STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Borrello, P.J., Servitto and Stephens, JJ.)

REYES GALVAN and MINHWA KIM,	Supreme Court No. 163741
Plaintiffs/Appellees,	Court of Appeals No. 352559
v	Washtenaw County CC: 17-1249-NZ
YAM FOO POON, HWAI-TZU HONG POON and DANIEL Y. POON, jointly and severally,	
Defendants/Appellants.	

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AMICUS CURIAE BRIEF ON BEHALF OF MICHIGAN REALTORS® IN SUPPORT OF DEFENDANTS/APPELLANTS' POSITION

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STATEMENT OF JURISDICTION

On April 20, 2022, this Court directed the Clerk to schedule oral argument on the application for leave to appeal the August 19, 2021, judgment of the Court of Appeals and ordered the filing of supplemental briefs. This Court has jurisdiction pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COVENANT OF TITLE UNDER MCL 565.151, WHICH STATES THAT THE PREMISES "ARE FREE FROM ALL INCUMBRANCES," INCLUDES A COVENANT THAT THE STRUCTURE OF THE PREMISES CONFORMS TO CURRENTLY APPLICABLE BUILDING CODES?

Plaintiffs/Appellees answer,	"Yes."
Defendants/Appellants answer,	"No."
The Trial Court answered,	"No."
The Court of Appeals answered,	"Yes."
Amicus Curiae Michigan Realtors® answers,	"No."

I. INTRODUCTION[1]

Historically, under Michigan law, the covenant against encumbrances warrants clear title to real property from the grantor to the grantee. Historically, under Michigan law, the covenant against encumbrances pertains only to a property's title and not its physical condition. The Court of Appeals turned real property law on the covenant against encumbrances on its head when it held that a building code violation, which is not recorded and does not affect title, constitutes an encumbrance and a breach of the grantor's warrant of clear title. *Galvan v Poon,* unpublished opinion per curiam of the Court of Appeals, issued August 19, 2021 (Docket No. 352559); 2021 WL 3700299, a copy of which is attached as Exhibit 1 ("COA Op").

Michigan Realtors® (the "Association") is Michigan's largest, nonprofit trade association, comprising 40 local boards and a membership of thousands of individual associate brokers and salespersons licensed under Michigan law. Each year, the Association's members handle thousands of transactions involving existing residential property. There are over 1.5 million Realtors® nationally and 36,000 Realtors® in the State of Michigan alone. The Association's members have a vested interest in the continued clarity of Michigan real property law.

The decision of the Court of Appeals expanded the concept of a title encumbrance to include building code violations. A covenant against encumbrances is, in essence, an indemnity. In the case of a breach of a covenant against encumbrances, a purchaser is entitled to recover the reasonable cost of removing the encumbrance. Such an enlargement of the covenant against

[1] Counsel for a party did not author any part of this Brief. Neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this Brief. MCR 7.312(H)(4).

encumbrances would drastically alter existing law by forcing each and every seller to provide a warranty as to the physical condition of their home.

Accordingly, the outcome of this case is of continued and vital concern to the Association and its members. In *Grand Rapids v Consumers Power Co,* 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae . . . ." The Association seeks leave to file this brief amicus curiae in support of the position of Defendants/Appellants.

II. STATEMENT OF FACTS

This case involves the sale of Defendants' condominium unit located in Ann Arbor to Plaintiffs. As is typical, prior to closing, Plaintiffs had the home inspected and received a completed Seller's Disclosure Form. At closing, Plaintiffs received a warranty deed.

The condominium unit was originally built as part of a townhouse apartment complex. Years later, the complex was converted into a cooperative and then into a condominium. While a cooperative, the unit was one of three units combined into a single residence. A prior owner had restored the residence back to three separate units. Unbeknownst to defendants, the restoration work failed to include the construction of fire walls between the three units.

After closing, Plaintiffs found signs of prior plumbing issues and hired a contractor to remediate the moisture in the walls. The contractor discovered the lack of a firewall between their unit and a neighboring unit. Plaintiffs notified the City of Ann Arbor, which ultimately sued Plaintiffs and required them to rebuild the firewalls. Plaintiffs, in turn, sued Defendants for fraud,

misrepresentation, fraudulent concealment, silent fraud, innocent misrepresentation, breach of warranty (specifically, breach of the covenant against encumbrances) and loss of consortium.

The matter proceeded to trial. The jury found that Defendants failed to disclose material facts about the condition of the property an awarded damages for economic and noneconomic losses. As to the breach of warranty claim, the trial court granted Defendants' motion for directed verdict, ruling that, as a matter of law, building code violations do not constitute an "encumbrance" under the warranty deed.

The Court of Appeals reversed, providing the following analysis:

> Through the warranty deed, defendants were obliged to convey marketable title to plaintiffs. "Marketable title is one of such character as should assure to the vendee the quiet and peaceful enjoyment of the property, which must be free from incumbrance." *Madhavan v Sucher*, 105 Mich App 284, 287-288; 306 NW2d 481 (1981). "A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business." *Bartos v Czerwinski*, 323 Mich 87, 92; 34 NW2d 566 (1948).
>
> Here, the violation of the building code ordinance constituted an encumbrance on the title as it immediately opened plaintiffs up to the risk of litigation and made their home unlivable and unmarketable. See *Praegner v Kinnebrew & Ratcliff*, 156 La 132, 136; 100 So 247 (1924) (explaining that the buyer "agreed to purchase the property and not the property plus a probable lawsuit"). Indeed, because of the building code violations, the City of Ann Arbor brought suit against plaintiffs. Ultimately, plaintiffs were forced to pay $18,000 in order to replace the firewalls and $27,160 for an architect.

COA Op, p. 3, Exhibit 1.

Defendants filed an Application for Leave to Appeal (the "Application") with this Court. By Order dated April 20, 2022, this Court directed oral argument on the Application and the filing of supplemental briefs addressing the single issue of:

> . . . whether the covenant of title under MCL 565.151, which states that the premises "are free from all incumbrances," includes a covenant that the structure of the premises conforms to currently applicable building codes.

Supreme Court Order, April 20, 2022.

III. ARGUMENT

A. Standard of Review

Issues of statutory interpretation and a trial court's decisions on motions for directed verdict are reviewed *de novo* by this Court. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019); *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

B. As a Matter of Law, an "Encumbrance" is a Condition of Title Only

Prior to 1881, the covenant against encumbrances, pursuant to which the seller of real property warrants to the buyer that the property is free from all encumbrances, was a matter of Michigan common law. In 1881, the covenant against encumbrances as a provision in a warranty deed was codified and currently reads as follows:

> That any conveyance of lands worded in substance as follows: "A.B. conveys and warrants to C.D. (here describe the premises) for the sum of (here insert the consideration)," the said conveyance being dated and duly signed, sealed and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives, that he is lawfully seized of the premises, has good right to convey

> the same, and guarantees the quiet possession thereof; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims.

MCL 565.151.

The statute does not define "encumbrance." However, Michigan statutory interpretation law provides that where a statute is silent, or creates doubt as to its meaning, it is to be "given the effect which makes the least rather than the most change in the common law." *Energetics, Ltd v Whitmill,* 442 Mich 38, 51; 497 NW2d 497 (1993). Further, the Legislature is deemed to act with knowledge of the common law in existence before legislation is enacted. *Nation v WDE Electric Co,* 454 Mich 489, 494; 563 NW2d 233 (1997). And, a well-recognized rule for the construction of statutes is that when words are adopted which have a settled and definite meaning at common law, it is to be assumed that the words are used with the meaning which they had at common law. *People v Pinkney,* 501 Mich 259, 273; 912 NW2d 535 (2018).

Historically, an encumbrance affects title, and title only – an encumbrance is not a physical condition of a structure located on the property. In 1879, two years before MCL 565.151 took effect, Justice Cooley discussed encumbrances as follows:

> If all encumbrances were the same in nature, and might be got rid of at the pleasure of the owner of the property encumbered, there would be no difficulty and no wrong in applying to all the same rule. But anything is an encumbrance which constitutes a burden upon the title; a right of way, (*Clark v Swift*, 3 Met 392;) a condition which may work a forfeiture of the estate,(*Jenks v Ward*, 4 Met 412;) a right to take off timber, (*Cathcart v Bowman*, 5 Pa St 317;) a right of dower, whether assigned or unassigned, (*Russells v Webber*, 59 Me 488.) In short, "every right to, or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance." *Prescott v Insman*, 4 Mass 627, 630.

Post v Campau, 42 Mich 90, 94-95; 3 NW 272 (1879).

As stated in 4 Tiffany, Real Property, ¶1002 (3d ed, 1939),

> An "incumbrance," as the term is used in a covenant that the premises are free and clear of all incumbrances, has been defined, in a general way, as "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance." It must be a valid, legal and subsisting lien, such as the law will protect and enforce. The covenant speaks as of the time of the delivery of the deed.
>
> * * *
>
> A covenant against incumbrances is, in essence, a contract of indemnity. Therefore, for breach of the covenant the purchasers would be entitled to recover whatever the reasonable cost would be of removing that encumbrance. Notice or knowledge of an encumbrance does not bar an action for breach of covenant against encumbrances which is executed for the protection and indemnity against known and unknown encumbrances.

Black's Law Dictionary (6th ed), p 527, defines an encumbrance as:

> Any right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee by conveyance. *Knudson v Weeks*, DC Okl, 394 F Supp 963, 976. A claim, lien, charge, or liability attached to and binding real property; e.g. a mortgage; judgment lien; mechanics' lien; lease; security interest; easement or right of way; accrued and unpaid taxes. If the liability relates to a particular asset, the asset is encumbered.

Simply put, an encumbrance is the right or interest of another in the property pursuant to which the third party claims a property right that affects title.

Here, the Court of Appeals incorrectly held that building code violations are encumbrances because they subjected the plaintiff/purchaser to a lawsuit and rendered the property uninhabitable. COA Op, p 3, Exhibit 1. Habitability, however, has nothing to do with title. Habitability has to do with the physical condition of the structure on the property.

Here, Defendants had fee title to the property at issue and conveyed that title. That a building code violation rendered the property uninhabitable until cured, may form the basis for many other claims, but not breach of a warranty deed; specifically, not a breach of the covenant against encumbrances. The Court of Appeals erred in ruling otherwise.

C. As a Matter of Law, "Marketable Title" is Not Affected by Building Code Violations

The Court of Appeals similarly erred by concluding that the presence of building code violations in the structure located on the property rendered title "unmarketable." See, COA Op, p 3, Exhibit 1. It is true under Michigan law, as cited by the Court of Appeals, that:

> Generally speaking, the vendor is under an obligation to convey a merchantable or marketable **title**. *Fix v Amiot,* 251 Mich 124; 231 NW 114 (1930). Marketable **title** is one of such character which should assure the vendee the quiet and peaceful enjoyment of the property, which must be free from encumbrance. A **title** may be regarded as "unmarketable" where a reasonably prudent man, familiar with the facts, would refuse to accept **title** in the ordinary course of business, and it is not necessary that the **title** actually be bad in order to render it unmarketable. *Mahavan v Sucher*, 105 Mich App 284; 306 NW2d 481 (1981).

Stover v Whiting, 157 Mich App 462, 468; 403 NW2d 575 (1987). In reaching the conclusion that the property was "unmarketable," the Court of Appeals pointed to the fact that the physical condition of the house made the house "unlivable." COA Op, p 3, Exhibit 1. The Court noted that, at trial, a real estate appraiser had testified that "a family would not purchase that home to live in because [they] would not be able to move into the home with these violations." COA Op, p 4, Exhibit 1. Akin to its earlier error regarding what is, and what is not, an encumbrance, the Court of Appeals conflates the marketability of the property with the marketability of the title. As discussed, these two things are not the same. The fact that the physical condition of the house

is such that it that there is only a small market for the house has nothing to do with the marketability of title. Marketable title pertains to the seller's ability to convey fee title to property, free of claims by others that they have some legally recognizable interest in the property itself – i.e., leasehold, easement, mortgage, lien. Marketable title does not pertain to a seller's ability to convey a structure free of defects. See, *Bartos v Czerwinski*, 323 Mich 87; 34 NW2d 566 (1948) (If defendant's title to realty was not a marketable one because of the possible outstanding interest in the property of another, the trial court did not abuse its discretion in denying specific performance of contract or purchase of realty, because there was no assurance that defendant could obtain a quitclaim deed from the third person who might have an interest in the property). More recently, the Court of Appeals, quoting 20 Am Jur 2nd, Covenants, with approval, stated:

> At issue in this case is the covenant to warrant and defend the title.
>
> > The covenant of warranty is an agreement by the grantor that upon the failure of the title which the deed purports to convey, he will make compensation in money for the loss sustained. It is an assurance or guarantee of title, or an agreement or assurance by the grantor of an estate that the grantee and his heirs and assigns shall enjoy it without interruption by virtue of a paramount title, and that they shall not, by force of a paramount title, be evicted from the land or deprived of its possession. [*Id.,* §48, pp 505-506.]

McCausey v Oliver, 253 Mich App 703, 707; 660 NW2d 337 (2002).

Accordingly, the Court of Appeals erred by ruling that a building code violation in a structure located on the premises being sold renders title unmarketable. This Court should reverse the opinion of the Court of Appeals.

D. The Court of Appeals Opinion is Wholly Inconsistent with the Law in Other Jurisdictions

There is no Michigan decision directly on point with the issue identified for oral argument by this Court. In its opinion, the Court of Appeals relied on a number of cases from other jurisdictions which it claims to support its holding. In its Supplemental Brief, the Appellee states that as to the issue at hand, there is a split of authority amongst other jurisdictions. Neither statement is correct. Neither the Court of Appeals nor the Appellee have cited any case holding that a building code violation is an encumbrance within the meaning of a covenant against encumbrances. In fact, the law is well-settled throughout the country that building code violations are not encumbrances.

Courts from around the country have consistently refused to expand the concept of "encumbrance" to include structural conditions that constitute a violation of a building code. As was stated in an early Pennsylvania case involving a party wall that was four inches thick instead of nine inches thick in violation of a building statute:

> Although the statute creating covenants has been in existence for two hundred years our attention has not been called to a case in which an action has been successfully prosecuted on the theory advanced by the plaintiff. The condition of the premises as to dilapidation or the existence of a nuisance or the necessity of reparation to conform to building laws has not so far as we have been able to discover ever been held to be a fact affecting the title or in the class of encumbrances.
>
> * * *
>
> With such construction of the statute every grantor of real estate with a building thereon constructed or altered or repaired by himself would become a warrantor that the building complied in all respects with the building laws or ordinances in force in the locality.

Berger v Weinstein, 63 Pa Super 153 (1916) (emphasis supplied). *See also, Gaier v Berkow*, 90 NJ Super 377, 379; 217 A2d 642 (App Div, 1966) ("plaintiffs' claim for breach of a covenant against encumbrances cannot be predicated on the necessity of repair or alteration to conform to the provisions of" construction regulations); *McCrae v Giteles*, 253 So2d 260, 261 (Fla App, 1971) ("a housing code violation is not an 'encumbrance' within the meaning of a covenant against encumbrances"); *Monti v Tangora*, 99 Ill App 3d 575, 582; 425 NE2d 597 (1981) ("a building code violation is not of itself an encumbrance"); *Frimberger v Anzellotti*, 25 Conn App 401, 408-409; 594 A2d 1029 (1991) ("Although, under the statute, [the government] could impose fines or restrict the use of the property until it is brought into compliance, such a restriction is not an encumbrance"); and *Silverblatt v Livadas*, 340 Mass 474, 479; 164 NE2d 875 (1960) (holding that inchoate building code violations were not an encumbrance).

The Court of Appeals in this case cited no case law involving a building code violation. Appellant cited one case in which the Wisconsin Supreme Court found that a building code violation *could* be an encroachment, but only if "official action has been taken before the conveyance so that enforcement action is imminent when the deed is delivered." *Brunke v Pharo*, 3 Wis 2d 628, 631; 89 NW2d 221 (1958).

The *Brunke* case, however, is not dispositive here. First, unlike the facts in *Brunke,* no enforcement action had been taken before the Defendants in this case delivered the deed. Second, the *Brunke* decision is an outlier and has been expressly rejected by courts in other states. For example, in a case involving a stream culvert constructed in violation of state regulatory requirements, the plaintiff-buyer had urged the Supreme Court of New Jersey to follow *Brunke* and hold that an encumbrance covers structural conditions which constitute a violation of

governmental regulations. *Fahmie v Wulster*, 81 NJ 391; 408 A2d 789 (1979). The New Jersey Supreme Court disagreed, noting that the *Brunke* decision was distinguishable from its case (as well as our case) because in *Brunke*, the conveyance happened *after* the building code violations had been found and official action had begun. The *Fahmie* Court went on to say that "in any event [it was] not inclined to follow the [*Brunke* decision]:"

> To expand the concept of encumbrance as urged by plaintiffs would create uncertainty and confusion in the law of conveyancing and title insurance. A title search would not have disclosed the violation, nor would a physical examination of the premises. The better way to deal with violations of governmental regulations, their nature and scope being as pervasive as they are, is by contract provisions which can give the purchaser full protection in a situation such as is here presented.

Id. at 397.

Similarly, the Court in *FFG, Inc v Jones*, 6 Hawaii App 35, 49; 708 P2d 836 (1985) also rejected the *Brunke* decision noting that "the case law from other jurisdictions clearly reflects the principle that building code violations do not constitute encumbrances." The holding in *Brunke* was likewise rejected in the *Silverblatt*, *Gaier* and *McCrae* decisions referenced above. *Brunke* is an outlier, is factually not applicable here and should not be followed by this Court.

Other than *Brunke*, Appellee's out-of-state authority consists of several cases that held that a violation of the building code was not an encumbrance, but that Appellee believes may have been decided differently had the facts been different. For example, Appellee points out that in both *Domer v Sleeper*, 533 P2d 9 (Alas, 1975) and *Frimberger, supra*, the courts mention that the building code violation in question was unknown to the seller. Had this not been the case, the Appellee suggests, either court may have reached a different result.

This constitutes pure speculation. In neither of these cases did the court indicate that it would have held differently if the seller had known of the defect. Obviously, that question was not even *before* either court. Moreover, even the Court of Appeals below recognized that in the case of a breach of a covenant against encumbrances, notice or knowledge of the title defect on the part of the grantor is irrelevant:

> The issue at hand was not whether [sellers] knew about or were liable for the violations, but whether the violation was an encumbrance . . . .

COA Op, p 4, Exhibit 1. Clearly, knowledge of a defect on the part of a seller is not pertinent to issue before this Court, much less Appellee's speculation on that subject.

Appellee also suggests that in the case of *FFG, supra* (in which the Hawaii Court held that building code violations do not constitute a breach of the covenant against encumbrances), may have been decided differently had the facts involved a more "substantial" defect. Again, however, the Court in *FFG* did not hold, or even suggest, that a "substantial" building code violation could constitute an encumbrance. In fact, the Court expressly rejected the argument that the "jurisdictions are split on whether building code violations constitute encumbrances." *FFG* at 48. Instead, the Court found that the "settled rule is that building code violations are ***not*** encumbrances and only zoning violations which render title unmarketable constitute encumbrances." *Id.*[2]

[2] The Court went on to find that the zoning violation in that case (i.e., insufficient parking spaces) was not of a type that rose to the level of an encroachment. *FFG, Inc v Jones*, 6 Hawaii App 35, 49; 708 P2d 836 (1985).

Finally, the Appellee concludes that "the majority of jurisdictions have held that a violation of a city ordinance existing at the time of a conveyance is an encumbrance within the meaning of the warranty against encumbrances." This is simply not true. A careful reading of Appellees' case law reveals that the issues therein were violations of zoning ordinances – not building code ordinances. And, while it is true that a number of jurisdictions have held that certain zoning code violations are an encumbrance within the meaning of a covenant against encumbrances, the type of violations involved in those cases have typically involved encroachments such as a violation of a setback requirement[3] or the construction of improvements within a road right-of-way.[4] Simply put, a right-of-way or a setback is akin to an easement (which is an encumbrance) in that it represents an interest in land held by third persons which diminishes the value of the land. 4 Tiffany, Real Property, *supra*. A building code violation is not.

The Court of Appeals did not cite, and the Appellee has not produced, even one case from any jurisdiction holding that a buyer who discovers a building code violation after closing has a claim against the seller for breach of warranty of title. As discussed above, each and every one of the cases located by the Association addressing this issue has held that a building code violation is not an encumbrance.

In sum, reliance by the Court of Appeals on case law from other jurisdictions in this case is misplaced. This Court should reverse the opinion of the Court of Appeals.

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[3] *Moyer v DeVincentis Const Co*, 107 Pa Super 588; 164 A 111 (1933); *Lohmeyer v Bower*, 170 Kan 442; 227 P2d 102 (1951).

[4] *Bethurem v Hammett*, 736 P2d 1128 (Wy, 1987).

E. The Court of Appeals Opinion Extends Sellers' Potential Liability Beyond that Proscribed by the Legislature

The law in Michigan is well-settled as it relates to liability in the case of defects in a home discovered by a buyer after closing. In general, under the common law, sellers are liable if they make a false statement about the condition of the property, whether the false statement was made intentionally, negligently or innocently. *M & D, Inc v McConkey*, 231 Mich App 22; 585 NW2d 33 (1998). As a general rule, however, a seller had no common law obligation to volunteer information about a defect. In other words, there is no cause of action against a seller for "silent fraud." *Id.*

In 1994, the Michigan legislature adopted the Seller Disclosure Act ("SDA") which, for the first time, required sellers to volunteer certain information about the physical condition of their home by completing a comprehensive statutorily required form. MCL 565.957. A copy of the Seller's Disclosure Form is attached as Exhibit 2. In exchange for this obligation, however, sellers were protected from strict liability; that is, liability for any innocent misrepresentations. The Seller Disclosure Act explicitly states:

> The [seller] or his or her agent is not liable for any error, inaccuracy or omission if the error, inaccuracy or omission was not within the personal knowledge of the [seller].
>
> The information provided to a prospective purchaser pursuant to this act shall be based upon the best information available or known to the [seller].
>
> * * *
>
> This statement is not a warranty of any kind by the seller . . . .

MCL 565.955 - MCL 565.957 (emphasis supplied).

Relying on this language from the SDA and its holdings from earlier unpublished opinions, the Michigan Court of Appeals expressly held that innocent misrepresentation is not a viable theory of liability under the SDA for any claim brought by a purchaser of a residential dwelling on the basis of misrepresentations or omissions in a seller's disclosure form. *Roberts v Saffell,* 280 Mich App 397, 405-407; 760 NW2d 715 (2008). The Court elaborated:

> The SDA modifies the common law and in certain real estate transactions requires the transferor to disclose certain information in a specified format. The act applies to "the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units...." MCL 565.952.... The SDA requires that the transferor of any real property covered by the act "shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act." MCL 565.954(1). The form and substance of the written statement required by the act is set forth in MCL 565.957.[3] The transferor must complete the SDS by answering its questions in "good faith," i.e., with "honesty in fact in the conduct of the transaction." MCL 565.960.

Id. at 407-408 (footnote omitted). The Court concluded:

> In sum, the SDA only requires a transferor to honestly disclose information known to the transferor at the time the SDS is completed. MCL 565.956; MCL 565.957. Further, a transferor may not be held liable for any errors, inaccuracies, or omissions in the SDS unless they were within the transferor's personal knowledge. MCL 565.955(1). The SDA expressly states that the transferor "is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor" and ordinary care was used in transmitting the information. *Id.* (emphasis added). But the act also states that "[t]he specification of items for disclosure in this act does not limit or abridge any obligation for disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." MCL 565.961. Considered together, these two sections mean that where an item is specified for disclosure on the SDS, a transferor may be liable for fraud or silent fraud if the

> elements of those causes of action are proved, including that the transferor possessed personal knowledge about the item but failed to exercise "good faith" by disclosing that knowledge. MCL 565.960; *Bergen*, *supra*. Correspondingly, a transferor cannot be found liable for an innocent misrepresentation regarding a disclosure required by the act because an innocent misrepresentation claim would allow liability for erroneous information even if the transferor lacked personal knowledge that the information was false and was acting in good faith. *United States Fidelity & Guaranty Co.*, *supra* at 117; 313 NW2d 77.

Id. at 413-414.

By expanding the concept of an encumbrance on title to include a physical defect, the Court of Appeals has left sellers strictly liable for physical defects regardless of whether they are aware of the defect. This outcome is completely at odds with the obvious intent of the Legislature in enacting the SDA – "to require certain disclosures in connection with transfers of residential property," make sellers liable for knowingly failing to accurately do so, but protect sellers from liability for unknown property conditions. This Court should reverse the opinion of the Court of Appeals.[5]

[5] In a similar vein, the Court of Appeals opinion is contrary to common law fraud which requires proof that (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. *Roberts v Saffell,* 280 Mich App 397, 403; 760 NW2d 715 (2008). Under the Court of Appeals strict liability ruling, this burden of proof disappears.

F. The Court of Appeals Opinion is Contrary to Existing Michigan La on the Statute of Limitations

The limitation period for common law fraud claims, based on an express contract, is 6 years. MCL 600.5813. Fraud claims involving injury to person or property or an implied contract must be brought within 3 years of their accrual. MCL 600.5805(2). By contrast:

> The period of limitations is 10 years for an action founded on a covenant in a deed or mortgage of real estate.

MCL 600.5807(5); *Post*, 42 Mich at 94. Here, contrary to the common law and the SDA, the Court of Appeals has extended seller liability for defects in a home by 4-7 years.

IV. CONCLUSION

In conclusion, under the Court of Appeals opinion, sellers of homes are 10-year indemnitors to home buyers for any and all defects in a home which constitute a building code violation – known or unknown at the time of sale. The Court of Appeals' creation of this unprecedented liability is wholly without citation to any case law which, in actuality, supports its holding. The Court of Appeals opinion undermines the SDA and the Legislative intent behind its enactment as well as the common law invoked for hundreds of years by home buyers to bring claims for undisclosed defects in a home against sellers. Encumbrances relate solely to title. A building code violation has nothing to do with title. Building code violations are not encumbrances under Michigan law and do not constitute a breach of the covenant of title under MCL 565.151.

V. RELIEF REQUESTED

For all the foregoing reasons, the Michigan Realtors® respectfully requests that this Court grant the Michigan Realtors®' Motion for Leave to File this Amicus Brief, reverse the decision of the Court of Appeals and reinstate the decision of the Circuit Court granting Defendants' Motion for Directed Verdict.

McCLELLAND & ANDERSON, LLP
Counsel for Amicus Curiae
Michigan Realtors®

By: _____
Melissa A. Hagen (P42868)
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Date: July 12, 2022

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LIST OF EXHIBITS TO *AMICUS CURIAE* BRIEF ON BEHALF OF MICHIGAN REALTORS® IN SUPPORT OF DEFENDANTS/APPELLANTS' POSITION

1. *Galvan v Poon,* unpublished opinion per curiam of the Court of Appeals, issued August 19, 2021 (Docket No. 352559); 2021 WL 3700299

2. Seller's Disclosure Form

EXHIBIT 1

STATE OF MICHIGAN

COURT OF APPEALS

REYES GALVAN,

Plaintiff-Appellant,

and

MINHWA KIM,

Plaintiff,

v

YAM FOO POON, HWAI-TZU HONG POON, and DANIEL Y. POON,

Defendants-Appellees.

UNPUBLISHED
August 19, 2021

No. 352559
Washtenaw Circuit Court
LC No. 17-001249-NZ

Before: BORRELLO, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff, Reyes Galvan, appeals by right the trial court's order granting defendants', Yam Foo Poon, Hwai-Tzu Hong Poon, and Daniel Y. Poon, motion for a directed verdict. We reverse and remand for further proceedings consistent with this opinion.

This case arises out of Galvan's[1] purchase of defendants' condominium unit in 2017. Prior to the purchase, plaintiffs had the home inspected. They also received a seller's disclosure form, which did not disclose any known problems with the unit, and so they made an offer, which defendants accepted. Plaintiffs received a warranty deed for the Ann Arbor property. Before moving in, Galvan painted and installed new flooring, but while doing so, he found staining on the drywall in the kitchen. Galvan contacted the condominium association and saw a number of records of previous maintenance visits for leaks and plumbing issues in the unit. Galvan also saw that one of defendants, Hwai-Tzu, had signed a unit modification responsibility form, which

[1] Minhwa Kim was a plaintiff in the proceedings below, but she is not a party on appeal.

showed that the upstairs walls had been moved and the neighboring unit encroached on Galvan's unit in the upstairs bathroom. Galvan hired a professional to remediate the moisture and mold found in the unit, and the company found that there was no firewall between Galvan's unit and the neighboring unit.

Galvan contacted the City of Ann Arbor and learned that the lack of a firewall "was a major hazard." The City of Ann Arbor's building department director sent Galvan a letter informing him that the Michigan building code required firewalls between units and that a previous owner of plaintiffs' unit had combined it with the neighboring units in 1984. It was unknown when the units were converted back into separate units, but Galvan learned that there were no firewalls between his unit and either of the neighboring units. In order to rebuild the firewalls between the units, one of plaintiffs' neighbors would need to lose square footage in their unit. As a result of the work that needed to be done on the condominium, plaintiffs moved into a separate apartment in September 2017.

In January 2018, the City of Ann Arbor sued plaintiffs and their two neighbors, seeking installation of firewalls between the units. The trial court ordered that Galvan pay $9,000 to bring one of the neighboring walls into compliance and $9,000 to the other neighbor in order to compensate her for the transfer of a portion of her unit to him, as was necessary in order to install the firewall. Plaintiffs did not have enough money to pay the total, so the condominium association placed a lien on the property until they paid it, which plaintiffs later did.

Plaintiffs thereafter sued defendants for fraud, misrepresentation, fraudulent concealment, silent fraud, innocent misrepresentation, breach of warranty, and loss of consortium due to the water issues, mold, and a lack of firewalls between units, which violated the City of Ann Arbor's building codes and condominium bylaws. Plaintiffs alleged that defendants accepted responsibility for the unit modifications, including the previous construction on the walls, and that defendants were aware of the water problems in the home yet failed to disclose the same.

The matter proceeded to trial and, at the end of the trial, defendants moved the court to hold as a matter of law that the building code violations did not constitute an encumbrance under the warranty deed. The trial court granted defendants' motion. Ultimately, the jury found that defendants failed to disclose material facts about the condition of the property and awarded damages for Galvan's economic losses and Kim's noneconomic losses. Plaintiffs moved the trial court for reconsideration on the directed verdict, and the trial court denied the motion on the basis that plaintiffs "failed to demonstrate a palpable error." This appeal followed.

Galvan argues that the trial court erred when it held that the building code violation was not an encumbrance. We agree.

This Court reviews de novo questions of law. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008). This Court also reviews de novo a trial court's decision on a motion for a directed verdict. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). "A party is entitled to a directed verdict if the evidence, when viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law." *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 497 Mich 337, 345; 871 NW2d 136 (2015).

Further, this Court reviews de novo questions of statutory interpretation. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). When reasonable mind may differ regarding the statutory term's meaning, judicial construction is appropriate. *Adrian School Dist v Mich Pub Sch Employees' Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998).

Defendants transferred title of the property to plaintiffs under a warranty deed. MCL 565.151 governs warranty deeds and provides that a seller warrants that he or she "guarantees the quiet possession [of the real property]; that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims." Black's Law Dictionary (11th ed) defines an encumbrance[2] as a "claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest." An encumbrance includes anything which "constitutes a burden upon the title . . . " including a "right-of-way, . . . a condition which may work a forfeiture of the estate, . . . a right to take off timber, . . . a right of dower. . . . In short, every right to, or interest in the land, to the diminution of the value of the land. . .." *Darr v First Fed Sav & L Ass'n of Detroit*, 426 Mich 11, 20; 393 NW2d 152 (1986), quoting *Post v Campau*, 42 Mich 90, 94; 3 NW 272 (1879).

Through the warranty deed, defendants were obliged to convey marketable title to plaintiffs. "Marketable title is one of such character as should assure to the vendee the quiet and peaceful enjoyment of the property, which must be free from incumbrance." *Madhavan v Sucher*, 105 Mich App 284, 287-288; 306 NW2d 481 (1981). "A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business." *Bartos v Czerwinski*, 323 Mich 87, 92; 34 NW2d 566 (1948).

Here, the violation of the building code ordinance constituted an encumbrance on the title as it immediately opened plaintiffs up to the risk of litigation and made their home unlivable and unmarketable. See *Praegner v Kinnebrew & Ratcliff*, 156 La 132, 136; 100 So 247 (1924) (explaining that the buyer "agreed to purchase the property and not the property plus a probable lawsuit").[3][4] Indeed, because of the building code violations, the City of Ann Arbor brought suit against plaintiffs. Ultimately, plaintiffs were forced to pay $18,000 in order to replace the firewalls and $27,160 for an architect. Mark St. Dennis, a real estate appraiser qualified as an expert, testified at trial that the estimated total cost of the violation was $30,000. The condominium association put a lien on plaintiffs' property because they could not afford the total cost. Although

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[2] We using the modern spelling of "encumbrance" rather than the archaic spelling "incumbrance" in all instances other than when directly quoting a source using the archaic spelling.

[3] Although not binding, authority from other jurisdictions may be considered for its persuasive value. *Estate of Voutsaras v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019).

[4] See also, *Lohmeyer v Bower*, 170 Kan 442, 448; 227 P2d 102 (1951), in which the Kansas Supreme Court explained that a home that violated different ordinances and restrictions on the date of conveyance, "so encumber[ed] the title to [the home] as to expose the party holding it to the hazard of litigation and ma[d]e such title doubtful and unmarketable." *Id*. at 452.

plaintiffs eventually paid the cost and the lien was removed, this evidences the vulnerability of plaintiffs' right to their property as a result of the building code violation.

Further, St. Dennis testified that a family would not purchase that home to live in because a buyer would not be able to move into the home with these violations. See, e.g., *Bethurem v Hammett*, 736 P2d 1128, 1132 (Wy, 1987) (stating that there is "overwhelming authority for the proposition that title is unmarketable where it cannot be readily sold to a reasonably prudent person, familiar with the facts" and holding that a title was unmarketable when the extent of the encroachments would have led a reasonably prudent person to not buy the property). In fact, plaintiffs were forced to rent a separate apartment while the issues were resolved. Because of the violations and resulting costs, Galvan did not receive a property that was free of encumbrances, despite the warranty deed's guarantee that the property was free from encumbrances and that the seller would defend and pay for losses resulting from defects in the title. See MCL 565.151.

Other jurisdictions have considered similar issues. In *Oatis v Delcuze*, 226 La 751, 757; 77 So2d 28 (1954), for example, the Supreme Court of Louisiana explained that the "mere existence of the zoning regulations under the ordinance does not of itself create an encumbrance on the title to the property," but that it was the "violation of the restrictions imposed by the ordinance that affects the merchantability of the title." Similarly, in *Moyer v De Vincentis Const Co*, 107 Pa Super 588, 592; 164 A 111 (1933), the Superior Court of Pennsylvania held in favor of the buyer of a property that violated a zoning ordinance because the seller "agreed to furnish a good and marketable title free from liens and incumbrances" and the buyer "could not take possession without immediately becoming a violator of the law and subject to suit." On a different basis, in *Garrison v Berryman*, 225 Kan 644, 648; 594 P2d 159 (1979), the Supreme Court of Kansas affirmed the rescission of a contract for the sale of real property on the basis of mutual mistake because both parties knew the purpose of the sale of the land and it was later discovered that the buyer could not build on it.

The issue at hand was not whether defendants knew about or were liable for the violations, but whether the violation was an encumbrance, which it was. See *Post*, 42 Mich at 94. Plaintiffs, therefore, did not receive title to a property that was free from encumbrance and that allowed them "quiet and peaceful enjoyment of their property." *Madhavan*, 105 Mich App at 287-288. Thus, the trial court erred by directing the verdict in defendants' favor. See *Silberstein*, 278 Mich App at 455.

Reversed and remanded. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

EXHIBIT 2

SELLER'S DISCLOSURE STATEMENT

Property Address: _____ Michigan
Street City, Village, or Township

Purpose of Statement: This statement is a disclosure of the condition of the property in compliance with the seller disclosure act. This statement is a disclosure of the condition and information concerning the property, known by the seller. Unless otherwise advised, the seller does not possess any expertise in construction, architecture, engineering, or any other specific area related to the construction or condition of the improvements on the property or the land. Also, unless otherwise advised, the seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. **This statement is not a warranty of any kind by the seller or by any agent representing the seller in this transaction, and is not a substitute for any inspections or warranties the buyer may wish to obtain.**

Seller's Disclosure: The seller discloses the following information with the knowledge that even though this is not a warranty, the seller specifically makes the following representations based on the seller's knowledge at the signing of this document. Upon receiving this statement from the seller, the seller's agent is required to provide a copy to the buyer or the agent of the buyer. The seller authorizes its agent(s) to provide a copy of this statement to any prospective buyer in connection with any actual or anticipated sale of property. The following are representations made solely by the seller and are not the representations of the seller's agent(s), if any. THIS INFORMATION IS A DISCLOSURE ONLY AND IS NOT INTENDED TO BE A PART OF ANY CONTRACT BETWEEN BUYER AND SELLER.

Instructions to the Seller: (1) Answer ALL questions. (2) Report known conditions affecting the property. (3) Attach additional pages with your signature if additional space is required. (4) Complete this form yourself. (5) If some items do not apply to your property, check NOT AVAILABLE. If you do not know the facts, check UNKNOWN. FAILURE TO PROVIDE A PURCHASER WITH A SIGNED DISCLOSURE STATEMENT WILL ENABLE A PURCHASER TO TERMINATE AN OTHERWISE BINDING PURCHASE AGREEMENT.

Appliances/Systems/Services: The items below are in working order (the items below are included in the sale of the property only if the purchase agreement so provides):

	Yes	No	Unknown	Not Available		Yes	No	Unknown	Not Available
Range/Oven	____	____	____	____	Lawn sprinkler system	____	____	____	____
Dishwasher	____	____	____	____	Water heater	____	____	____	____
Refrigerator	____	____	____	____	Plumbing system	____	____	____	____
Hood/fan	____	____	____	____	Water softener/conditioner	____	____	____	____
Disposal	____	____	____	____	Well & pump	____	____	____	____
TV antenna, TV rotor & controls	____	____	____	____	Septic tank & drain Field	____	____	____	____
Electrical system	____	____	____	____	Sump pump	____	____	____	____
Garage door opener & remote control	____	____	____	____	City Water System	____	____	____	____
Alarm system	____	____	____	____	City Sewer System	____	____	____	____
Intercom	____	____	____	____	Central air Conditioning	____	____	____	____
Central vacuum	____	____	____	____	Central heating system	____	____	____	____
Attic fan	____	____	____	____	Wall furnace	____	____	____	____
Pool heater, wall liner & equipment	____	____	____	____	Humidifier	____	____	____	____

	Yes	No	Unknown	Not Available		Yes	No	Unknown	Not Available
Microwave	_____	_____	_____	_____	Electronic air filter	_____	_____	_____	_____
Trash compactor	_____	_____	_____	_____	Solar heating system	_____	_____	_____	_____
Ceiling fan	_____	_____	_____	_____	Fireplace & chimney	_____	_____	_____	_____
Sauna/hot tub	_____	_____	_____	_____	Wood burning system	_____	_____	_____	_____
Washer	_____	_____	_____	_____					
Dryer	_____	_____	_____	_____					

Explanations (attach additional sheets if necessary):

_____

_____

_____

_____

UNLESS OTHERWISE AGREED, ALL HOUSEHOLD APPLIANCES ARE SOLD IN WORKING ORDER EXCEPT AS NOTED, WITHOUT WARRANTY BEYOND DATE OF CLOSING.

Property conditions, improvements & additional information:

1. Basement/crawl space: Has there been evidence of water? yes____ no____
   If yes, please explain: _____
2. Insulation: Describe, if known _____
   Urea Formaldehyde Foam Insulation (UFFI) is installed? unknown____ yes____ no____
3. Roof: Leaks? yes____ no____
   Approximate age if known _____
4. Well: Type of well (depth/diameter, age, and repair history, if known):_____
   Has the water been tested? yes____ no____
   If yes, date of last report/results: _____
5. Septic tanks/drain fields: Condition, if known: _____
6. Heating System: Type/approximate age: _____
7. Plumbing system: Type: copper___ galvanized___ other___
   Any known problems? _____
8. Electrical system: Any known problems?_____
9. History of infestation, if any: (termites, carpenter ants, etc.)_____
10. Environmental Problems: Are you aware of any substances, materials, or products that may be an environmental hazard such as, but not limited to, asbestos, radon gas, formaldehyde, lead-based paint, fuel or chemical storage tanks and contaminated soil on the property.
    unknown___ yes___ no___
    If yes, please explain:_____
11. Flood insurance: Do you have flood insurance on the property? unknown ___yes ___no___
12. Mineral rights: Do you own the mineral rights? unknown___ yes___ no___

Other Items: Are you aware of any of the following:

1. Features of the property shared in common with the adjoining landowners, such as walls, fences, roads and driveways, or other features whose use or responsibility for maintenance may have an effect on the property? unknown___ yes___ no___
2. Any encroachments, easements, zoning violations, or nonconforming uses?
   unknown___ yes___ no___
3. Any "common areas" (facilities like pools, tennis courts, walkways, or other areas co-owned with others), or a homeowners' association that has any authority over the property?
   unknown___ yes___ no___

4. Structural modifications, alterations, or repairs made without necessary permits or licensed contractors? unknown___ yes___ no___
5. Settling, flooding, drainage, structural, or grading problems? unknown___ yes___ no___
6. Major damage to the property from fire, wind, floods, or landslides? unknown___ yes___ no___
7. Any underground storage tanks? unknown___ yes___ no___
8. Farm or farm operation in the vicinity; or proximity to a landfill, airport, shooting range, etc.? unknown___ yes___ no___
9. Any outstanding utility assessments or fees, including any natural gas main extension surcharge? unknown___ yes___ no___
10. Any outstanding municipal assessments or fees? unknown___ yes___ no___
11. Any pending litigation that could affect the property or the seller's right to convey the property? unknown___ yes___ no___

If the answer to any of these questions is yes, please explain. Attach additional sheets, if necessary:

_____

The seller has lived in the residence on the property from _____ (date) to _____ (date).
The seller has owned the property since _____ (date).

The seller has indicated above the condition of all the items based on information known to the seller. If any changes occur in the structural/mechanical/appliance systems of this property from the date of this form to the date of closing, seller will immediately disclose the changes to buyer. In no event shall the parties hold the broker liable for any representations not directly made by the broker or broker's agent.

Seller certifies that the information in this statement is true and correct to the best of seller's knowledge as of the date of seller's signature.

BUYER SHOULD OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY. THESE INSPECTIONS SHOULD TAKE INDOOR AIR AND WATER QUALITY INTO ACCOUNT, AS WELL AS ANY EVIDENCE OF UNUSUALLY HIGH LEVELS OF POTENTIAL ALLERGENS INCLUDING, BUT NOT LIMITED TO, HOUSEHOLD MOLD, MILDEW AND BACTERIA.

BUYERS ARE ADVISED THAT CERTAIN INFORMATION COMPILED PURSUANT TO THE SEX OFFENDERS REGISTRATION ACT, 1994 PA 295, MCL 28.721 TO 28.732, IS AVAILABLE TO THE PUBLIC. BUYERS SEEKING THAT INFORMATION SHOULD CONTACT THE APPROPRIATE LOCAL LAW ENFORCEMENT AGENCY OR SHERIFF'S DEPARTMENT DIRECTLY.

BUYER IS ADVISED THAT THE STATE EQUALIZED VALUE OF THE PROPERTY, PRINCIPAL RESIDENCE EXEMPTION INFORMATION, AND OTHER REAL PROPERTY TAX INFORMATION IS AVAILABLE FROM THE APPROPRIATE LOCAL ASSESSOR'S OFFICE. BUYER SHOULD NOT ASSUME THAT BUYER'S FUTURE TAX BILLS ON THE PROPERTY WILL BE THE SAME AS THE SELLER'S PRESENT TAX BILLS. UNDER MICHIGAN LAW, REAL PROPERTY TAX OBLIGATIONS CAN CHANGE SIGNIFICANTLY WHEN PROPERTY IS TRANSFERRED.

Seller_____ Date_____

Seller_____ Date_____

Buyer has read and acknowledges receipt of this statement.

Buyer_____ Date_____ Time:_____

Buyer_____ Date_____ Time:_____