IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 6, 2009 Session

JOSEPH DAVIS ET AL. v. PATRICK J. McGUIGAN ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Davidson County
No. 05C-115 Hamilton V. Gayden, Jr., Judge

No. M2007-02242-SC-R11-CV - Filed October 26, 2010

This appeal arises from a trial court's grant of summary judgment in an action against a real estate appraiser for fraudulent misrepresentation and for violation of the Tennessee Consumer Protection Act. A husband and wife alleged that the appraiser, who was hired by the bank financing the husband and wife's home construction, recklessly overestimated the value of their proposed construction and that they reasonably relied on the appraisal value to their detriment. The Court of Appeals affirmed the trial court's ruling, holding that an appraisal is an opinion that cannot form the basis for a fraudulent misrepresentation claim. We hold that an opinion can form the basis of a fraudulent misrepresentation claim. We further hold that genuine issues of material fact preclude summary judgment as to the husband and wife's claims against the appraiser. We reverse the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 11 Appeal by Permission;
Judgment of the Court of Appeals Reversed;
Case Remanded to Trial Court for Further Proceedings

JANICE M. HOLDER, J., delivered the opinion of the Court, in which GARY R. WADE and SHARON G. LEE, JJ., joined. WILLIAM C. KOCH, JR., J., filed a separate dissenting opinion, in which CORNELIA A. CLARK, C.J., joined.

Daniel P. Berexa, C. Bennett Harrison, Jr. and Brian W. Holmes, Nashville, Tennessee, for the appellants, Joseph Davis and Kimberli Davis.

Michael G. Hoskins, Nashville, Tennessee, for the appellees, Patrick J. McGuigan and McGuigan & Associates.

OPINION

I. Facts and Procedural History

Joseph and Kimberli Davis ("the Davises") purchased an unimproved, corner lot in the Horseshoe Bend subdivision near Nashville, Tennessee, for $135,500. They subsequently retained an architect to design a custom home for the lot and selected Frawood Custom Builders as the contractor. After working extensively with the Davises to refine the home's design and to select amenities, furniture, and fixtures for the home, the contractor calculated that the cost of building the home to the Davises' specifications was $595,394.50, resulting in a total cost of $730,894.50 for the lot and construction.

To finance the construction, the Davises contacted Alene Gnyp, a loan consultant at SunTrust Bank ("SunTrust") and submitted a Uniform Residential Loan Application to SunTrust for a $580,000 residential loan. The loan application states, in part, "The [Davises] specifically acknowledge and agree that: . . . (9) the Lender, its agents, successors and assigns make no representation or warranties, express or implied, to the Borrower(s) regarding the property, the condition of the property, or the value of the property." As part of the loan application, the Davises also signed a document entitled "Disclosure Notices-Right to Receive A Copy of Appraisal," which states, "You have the right to a copy of the appraisal report used in connection with your application for credit." SunTrust began processing the Davises' loan application on May 15, 2002.

On June 18, 2002, an employee of SunTrust faxed an Appraisal Request to Patrick McGuigan, an appraiser whom SunTrust regularly used. The employee had written "Rush!" at the top of the request, and the request stated that the "sales price" for the Davises' proposed house was $735,000. Mr. McGuigan was provided the contractor's plans and specifications for the Davises' custom home. Mr. McGuigan accepted the assignment and executed a Uniform Residential Appraisal Report the next day.

According to the appraisal report, Mr. McGuigan used two approaches to appraise the property: the "cost approach" and the "sales comparison approach." Pursuant to the cost approach, Mr. McGuigan consulted the "Marshall & Swift Residential Cost Handbook, local builder estimates, and [his] own cost files" to estimate the cost per square foot to reproduce the home. Mr. McGuigan then multiplied the estimated cost per square foot by the total square feet of the home, added the product to the estimated site value, and added an "'As-is' Value of Site Improvements." Using the cost approach, Mr. McGuigan appraised the property's value as $731,000 if the home were completed according to the contractor's plans and specifications.

Using the sales comparison approach, Mr. McGuigan estimated the amount that a reasonable buyer would pay for the home by evaluating recent sales of comparable properties and adjusting the comparable properties' sales prices based on the subject home's specifications. Mr. McGuigan did not use any homes from the Horseshoe Bend subdivision for comparison and instead chose the recent sales of three properties in the LaurelBrooke subdivision, located approximately one mile from the Horseshoe Bend subdivision. According to the appraisal report,

> These sales were chosen due to their similarity to the subject [property] in size, quality, and appeal and are deemed the best and/or the most similar sales available as of the date of this report. All sales were given site adjustments due to the known difference in site values. Design/Appeal adjustments were given to all sales because the subject [property] is one story and cost[s] more to build. Equal weight was given to all sales in estimating the market value for the subject property.

Using the sales comparison approach, Mr. McGuigan appraised the Davises' property value as $735,000 if the home were completed according to its plans and specifications.

The appraisal report estimates the market value of the home as $735,000. It reconciles the differences in value resulting from the cost approach and the sales comparison approach by stating that "[b]ecause buyers rely heavily on comparisons, the direct sales comparison approach is considered the best indicator of market value" but that "[t]he cost approach supports the sales comparison approach."

Mr. McGuigan forwarded a copy of his appraisal report to SunTrust on June 21, 2002, including the Uniform Standards of Professional Appraisal Practice Compliance Addendum with the report. Under the heading "Purpose of the Appraisal," Mr. McGuigan included the following statement: "This appraisal report is prepared for the sole and exclusive use of the lender as mentioned in the client section of this report, to assist with the mortgage lending decision. It is not to be relied upon by third parties for any purpose, whatsoever." SunTrust was the only entity identified in the Lender/Client section of the appraisal report.

Ms. Gnyp informed the Davises by telephone that their proposed home had been appraised for $735,000 and that their loan application for $580,000 had been approved. At some time between June 21 and June 24, 2002, the Davises signed a cost-plus contract with Frawood Custom Builders to construct their home. The Davises had not obtained a copy of the appraisal report before they signed the contract with Frawood Custom Builders, nor did

they read the appraisal report when they received a copy of it at the loan closing on July 2, 2002.

After living in the completed home for more than a year, Mr. Davis returned to SunTrust seeking a home equity line of credit. SunTrust ordered another appraisal of the Davises' home as part of the loan approval process, and the second appraisal stated that the home's value was $510,000. The bank denied the Davises' loan application. After inquiring into the denial, Mr. Davis learned of the second appraisal. Around the same time, Ms. Davis became unemployed.

The Davises subsequently decided to sell their home. They consulted six real estate agents, each of whom told them that the home would sell for between $590,000 and $625,000. The Davises hired real estate agent Michael Hays to sell the property. On Mr. Hays's advice, the Davises listed the property for sale at $679,000 on November 30, 2004. The Davises accepted an offer on the home from the first prospective buyer and, on April 8, 2005, closed on the sale of the property for $660,000. On April 13, 2005, Mr. Davis filed a complaint for divorce, stating that he and Ms. Davis had separated on November 11, 2004.

On April 20, 2005, Mr. and Ms. Davis filed a complaint against Mr. McGuigan in the Circuit Court of Davidson County. The Davises asserted that Mr. McGuigan had intentionally or negligently misrepresented the market value of their home when he appraised it in June 2002 and that he had also violated the Tennessee Consumer Protection Act. After discovery, the trial court entered an order granting Mr. McGuigan summary judgment with regard to the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims. The Davises subsequently filed a notice of voluntary dismissal of their negligent misrepresentation claim.

The Davises appealed the summary judgment as to the intentional misrepresentation and Tennessee Consumer Protection Act claims to the Court of Appeals. The intermediate appellate court affirmed summary judgment, holding in part that because "appraisals are not considered facts, but rather estimates or opinions," an appraisal cannot provide the basis for an intentional misrepresentation claim. Davis v. McGuigan, No. M2007-02242-COA-R3-CV, 2008 WL 4254150, at *6 (Tenn. Ct. App. Sept. 10, 2008). We granted the Davises permission to appeal.

II. Analysis

Summary judgment may be granted only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Because the granting or denying of summary judgment is

a question of law, we apply a de novo standard of review. Blair v. W. Town Mall, 130 S.W.3d 761, 763 (Tenn. 2004). We first address whether the trial court properly granted Mr. McGuigan summary judgment on the Davises' intentional misrepresentation claim before turning to whether summary judgment was properly granted on the Davises' Tennessee Consumer Protection Act claim.

A. Intentional Misrepresentation Claim

The Davises must prove six elements to establish their claim of intentional misrepresentation at trial: (1) that Mr. McGuigan made a representation of an existing or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that Mr. McGuigan made the representation recklessly, with knowledge that it was false, or without belief that the representation was true; (5) that the Davises reasonably relied on the representation; and (6) that they were damaged by relying on the representation. Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 311 (Tenn. 2008) (citations omitted).

To satisfy his burden of production for summary judgment on the Davises' intentional misrepresentation claim, Mr. McGuigan must either produce evidence or refer to evidence in the record that affirmatively negates an essential element of the Davises' claim or shows that the Davises cannot prove an essential element of their claim at trial. Mills v. CSX Transp., Inc., 300 S.W.3d 627, 631 (Tenn. 2009) (citing Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 8-9 (Tenn. 2008)). To affirmatively negate an essential element of the claim of intentional misrepresentation, Mr. McGuigan must point to evidence that tends to disprove a material factual allegation made by the Davises. Id. (citing Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008)). Mr. McGuigan has identified evidence to challenge the first, fourth, fifth, and sixth elements.[1]

i.

Regarding the first element, Mr. McGuigan contends that his appraisal was an opinion, not a representation of fact, and that an opinion cannot provide a basis for the Davises to show at trial that Mr. McGuigan made a representation of existing or past fact. For support, Mr. McGuigan points to his appraisal report, which states that it provides an estimate of the market value. Additionally, we observe that a real estate appraisal is defined by Tennessee Code Annotated section 62-39-102(3) (2009) as "the act or process of

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[1] In his brief, Mr. McGuigan contends that there is no genuine issue of material fact as to any of the six elements. Before the trial court, however, he argued that summary judgment was warranted only on the first, fourth, fifth, and sixth elements. We therefore consider Mr. McGuigan's arguments regarding the second and third elements to be waived. See Fayne v. Vincent, 301 S.W.3d 162, 171 (Tenn. 2009).

developing an *opinion of value* of identified real estate." (Emphasis added). The Davises do not dispute that an appraisal is an opinion of value but argue that it is a representation for the purpose of an intentional misrepresentation claim.

In Sunderhaus v. Perel & Lowenstein, this Court stated that the general rule is that "ordinarily representations of value made by one seeking to dispose of property commercially are to be regarded as expressions of opinion . . . not constituting a basis of fraud." 388 S.W.2d 140, 142 (Tenn. 1965). We observed, however, "a number of exceptions to this general rule." Id. "Representations as to market price or market value are not mere statements of opinion, but are representations of fact which, if false, will support an action for fraud or deceit." Id. (quoting 23 Am. Jur. *Fraud and Deceit* § 62). We also stated,

> Wherever a party states a matter, which might otherwise be only an opinion, and does not state it *as the mere expression of his own opinion*, but affirms it *as an existing fact* material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation.

Id. at 142-43 (quoting 3 Pomeroy's Equity Jurisprudence § 878b (5th ed. 1941)). "The statements which most frequently come within this branch of the rule are those concerning value." Id. at 143 (quoting 3 Pomeroy's Equity Jurisprudence § 878b (5th ed. 1941)).

The Restatement (Second) of Torts also states that an opinion may give rise to an intentional misrepresentation claim. Restatement (Second) of Torts § 525 (1977). It further explains that the form of an opinion may control whether it is a representation. "'I believe that there are ten acres here,' is a different statement . . . from 'The area of this land is ten acres.' The one conveys an expression of some doubt while the other leaves no room for it." Restatement (Second) of Torts § 538A cmt. c (1977). The speaker's relationship to the recipient also is important. A person may doubt a seller's statement about the value of the property being sold while the same person may accept as true a disinterested expert's opinion of value about the same property. See Restatement (Second) of Torts § 539 cmt. c (1977).[2] Indeed, section 543 of the Restatement (Second) of Torts states, "The recipient of a fraudulent misrepresentation of opinion is justified in relying upon it if the opinion is that of

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[2] "[A] representation that a person who is reasonably believed by the recipient to be disinterested has a particular opinion[] may reasonably be understood as impliedly asserting that the opinion expressed is an honest one and that he knows of no facts that make it incorrect. This is true since there is no apparent reason for a disinterested person to exaggerate the facts upon which it may be assumed that his opinion is based and of which the recipient knows nothing."

a person whom the recipient reasonably believes to be disinterested and if the fact that such person holds the opinion is material."

We therefore hold that an opinion of value may provide the basis for a fraudulent misrepresentation claim and overrule the holding of the Court of Appeals that Mr. McGuigan's appraisal is not actionable because it is an opinion of value. Because Mr. McGuigan has not shown that the Davises are unable to prove the first element of their intentional misrepresentation claim at trial, he has not satisfied his burden of production for summary judgment on the first element. We therefore turn to Mr. McGuigan's arguments concerning the other elements of the Davises' intentional misrepresentation claim.

ii.

Regarding the fourth element, Mr. McGuigan contends that there is no genuine issue of material fact as to whether he made the representation recklessly, with knowledge that it was false, or without belief that the representation was true. In the context of determining whether punitive damages are warranted, we have held that a person acts recklessly when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 531 (Tenn. 2008) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992)); see Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 37-38 (Tenn. 2005).

In support of his position, Mr. McGuigan points to his deposition in which he states that he considered recent sales of homes in the Horseshoe Bend subdivision but deliberately used homes from the LaurelBrooke subdivision because he thought they provided a better comparison for the proposed construction. Mr. McGuigan also points to his appraisal's use of the objective cost approach as well as its use of the more subjective sales comparison approach to arrive at the $735,000 value of the house. Finally, Mr. McGuigan points to the appraisal report, which states that it was prepared in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). The Tennessee Real Estate Appraiser Commission, which was created by statute, has adopted the USPAP as its standard for professional practice. Real Estate Appraisers Licensing & Certification Act, ch. 865, § 7, 1990 Tenn. Pub. Acts 412-13 (codified as amended at Tenn. Code Ann. §§ 62-39-201 to -202); Tenn. Comp. R. & Regs. 1255-5-.01 (Lexis through May 2010).

Mr. McGuigan has affirmatively negated an essential element of the Davises' cause of action. By pointing to evidence that he considered homes in the LaurelBrooke subdivision to provide better comparisons, Mr. McGuigan has provided evidence that tends to disprove

the Davises' factual allegation that he intentionally chose homes in a more upscale neighborhood to inflate the proposed home's value. See Mills, 300 S.W.3d at 631. Also, Mr. McGuigan's statement that the value stated in the appraisal report was supported by the cost approach is evidence that tends to disprove the Davises' factual allegation that Mr. McGuigan did not believe his appraised value was accurate. Finally, by pointing to evidence that he adhered to the standard of professional practice for appraisers, Mr. McGuigan has provided evidence that tends to disprove the Davises' factual allegation that his actions grossly deviated from the standard of care for an ordinary appraiser. Mr. McGuigan therefore has satisfied his burden of production for summary judgment on this element.

Consequently, the Davises must "produce evidence of specific facts establishing that genuine issues of material fact exist" to show that summary judgment is not warranted. Martin, 271 S.W.3d at 84. The Davises may satisfy their burden of production by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.

Id. (quoting McCarley v. W. Quality Food Serv., 960 S.W.2d 585, 588 (Tenn. 1998)).

The Davises point to several specific facts to establish a genuine issue of material fact, including that the appraisal request from SunTrust asked for a "Rush!" appraisal; the request included the "sales price" for the proposed construction, which both parties agree is unnecessary for an appraiser's analysis; Mr. McGuigan completed the appraisal in less than one business day; the appraisal value matched the "sales price"; and Mr. McGuigan did not use any properties in the Horseshoe Bend subdivision when using the sales comparison approach to determine the market value of the proposed construction.

Additionally, the Davises point to the deposition and affidavit of J. Donald Turner, an appraiser whom the Davises disclosed as an expert witness testifying on their behalf.[3] Mr.

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[3] Mr. McGuigan challenges Mr. Turner's affidavit based on allegedly contradictory statements in his affidavit and deposition regarding whether Mr. McGuigan had intentionally created an inaccurate appraisal of the Davises' home. We conclude that the trial court did not err in denying Mr. McGuigan's motion to strike the statement in the affidavit pursuant to the cancellation rule because the statement in the affidavit is not contradictory to the statements in the deposition. See Church v. Perales, 39 S.W.3d 149, (continued...)

Turner stated that Mr. McGuigan failed to conform to the USPAP by failing to include properties from the Horseshoe Bend subdivision for comparison when conducting the sales comparison approach. Mr. Turner stated that placing too much reliance on the cost approach to appraise proposed construction is inappropriate because a home's cost of construction does not necessarily equal the home's ultimate value. He stated that an appraisal of proposed construction should include properties for comparison from the same neighborhood to prevent overbuilding, that is, spending significantly more to construct a home than other homes in the neighborhood are worth.

To determine whether the specific facts identified by the Davises create a genuine issue of material fact precluding summary judgment, we take the strongest legitimate view of the evidence in favor of the Davises, allow all reasonable inferences in their favor, and discard all countervailing evidence. Blair, 130 S.W.3d at 768 (quoting Byrd v. Hall, 847 S.W.2d 208, 210-11 (Tenn. 1993)). There is a genuine issue of material fact if the undisputed facts and inferences drawn in the Davises' favor permit a reasonable person to reach more than one conclusion. See Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000). In reviewing the statements of Mr. Turner, a reasonable person can reach different conclusions as to whether Mr. McGuigan deviated from the USPAP in preparing his appraisal of the Davises' proposed home and whether that deviation was substantial enough to amount to a conscious disregard of a substantial and unjustifiable risk of such a nature so as to constitute a gross deviation from the standard of care.[4] The Davises therefore have shown that there is a genuine issue of material fact as to whether Mr. McGuigan acted recklessly, and summary judgment is not warranted based on this element.[5]

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[3] (...continued)
169-70 (Tenn. Ct. App. 2000); accord Johnston v. Cincinnati N.O. & T.P. Ry. Co., 240 S.W. 429, 435-36 (Tenn. 1922). Although there may be appropriate questions regarding the weight to be given Mr. Turner's testimony at trial in light of his equivocation, determining the weight of the evidence is not appropriate at the summary judgment stage. Martin, 271 S.W.3d at 87.

[4] The dissent states that "Mr. Turner's testimony regarding Mr. McGuigan's beliefs or intent in performing the appraisal should not be considered in determining whether the trial court properly granted the summary judgment" because "Mr Turner's testimony regarding whether Mr. McGuigan intentionally performed an inaccurate appraisal is, by his own admission, speculation." The speculative nature of Mr. Turner's testimony was not raised by Mr. McGuigan. If it had been raised, however, it would not preclude us from considering Mr. Turner's testimony that Mr. McGuigan's conduct was outside the standard of care for appraisers, which cannot be characterized as speculation. It is on the basis of Mr. Turner's testimony concerning the standard of care for appraisers that we recognize a genuine issue of material fact that precludes summary judgment based on the fourth element.

[5] The dissent disagrees with this holding, stating that "the Davises have been unable to present any direct evidence substantiating their assertion that Mr. McGuigan 'intentionally or recklessly misrepresented

(continued...)

iii.

Regarding the fifth element, Mr. McGuigan argues that the Davises cannot show they reasonably relied on his appraisal as a matter of law. We must first address how the Davises can show at trial that they reasonably relied on Mr. McGuigan's appraisal before we can determine whether Mr. McGuigan has pointed to evidence satisfying his burden of production for summary judgment.

Whether a person's reliance on a representation is reasonable generally is a question of fact requiring the consideration of a number of factors. E.g., City State Bank v. Dean Witter Reynolds, Inc., 948 S.W.2d 729, 737 (Tenn. Ct. App. 1996). The factors include the plaintiff's sophistication and expertise in the subject matter of the representation, the type of relationship – fiduciary or otherwise – between the parties, the availability of relevant information about the representation, any concealment of the misrepresentation, any opportunity to discover the misrepresentation, which party initiated the transaction, and the specificity of the misrepresentation. See, e.g., id.; accord Allied Sound, Inc. v. Neely, 58 S.W.3d 119, 122-23 (Tenn. Ct. App. 2001).

The cause of action alleged by the Davises, however, differs from most intentional misrepresentation claims. The Davises do not allege that Mr. McGuigan directly represented to them the value of the home. Instead, Mr. McGuigan provided the appraisal to SunTrust, and Ms. Gnyp, a SunTrust employee, conveyed the result of Mr. McGuigan's appraisal to the Davises. The Davises in turn contend that they relied on the figure conveyed to them by Ms. Gnyp, not the appraisal report prepared by Mr. McGuigan, when they decided to execute the construction contract.

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[5] (...continued)
that his best estimate of the value of the plaintiffs' proposed construction was $735,000.'" The dissent reaches this conclusion by applying an incorrect summary judgment analysis. First, a party opposing a summary judgment motion need not present direct evidence. Rather, the party only "must set forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. Second, the dissent acknowledges four undisputed, specific facts introduced by the Davises, excluding the testimony of Mr. Turner. To determine if there is a genuine issue of material fact for trial, we are limited to taking the strongest legitimate view of the evidence in favor of the party opposing the summary judgment motion, allowing all reasonable inferences in that party's favor, and discarding all countervailing evidence. Blair, 130 S.W.3d at 768. Although the dissent acknowledges this standard, it nevertheless evaluates the Davises' facts in the context of "the parties' lengthy and detailed discovery," comparing the Davises' facts to those facts introduced by Mr. McGuigan. Our well-established summary judgment analysis precludes us from weighing facts in this manner. Martin, 271 S.W.3d at 87 (citing Byrd, 847 S.W.2d at 211); accord Martin, 271 S.W.3d at 89 (Koch, J., concurring) (concluding that "[w]hile there may be substantial doubt about the weight that a reasonable jury might give to [a witness's] testimony, it is sufficient for summary judgment purposes to create a genuine issue").

In an analogous case, the United States District Court for Kansas held that a person seeking to recover for a misrepresentation not heard directly from the source "must demonstrate that his or her reliance on the original fraudulent misrepresentation would have been justifiable." Deboer v. Am. Appraisal Assocs., Inc., 502 F. Supp. 2d 1160, 1168 (D. Kan. 2007). In Deboer, the plaintiff executed a loan guarantee to a company after learning from the company's owner that "a fairly current appraisal from [defendant] American Appraisal" had appraised the value of the company at "'a million three or some such number.'" Id. at 1167. After the company went bankrupt, the plaintiff brought an action for fraudulent misrepresentation against the appraiser.

The district court initially observed that "under Kansas law a third party may have an action for fraud without any direct contact with and without having received any direct misrepresentations from the defrauding party." Id. at 1168. The plaintiff, however, could not base his action "on the pared down version of the appraisal that he received from" the company's owner. Id. Construing section 533 of the Restatement (Second) of Torts, which states that "[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance *upon it*," the court reasoned that the plaintiff must show that he could justifiably rely on a misrepresentation in the appraisal report, not on the company owner's incomplete summary of the appraisal report, to recover from the appraiser. Id. (emphasis added). The court granted summary judgment to the defendant appraiser because "the appraisal was so laden with qualifications and disclaimers that no reasonable financier would have accepted it as appropriate to support a $595,000 loan guarantee without conducting any further investigation." Id. at 1169.

We agree with the court's reasoning in Deboer. Recovery should be determined based on the defendant's representation, not on how the representation was relayed. To that end, we adopt section 533 of the Restatement (Second) of Torts, which states in its entirety,

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

To show at trial that they reasonably relied on Mr. McGuigan's representation, the Davises therefore must show that (1) they could have reasonably relied on Mr. McGuigan's appraisal report, (2) Mr. McGuigan intended or had reason to expect that the terms or substance of his

appraisal report would be repeated to the Davises, and (3) Mr. McGuigan intended or had reason to expect that his appraisal would influence the Davises' conduct in deciding to proceed with the construction.

We now turn to whether Mr. McGuigan has identified or introduced facts in the record that affirmatively negate the reasonable reliance element of the Davises' claim. Mr. McGuigan points to the appraisal report, which states, "This appraisal report is prepared for the sole and exclusive use of the lender [SunTrust] . . . , to assist with the mortgage lending decision. It is not to be relied upon by third parties for any purpose, whatsoever." The evidence shows that Mr. McGuigan stated in the appraisal report that it was prepared solely for the client and that third parties should not rely on it. We hold that this evidence tends to disprove the Davises' material factual allegation that they could have reasonably relied on the appraisal report. It therefore affirmatively negates an essential element of the Davises' claim, and Mr. McGuigan has satisfied his burden of production for summary judgment. See Mills, 300 S.W.3d at 631; Hannan, 270 S.W.3d at 8-9.

In response, the Davises point to evidence in the record to identify a genuine issue of material fact as to this element. See Martin, 271 S.W.3d at 84. They point to Mr. Davis's deposition, in which he stated that Ms. Gnyp conveyed to him Mr. McGuigan's appraisal value for the home and that he relied on it as a representation of a disinterested appraiser when proceeding with construction. They point to the appraisal report, which states, "I stated in the appraisal report only my personal, unbiased, and professional analyses, opinions, and conclusions," and "I certify to the best of my knowledge and belief: The statements of fact contained in this report are true and correct." The Davises also point to the statements in Mr. Turner's affidavit that "[a]ppraisers know that buyers of property are interested in and could learn of the value at which they appraise that property. Appraisers know that those buyers . . . are likely to rely upon their conclusions in making decisions regarding the purchase, or in this case construction, of a residence."

Taking the strongest legitimate view of the evidence in favor of the Davises, allowing all reasonable inferences in their favor, and discarding all countervailing evidence, we hold that summary judgment is not warranted based on this element. See Blair, 130 S.W.3d at 768 (quoting Byrd, 847 S.W.2d at 210-11). Looking to the appraisal report, a reasonable person could reach different conclusions as to whether the Davises could have reasonably relied on the appraisal report as a statement of a disinterested expert as to the value of their home.[6]

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[6] The dissent concludes that no reasonable fact-finder could determine based on the undisputed facts that the Davises relied on Mr. McGuigan's appraisal because, in part, "the Davises could only have relied on the statement of the bank employee that their project had appraised for $735,000." The Davises contend, however, that they reasonably relied on the appraisal estimate from the appraisal report and that they could (continued...)

See Staples, 15 S.W.3d at 89. Furthermore, looking at the statements of Mr. Turner in his affidavit, a reasonable person could reach different conclusions as to whether Mr. McGuigan had reason to expect that SunTrust would communicate the substance of the appraisal report to the Davises and that the result might influence the Davises' conduct despite the report's disclaimer. As we stated in Martin, "although a trial court may conclude that the plaintiffs' case is not particularly strong, it is not the role of a trial or appellate court to weigh the evidence or substitute its judgment for that of the trier of fact." 271 S.W.3d at 87.

iv.

Regarding the sixth element of the Davises' intentional misrepresentation claim, Mr. McGuigan contends that the Davises sold their home for less than its $735,000 value because of a superseding cause, namely the loss of Ms. Davis's job and the Davises' impending divorce. A superseding cause "breaks the chain of proximate causation and thereby precludes recovery." White v. Lawrence, 975 S.W.2d 525, 529 (Tenn. 1998). To establish that an intervening event is a superseding cause, Mr. McGuigan must show: (1) that the harmful effects of the intervening event occurred after his allegedly reckless conduct; (2) that the intervening event was not brought about by his conduct in forming the appraisal; (3) that the intervening event actively worked to bring about a result that would not have followed from his conduct; and (4) that he could not reasonably foresee the intervening event. White v. Premier Med. Grp., 254 S.W.3d 411, 417 (Tenn. Ct. App. 2007) (citing Godbee v. Dimick, 213 S.W.3d 865, 882 (Tenn. Ct. App. 2006)); see White v. Lawrence, 975 S.W.2d at 529. Because Mr. McGuigan bears the burden of proof at trial to establish this affirmative defense, he must introduce undisputed facts showing the existence of the superseding cause to satisfy his burden of production for summary judgment. See Hannan, 270 S.W.3d at 9 n.6.

Mr. McGuigan points to the deposition of Ms. Davis, who stated that the Davises needed to sell their home because she lost her job and could not make mortgage payments without her income. Mr. McGuigan also identifies the Divorce Complaint filed by Mr. Davis, which states that the Davises separated on November 11, 2004, less than three weeks before they listed the home for sale. Mr. McGuigan further points to the affidavit of the Davises' real estate agent, Mike Hays, who stated that the Davises agreed to list their home for $679,000 without first listing it for $735,000. Finally, Mr. McGuigan points to the affidavit of Steven Johnson, who purchased the Davises' home. In his affidavit, Mr. Johnson states that he and his wife noticed signs of unemployment and divorce and "extended an offer

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[6] (...continued)
have reasonably relied on the appraisal report if they reviewed it. By pointing to specific facts showing that the appraisal report stated it was an unbiased and accurate estimate of the home's value, the Davises have identified a genuine issue of material fact as to whether they could have reasonably relied on Mr. McGuigan's representation.

to the Davises that was substantially below their asking price[] because we felt the Davises were exceptionally motivated to sell the property and were willing to take less than what the property was worth." Mr. Johnson also stated that he and his wife "might have been willing to pay more than the list price."

Mr. McGuigan has not satisfied his burden of production for summary judgment on this element. He has not pointed to undisputed facts establishing the third element of the superseding cause analysis, that the intervening events of Ms. Davis's unemployment or the Davises' divorce brought about a result that would not have followed from Mr. McGuigan's appraisal. More specifically, the record includes the affidavit of Mr. Davis, in which Mr. Davis states that they were not unduly motivated to sell their home and that they had the financial ability to continue paying their mortgage despite Ms. Davis's loss of her job. Viewing the evidence in a light most favorable to the Davises, a reasonable person could reach different conclusions as to whether the Davises' circumstances resulted in the sale of their home for less than market value. See Staples, 15 S.W.3d at 89. Mr. McGuigan has failed to show that there is no genuine issue of material fact regarding the existence of a superseding cause, and summary judgment therefore is not warranted based on the sixth element of the intentional misrepresentation claim. See McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 905 (Tenn. 1996) (stating that "the existence of a superseding, intervening cause [is a] jury question[] unless the uncontroverted facts and inferences to be drawn from the facts make it so clear that all reasonable persons must agree on the proper outcome" (citations omitted)).

B. Tennessee Consumer Protection Act

Mr. McGuigan also moves for summary judgment on the Davises' Tennessee Consumer Protection Act claim. The Tennessee Consumer Protection Act creates a cause of action for "[a]ny person who suffers an ascertainable loss of money or property . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by" the Consumer Protection Act. Tenn. Code Ann. § 47-18-109(a)(1) (2001). In their complaint, the Davises do not allege that Mr. McGuigan engaged in any specific act or practice declared unlawful by the Tennessee General Assembly in Tennessee Code Annotated section 47-18-104(b) (2001 & Supp. 2009). As such, to establish their Tennessee Consumer Protection Act claim at trial, the Davises must prove that they suffered "an ascertainable loss of money or property . . . as a result" of Mr. McGuigan's "engaging in any . . . act or practice which is deceptive to the consumer or to any other person." Tenn. Code Ann. §§ 47-18-104(b)(27), -109(a).

Mr. McGuigan contends that his actions were neither deceptive nor unfair. "[A] 'deceptive act or practice' is a material representation, practice or omission likely to mislead

a reasonable consumer." Ganzevoort v. Russell, 949 S.W.2d 293, 299 (Tenn. 1997) (quoting Bisson v. Ward, 628 A.2d 1256, 1261 (Vt. 1993)); see Fayne, 301 S.W.3d at 177. An act is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Tucker v. Sierra Builders, 180 S.W.3d 109, 116-17 (Tenn. Ct. App. 2005) (quoting 15 U.S.C.A. § 45(n) (1977)).

We need not decide whether Mr. McGuigan satisfied his burden of production for summary judgment because the Davises have identified a genuine issue of material fact precluding summary judgment on this claim. Mills, 300 S.W.3d at 634-35. The Davises point to the appraisal report's use of the sale of homes only from the LaurelBrooke subdivision for the sales comparison approach. The Davises also point to the deposition of Mr. Turner, who opined that Mr. McGuigan deviated from the standard of care for appraisers in failing to include a home from the Horseshoe Bend subdivision as a comparison. We have held that negligent misrepresentations may be found to be a violation of the Tennessee Consumer Protection Act, see Fayne, 301 S.W.3d at 177, and that "[w]hether a particular act is unfair or deceptive is a question of fact," id. at 170. Viewing the evidence in a light most favorable to the Davises, drawing all reasonable inferences in their favor, and discarding all countervailing facts, a reasonable person could reach different conclusions as to whether Mr. McGuigan's appraisal was unfair or deceptive. See Staples, 15 S.W.3d at 88-89. Summary judgment therefore is not warranted based on this claim.[7]

III. Conclusion

We hold that Mr. McGuigan has failed to satisfy the requirements for summary judgment as to either the Davises' intentional misrepresentation claim or their Tennessee Consumer Protection Act claim. We therefore reverse the decision of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion. Costs are assessed against the appellees, Patrick J. McGuigan and McGuigan & Associates, for which execution may issue if necessary.

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JANICE M. HOLDER, JUSTICE

[7] Mr. McGuigan also contends that the Davises cannot show that they suffered an ascertainable loss *as a result of* his action. As we explained in Section II.A.iii., there is a genuine issue of material fact as to whether the Davises' reliance on Mr. McGuigan's appraisal was reasonable. This issue of material fact likewise precludes summary judgment as to whether Mr. McGuigan's appraisal caused the Davises an ascertainable loss.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
October 6, 2009 Session

JOSEPH DAVIS ET AL. v. PATRICK J. McGUIGAN ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Davidson County
No. 05C-115 Hamilton V. Gayden, Jr., Judge

No. M2007-02242-SC-R11-CV - Filed October 26, 2010

WILLIAM C. KOCH, JR., J., dissenting.

This appeal involves the liability of a real estate appraiser to two property owners for an appraisal prepared for the use of the bank that loaned the property owners funds to construct an expensive, custom-built house. The Court today reverses the conclusions of both the trial court and the Court of Appeals that the appraiser was entitled to a summary judgment dismissing the property owners' intentional misrepresentation and Tennessee Consumer Protection Act claims. I respectfully disagree. The only reasonable conclusion to be drawn from the undisputed facts of this case is that the appraiser is entitled to a judgment as a matter of law with regard to the property owners' intentional misrepresentation and Tennessee Consumer Protection Act claims.

I.

Joseph and Kimberly Davis married in September 2000. Both were college graduates and were gainfully employed. Mr. Davis had worked for twenty-four years as a finance manager for General Motors. Ms. Davis had worked for eighteen years as a sales executive but had recently changed jobs. Their combined annual income was approximately $158,000.

The Davises decided that they would mark their marriage by building their dream home. Even before their wedding, they purchased an unimproved corner lot in the upscale Horseshoe Bend subdivision near Nashville for $135,000. Following their marriage, they worked with a custom builder to prepare plans for a 3,940 square foot ranch-style house with three bedrooms, three and one-half bathrooms, and many luxurious amenities. The Davises' contractor informed them that the house would cost $595,394.50 to construct.

The Davises then contacted SunTrust Bank to arrange financing for their new house. Based on its estimate that the value of the house and lot was $735,000, the bank told the Davises that the largest loan they could qualify for would be $580,000 if they desired to avoid the additional expense of private mortgage insurance. Accordingly, on May 12, 2002, the Davises completed and signed an application for a $580,000 loan. While this application did not obligate the Davises to borrow the funds from the bank, it served the purpose of locking in a favorable interest rate as long as the loan was closed within sixty days.

The processing of the Davises' loan application was slowed for three reasons. First, the loan-to-value ratio of their loan exceeded 75%. Second, the debt-to-income ratio of their loan exceeded 38%. Third, Ms. Davis had recently changed jobs and had been employed by her current employer for a relatively short period of time. These circumstances necessitated obtaining additional information from the Davises and required additional internal bank approvals. Eventually, on June 17, 2002, the bank approved the Davises' loan application.

On June 18, 2002, with the deadline for the locked-in interest rate fast approaching, the bank faxed a request for a residential appraisal to Patrick McGuigan, one of the six appraisers who regularly performed residential appraisals for the bank. The bank provided Mr. McGuigan with the name of the borrowers, the name of the builder, and the address of the property. It also informed Mr. McGuigan that the "sales price" was $735,000.[1] At the top of the bank's request, written in hand, was the word "Rush!".[2] The bank also provided Mr. McGuigan with the plans and specifications for the house.

Mr. McGuigan was able to prepare his appraisal for the bank in one day, largely because the loan involved new construction. Using the "cost approach," he examined the plans and specifications for the proposed house and estimated that the value of the lot and planned house was $731,000. Mr. McGuigan also examined the sales of comparable houses in the area to determine the value of the Davises' new house. After deciding that many of the amenities that the Davises planned to include in their house were not found in other houses in the Horseshoe Bend subdivision, Mr. McGuigan decided to select comparable houses in a nearby subdivision called LaurelBrooke. After adjusting for the differences between the Davises' house and the comparable houses, Mr. McGuigan estimated that the

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[1]The bank employees later testified without contradiction that it was commonplace for them to include the "sales price" on appraisal requests and that most appraisers asked for the "sales price" if it was not provided.

[2]The bank employees later testified without contradiction that they regularly marked their appraisal request with "rush" because it was the nature of the business.

market value of the Davises' house, if built according to the plans and specifications, would be $735,000.

On June 19, 2002, Mr. McGuigan forwarded a copy of his appraisal report and an invoice for $325 to the bank. He included with his appraisal a copy of the Uniform Standards of Professional Appraisal Practice ("USPAP") Compliance Addendum. Under the heading "Purpose of the Appraisal," Mr. McGuigan included the following statement:

> This appraisal report is prepared for the sole and exclusive use of the lender as mentioned in the client section of this report, to assist with the mortgage lending decision. It is not to be relied upon by any third parties for any purpose, whatsoever.

When the bank received Mr. McGuigan's appraisal, it informed the Davises that the proposed house and property had been appraised for $735,000 and that their loan application had been approved. The Davises did not request a copy of the appraisal despite being informed in writing that they could request a copy of the report at any time.

On June 21, 2002, the Davises signed a cost-plus contract with their contractor in which they agreed to pay $60,000 plus the actual cost of the construction of the house. This contract did not contain any financing contingencies. Around this same time, the Davises took out a loan against the equity in their current residence to use as a down payment. This loan provided sufficient additional funds necessary to complete the project and to enable the Davises to avoid purchasing private mortgage insurance.

On July 2, 2002, as a result of the timely efforts of the bank staff and Mr. McGuigan, the Davises and the bank held a closing on the Davises' mortgage loan at the agreed upon interest rate. During the closing, the Davises signed a final Uniform Residential Loan Application and a Construction and Permanent Loan Agreement. The following disclaimer appears in the "Acknowledgment and Agreement" section of the loan application immediately above the Davises' signatures:

> [T]he Lender, its agents, successors and assigns make no representations or warranties, express or implied, to the Borrower(s) regarding the property, the condition of the property, or the value of the property.

Even though the bank provided the Davises with a copy of Mr. McGuigan's appraisal at the closing, the Davises did not read or review it.

The construction of the Davises' new home was substantially complete by June 2003. The loan agreement required Mr. McGuigan to recertify his original appraisal after the house was substantially completed. This process called for viewing the house as constructed and comparing it with recent sales of comparable houses. On June 17, 2003, Mr. McGuigan completed his recertification stating that the house's value was at least $735,000 in his opinion.

The Davises were pleased with their new house. However, in the Fall of 2004, changed circumstances required the Davises to reconsider their personal finances. In September 2004, the Davises applied to SunTrust Bank for a home equity loan to pay credit card debt. In November 2004, Ms. Davis lost her job, thereby significantly reducing the Davises' combined income. The Davises also separated in November 2004.

The bank declined to approve the Davises' application for a home equity loan after a "desk top" appraisal of their house indicated that the current market value of the house was less than the balance of the mortgage loan.[3] In light of their circumstances, the Davises retained a realtor to sell their house. They listed the house for $679,900 and sold the house for $660,000 to the first buyer who made an offer. This sale closed on April 8, 2005. Five days later, on April 13, 2005, Mr. Davis filed for divorce in the Circuit Court for Williamson County.

On April 20, 2005, one week after Mr. Davis filed for divorce, the Davises filed a complaint in the Circuit Court for Davidson County seeking to recover damages from Mr. McGuigan. Among their many claims, the Davises alleged that Mr. McGuigan had intentionally misrepresented the fair market value of their house when he prepared his appraisals and that Mr. McGuigan had also violated the Tennessee Consumer Protection Act. In addition to compensatory damages, the Davises sought either punitive damages or treble damages under the Tennessee Consumer Protection Act.

After over one year of discovery, Mr. McGuigan filed a motion for summary judgment seeking dismissal of all of the Davises' claims. He supported this motion with voluminous evidentiary materials and with the Davises' responses to his statement of undisputed material facts. The Davises opposed the motion with evidentiary materials of their own, including affidavits from three experts regarding the deficiencies in Mr. McGuigan's appraisal methodology. Mr. McGuigan moved to strike these three affidavits.

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[3]A "desktop" appraisal is a computer-generated appraisal based on tax records. The desktop appraisal performed in the Fall of 2004 estimated that the market value of the Davises' house was $510,000. The face amount of the original mortgage loan was $580,000.

The trial court heard both the motion to strike the affidavits of the Davises' three experts and Mr. McGuigan's motion for summary judgment on February 2 and 23, 2007. During the February 23, 2007 hearing, the trial court granted Mr. McGuigan's motion to strike the affidavits of two of the Davises' three experts. On March 7, 2007, the trial filed an order excluding the affidavits of the two experts and a separate order granting Mr. McGuigan a summary judgment with regard to the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims.

The case proceeded on the Davises' negligent misrepresentation claim against Mr. McGuigan. A trial date was set for September 27, 2007 – almost two and one-half years after the filing of the complaint. However, following a hearing on September 14, 2007, the trial court entered an order on September 21, 2007, determining that two of the Davises' expert witnesses were not qualified to provide expert opinions regarding the standard of care of appraisers of real property in Middle Tennessee or the value of real property in Middle Tennessee.[4] Hobbled by the exclusion of two of their expert witnesses, the Davises filed a notice of the voluntary dismissal of their negligent misrepresentation claim on September 21, 2007. The Davises filed a notice of appeal on September 28, 2007.

Before the Court of Appeals, the Davises took issue with the trial court's decision to grant Mr. McGuigan a summary judgment on their intentional misrepresentation and Tennessee Consumer Protection Act claims. They also took issue with the trial court's decisions to exclude their expert witnesses. For his part, Mr. McGuigan objected to the trial court's denial of his motion to exclude the affidavit of the third expert witness whom the Davises had retained to oppose his summary judgment motion.

The Court of Appeals filed its opinion on September 10, 2008, concluding that the trial court had correctly granted the summary judgment dismissing the Davises' fraudulent misrepresentation and Tennessee Consumer Protection Act claims. *Davis v. McGuigan*, No. M2007-02242-COA-R3-CV, 2008 WL 4254150, at *9 (Tenn. Ct. App. Sept. 10, 2008). Because the Davises had voluntarily dismissed their negligent misrepresentation claim, the Court of Appeals declined to address the trial court's post-summary judgment evidentiary rulings or its denial of Mr. McGuigan's motion for summary judgment on the Davises' negligent misrepresentation claim. *Davis v. McGuigan*, 2008 WL 4254150, at *7-9. The Court of Appeals did not explicitly address the issue raised by Mr. McGuigan regarding the denial of his motion to strike Mr. Turner's affidavit filed in opposition to the motion for summary judgment.

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[4]The record reflects that one of the Davises' witnesses had received a warning from the Tennessee Real Estate Commission regarding engaging in unlicensed appraisal practice.

The Davises filed a Tenn. R. App. P. 11 application for permission to appeal with regard to the summary judgment dismissing their intentional misrepresentation and Tennessee Consumer Protection Act claims against Mr. McGuigan. Mr. McGuigan did not file a Tenn. R. App. P. 11 application. However, in his brief filed after this Court granted the Davises' application for permission to appeal, Mr. McGuigan took issue with the portion of the trial court's May 23, 2007 order denying his motion to strike the affidavit of the Davises' third expert filed in opposition to his summary judgment motion.

II.

Summary judgments are not disfavored procedural devices. *Eskin v. Bartee*, 262 S.W.3d 727, 732 (Tenn. 2008); *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997). They provide a disciplined process that enables courts to pierce through the pleadings to determine whether a particular case justifies the time and expense of a trial. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). Accordingly, a summary judgment is proper in virtually any civil case that can be resolved on legal issues alone. *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009).[5]

A court should grant a summary judgment when the undisputed facts, as well as the inferences reasonably drawn from the facts, permit the conclusion that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Griffis v. Davidson Cnty. Metro. Gov't*, 164 S.W.3d 267, 284 (Tenn. 2005); *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002). A defendant seeking a summary judgment is entitled to a judgment as a matter of law when, relying on the undisputed facts, it "affirmatively negate[s]" an essential element of the plaintiff's case or when it "show[s]" that the plaintiff cannot prove an essential element of its claim at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

An order granting a summary judgment is not entitled to the presumption of correctness on appeal. *Stanfill v. Mountain*, 301 S.W.3d 179, 184-85 (Tenn. 2009); *Amos v. Metro. Gov't of Nashville & Davidson Cnty.*, 259 S.W.3d 705, 710 (Tenn. 2008). Accordingly, in each case, the appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been met. *Green v. Green*, 293 S.W.3d at 514;

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[5]For example, while this Court has noted that summary judgments are "almost never an option" in contested workers' compensation cases, *Berry v. Consol. Sys., Inc.*, 804 S.W.2d 445, 446 (Tenn. 1991), we have affirmed summary judgments in workers' compensation cases when the party seeking the judgment has complied with all the requirements of Tenn. R. Civ. P. 56. *Wait v. Travelers Indem. Co.*, 240 S.W.3d 220, 230 (Tenn. 2007) ; *Dye v. Witco Corp.*, 216 S.W.3d 317, 322-23 (Tenn. 2007).

Staples v. CBL & Assocs., 15 S.W.3d 83, 88 (Tenn. 2000); *Mason v. Seaton*, 942 S.W.2d 470, 472 (Tenn. 1997).

Appellate courts reviewing a summary judgment must consider the evidence in the light most favorable to the non-moving party and must draw all reasonable inferences in the non-moving party's favor. *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 632 (Tenn. 2009); *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 84 (Tenn. 2008). When reviewing the evidence, they must first determine whether factual disputes exist. If a factual dispute exists, the reviewing courts must determine whether the disputed fact is material to the claim or defense being tested by the summary judgment motion and whether the disputed fact creates a genuine issue for trial. *Eskin v. Bartee*, 262 S.W.3d at 732; *Cumulus Broad., Inc. v. Shim*, 226 S.W.3d 366, 374 (Tenn. 2007); *McCarley v. W. Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998). However, no factual dispute exists when the undisputed facts and the inferences drawn from the undisputed facts permit a reasonable fact-finder to reach only one factual conclusion. *Gossett v. Tractor Supply Co.*, ___ S.W.3d ___, ___, 2010 WL 3633459, at *6 (Tenn. 2010); *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009).

III.

We turn first to the issue raised by Mr. McGuigan regarding the admissibility of one of the affidavits offered by the Davises to oppose his motion for summary judgment. Mr. McGuigan asserts that the trial court erred by denying his motion to strike an affidavit[6] prepared by J. Donald Turner, one of the Davises' experts, in an effort to shore up his earlier deposition. The resolution of this issue affects the facts that can properly be considered in determining whether Mr. McGuigan is entitled to a judgment as a matter of law with regard to the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims.

A.

The legal sufficiency of the evidentiary materials in the record when a court considers a summary judgment motion is of pivotal importance. Affidavits are the most common form of evidence submitted at the summary judgment stage. 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2722, at 377 (3d ed. 1998) ("*Federal Practice and Procedure*"). The substance of evidence in affidavits submitted by the parties to support and to oppose a summary judgment motion must be admissible at trial. Tenn. R. Civ. P. 56.06; *Green v. Green*, 293 S.W.3d at 513; *Messer Griesheim Indus. v. Cryotech of Kingsport, Inc.*, 45

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[6] A motion to strike is the proper vehicle for challenging the admissibility of evidence at the summary judgment stage of the proceeding. 11 James Wm. Moore et al., *Moore's Federal Practice and Procedure* § 56.14[4][a] (3d ed. 2009).

S.W.3d 588, 598 (Tenn. Ct. App. 2001); *see also* 10B *Federal Practice and Procedure* § 2738, at 330, 342. Accordingly, these affidavits are likely to be scrutinized carefully by the courts to evaluate their probative value and to determine whether they meet the standards prescribed in Tenn. R. Civ. P. 56.06. *See* 10A *Federal Practice and Procedure* § 2722, at 379.

When issues have been raised regarding the compliance of affidavits with the standards prescribed by Tenn. R. Civ. P. 56 or the admissibility of evidence contained in these affidavits, the threshold issue of admissibility should be resolved before determining whether or not unresolved questions of fact exist. *Travis v. Ferraraccio*, No. M2003-00916-COA-R3-CV, 2005 WL 2277589, at *4-5 (Tenn. Ct. App. Sept. 19, 2005) (No Tenn. R. App. P. 11 application filed); *see also United States v. Hangar One, Inc.*, 563 F.2d 1155, 1157-58 (5th Cir. 1977); *EEOC v. Fostoria Restaurants, Inc.*, 25 F. Supp. 2d 803, 806 (N.D. Ohio 1998); *Montgomery v. Montgomery*, 205 P.3d 650, 658 (Idaho 2009); *Chavez v. Ronquillo*, 612 P.2d 234, 237 (N.M. Ct. App. 1980). After these threshold questions have been addressed, the trial court may then determine whether, taking the strongest view of the admissible evidence in favor of the non-moving party, there remain any genuine issues of material fact to be decided at trial. *Byrd v. Hall*, 847 S.W.2d at 210-11.

Thus, before determining whether the lower courts properly determined that Mr. McGuigan was entitled to a summary judgment with regard to the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims, it is appropriate to address and to decide definitively the admissibility of the substance of Mr. Turner's affidavit. If Mr. McGuigan is correct that the substance of Mr. Turner's affidavit is inadmissible, the affidavit should play no role in the consideration of Mr. McGuigan's summary judgment motion. By the same token, if Mr. McGuigan is not correct, then the facts and opinions contained in Mr. Turner's affidavit can properly be considered in determining whether Mr. McGuigan is entitled to a summary judgment.

Decisions regarding the admissibility of evidence are discretionary, and, therefore, the appellate courts review these decisions using the "abuse of discretion" standard. *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005); *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004). This standard applies to appellate review of decisions by a trial court when it is acting as a gatekeeper with regard to the admissibility of an expert witness's opinion testimony. Accordingly, the appellate courts review decisions regarding the qualifications, admissibility, relevancy, and competency of expert testimony using the abuse of discretion standard. *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263-64 (Tenn. 1997). This standard of review should also be used at the summary judgment stage. *General Electric Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).

B.

Mr. McGuigan asserts that the trial court erred by failing to exclude Mr. Turner's affidavit on two grounds. First, he insists that Mr. Turner's opinion regarding the market value of the Davises' house is flawed because it is not based on the plans and specifications for the Davises' house that were prepared by Mr. Frasch. Second, he asserts that there is an irreconcilable conflict between Mr. Turner's affidavit and his deposition that undermines the admissibility of both.

In his affidavit submitted in opposition to Mr. McGuigan's summary judgment motion, Mr. Turner opined that the market value of the Davises' house when Mr. McGuigan appraised it in June 2002 for $735,000 was really $550,000. Mr. McGuigan insists that the trial court should not have permitted Mr. Turner to give an opinion regarding the market value of the house because Mr. Turner was not provided with the information necessary to appraise new construction and, therefore, Mr. Turner "did not follow his own stated method of appraising new construction."

Mr. Turner prepared his affidavit after he was deposed. While several of his answers to questions during his deposition are ambiguous with regard to the documents he consulted in order to arrive at his appraised value of the Davises' house, Mr. Turner states unequivocally in his affidavit that he reviewed the complaint, the answer, Mr. McGuigan's responses to the Davises' first set of interrogatories and requests for production of documents, and the transcript of Mr. McGuigan's deposition and the exhibits to the deposition. Included among these documents was Mr. McGuigan's file which purportedly included the plans and specifications and the estimated cost of construction. Accordingly, while Mr. Turner's testimony in his deposition could provide fertile ground for cross-examination, it does not support Mr. McGuigan's claim that Mr. Turner's opinion regarding the market value of the Davises' house is so lacking in evidentiary support that it should have been excluded.

Mr. McGuigan also insists that Mr. Turner's deposition testimony is in such conflict with his later affidavit that the trial court should have held that they were both inadmissible. This argument is premised on what is commonly referred to as the "cancellation rule" – contradictory statements by the same witness that go unexplained or uncorroborated by other evidence cancel each other out. *Taylor v. Nashville Banner Publ'g Co.*, 573 S.W.2d 476, 482-83 (Tenn. Ct. App. 1978). While the cancellation rule applies to a witness's deposition and affidavit filed in support of or in opposition to a motion for summary judgment, the court must view the challenged evidence in a light most favorable to the opponent of the summary judgment motion. *Helderman v. Smolin*, 179 S.W.3d 493, 502 (Tenn. Ct. App. 2005); *Church v. Perales*, 39 S.W.3d 149, 170 (Tenn. Ct. App. 2000).

During his deposition on January 23, 2007, Mr. Turner was quite diffident about whether Mr. McGuigan had intentionally created an inaccurate appraisal of the Davises' house. His answer was essentially, "I don't know." Three days later, Mr. Turner signed an affidavit stating, in part, that "[w]hile I don't know whether he [Mr. McGuigan] intentionally provided an inaccurate appraised value, I do believe that he knowingly performed an appraisal using methods not in conformance with reliable and accepted standards in the industry or with USPAP."

While these statements are certainly equivocal, they are not necessarily contradictory. The crux of Mr. Turner's testimony, viewed in the light most favorable to the Davises, is that, although he was unwilling to accuse Mr. McGuigan of intentionally providing an inaccurate appraisal, he believed that Mr. McGuigan "knowingly" deviated from accepted practices by selecting his comparable properties from the LaurelBrooke subdivision rather than from Horseshoe Bend. While there may very well be appropriate questions regarding the weight to be given to Mr. Turner's testimony, determining the weight of the evidence is not appropriate at the summary judgment stage. *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 815 (Tenn. 2008); *Wilson v. Patterson*, 73 S.W.3d 95, 104 (Tenn. Ct. App. 2001). Mr. Turner's deposition testimony and affidavit are not so fatally inconsistent that they should be treated as "no evidence" at all. *See Johnston v. Cincinnati, N.O. & T.P. Ry.*, 146 Tenn. 135, 160, 240 S.W. 429, 436 (1922) (reversing jury decision based on unexplained, inconsistent testimony).

C.

Even though Mr. Turner's statements in his deposition and affidavit are not self-cancelling, they suffer from another fatal flaw plainly evident in Mr. Turner's own testimony. When asked during his deposition whether it was his opinion that Mr. McGuigan intentionally performed an inaccurate appraisal, Mr. Turner responded: "I would say that he performed an inaccurate appraisal. Now was it his intention or not, I don't know." After being pressed to explain "how far your opinion goes," Mr. Turner replied, "[y]ou know, I just can't read another appraiser's mind." After speculating about how Mr. McGuigan might have performed the appraisal, Mr. Turner was asked, "[d]o you think that's what happened?" Mr. Turner answered, "I don't know. You know, that's what I said, I can't tell you what was his intention. I said this was a possibility that it could have happened, but I have no idea."

In the context of medical causation evidence that requires an expert opinion, this Court has noted that an expert physician's testimony as to what "is *possible* is no evidence at all" because "[h]is opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible." *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 862 (Tenn. 1985) (quoting *Palace Bar, Inc. v. Fearnot*, 381 N.E.2d 858, 864 (Ind. 1978)).

A corollary to the lack of value of opinions regarding "possibilities" is that experts are not permitted to give opinions regarding the ultimate issue of fact if the fact-finder is capable of drawing its own conclusions without the aid of expert testimony. *State v. Turner*, 30 S.W.3d 355, 360 (Tenn. Crim. App. 2000); *see also* 10B *Federal Practice & Procedure* § 2738, at 345-46.

These principles are applicable here. Mr. Turner's testimony regarding whether Mr. McGuigan intentionally performed an inaccurate appraisal is, by his own admission, speculation. He is no more qualified than the jury to determine what Mr. McGuigan believed the real market value of the Davises' house was. Significant portions of Mr. Turner's opinion testimony amount to nothing more than conjecture about Mr. McGuigan's beliefs and intent. Thus, because of the speculative nature of Mr. Turner's testimony, the trial court erred by failing to strike the portions of his deposition and affidavit regarding Mr. McGuigan's beliefs and intent. Accordingly, Mr. Turner's testimony regarding Mr. McGuigan's beliefs or intent in performing the appraisal should not be considered in determining whether the trial court properly granted the summary judgment dismissing the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims against Mr. McGuigan.

IV.

Unlike other recent appeals involving summary judgments that have been considered by this Court,[7] this case does not require the Court to analyze whether Mr. McGuigan, as the party seeking the summary judgment, presented sufficient evidence to successfully shift the burden of production to the Davises. The Davises do not dispute that Mr. McGuigan successfully shifted the burden of production to them. Accordingly, the Court has properly pointed out that Mr. McGuigan, as the moving party, carried his burden of presenting evidence that negated two essential elements of the Davises' intentional misrepresentation claim. These elements relate to Mr. McGuigan's intent and knowlege when he prepared the appraisal and the reasonableness of the Davises' reliance on Mr. McGuigan's appraisal. The pivotal question is whether the Davises have succeeded in demonstrating the existence of genuine material factual disputes that warrant the time and expense of a trial. I have concluded that they have not.

A.

The recipients of an allegedly fraudulent misrepresentation may recover damages only if they prove that the person making the representation did so recklessly, with knowledge that

[7] *See, e.g., Hannan v. Alltel Publ'g Co.*, 270 S.W.3d at 8-9.

it was false, or without belief that the representation was true. *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn. 2008); Restatement (Second) of Torts § 526 (1977). Despite their best efforts, the Davises have been unable to present any direct evidence substantiating their assertion that Mr. McGuigan "intentionally or recklessly misrepresented that his best estimate of the value of the plaintiffs' proposed construction was $735,000."

The Davises assert that the inferences from four undisputed facts should be sufficient to create a jury question with regard to Mr. McGuigan's state of mind when he performed the appraisal. They first point to the undisputed fact that SunTrust marked its request for the appraisal "Rush!" when it faxed the request to Mr. McGuigan on June 18, 2002. Second, they point out that the request for an appraisal stated that the "sales price" was $735,000. Third, they point out that Mr. McGuigan based his appraisal, in part, on properties in LaurelBrooke rather than in Horseshoe Bend. Finally, they point out that Mr. McGuigan completed and returned his appraisal only one day later on June 19, 2002.

The parties' lengthy and detailed discovery places these four facts in clear context. It is undisputed that the bank's mortgage processors frequently marked their requests for appraisals with "rush" because it was the nature of the business. With regard to the Davises' loan, time was becoming of the essence in mid-June because of the fast-approaching July 15, 2002 deadline on the lock-in agreement on the loan's interest rate. The quick completion of the appraisal enabled the parties to close the loan on July 2, 2002.

The witnesses also testified uniformly that it was commonplace to include the "sales price" on appraisal requests. While a number of the witnesses could not explain the reason for the practice, there was little disagreement that when the sales price was not provided, most appraisers regularly called to obtain it. The Davises were unable to uncover any evidence that would enable a reasonable fact-finder to conclude that the bank passed along the "sales price" on properties for which it sought appraisals in order to prompt its appraisers to provide an appraisal for the amount of the "sales price."

Mr. McGuigan's choices regarding comparable properties were closely scrutinized during discovery. Several of the Davises' witnesses were skeptical of his choices. However, none of the Davises' witnesses provided admissible testimony that Mr. McGuigan selected comparable properties for the purpose of inflating the amount of his appraisal to coincide with the "sales price" listed on the bank's request for an appraisal.

Finally, there is no evidence in the record casting suspicion on the fact that Mr. McGuigan completed his appraisal in one day. The evidence shows that an appraisal of new construction can proceed expeditiously, as long as the appraiser has the plans and

specifications for the construction. It is undisputed that Mr. McGuigan based his appraisal on the plans and specifications prepared by the Davises' contractor, his personal inspection of the Horseshoe Bend subdivision and the Davises' lot, and the comparable properties that he and his staff selected.

B.

The recipients of an allegedly fraudulent misrepresentation may recover only if their reliance on the representation was reasonable or justifiable. *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d at 311; Restatement (Second) of Torts § 537(b) (1977). When the alleged misrepresentation is an opinion, the form of the opinion, the materiality of the opinion, and the relationship of the parties assume pivotal significance. For the purpose of this appeal, I have assumed, despite scant contemporaneous evidence, that the amount of the appraised fair market value of the Davises' house was material with regard to the loan transaction between the Davises and the bank.

The relationship between the parties and the form of the opinion in *Sunderhaus v. Perel & Lowenstein*, 215 Tenn. 619, 388 S.W.2d 140 (1965) differ markedly from the relationship between the Davises and Mr. McGuigan and the form of Mr. McGuigan's appraisal. In *Sunderhaus*, the seller of a ring, who stood to benefit directly from the transaction, provided the buyer a written warranty guaranteeing the value of the ring. *Sunderhaus v. Perel & Lowenstein*, 215 Tenn. at 621, 388 S.W.2d at 141. There is no such direct relationship or written warranty in this case.

By definition, an appraisal of real property is an opinion. Tenn. Code Ann. § 62-39-102(2) (2009) (defining "appraisal" as "the act or process of developing an opinion of value of identified real estate").[8] In this case, Mr. McGuigan, who was paid a flat fee for his appraisal regardless of its result, stated in the appraisal itself that he was providing an "estimated" value of the property. In addition, the bank was Mr. McGuigan's sole client. In both their preliminary and final loan applications, the Davises certified that neither the bank nor any of its agents "made . . . representations or warranties, express or implied, to the Borrower(s) regarding the property, the condition of the property, or the value of the property."[9]

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[8]*See also* Tenn. Code Ann. § 62-39-102(16) defining "valuation appraisal" as "an analysis, opinion or conclusion prepared by a real estate appraiser that estimates the value of an identified parcel of real estate or identified real property at a particular point in time."

[9]The Davises completed and signed the final loan application after Ms. Gynp informed them that Mr. McGuigan had estimated that the fair market value of their home, if constructed in accordance with the plans (continued...)

All the terms and conditions of the transaction were available to the Davises before the closing. A copy of Mr. McGuigan's appraisal was likewise available to them had they requested it. However, the Davises never talked with Mr. McGuigan nor read his appraisal until after this dispute arose even though they received a copy at the closing on July 2, 2002. The legal import and effect of the documents embodying the parties' rights and obligations in a transaction are not undermined by a party's decision not to read the documents. *See De Ford v. Nat'l Life & Accident Ins. Co.*, 182 Tenn. 255, 266-69, 185 S.W.2d 617, 621-22 (1945) (holding that a person cannot ordinarily avoid a contract on the ground that he did not read it); *Moody Realty Co. v. Huestis*, 237 S.W.3d 666, 676 (Tenn. Ct. App. 2007) (holding that one who signs a contract cannot later plead ignorance of its contents if there was an opportunity to read it before signing). Thus, as a matter of law, the Davises are presumed to have been aware of the disclaimers that were contained in the loan documents.

It is entirely undisputed that the Davises never talked with Mr. McGuigan and did not read or review his appraisal prior to the closing on July 2, 2002. By their own admission, the Davises could only have relied on the statement of the bank employee that their project had appraised for $735,000. The Court has properly pointed out that, for the purpose of an intentional misrepresentation claim, the plaintiff must rely "on the defendant's representation, not on how the representation was relayed." Under these circumstances, the only conclusion that a reasonable fact-finder can draw from the undisputed facts in this record is that the Davises did not, in fact, place any reliance on Mr. McGuigan's appraisal.

C.

Based on the undisputed facts in this record, Mr. McGuigan's estimate of the fair market value of the Davises' house – which was only $4,000 more than the combined amount of the cost of the lot and the estimated construction cost of the house – was an opinion. Even though an opinion can provide the basis for a fraudulent misrepresentation claim, the undisputed facts in this record, and the inferences reasonably drawn from these facts, support only the following conclusions. First, based on the plain terms of all the documents in their loan transactions, the Davises could not, as a matter or law, rely on Mr. McGuigan's appraisal of the fair market value of their house. Second, the Davises have presented no admissible evidence that Mr. McGuigan prepared his appraisal of their house recklessly or with knowledge that he had not followed applicable appraisal standards or that he did not believe the conclusion in his appraisal that the fair market value of the Davises' house, if completed in accordance with the plans and specifications, would be $735,000. Finally, the Davises presented no evidence that Mr. McGuigan's appraisal was influenced, directly or

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[9](...continued)
and specifications prepared by Mr. Frasch, would be $735,000.

indirectly, by the bank. Accordingly, the summary judgment dismissing the Davises' intentional misrepresentation claim should be affirmed.

V.

In addition to their fraudulent misrepresentation claim, the Davises allege that Mr. McGuigan violated the Tennessee Consumer Protection Act of 1977 (codified as amended at Tenn. Code Ann. §§ 47-18-101 to -130 (2001 & Supp. 2009)). Claims under this Act must be alleged with the same specificity applicable to fraud claims. *Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 275 (Tenn. Ct. App. 1999); *Humphries v. West End Terrace, Inc.*, 795 S.W.2d 128, 132 (Tenn. Ct. App. 1990). The Davises' complaint alleges, in the most general terms, that Mr. McGuigan's "actions in connection with the appraisal of the subject home constitute an unfair and deceptive trade practice."

The Tennessee General Assembly has identified forty-seven specific types of acts or practices that violate the Tennessee Consumer Protection Act.[10] However, the General Assembly was aware that "[f]raud assumes many shapes, disguises and subterfuges"[11] and that even as one fraud is defined and proscribed, another variant appears.[12] Accordingly, the Tennessee Consumer Protection Act also broadly proscribes engaging in any act or practice which is unfair or deceptive to the consumer. Tenn. Code Ann. § 47-18-104(a), (b)(27).

The Tennessee Consumer Protection Act does not provide a single standard applicable to all circumstances for determining whether a particular act or practice is unfair or deceptive for the purpose of Tenn. Code Ann. § 47-18-104(a) or Tenn. Code Ann. § 47-18-104(b)(27). *Fayne v. Vincent*, 301 S.W.3d 162, 177 (Tenn. 2009). In the proper circumstances, negligent misrepresentations may constitute an unfair or deceptive act or practice. *Fayne v. Vincent*, 301 S.W.3d at 177; *Holladay v. Speed*, 208 S.W.3d 408, 416 (Tenn. Ct. App. 2005). A deceptive act or practice is an act or practice "that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact." *Tucker v. Sierra Builders*, 180 S.W.3d 109, 116 (Tenn. Ct. App. 2005). An act is "unfair"

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[10]*See* Tenn. Code Ann. § 47-18-104(b) (West 2010).

[11]*Waller v. Hodges*, 45 Tenn. App. 117, 130, 321 S.W.2d 265, 271 (1958) (quoting 1 Henry R. Gibson, *Gibson's Suits in Chancery* § 456, at 520 (5th ed. 1955)).

[12]*SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 193 n.41 (1963) (quoting a June 30, 1759 letter from Lord Hardwicke to Lord Kames stating that "[f]raud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive").

when it causes or is likely to cause substantial injury to consumers which is not easily avoidable by the consumers themselves and is not outweighed by countervailing benefits to consumers or to competition. *Tucker v. Sierra Builders*, 180 S.W.3d at 116-17 (citing 15 U.S.C. §45(n)).

Because of the generality of their complaint, I have assumed that the Davises' Tennessee Consumer Protection Act claim against Mr. McGuigan is based on Tenn. Code Ann. § 47-18-104(a), Tenn. Code Ann. § 47-18-104(b)(27), or both. As the litigation progressed and the Davises were required to state their claim more specifically, it became clear that their complaint against Mr. McGuigan was chiefly based on their belief that he purposely inflated his appraisal to equal the sales price listed on the bank's appraisal request by improperly selecting properties in the neighboring subdivision of LaurelBrooke to use as comparable properties.

The Davises have not leveled claims of predatory lending practices against the bank. Neither have they asserted that the bank conspired with Mr. McGuigan to obtain an inflated appraisal of their project for the purpose of inducing them to borrow money to construct a house that would be worth less than it cost to build. Nor have they presented admissible evidence that appraisers must base an appraisal of the market value of real property in a particular subdivision only on comparable real property in the same subdivision. At the most, they have proved that other appraisers might not have selected the same houses as comparable properties that Mr. McGuigan selected or that other appraisers might have made different adjustments to the comparable properties than Mr. McGuigan did.

An appraisal of real property is not the result of a scientific analysis, but rather it is a "subjective opinion which can and does differ from [one appraisal to] the next appraisal even though both may be based on real estate market trends." *In re Rehbein*, 49 B.R. 250, 253 (Bankr. D. Mass. 1985). Even the United States Supreme Court has noted that "common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained." *Montana Ry. v. Warren*, 137 U.S. 348, 353 (1890). Accordingly, "[i]t is not surprising how many different results are had when more than one person looks at a piece of real estate." *In re Rehbein*, 49 B.R. at 252.

Based on the undisputed facts in this record and the inferences that can be reasonably drawn from these facts, the only reasonable conclusion to be drawn is that Mr. McGuigan's appraisal of the Davises' house was not deceptive for the purposes of Tenn. Code Ann. § 47-18-104(a) or Tenn. Code Ann. § 47-18-104(b)(27) because it did not contain a false or misleading statement of fact. Mr. McGuigan's appraisal stated only that it was an "estimate."

By the same token, the manner in which Mr. McGuigan prepared his appraisal was not unfair for the purposes of Tenn. Code Ann. § 47-18-104(a). Adopting a broad principle that appraisers of real property can be held liable whenever the actual sales price of a property is less than its appraised value will result in "defensive appraising which would depreciate loan values to the detriment of would-be borrowers." *Young v. Leader Fed. Sav. & Loan Ass'n*, No. 89-47-II, 1989 WL 67205, at *6 (Tenn. Ct. App. June 23, 1989) (No Tenn. R. App. P. 11 application filed). Accordingly, I would affirm the summary judgment dismissing the Davises' Tennessee Consumer Protection Act claim against Mr. McGuigan.

VI.

The undisputed facts in this record, together with the inferences reasonably drawn from these facts, support the lower courts' conclusion that Mr. McGuigan was entitled to a dismissal of the Davises' intentional misrepresentation claim and Tennessee Consumer Protection Act claim as a matter of law. Accordingly, I respectfully part company with my colleagues and conclude that the summary judgment dismissing the Davises' intentional misrepresentation and Tennessee Consumer Protection Act claims against Mr. McGuigan should be affirmed.

I am authorized to state that Chief Justice Clark concurs in this opinion.

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WILLIAM C. KOCH, JR., JUSTICE