UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0669

September Term, 2015

RYAN SHAY, ET. UX.

v.

JANICE STEVENS

Eyler, Deborah S.,
Wright,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: May 4, 2016

Appellants Ryan and Brittany Shay ("the Shays") sought in 2014 to purchase a parcel of residential/agricultural real property in Talbot County from Appellee Janice Stevens. The parties discussed terms and exchanged versions of a written contract of sale. The Shays believed ultimately that there was agreement as to the terms of a contract and they had an enforceable deal. Stevens, believing to the contrary, entered into a contract with a different set of purchasers to sell the property. Litigation, but no laughter, ensued. The Circuit Court for Talbot County granted summary judgment to Stevens under a Statute of Frauds analysis. For reasons we shall elaborate, we affirm in part and reverse in part the circuit court's judgment.

FACTS AND LEGAL PROCEEDINGS

The subject property, owned by Stevens, is located at 29336 Howell Point Road ("the property") in Trappe, Maryland. The property contains a residence and approximately ten "tillable" acres. Stevens listed the property for sale in 2014 with Chesapeake Bay Properties and its real estate agents Sheila Monahan and Kurt Petzold. The listed purchase price was $195,000.00. The Shays, interested in acquiring the property, retained Gwen Eskridge to act as their real estate agent.

During the negotiations, the Shays and Eskridge dealt mostly with Monahan. On 10 June 2014, Eskridge delivered the Shays' written offer to Monahan. The offer, expressed in a standard Maryland Realtors Association form contract, with addenda, was for the full list price, but contained some express contingencies. The contingencies included: 1) that Ms. Shay obtain employment; 2) the Shays are able to secure financing; 3) receipt of an acceptable home inspection; and 4) a confirming appraisal. The Shays

had the right to terminate the contract if the contingencies were not satisfied. If the Shays missed other benchmark deadlines imposed in the offer, then Stevens would be able to enforce the contract, if accepted, as written.

On 18 June 2014, Monahan informed (allegedly) the Shays that their offer had been accepted by Stevens. There were some changes made by Stevens to the Shays' offer, however. Stevens changed, by interlineation, the portion of the Shays' offer relating to the payment of agricultural taxes, shifting the tax payment obligation, if any, from Seller to Buyer. She initialed this change and provided a space for the Shays to initial as well. Stevens also declined two of the addenda accompanying the Shays' offer.[1] The parties disagree over whether Stevens' changes to the Shays' written offer were apparent readily to the human eye.[2] The Shays professed to labor under the belief that there was a binding contract between the parties, notwithstanding Stevens' changes. Monahan claimed, however, that, as of 2 July 2014, neither she nor Stevens received back a copy of the revised offer with the Shays' notation on the counter-offer of their agreement to the changes made by Stevens.

This state of affairs precipitated a text message sent on 2 July 2014 from Monahan to Eskridge, requesting that the Shays return the counter-offer contract with their initialed

[1] Stevens declined to accept an "On-Site Sewage Disposal System (OSDS) Inspection and Test Addendum" and an "Inspection/Certification-Well Addendum." Both required the respective utility systems to pass certification tests and made Stevens responsible for the cost of any needed repairs to achieve passage.

[2] The Shays suggest that they were not informed verbally of these changes and did not notice them at the time, but, in any event, they deemed Stevens' changes to be minor.

approval of Stevens' changes. Written acceptance of the revisions, along with the date of acceptance entered in the appropriate blank provided in the contract form, was not returned promptly by the Shays. A meeting was scheduled to discuss further questions that the Shays posed regarding the property. On 3 July 2014, the Shays met with Stevens at the property. Monahan and Eskridge were present at the meeting. At this meeting, the Shays alleged that they accepted orally Stevens' counter-offer, meaning all of her modifications to the Shays' offer. Monahan, in her capacity as Stevens' agent, testified in the ensuing litigation that this was not her understanding of what transpired.

At the July 3 meeting, Eskridge informed Stevens that the Shays had not signed the change to the agricultural tax responsibility provision because Mr. Shay had unanswered questions regarding this issue and was awaiting a response from the Maryland State Department of Assessments and Taxation as to how much any recoupment tax might be if the Shays discontinued farming the property. The Shays had not determined yet whether to continue farming the property and requested additional information from Stevens about her current tenant farmer.

Following this meeting, the Shays applied for financing and sought to schedule a home inspection. Due to difficulty with finding an available home inspector, the Shays asked for an extension of time on the home inspection contingency deadline, which Monahan approved after receiving Stevens' acquiescence. The Shays signed a loan commitment with Talbot Bank on 23 July 2014 and ordered an appraisal to be performed.

The Shays and Stevens agree that, as of 22 July 2014, the Shays had not delivered to Stevens or Monahan an initialed version of the counter-offer contract with a date of

acceptance inserted. On that same day, Stevens received and accepted ostensibly another offer on the property, under the belief that there was no valid contract with the Shays. On 24 July 2014, when the Shays contacted Monahan to inform her that they had secured the necessary financing, she informed them that Stevens had accepted another offer and that further negotiations with the Shays would cease. The Shays attempted then to deliver on 28 July 2014 to Stevens an initialed copy of Stevens' counter-offer contract, although the "date of acceptance" line remained blank.

The contract with the other buyers was finalized on 4 August 2014 and the property was removed from the Multiple Listing Service ("MLS"). Also, on 4 August 2014, the Shays filed with the circuit court a Complaint, as well as an Emergency Request for Temporary Injunction seeking to prevent Stevens from selling the property to the other purchasers.[3] On 4 September 2014, an evidentiary hearing (the only one held in this case so far) was conducted to decide the preliminary injunction request. Testimony was given by the parties, from which many of the dueling factual contentions mentioned in this opinion are drawn (as to which we made no effort to reconcile perceived inconsistencies), as well as from the Complaint. The parties iterated the timeline of the contract negotiations and their understandings of the events. Monahan testified further that she advised Stevens to approve the home inspection contingency time extension requested by the Shays. She noted also that Stevens had spent a significant amount of

[3] The other purchasers withdrew from their contract, with full releases, during the pendency of this case in the circuit court. They did not participate in this appeal.

time during the relevant events in Detroit tending to an ill relative. She testified further that she did not request a "mutual release" from the Shays before counseling Stevens to accept the other parties' offer, nor inform the Shays of the existence of negotiations with the other purchasers until the July 24 communication.[4] The circuit court denied the request for a temporary injunction and, on 12 September 2014, the circuit court ordered mediation. Mediation did not occur due to Stevens' objection to it.

The Shays' Complaint, in addition to seeking specific performance of the alleged contract, requested damages and demanded a jury trial. They propounded also discovery requests. On 17 October 2014, the Shays amended their Complaint to add as John Doe parties the as yet un-named second set of buyers. Discovery revealed these individuals'

[4] Eskridge testified that the real estate practice of executing a mutual release should have been followed if Monahan and Stevens were planning on accepting another contract:

> Q: Where there is, there are outstanding contract documents signed by the parties indicating that there is a contract for an offer outstanding. What is the practice of realtors in terms of insuring that if the seller is going to consider another contract there is first a release from the parties that have the signed documents?
> A: Yes, certainly a mutual release of obligation and deposit, it's always done.
> Q: And why do you do that?
> A: Well because you're jeopardizing your seller if you don't have that done. You're jeopardizing all parties really.

She testified that, even without a "mutual release," Stevens could entertain other offers as a back-up offer but would need an executed release in order to begin negotiating with the other parties: "[Y]es, before she could entertain that offer as her primary offer she should have definitely signed that release. Now she could have taken the other offer as a back-up offer. That would have been permissible as long as language was in there that you know stated that."

names and the contents of the second contract, which also lacked insertion of a date of contract acceptance. Stevens filed a Motion for Summary Judgment. The Shays filed a Motion for Partial Summary Judgment. The circuit court heard argument on the motions on 13 March 2015 and 28 April 2015.

The circuit court focused first at argument, however, on a Motion to Disqualify Stevens' counsel filed by the Shays on asserted conflict of interest grounds. The judge concluded ultimately that the motion should be denied because he concluded that Stevens (although a senior citizen) was competent and had the right to be represented by counsel of her choice, despite the fact that the law firm was also outside counsel historically to Chesapeake Bay Properties (not a party to the proceedings).

In a Memorandum Opinion and Order issued on 1 June 2015, the circuit court explained why it granted Stevens' Motion for Summary Judgment. As to Counts I (Specific Performance) and II (Breach of Contract) of the Shays' Complaint, the court's analysis relied on its understanding and application of the Statute of Frauds. The circuit court concluded that the "Date of Contract Acceptance" provision of the purported contract was a material omitted term and thus, the document was not sufficient to satisfy the Statute of Frauds. As to Count III (Negligent Misrepresentation), the court concluded that the Shays failed to show that Stevens owed a duty of care to them. Although Count IV (Constructive Trust) was not discussed specifically in the circuit court's written memorandum, because its propriety was not argued in writing or otherwise before the court, the court, having ruled against the Shays as to Counts I, II and III of their

Complaint, concluded Count IV would fail logically as a matter of law, in the absence of Counts I, II and II. The Shays' filed their notice of appeal to this Court on 4 June 2015.

QUESTIONS PRESENTED[5]

Appellants present four questions for our consideration, which we condense as follows:

> 1. Did the circuit court err in granting summary judgment to Stevens on the contract claims by concluding that the Statute of Frauds was not satisfied by the Shays' oral agreement to the counter-offer?
>
> 2. Did the circuit court err when it gave judgment on the claim for constructive trust when there was no motion pending, briefed, or heard that encompassed that claim?
>
> 3. Did the circuit court err when it entered judgment on the claim for negligent misrepresentation on the basis that the facts did not establish duty?

[5] Appellants' questions were framed as follows in their brief:

> 1. Did the Trial Court err in its determination on cross motions for partial summary judgment that the Statute of Frauds had not been satisfied as a matter of law and of fact under the pertinent standard of review?
>
> 2. Did the Trial Court err when it dismissed Count Three asserting negligent misrepresentation on the basis of a lack of duty?
>
> 3. Did the Trial Court err when it dismissed Count Four asserting a request to establish a constructive trust over the Stevens' property where there was no motion pending, briefed or heard that challenged that claim?
>
> 4. Did the Trial Court err when it denied the Shays' motion to disqualify defense counsel in light of the circumstances of this litigation?

The record involving the grounds of the Shays' motion to disqualify Stevens' counsel was not developed fully enough before the circuit court and, therefore, we shall not address this question on the "merits."

For reasons we shall explain, we affirm in part and reverse in part the circuit court's judgment.

STANDARD OF REVIEW

The "function of a summary judgment proceeding is not to try the case or to attempt to resolve factual disputes but to determine whether there is a dispute as to material facts sufficient to provide an issue to be tried." *Miller v. Bay City Prop. Owners Ass'n, Inc.*, 393 Md. 620, 631, 903 A.2d 938, 945 (2006) (citation omitted). Thus, under Maryland Rule 2-501(f), a "court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." When an appellate court reviews the grant of a motion for summary judgment, "we must determine whether a material factual issue exists, and all inferences are resolved against the moving party." *Miller*, 393 Md. at 631, 903 A.2d at 944-45 (citation omitted). Our review is non-deferential as we "independently review the record. . . in the light most favorable to the non-moving party and construe any reasonable inferences which may be drawn from the facts against the movant." *Livesay v. Baltimore Cnty.*, 384 Md. 1, 10, 862 A.2d 33, 38 (2004) (internal citations omitted).

DISCUSSION

I. Counts I & II: The Statute of Frauds

a. The Parties' Contentions

The Shays contend that the Statute of Frauds was satisfied because the written contract was complete and signed by Stevens as the party to be charged. They argue

further that verbal acceptance by them of Stevens' revisions is sufficient to create a binding contract. The Shays maintain finally that the circuit court should not have ruled on the constructive trust claim as it was not properly before the court.

Stevens responds that the circuit court was correct to grant her motion because the changes she made to the contract represented a counter-offer, not acceptance of the Shays' offer, and that the Statute of Frauds could not be satisfied by her counter-offer, absent timely written acceptance by the Shays. She maintains further that, in view of the circuit court's judgment in favor of her as to the Shays' other counts, the remaining naked claim for a constructive trust could not be maintained by the Shays.

b. Analysis

The Statute of Frauds was created to prevent "successful fraud by inducing the enforcement of contracts that were never in fact made. It is not to prevent the performance or the enforcement of oral contracts that have in fact been made." *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 437, 961 A.2d 665, 683 (2008) (citation omitted). The Statute of Frauds states:

> No action may be brought on any contract for the sale or disposition of land or of any interest in or concerning land unless the contract on which the action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or some other person lawfully authorized by him.

Maryland Code (1974, 2015 Repl Vol), Real Property Article, § 5-104 ("Real Prop."). Essentially, the "statute of frauds requires a memorandum for the sale of real estate to contain all the elements of a valid contract." *Beall v. Beall*, 291 Md. 224, 229, 434 A.2d

1015, 1018 (1981). The Court of Appeals described specific elements that must be present in order for a writing to satisfy the Statute of Frauds:

> (1) a writing (formal or informal);
> (2) signed by the party to be charged or by his agent;
> (3) naming each party to the contract with sufficient definiteness to identify him or his agent;
> (4) describing the land or other property to which the contract relates; and
> (5) setting forth the terms and conditions of all the promises constituting the contract made between the parties.

Beall, 291 Md. at 228-29, 434 A.2d at 1018.

In *Royal Inv. Grp., LLC v. Wang*, this Court applied these factors. The general rule is that "a memorandum satisfying the Statute of Frauds may be made *before or after* the making of the contract." *Royal Inv. Grp., LLC*, 183 Md. App. at 435, 961 A.2d at 682 (citation omitted). This Court explained:

> The Statute does not require its satisfaction by a writing to be made simultaneously with the agreement, and it is unnecessary to make the fictitious assumption that it is in fact simultaneous in a case where it is not. Satisfaction of the Statute by the making of the memorandum does, however, result in the previously unenforceable oral agreement becoming binding, and since it is that contract which becomes binding, it should be as of the date of the oral contract; and there seems to be no limit, except perhaps that imposed by the Statute of Limitations, upon the power of a party to an oral contract at any time to make a memorandum binding upon himself.

Royal Inv. Grp., LLC, 183 Md. App. at 436, 961 A.2d at 683 (footnotes omitted). The Court concluded that "the Statute of Frauds is not a bar to enforcing an oral contract when there is a subsequent writing confirming the agreement, even if the writing is signed after a breach of the agreement." *Royal Inv. Grp., LLC*, 183 Md. App. at 437, 961 A.2d at 683. The "signed writing protects against a fraudulent allegation of an oral

contract, and it prevents the signor from preventing enforcement of the oral contract pursuant to the Statute of Frauds, regardless of when the writing was signed." *Royal Inv. Grp., LLC*, 183 Md. App. at 437, 961 A.2d at 683.

The Statute of Frauds' "purpose of preventing fraud is not offended by permitting a document that sets forth all terms of an agreement to serve as the writing required by [Maryland Code (2006, 2013 Repl Vol), Courts & Judicial Proceedings Article,] § 5-901(3), even if the document was signed before the technical formation of a contract." *Salisbury Bldg. Supply Co. Inc. v. Krause Marine Towing Corp.*, 162 Md. App. 154, 162, 873 A.2d 452, 457 (2005). In *Salisbury Bldg. Supply Co. Inc.*, the parties "entered into a subsequent oral contract upon the same terms as the written contract." *Salisbury Bldg. Supply Co. Inc.*, 162 Md. App. at 156, 873 A.2d at 453. After trial, a jury found that the parties entered "into an oral contract by adopting the terms of the previously executed written agreement." *Salisbury Bldg. Supply Co. Inc.*, 162 Md. App. at 156, 873 A.2d at 453.

When applying the statute, it is established that "the Statute of Frauds, at least as it applies to executory land contracts, is not satisfied [only] by a finding that there was in fact an oral contract to transfer." *Litzenberg v. Litzenberg*, 307 Md. 408, 420, 514 A.2d 476, 482 (1986). A signed memorandum that sets forth all of the material facts is required to constitute a binding contract. *Litzenberg*, 307 Md. at 420, 514 A.2d at 482. The signature of the party to be charged must be on the written memorandum. *See* Real Prop § 5-104. As for the other party, "[i]t should be noted that a signature is not required in order to bring a contract into existence, nor is a signature always necessary to the

execution of a written contract." *Porter v. Gen. Boiler Casing Co.*, 284 Md. 402, 410, 396 A.2d 1090, 1095 (1979). The mutuality aspect of a contract may be established through the conduct of the parties if a signature is not present. *Porter*, 284 Md. at 410, 396 A.2d at 1095.

As a result, part performance "is adequate to remove the bar of the statute of frauds when there is 'full and satisfactory evidence' of the terms of the agreement and the acts constituting part performance." *Beall*, 291 Md. at 230, 434 A.2d at, 1019 (citation omitted). Although part performance can show mutual assent, it "is not enough that it [be] evidence of *some* agreement, but it must relate to and be unequivocal evidence of the *particular* agreement." *Beall*, 291 Md. at 230, 434 A.2d at 1019 (emphasis added).

Because this case was disposed of on summary judgment, the circuit court was to determine only whether a genuine dispute of a material fact existed and, if not, whether either side was entitled to judgment as a matter of law. Here, the circuit court concluded that the omission of completion of the "Date of Contract Acceptance" blank was a missing material term and as a result, the Statue of Frauds was not satisfied. We disagree and furthermore conclude that there were genuine and material disputes demonstrated that precluded summary judgment at the point in time it was granted.

The Shays allege that they agreed verbally to the contract (as revised by Stevens) at the 3 July 2013 meeting between the parties and their respective agents. At the sole evidentiary hearing (on the motion for a preliminary injunction), the question of verbal acceptance was disputed, as well as the significance/importance of the "date of contract acceptance" provision. The two principal real estate agents testified before the court as

expert witnesses on the importance of the omission of date of contract acceptance. Monahan (Stevens' agent) testified that, without a date of contract acceptance filled in, she did not believe that there could be a binding contract:

> Q: In your experience have you ever ended up with a final contract if you do not have a statement of contract acceptance date?
> A: No.
> Q: Is this a common within the industry for there to be verbal offers of acceptance or verbal terms to a contract?
> A: It's fine to talk about things but unless it is in writing it's not an enforceable contract.

Monahan's view was that this date was a material term because many of the deadlines associated with the contract, such as fulfillment of the contingencies, were based expressly on and measured from the date of contract acceptance. There was additional testimony at the evidentiary hearing that revealed that the Shays and Eskridge failed to notice the changes Stevens made to the Shays' contract offer because of the poor quality of the electronically-transmitted copy purporting to be a counter-offer. Moreover, the testimony regarding the July 3 meeting presented equivocal views as to whether there was a binding contract in place.

Eskridge (the Shays' agent) believed that it was not material that the date of contract acceptance was missing because of the verbal acceptance she believed was communicated by the Shays at the July 3 meeting. As to the alleged verbal agreement, Eskridge stated:

> Q: Is it the standard practice in your industry to have verbal agreements rather than written agreements?
> A: It is. You know I mean when everyone sits together it was like a meeting of the minds. And you know again at that point in time when we sat down

> with Mrs. Stevens, you know Sheila [Monahan] was there, Ryan and Brittany [Shay], it was agreed upon. It was a done deal in our minds. It was done. You know if we had any inkling that we had to provide that initials back to them in a five day period, in a ten day period it would have been done but in our minds it was just a matter of formality at that point.

Mr. Shay testified that, although he was aware generally of the need to initial or accept otherwise Stevens' changes, "no timeline" was placed on accomplishment of this. When he left the July 3 meeting, he understood there to be a binding contract:

> It was understood that officially it would need to be signed and delivered at some point. But there was never any indication that we did not have a binding contract before that was delivered to them as far as we were aware we had a binding contract as of that day. Furthermore we thought we had a binding contract before that day. Because it wasn't until the 2nd that it was mentioned that there was any change to the accepted contract that was delivered to us.

Monahan retorted, however, that she and her client did not believe there was a "meeting of the minds" because the purpose of the meeting was only to answer the Shays' remaining questions:

> Q: After July 2nd the next day was the meeting?
> A: . . . We did not leave with a meeting of the minds. This was not a meeting to discuss the contract. It was a meeting to discuss the questions that have been submitted by the Shays.
>
> . . .
>
> So we did not leave that meeting feeling we had a meeting of the minds and a binding contract. We were waiting for some resolution on this. And we did not have a contract acceptance date. We had not received a waiver of the employment contingency, which had expired on the 30th. We did not have a contract acceptance date and we did not know what the Shays were going to do about the agricultural transfer tax.

Before concluding ultimately that the Statute of Frauds was not satisfied, even the circuit court noted that "it [was] possible that a counter-offer signed by Stevens before an oral

agreement between the parties could make that oral agreement enforceable against her if the other requirements were met."

We hold that a reasonable fact-finder could conclude, if it believed the Shays' factual assertions (albeit some of which appear internally inconsistent to other of their factual assertions), that the written counter-offer sent by Stevens, combined with the Shays' July 3 verbal acceptance, fulfilled the requirements of the Statute of Frauds. The counter-offer was signed and initialed by Stevens and contained all the pertinent details about the property and the terms of sale that were agreeable apparently to Stevens. The Shays undertook some performance under the terms of the contract by securing financing and providing evidence of Ms. Shay's employment. The disagreement over the date of contract acceptance provision, as to whether it was a material provision, demonstrates that there are triable issues that should be submitted to the finder of fact, and the case was not appropriate for decision as a matter of law on Statute of Frauds grounds at the summary judgment stage of proceedings. Because this Court and others have found that verbal acceptance of a contract may suffice, the resolution of the conflicting factual accounts of whether the alleged verbal acceptance occurred on July 3 and whether thereby a binding contract arose should be left for the fact-finder to resolve, upon proper instructions from the court.

c. Count IV: Constructive Trust

When the circuit court determined, albeit in error (with benefit of hindsight), that Stevens was entitled to summary judgment as to Counts I and II, it concluded apparently and understandably that the Shays' claim for a constructive trust could not be maintained

as a stand-alone claim. A constructive trust "is the remedy employed by a court of equity to convert the holder of the legal title to property into a trustee for one who in good conscience should reap the benefits of the possession of said property." *Wimmer v. Wimmer*, 287 Md. 663, 668, 414 A.2d 1254, 1258 (1980). This remedy is available only "where property has been acquired by fraud, misrepresentation, or other improper method, or where the circumstances render it inequitable for the party holding the title to retain it." *Wimmer*, 287 Md. at 668, 414 A.2d at 1258.

This remedy has been used in situations where "another person had some good equitable claim of entitlement to property resulting from the expenditure of funds or other detrimental reliance resulting in unjust enrichment." *Wimmer*, 287 Md. at 669, 414 A.2d at 1258. Because we reverse summary judgment as to Counts I and II (and because Stevens has exhibited a propensity to attempt to sell the property to others than the Shays, without a release or resolution of the Shays' claims), there is a possibility that a constructive trust may be appropriate. Thus, we vacate also the circuit court's judgment as to Count IV and remand Count IV to be reconsidered in light of further proceedings on Counts I and II.

II. Count III: Negligent Misrepresentation

a. Contentions

The Shays contend that the circuit court misinterpreted the law involving their claim for negligent misrepresentation that Stevens negligently led them to believe they had a binding contract. They argue further that a "sufficiently close nexus" is enough to establish a duty of care between the parties. Stevens responds that the circuit court was

correct because there was no prima facie case for negligent misrepresentation pled by the Shays and she owed no duty to them.

b. Analysis

In order to state a claim for negligent misrepresentation, the plaintiff must be able to establish each of the following:

> (1) the defendant, owing a duty of care to the plaintiff, negligently assert[ed] a false statement;
> (2) the defendant intend[ed] that his statement [would] be acted upon by the plaintiff;
> (3) the defendant ha[d] knowledge that the plaintiff [would] probably rely on the statement, which, if erroneous, [would] cause loss or injury;
> (4) the plaintiff, justifiably, [took] action in reliance on the statement; and
> (5) the plaintiff suffer[ed] damage proximately caused by the defendant's negligence.

Goldstein v. Miles, 159 Md. App. 403, 435, 859 A.2d 313, 332 (2004) (citing *Martens Chevrolet, Inc. v. Seney,* 292 Md. 328, 337, 439 A.2d 534, 539 (1982)). The circuit court granted Stevens' Motion for Summary Judgment as to the Shays' claim for negligent misrepresentation because a duty of care was not established by the alleged facts. There was no fiduciary relationship between the parties, acting as buyer and seller. The Shays' argument of a "sufficiently close nexus or relationship" creating a duty may be an accurate observation, but those facts were not before the court. We agree with the circuit court that no duty was established by the facts as such before the court and that summary judgment was proper.

It is established under Maryland law that, within an arm's length transaction, no fiduciary relationship is created ordinarily. Specifically, in an arm's length transaction, "[t]here is nothing to show any fiduciary relation between the parties, or that the plaintiff

stood in a position of confidence toward or dependence upon the defendant." *Fegeas v. Sherrill*, 218 Md. 472, 478, 147 A.2d 223, 226 (1958) (citation omitted). Explained further,

> [i]n ordinary contracts of sale, where no previous fiduciary relation exists, and where no confidence, express or implied, growing out of or connected with the very transaction itself, is reposed on the vendor, and the parties are dealing with each other at arm's length, and the purchaser is presumed to have as many reasonable opportunities for ascertaining all the facts as any other person in his place would have had, then the general doctrine already stated applies: no duty to disclose material facts known to himself rests upon the vendor; his failure to disclose is not a fraudulent concealment.

Polson v. Martin, 228 Md. 343, 349, 180 A.2d 295, 298 (1962) (citations and internal quotations omitted). Because there is no duty established in these types of contracts, the Shays are unable to establish the required elements of a negligent misrepresentation claim.

The Shays point this Court to two employment cases that involved contract negotiations. *See Weisman v. Connors*, 312 Md. 428, 431, 540 A.2d 783, 784 (1988) (case concerning negligent misrepresentation alleged to have arisen from the factual matrix of an arm's length negotiation of an employment contract); *Griesi v. Atl. Gen. Hosp. Corp.*, 360 Md. 1, 3, 756 A.2d 548, 549 (2000) (case involving an allegation that "Atlantic General negligently misrepresented material facts during the course of pre-employment negotiations upon which Griesi relied to his ultimate detriment"). The Court of Appeals's conclusions in those cases are limited to their employment law context but, even so, reject the "sweeping" assertion that no duty or claim for negligent

misrepresentation could ever exist in an arm's length transaction. *See Weisman*, 312 Md. at 445, 540 A.2d at 791.

The distinction, however, arises because of the facts presented in them. In both of those cases, the Court of Appeals was presented with the potential misrepresentation of material facts that would lead an individual to rely to his or her detriment. Here, we are confronted with the context of a real estate contract where "the agency relationship and, thus, the fiduciary duty ran from the agent to the seller, not to the buyer." *See Lopata v. Miller*, 122 Md. App. 76, 86-87, 712 A.2d 24, 29 (1998).[6] Because both sides were represented by real estate agents in the residential real property contract negotiations and no facts were presented to show that Stevens owed a duty of care to the Shays, no claim for negligent misrepresentation was pled properly in the Complaint. We affirm the circuit court's grant of summary judgment on this count.

III. Conclusion[7]

We reverse the circuit court's judgment on Counts I, II and IV and remand this case to the circuit court for further proceedings. We affirm, however, the grant of

[6] Because a real estate broker's duty is to the "general public," it is distinguishable from a tort duty. *Lopata v. Miller*, 122 Md. App. 76, 86, 712 A.2d 24, 29 (1998). If a real estate agent "intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know pertaining to the property at issue," they are subject to license suspension or revocation. *Lopata*, 122 Md. App. at 90, 712 A.2d at 30 (citation and internal quotation marks omitted).

[7] As mentioned in footnote 5, the Shays' Motion to Disqualify Counsel is not properly before this Court for consideration, based on the current state of the record.

summary judgment in favor of Stevens as to Count III, the claim for negligent misrepresentation.

JUDGMENT OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE SPLIT EQUALLY BY THE PARTIES.