter dated December 28, 1993 (see Exhibit 33). Dr. Jones found the rear (east) wall structurally unsafe due to “excessive lateral earth and ground water pressures,” and he found that a lot of water was seeping through the lower third of the wall.

Plaintiff Edwards had on his inspection of the property noticed a horizontal crack in the east basement wall. He had asked Mr. Bruce about the crack and the statement from Mr. Bruce was that it had been there since day one and had never been a problem. Mr. Edwards had not noticed vertical cracks and one vertical crack of significance had been covered by Mr. Bruce with the placement of particle board at the end of shelving. According to Mr. Bruce the board was placed there to protect items on the shelf from mildew due to the wetness of the wall and not to conceal the vertical jagged crack.

Mr. Bruce was informed in December, 1993, by Mr. Edwards of what Dr. Jones had said.

With rain on December 10, 1993, there were basement water leakage problems. On February 10, 1994, and February 22, 1994, there was basement water leakage.

On the 28th day of November, 1994, there was a heavy rain in Gallatin. Mr. Edwards went and bought four (4) house jacks to put in the basement under the east wall. The next day his wife called Dr. Ron Jones to do the repair work to the house. GEC, Inc., started to work on the 7th day of December, 1994, and while at work, the east wall collapsed.

The Court finds that the east wall collapsed because the concrete blocks sheared in half due to more than fifteen (15) years of uncorrected water leakage. The workman did not cause the wall to fall at the time it fell.

* * *

The Court finds that the Bruces did not know that the east wall at 231 Graystone was structurally unsafe. They knew that water had seeped through the blocks since the purchase of the house, but there was not evidence that they had ever been told that the structural integrity of that wall was at risk.

* * *

To prevail under the Tennessee Consumer Protection Act, plaintiffs would have to prove by a preponderance of the evidence that defendants intentionally concealed from them the fact that the east wall had suffered extensive structural damage due to the water leakage through the blocks. Plaintiffs have not carried this burden of proof.

As to negligent misrepresentation, the Court finds that plaintiffs have proven by a preponderance of the evidence that water leaked through the lower third of the east wall; that defendants knew of this problem; that defendants had a duty to disclose the water leakage problems when they were asked and they did not make a full disclosure.

Defendants make [sic] a representation that the basement leakage had been controlled. This statement was not correct. Leakage was not controlled. Removing the water from the basement was controlled by the drain pipe defendants installed.

Defendants did not inform plaintiff the east wall leaked. Defendants related water leakage from the west wall in the room under the front porch.

Representations about leakage under control and

emphasis on the west wall were made with intent to induce plaintiffs to rely upon it.

Plaintiffs were unaware of the water leakage through the east wall, and they relied upon the representation of defendants.

The chancellor concluded that the Bruces were guilty of negligent misrepresentation, denied the defendants' motion to dismiss Joanne Bruce as a party defendant, and awarded the plaintiffs \$40,000.00 in damages.

The defendants-appellants appealed and present four issues for our review. As stated in their brief those issues are:

1. Whether the trial court erred in finding the Bruces guilty of negligent representation?
2. Whether the trial court erred in failing to apply comparative negligence to the case?
3. Whether the trial court erred in failing to apply express assumption of the risk to the case?
4. Whether the trial court erred in the awarding of damages?

The appellees also present three issues for our review. As stated in their brief those issues are:

1. Did the trial court err in failing to find the Defendants' conduct amounted to fraudulent misrepresentation, rather than negligent misrepresentation?
2. Did the trial court err in failing to find that the Defendants conduct violated the Tennessee Consumer Protection Act?
3. Did the trial court err in failing to award triple damages and attorney fees pursuant to the Tennessee Consumer Protection Act?
 - (i) As to attorney fees for negligent misrepresentation?
 - (ii) As to triple damages for fraudulent misrepresentation?

We will first address the appellants' and appellees' issues regarding fraudulent and negligent misrepresentation. Our review of the record is *de novo*

with a presumption of correctness of the factual findings of the trial court. T.R.A.P. 13(d).

The defendants argue that the evidence in this case preponderates against the trial court's finding that they negligently misrepresented the condition of the basement prior to the sale of the home. There was a sharp dispute in the testimony in this case as to whether Mr. Bruce told the Edwardses that the entire basement leaked or whether he told the Edwardses that only a portion of the basement under the front porch leaked. Mr. Edwards testified that Mr. Bruce specifically stated that only the area under the front porch leaked. Mr. Bruce, Ms. Bruce, and Ms. Martin, on the other hand, all testified that Mr. Bruce told Mr. Edwards that the entire basement leaked. The trial court specifically found that the Bruces misrepresented the condition of the basement with the intent of inducing the Edwardses to rely upon the misrepresentation. Thus, the chancellor implicitly found the testimony of Mr. Edwards to be more credible than that of the defendants and their witness, and he obviously weighted the testimony accordingly. When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *Mays v. Brighton Bank*, 832 S.W.2d 347, 351-52 (Tenn.App. 1992). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *Id.* At 352; *Town of Alamo v. Forcum--James Co.*, 327 S.W.2d 47, 49 (Tenn. 1959). Although the defendants presented evidence contrary to that presented by the plaintiffs, the evidence presented by the defendants does not preponderate against the chancellor's findings of fact.

The plaintiffs argue that the defendants are liable for fraudulent misrepresentation rather than negligent misrepresentation, because the chancellor found that the defendants intentionally concealed the extent of the

water problem from the plaintiffs. We agree. In order to recover for fraudulent misrepresentation, a plaintiff must prove the following elements: (1) the defendant made a representation regarding a present or past fact; (2) the representation was false; (3) the representation was in regard to a material fact; (4) the false representation was made either knowingly or recklessly; (5) the plaintiff actually relied on the misrepresentation of the material fact; (6) such reliance was reasonable under the circumstances; and (7) the plaintiff suffered damages as a result of such reliance. *Metropolitan Gov't of Nashville v. McKinney*, 852 S.W.2d 233, 237 (Tenn. App. 1992). Nondisclosure of a material fact may also give rise to a claim for fraudulent or negligent misrepresentation when the defendant has a duty to disclose and the matters not disclosed are material. *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn.App. 1992). The elements of the tort of negligent misrepresentation are the same as those of fraudulent misrepresentation with one exception; 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 220 (Tenn.App. 1976).

The chancellor in this case found that the defendants intentionally misrepresented the extent of the leaking to the plaintiffs and that the defendants made this representation with the intent of inducing the plaintiffs to rely on the representation. Based upon these findings of fact, the defendants should have been found liable on the basis of fraudulent misrepresentation rather than negligent misrepresentation.

The defendants argue that they should not have been found liable for either fraudulent or negligent misrepresentation, because their representations regarding the basement were true. The defendants alternatively argue that even if the representations were false, the Edwardses reliance on those representations was not reasonable. The defendants contend that the statement in Ms. Martin's real estate folder that the "basement leaking has been

definitely controlled" was not made by them; rather, the statement was a conclusion drawn by Ms. Martin after she inspected the house and spoke with Mr. Bruce about the drainage system installed in the basement. The defendants argue that even if the statement could be attributed to them, the statement was true, because the water leakage had been controlled by the drainage system installed by Mr. Bruce. They essentially argue that the word "controlled" does not mean "fixed" or "stopped" it means "exercising direction over or to prevent the spread of something undesirable."

The record does support the defendants' contention that the notation in the real estate folder was a "conclusion" by Ms. Martin. However, Ms. Martin did not make this "conclusion" of her own accord, she made this conclusion based upon her conversations with Mr. Bruce regarding the drainage system. The record indicates that Mr. Bruce told Ms. Martin that the basement leakage had been controlled. Although the basement leakage may have been "controlled" by the drainage system because the drainage system removed at least some of the water, the statement was still misleading, because Mr. Bruce did not inform Mr. Edwards that the entire basement leaked or that any water would pool in the basement other than under the front porch. The record indicates that due to Mr. Bruce's representations, Mr. Edwards understood "controlled" to mean that only the area under the front porch leaked, and that the remainder of the basement remained dry. This was a reasonable conclusion, because according to Mr. Edwards, he was told that only the area under the front porch leaked. In any event, the chancellor did not premise his finding of liability on the note in the real estate folder, he premised his finding of liability on the representations which Mr. Bruce made directly to the Edwardses.

The defendants also argue that Mr. Bruce's statements to Ms. Martin which were related to Ms. Mingle and then to the Edwardses, were true. The defendants argue that Ms. Mingle told Ms. Martin that water came in "around the basement," thus, through the use of the word "around" the Bruces informed

the Edwardses that the entire basement leaked. In making this argument, the defendants ignore the portions of this same conversation in which Ms. Martin stated that Mr. Bruce had gone to "great expense to be sure that it [the leaking] would never happen again," and that if any water did "get into the basement it will drain through the little hole in the basement."⁴ It is uncontroverted that the entire basement leaked and that the water pooled and did not drain through Mr. Bruce's drainage system. Mr. Edwards testified that Mr. Bruce told him that the drain holes cut into the basement floor were installed to drain any overflow from the area under the front porch. Thus, Mr. Bruce's statements to Ms. Martin which were related to Ms. Mingle and the Edwardses were false. This argument is without merit.

The defendants also argue that Mr. Edwards stated "let me put it to you like this, if I have anything I didn't want to get wet I would not put it in the basement," and that this statement was in regard to the entire basement and was thus true. As stated above, the chancellor found this statement was made in the context of only the area under the front porch, and the evidence does not preponderate against this finding.

The defendants next argue that the Edwardses reliance on Mr. Bruce's statements was unreasonable, because the drainage system, ditches along the north and east walls, and rotting wood were in plain view and clearly visible. They argue that under these circumstances, it was unreasonable for the Edwardses to rely on their representations that the east wall did not leak. We disagree. At the time the Edwardses inspected the property, there was no water leaking from the east wall, and the only way they could have been sure that the wall did not leak during or following a heavy rain would have been to either inspect the wall during a rain or hire an expert to inspect the basement. Given

⁴The defendants are in effect seeking to change the character of these statements by taking them out of context and relying on only certain portions of the statements.

the representations made by the Bruces, we do not think it was necessary for the Edwardses to hire an expert to inspect the home. The water leakage problems that the Edwardses observed at the home were consistent with the representations that the Bruces made to the Edwardses. The Bruces told the Edwardses that there had been water leakage problems in the past, but that these problems (with the exception of the area under the front porch) had been corrected. There was no water in the basement at the time the Edwardses inspected the home, thus, the Edwardses reasonably concluded that the water damage which they had observed was from past leakage and had been corrected.

The defendants next assert that the judgment in this case against Mrs. Bruce should be reversed, because she made no representations regarding the basement. The defendants argue that if any misrepresentations were made regarding the basement, those misrepresentations were made only by Mr. Bruce, not Ms. Bruce. The defendants contend that Mr. Bruce's misrepresentations, if any, cannot be imputed to Ms. Bruce, therefore, the trial court erred in awarding a judgment against Ms. Bruce. We disagree.

While the record does support the defendants' contention that Ms. Bruce made no representations regarding the water leakage, the record also indicates that Ms. Bruce knew or should have known of the water leakage problem, and that she did not disclose the problem to the Edwardses when she knew that her husband was misrepresenting the condition of the basement to the Edwardses. Although Ms. Bruce never spoke with the Edwardses regarding the basement, she was present during all conversations between Mr. Bruce and the Edwardses. Ms. Bruce knew or should have known that her husband was misrepresenting the condition of the basement, yet she remained silent. Ms. Bruce misrepresented the condition of the basement by her silence, and she

retained the benefits of the misrepresentation.⁵ Under these circumstances the trial court properly entered a judgment against Ms. Bruce. See *Dodson v. Anderson*, 710 S.W.2d 510, 512 (Tenn. 1986)(A spouse may . . . ratify the fraudulent act of the other so as to become liable for the fraud itself by accepting or retaining the benefits of the act knowing it was tainted with fraud. [citations omitted]).

The defendants next assert that the trial court erred in failing to apply comparative negligence to this case. They argue that the fault of the Bruces in making the representations should have been reduced by the fault of the Edwardses in negligently relying upon the representations. The defendants are essentially arguing that the fault attributable to an intentional tortfeasor should be reduced by the fault attributable to a negligent tortfeasor. We do not agree.

In *Turner v. Jordan*, No. 01-A-01-9411-CV-00544, 1995 Lexis 576 (Tenn. App. M.S. August 30, 1995) this Court allowed a negligent tortfeasor to reduce his liability by the percentage of fault attributable to an intentional tortfeasor. However, this Court stated that an intentional tortfeasor should not be allowed to reduce his or her liability by the percentage of fault attributable to a negligent tortfeasor. This Court stated:

Plaintiffs interpret the comparison rule to allow intentional tortfeasors to use the conduct of negligent tortfeasors to reduce their liability. Such an interpretation does not seem well founded. The present case concerns an injured party attempting to transfer an intentional tortfeasor's responsibility to a negligent tortfeasor, not an intentional tortfeasor attempting to transfer some of his own responsibility to a negligent tortfeasor. . . . As noted by plaintiffs, intentional tortfeasors in Tennessee have always been held fully responsible for the injuries they cause. The contributory negligence of a plaintiff has never been a defense to an intentional assault in

⁵Ms. Bruce testified that the proceeds from the sale of the house were deposited in a joint marital bank account.

Tennessee. See *State v. Dunn*, 282 S.W.2d 203, 213 (Tenn.App. 1943). Consequently, the comparison approach stands for the proposition that a negligent tortfeasor may reduce his liability by comparing his fault to that of an intentional tortfeasor, not that an intentional tortfeasor may reduce his liability by comparing his fault to that of a negligent tortfeasor.

Id. at *9. Since we have determined that the Bruces are guilty of fraudulent misrepresentation rather than negligent misrepresentation, the Bruces may not reduce their liability for the Edwardses damages by the percentage of fault attributable to the Edwardses in relying upon the representations. This issue is without merit.

The defendants' next issue for our review is "whether the trial court erred in failing to apply express assumption of the risk to the case?" The defendants argue that the plaintiffs are barred from recovering for any damage caused by the water leakage, because the defendants signed the Contract For Sale of Real Estate which expressly stated, "Buyer has not relied on any representations or warranties as to the condition of the premises except as herein stated and closing shall constitute a full acceptance of the condition of the premises." The defendants also rely on the "Buyer Representations" provision of the contract which provides, "the Buyer is satisfied with price, quality, size, etc. of the property under this contract" The contract further provides:

ORAL REPRESENTATIONS AND/OR AGREEMENTS: It is expressly agreed and understood that this instrument contains the entire agreement between the parties and the Agent(s), and that there are no collateral conditions, agreements, or representations, all such having been incorporated and resolved into this Agreement. The Buyer and the Seller agree that no statements or representations have been made by the real estate agent(s) regarding the real estate, nor has any tax advice been provided, which is not reduced to writing and included within this Agreement. No variations or alterations to the terms of this Agreement shall be binding upon the parties unless the same be reduced to writing and executed by the parties."

The defendants argue that because Mr. Edwards read, understood, and signed the sales contract, the plaintiffs expressly assumed the risk of water leaking in the basement.

The trial court specifically found that the Edwardses were unaware that the east wall of the basement leaked, and that they relied upon the representations of the Bruces when they purchased the property in question. The Bruces represented that with the exception of the area under the front porch, the basement did not leak. This representation was fraudulent. A contractual disclaimer will not serve as a shield to liability for fraud. *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925, 928 (Tenn. 1991); *Houghland v. Security Alarms & Services, Inc.*, 755 S.W.2d 769, 773 (Tenn. 1988). The Bruces cannot rely upon the disclaimer to absolve them from liability for fraudulent misrepresentation. This issue is without merit.

We next address the defendants' issue regarding the damage award. They assert that the chancellor erred in awarding the Edwardses both the reasonable cost of repairing the property, and the diminution in the fair market value of the property. The defendants contend that since Mr. Edwards testified that the diminution in the property's value as a result of the leaking was \$20,000, and the cost of repairing the property was \$20,350.00, the proper measure of damages was \$20,350.00. The defendants argue that the Edwardses were not entitled to recover both the cost of repairing the basement and the diminution in the house's value because of the leaking.

The plaintiffs, on the other hand, contend that the cost of repairing the house will not adequately compensate them, and that they are, therefore, entitled to recover the diminution in the house's value. Mr. Edwards testified that although he paid \$169,900.00 for the property, its value at the time of trial, after repairs were made, was \$149,900.00. He argues that this lower value is a result of having to disclose the leaking problem to any potential purchaser.

The general rule for the measure of damages for injuries to real estate is

the difference between the reasonable market value of the premises immediately prior to and immediately after the injury; but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is a lawful measure of damages. *Williams v. Southern Railway*, 55 Tenn. App. 18, 396 S.W.2d 98 (1965). In arriving at the difference in value immediately before and after the injury to the premises, the trier of fact can take into consideration the cost of restoring the property to its former condition. *McKinnon v. Michaud*, 37 Tenn. App. 148, 260 S.W.2d 721 (1953).

The basic rule prescribing the measure of damages for misrepresentation is the benefit of the bargain rule which compensates the injured party for the actual injuries sustained by placing him or her in the same position that he or she would have occupied had the misrepresentation not occurred. *Youngblood v. Wall*, 815 S.W.2d 512, 518 (Tenn. 1991). This measure of damages allows the plaintiff to recover the difference between the actual value of the property received at the time of the making of the contract and the value that the property would have possessed if the representations had been true. *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 233 (Tenn.App. 1977). In a fraudulent misrepresentation case the plaintiffs can also recover for any other pecuniary losses proximately caused by the misrepresentation. *Id.*

It is clear that the Edwardses suffered \$20,350.00 in damages as a result of repairing the east wall, thus, the trial court properly awarded this sum as damages. The repairs made to the house gave the Edwardses the benefit of their bargain: a basement with a dry, east wall. Any diminution in the property's value associated with leaks that were concealed at the time the contract was executed has been corrected. Accordingly, the damage award should be reduced by the \$20,000.00 awarded for diminution in value.

The defendants also contend that the plaintiffs did not mitigate their damages when they discovered that the east wall was in "active failure." The defendants assert that if the plaintiffs had begun repairs on the east wall at the

time they discovered the wall was shifting rather than a year later, the east wall would not have collapsed, and the cost of repairing the basement would have been \$900.00 less. They rely on the testimony of Dr. Jones who testified that when he originally inspected the Edwardses' home, he recommended that repairs be made to the east wall "as soon as possible." Dr. Jones testified that "as soon as possible" did not mean a year later, and that during the year between his recommendation of repair and commencement of work, the wall shifted an extra two inches. Dr. Jones's testimony indicates that the extra two inch shift contributed to the wall falling which in turn increased the cost of repair by \$900.00. Because the repair costs were increased by \$900.00 due to the Edwardses commencement of the repairs a year after they knew repairs were necessary, the Edwardses failed to mitigate their damages. Accordingly, we further reduce the damage award to the Edwardses by \$900.00.

The last issue for our review is presented by the plaintiffs. The plaintiffs argue that the chancellor erred by refusing to award attorney fees and treble damages pursuant to the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 (1995), *et seq.* T.C.A. § 47-18-109 (1995) provides in pertinent part:

(a)(1) Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any 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 to recover actual damages.

* * *

(3) If the court finds that the use or employment of the unfair or deceptive act or practice was a willful or knowing violation of this part, the court may award three (3) times the actual damages sustained and may provide such other relief as it considers necessary and proper.

(4) In determining whether treble damages should be awarded, the trial court may consider, among other things:

(A) The competence of the consumer or other person;

(B) The nature of the deception or coercion practiced upon the consumer or other person;

(C) The damage to the consumer or other person; and

(D) The good faith of the person found to have violated the provisions of this part.

(e)(1) Upon a finding by the court that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs.

In his memorandum opinion, the chancellor concluded:

To prevail under the Tennessee Consumer Protection Act, plaintiffs would have to prove by a preponderance of the evidence that defendants intentionally concealed from them the fact that the east wall had suffered extensive structural damage due to the water leakage through the blocks. Plaintiffs have not carried this burden of proof.

The plaintiffs assert that the chancellor erred by failing to consider the misrepresentations regarding the water leakage as a violation of the Tennessee Consumer Protection Act. The plaintiffs argue that the Bruces' misrepresentations regarding the water leakage constituted a violation of the Tennessee Consumer Protection Act, and, therefore, the plaintiffs' actual damages should have been trebled. In support of this argument, the plaintiffs cite *Klotz v. Underwood*, 563 F.Supp. 335 (E.D. Tenn. 1982), in which the court found that the Consumer Protection Act applies to sales of real estate between individuals who are not normally engaged in the business of selling real estate. We find the reasoning of *Klotz* persuasive and agree that the Tennessee Consumer Protection Act applies to sales of realty between individuals not normally engaged in the real estate business. We agree with the plaintiffs that the defendants knowingly and willfully deceived them, and such deception constitutes a violation of the Consumer Protection Act. The trial court's order does not discuss the Consumer Protection Act in the context of the misrepresentations regarding the water leakage. Accordingly, we remand the case to the trial court for a determination of the propriety of awarding treble

damages and/or attorney fees based on these misrepresentations. The decision whether to award such damages and fees is in the discretion of the trial court.

The judgment of the trial court is modified to award plaintiffs \$19,450.00, and the judgment is affirmed as modified. The case is remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed against the appellants.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE