

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2001-CA-000179-MR

JOHN L. AMARO AND RAMI AMARO

APPELLANTS

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 97-CI-00024

THE DREES COMPANY; AND  
JOHN SALIERNO

APPELLEES

OPINION

VACATING and REMANDING

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BEFORE: McANULTY AND TACKETT, JUDGES; JOHN D. MILLER, SPECIAL  
JUDGE.<sup>1</sup>

McANULTY, JUDGE: This is an appeal from a summary judgment  
granted to the Drees Company and John Salierno in a real estate  
contract case. We vacate the judgment and remand to the trial  
court for trial.

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<sup>1</sup> Senior status Judge John D. Miller sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

In January of 1996, Appellants were in the market for a new home in the Northern Kentucky area. During their search, Appellants viewed a model home constructed and marketed by Drees Company (Drees) in the Derby Farms subdivision (Subdivision). While viewing the model home, Appellants spoke with John Salierno, an employee of Drees, about the homes in the Subdivision.

According to Appellants, in their preliminary discussions with Salierno, they inquired about the use of some farmland located across from the Subdivision (Farmland). Appellants were searching for a home away from commercial and industrial development because their son had asthma and severe allergies, and because they desired a home in a rural suburban setting. Appellants assert that Salierno informed them that the Farmland had been purchased as part of an airport buyout and would never be developed. Appellants ultimately selected a home in the Subdivision and closed on the house on March 29, 1996.

In April of 1996 when Appellants were preparing to move into their home, they learned of plans to build an industrial park on the Farmland. Appellants attempted to rescind the contract, however, Drees would not agree to a rescission.

Appellants filed suit alleging, among other claims, misrepresentation, nondisclosure and fraudulent inducement.

Appellees filed a motion for summary judgment on all of Appellants' claims. The Boone Circuit Court granted the motion in its entirety, precipitating this appeal.

Appellants present several arguments in this appeal. First, they allege that Salierno's statement about the Farmland was a false statement of fact offered to induce Appellants to enter into the real estate contract. They also argue that their claims are not precluded by the fact that they were able to use their home for its intended purpose despite the development of the Farmland. Finally, Appellants argue that the integration clause in the home purchase contract does not preclude them from bringing a fraudulent inducement claim.

The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. See Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Because we find that Salierno's statement about the Farmland was a present statement of fact and the merger clause in the contract cannot be utilized to defeat a fraudulent inducement claim, we vacate and remand to the trial court for trial.

The central question in this case is whether Salierno's statement regarding property close in proximity to Appellant's home induced Appellant to enter into a real estate

contract. A related question, significant for the purposes of this appeal, is whether the statement was a present statement of fact, one of the requisite elements of actionable fraud, or a mere promise for the future. See Livermore v. Middlesborough Town Lands Co., 106 Ky. 140, 50 S.W. 6, 36 (1899). In the instant case, Appellants inquired about the Farmland. Salierno informed them that the land had been purchased as part of an airport buyout and would never be developed. We believe this is a statement of a presently existing restriction on the development of property. Contrary to the facts in Livermore, this statement was not promissory in nature, nor was it an expression of what was hoped for or expected. Salierno told Appellants that the Farmland would remain exactly as it presently existed -- unimproved.

The additional elements of fraud as set out in Livermore are as follows: the misrepresentation was of a matter of material fact (not opinion); the misrepresentation was relied upon by the person whose action is intended to be influenced; and the misrepresentation was made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. Moreover, the complaining party must have suffered injury as a result. See Sanford Construction Co. v. S & H Contractors, Inc., Ky., 443 S.W.2d 227, 231 (1969). On the element of misrepresentation of a matter of material fact,

"[t]he generally recognized distinction between statements of fact and opinion is whatever is susceptible of exact knowledge is a matter of fact, while that not susceptible is generally regarded as an expression of opinion." Pitney Bowes, Inc. v. Sirkle, Ky., 248 S.W.2d 920, 922 (1952). Appellees argue that one cannot have exact knowledge of something over which he or she has no control; however, that the statement be of a matter within one's control is not a requisite element of fraud. As far as Appellants knew and considering Salierno's statement, Salierno had exact knowledge or at least could have been presumed by Appellants to have means of knowing the disposition of the Farmland.

The question of the materiality of Salierno's statement, as well as the additional elements of fraud, remains for the jury to decide on remand. A fact is material if it is relevant to the subject of a contract as to some subject material to the contract itself, as distinguished from matters which are merely collateral. See Glass Coffee Brewer Corp. v. Embry, 292 Ky. 483, 166 S.W.2d 818, 823 (1942). In other words, a fact is material if it probably influenced the making of the contract. See Kaze v. Compton, Ky., 283 S.W.2d 204, 207 (1955).

The Appellees cite Evergreen Land Co. v. Gatti, Ky. App., 554 S.W.2d 862 (1977), in support of their argument that the zoning of the Farmland was not material because Appellants

were still able to use their property for its intended purpose. Evergreen held that a misrepresentation regarding the zoning of a land contract is not material per se unless the variance is such that the buyer will obviously be unable to use the property for its intended purpose. See id. at 864. Evergreen is essentially a case about materiality. The Evergreen holding may be analogous, though not on point, to the instant case as to those facts which probably influenced the making of a real estate contract. When homebuyers have specific concerns about the nature of the surrounding land due to the health of their child and desire to live in a rural suburb, the fact that a development restriction is not as it was represented could very well be material to the homebuyers. Thus, factual issues of materiality remain on Appellants' fraud claim, precluding summary judgment. See Smith v. General Motors Corp., Ky. App., 979 S.W.2d 127, 129 (1998).

We move to the issue of whether the express language of the contract between Appellants and Drees, specifically, the merger clause, bars Appellants' claim against Appellees. Because we conclude that Appellants may maintain a cause of action against Appellees for fraud, Appellees cannot rely on the merger clause to defeat Appellants' claims. "[F]raud in the inducement of or preliminary negotiations to a written contract is not ordinarily merged in the contract . . . to preclude an

action for fraud.'" Sanford Construction Co., 443 S.W.2d at 232. In the instant case, Appellants are not trying to alter or reform the contract, in which case the merger clause would preclude such attempts. Appellants are seeking recovery for damages on the basis of fraud in the inducement. For this reason, the merger clause cannot be utilized.

Summary judgment was improperly granted on Appellants' claims. The judgment of the Boone Circuit Court is vacated, and the case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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