IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

LUVELL L. GLANTON,	)	
	)	
Plaintiff/Appellant,	)	
	)	Davidson Circuit
	)	No. 95C-2102
VS.	)	
	)	Appeal No.
	)	01A01-9606-CV-00283
SHIRLEY BECKLEY,	)	
	)	
Defendant/Appellee.	)	

CONCURRING OPINION

I concur with the results of the court's opinion in this case. However, I am filing this separate opinion because I cannot follow the court's reasoning. I have concluded that the evidence fully supports the trial court's conclusion that Mr. Glanton negligently misrepresented to Ms. Beckley that he had secured lease agreements from his fellow lawyers that would generate $1,600 in monthly revenue. Accordingly, I would hold that Ms. Beckley is entitled to damages, recission of her agreement with Mr. Glanton, and partition of the property.

I.

Luvell Glanton, a Nashville lawyer, decided to purchase a dilapidated house on Jefferson Street to renovate for use as a law office. His uncle who was acting as one of the real estate agents for the transaction suggested that he approach Shirley Beckley about investing in the project. When Mr. Glanton discussed the project with Ms. Beckley in late February 1993, he told her that the renovated house would have offices for four lawyers that would each rent for $400 per month. He also told her that he intended to rent one of the offices himself and that he had already secured the agreement of three of his associates to rent the remaining offices. Ms. Beckley decided to invest in the project relying on Mr. Glanton's representations that she would receive half of the monthly rental proceeds and that she would benefit from the appreciation in the property's value.

Mr. Glanton and Ms. Beckley signed a contract to purchase the property on March 17, 1993. The closing occurred on March 22, 1993. Five days later, Mr. Glanton and Ms. Beckley signed an agreement containing the following four material terms:

> 1. Both parties agree that the premises located at 915 Jefferson Street, was bought to be used as a Law Office.
>
> 2. That the building will not be sold for at least 7 years without the agreement of both parties.
>
> 4. [sic] That both parties agree that they will keep the other party informed as to any work done on the premises.
>
> 4. Both parties shall share equally in the ownership liabilities, and the income generated from the property.

Mr. Glanton and Ms. Beckley began renovating the property soon after the closing. When the original contractor left after being paid approximately $10,000, they retained a second contractor to finish the renovations. In February 1994 they obtained an $82,500 construction loan from NationsBank to complete the project. Mr. Glanton finally moved into his law office between January and March 1994. Mr. Glanton's associates had never signed leases for the other offices and, consequently, never moved into the renovated house. Ms. Beckley stopped paying her share of the mortgage payments after the other three offices remained vacant for approximately six months. Mr. Glanton placed a "for rent" sign in the front window, but no one had rented the vacant offices by the time of the trial.

Mr. Glanton eventually sued Ms. Beckley in the Davidson County General Session Court in January 1995 seeking to recover her share of the mortgage payments and the maintenance costs, as well as "his time associated with the renovation of the property." Ms. Beckley responded by asserting that she was entitled to various set-offs. She also asserted that Mr. Glanton had failed to pay rent for thirteen months and had failed to reimburse her for advertising expenses. The general sessions court awarded Mr. Glanton $1,094.24.

Ms. Beckley filed an "amended counter-complaint" following her appeal to the Circuit Court for Davidson County.[1] The allegation of most relevance on this appeal was that Mr. Glanton had committed "fraud and deception" by falsely representing to Ms. Beckley that

> he and three associates then in his law office would rent the four private offices in the premises and the common areas, such as reception room, conference room, baths, kitchen area and parking lot for $400.00 each, for a total of $1,600.00, monthly. She was assured, again falsely, that she would receive one-half of the rental proceeds and this promise, if kept by the counter-defendant would have made the investment he persuaded her to make by such misrepresentations, worth the amount she paid. That the counter-defendant knew, or should have known, that his associates had not agreed as he lead the counter-plaintiff to believe they would and in any event he made the assurances as though they were known by him to be true when in fact they were false.

Based on these allegations, Ms. Beckley requested damages, rescission of the March 27, 1993 agreement, and the partition and sale of the property.

During the bench trial, Mr. Glanton and Ms. Beckley gave conflicting accounts of his representations concerning the status of the rental agreements of the other offices in the building. The trial court accredited Ms. Beckley's version of the representations and found that Ms. Beckley had made out a claim for negligent misrepresentation. The trial court set Ms. Beckley's damages at $19,200 but also determined that Mr. Glanton was entitled to an $8,000 set-off for expenses incurred in refurbishing the property. The trial court further reduced the award by $3,700 because Ms. Beckley did not confirm for herself that Mr. Glanton's associates had agreed to lease the remaining office space in the house. Accordingly, the trial court awarded Ms. Beckley a $7,500 judgment against Mr. Glanton.

II.

[1]Ms. Beckley actually filed versions of her amended counter-complaints in the circuit court.

The Tennessee Supreme Court recognized the tort of negligent misrepresentation over twenty-five years ago when it approved the tentative draft of what is now Restatement (Second) of Torts § 552 (1977). *Tartera v. Palumbo*, 224 Tenn. 262, 271-72, 453 S.W.2d 780, 784 (1970). The elements of the tort are described as follows:

> One who, in the course of his business, profession or employment, or in any other 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 the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1). Tennessee's courts have consistently cited and applied this definition for the past twenty-five years. *See, e.g., John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991); *McFarlin v. Watts*, 895 S.W.2d 687, 690 (Tenn. Ct. App. 1994).

The Restatement does not describe precisely the kinds of false information covered by this tort. Perceiving some connection between this tort and the tort of fraudulent misrepresentation,[2] Tennessee courts have joined several other courts in requiring that the false information must consist of statements of a material past or present fact. *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982); *Marshall v. Bostic*, App. No. 02A01-9406-CV-00141, 1995 WL 115971, at *4 (Tenn. Ct. App. Mar. 15, 1995); *York v. Branell College of Memphis, Inc.*, 02A01-9209-CV-00257, 1993 WL 484203, at *3 (Tenn. Ct. App. Nov. 23, 1993); *White v. Eastland*, App. No. 01A01-9009-CV-00329, 1991 WL

[2]The tort of fraudulent misrepresentation consists of knowingly and recklessly making a false representation as to a material fact that was justifiably relied on by the plaintiff. *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994); *Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812, 817 (Tenn. Ct. App. 1995). In order to support a claim of fraudulent misrepresentation, the representation must relate to a past or present fact. *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 498-99 (Tenn. 1978). The tort of fraudulent misrepresentation must be distinguished from the tort of promissory fraud that does not require a misrepresentation of a present or past fact but rather a promise of future action with no present intention to carry out the promise. *Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992); *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990); *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590 (Tenn. Ct. App. 1980).

149735, at *4 (Tenn. Ct. App. Aug. 9, 1991); *Henley v. Labat-Anderson, Inc.*, 03A01-9104-CV-00126, 1991 WL 120403, at *2 (Tenn. Ct. App. July 9, 1991).[3] Accordingly, the tort of negligent misrepresentation cannot be based on conjecture, statements of opinion, puffing and salestalk, or representations of future events.

The court has not explained the basis for its conclusion that the trial court erroneously concluded that Mr. Glanton "committed an actionable negligent misrepresentation of a present fact." I can only assume that it has determined that the representations Mr. Glanton made to Ms. Beckley to induce her to invest in the project involved conjecture, statements of opinion, and representations concerning future events. Specifically, the court must have concluded that Mr. Glanton's statements concerning the leasing of the other offices in the house and the expectation of future income did not relate to past or present facts.

The key evidence in this case is Ms. Beckley's testimony since the trial court chose to accredit her version of Mr. Glanton's representations. While grammarians could debate the significance of Ms. Beckley's choice of tenses, my reading of her entire examination and cross-examination leaves me with the firm conviction that Mr. Glanton's representations to her involved both past and present facts. In essence, she testified that Mr. Glanton told her that he expected that their monthly rental income after renovating the house would be $1,600 because he and three of his associates had agreed to lease the space for $400 per month each. While the statements concerning the anticipated rental income involved future events, they were based on the present fact that Mr. Glanton and his three associates had already agreed to lease offices in the building once it was renovated. The representations concerning these existing agreements involve a present or past fact and, therefore, support a claim for negligent misrepresentation.

III.

[3]*See also, Spragins v. Sunburst Bank*, 605 So. 2d 777, 780 (Miss. 1992); *Cechovic v. Hardin & Assocs., Inc.*, 902 P.2d 520, 525 (Mont. 1995); *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 455 S.E.2d 183, 188 n.6 (S.C.App. 1995).

My conclusion that Mr. Glanton made negligent misrepresentations concerning the existence of leases for the offices in the new building entitles Ms. Beckley to damages and recission of the March 27, 1993 agreement. I find no basis to disagree with the trial court's calculation of Ms. Beckley's damages based on her share of the rental income that she would have received during the two years since the completion of the renovation of the house. Likewise, I find no basis to disagree with the trial court's decision to reduce these damages to $7,500.[4] The recission of the March 27, 1993 agreement clears the way to an action for partition. Like my colleagues, I have concluded that Tenn. Code Ann. § 29-27-212 permits partition even in the absence of NationsBank. Accordingly, I concur that the case should be remanded to enable the partition to proceed.

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WILLIAM C. KOCH, JR., JUDGE

[4]The doctrine of contributory negligence formerly applied to actions for negligent misrepresentation. *Isaacs v. Bokor*, 566 S.W.2d 532, 540 (Tenn. 1978); Restatement (Second) of Torts § 552A (1977). Accordingly, the doctrine of comparative fault applies to the actions in accordance with the Tennessee Supreme Court's decision in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).