

Circuit Court for Montgomery County
Case No. 465771V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2603

September Term, 2019

JERRY JEWELL

v.

MARYLAND REAL ESTATE COMMISSION

Graeff,
Arthur,
Shaw Geter,
JJ.

Opinion by Graeff, J.

Filed: April 2, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In August 2017, Christopher and Nkese Miller (the “Millers”) filed a Complaint and Guaranty Fund Claim with the Maryland Real Estate Commission (the “Commission”), appellee, against appellant, Jerry Jewell, the listing agent for their recently purchased home. The Millers alleged that the listing stated that the house was “newly renovated,” but the house was “falling apart,” and Mr. Jewell did not fix items on “the inspection list.” The Commission issued an order for a hearing before the Office of Administrative Hearings (“OAH”), stating that the Millers had the burden to show that any loss was sustained as a result of, among other things, fraud or misrepresentation by Mr. Jewell. After the hearing, an Administrative Law Judge (“ALJ”) submitted a proposed order recommending a compensation award of \$27,636 to the Millers. The Commission agreed, and the circuit court subsequently affirmed.

On appeal, appellant presents the following question for this Court’s review, which we have rephrased slightly, as follows:

Did the circuit court err in upholding the ruling of the Commission finding Mr. Jewell liable for actual loss sustained by the Millers as a result of an act or omission that constitutes fraud or misrepresentation in the provision of real estate sales services?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Factual History

In 2017, Mr. Jewell, a licensed real estate agent working for RealtyForce, Inc., listed for sale a “newly renovated” property in Capitol Heights, Maryland (the “Property”). The

Millers, represented by another real estate agent, made an offer to purchase the Property and began the process of securing financing and closing on the home.

At the time of the listing, the Property was owned by RedShift, LLC, a real estate company that purchases homes for the purpose of renovating and reselling them. Mr. Jewell held a minority interest in RedShift, LLC, and in addition to his role as the listing agent, he also had a partial equity interest in the Property. Mr. Jewell introduced himself to the Millers as the owner, seller, and listing agent of the Property.

The Millers received a Federal Housing Administration (“FHA”) loan, which required an inspection and an appraisal. Mrs. Miller stated that she was unclear how the house passed the FHA inspection given the outstanding issues, but she knew that it did because they could not have received the loan otherwise. The Millers never received the signed FHA inspection report.¹ They ultimately received a loan following the appraisal. The Millers also retained a third-party inspection company to conduct an independent inspection of the home.

The third-party inspection report, which was admitted into evidence, listed numerous items to replace or repair. An addendum to the contract was drafted, and it contained a list of items to be repaired by the seller, as follows:

1.0 Roof shingles on the rear, left side, on drop edge that's [sic] broken, left and right rear dormer, all need to be repaired or replaced with a licensed contractor.

¹ Mr. Miller testified that, when he called to figure out why they never received the FHA inspection report, the representative he spoke with stated that the report was unfinished “due to intimidation.”

- 1.1 Repair or replace raising flashing around the chimney and rear roof with a licensed contractor.
- 1.2 [R]eplace missing chimney cap on roof with a licensed contractor.
- 1.4 [R]epair downspouts, the missing one and the rear right side of the house, and missing one in the rear with a licensed contractor.
- 2.0 Wall cladding flashing and trim; Seal wall hole around suction line and seal located at the rear of the house with a licensed contractor.
- 2.3 [S]ecure hand railing at rear of house. Extend concrete patio to help with water run off in rear of the house with licensed contractor[.]
- 3.5 [R]epair cabinet top hinge left of range in kitchen. [S]ecure bottom screws in cabinet above range.
- 3.8 [M]issing cover switch missing on outlet right side of the sink in kitchen. [O]utlet left of sink needs to be GFCI if 6 feet or less from sink. Electric outlet cover plate is missing. [L]eft range of kitchen.
- 3.9 [S]ecure dishwasher, connect power, and drain hose, in kitchen with lic. contractor[.]
- 3.14 [R]eplace missing microwave with licensed contractor[.]
- 3.16 [I]nstall refrigerator water line with a licensed contractor[.]
- 4.6 [B]ring ceiling light in living room to working order with a licensed contractor.
- 4.1D [W]ater stain in top floor bedroom. [R]epair and fix problem from stain and repair damage with a licensed contractor.

* * *

- 4.4D Repair entry door at lower level bedroom. repair latch at entry door bathroom lower level #1. Repair lower level entry door in lower bedroom #2 with a licensed contractor.
- 4.5D [R]epair window broken glass in basement window with a licensed contractor.
- 4.6D repair ceiling light lower bedroom #1, repair ceiling light in bedroom #2 with a licensed electrician.
- 4.3E [H]and railing missing on second level stairways with a licensed contractor[.]
- 4. 6E Electrical switch cover is missing in first level hallway.
- 4. 3F Extend handrailing to the []top of the stairway at lower level with a contractor licensed[.]
- 4.5F Window does not close to the right of the fireplace (lower level)
- 4.6F [Four] electrical outlet cover plates are missing in utility area in lower level, electrical switch missing in lower level. electrical missing switch left of rear entry at lower level with a licensed electrician.
- 5.2A Window lock handle is broken at second level bath. repair or replace.

- 5.4A Shower head missing in second level hall bath.
- 5.5A Electrical GFCI outlet cover plate is missing in second level hall bath.
- 5.4B Tub spout and diverter needs to be caulked at buddy bath. [S]ecure tub diverter handle, replace shower head.
- 5.5B Ceiling like [sic] is missing and wire splice is exposed and not in box in buddy bath. Repair or replace.
- 5.5C GFCI is needed in outlet in first bathroom.
- 5.6C No ventilation in first level bathroom with using license contractor
- 5.4D Sink leaks at lower level bath[.]
- 5.5D GFCI outlet is needed in lower level bathroom[.]
- 7.2 [W]ater heater romex connector is not secure in lower level. [R]epair or replace T&P valve-on water heater needs a 3/4 threaded pipe to extend within 6 inches from floor missing at lower level. NO PVC[.]

* * *

- 8.1 Electric panel earth ground is missing at lower level[.]
 - 8.3 [E]lectrical wire is exposed and not in box with a cover plate in the kitchen.
 - 8.7 [S]moke detector does not work at lower level.
 - 9.3 Second level hallway, second level bedroom wall register cover is missing, floor register cover is broken in first level bedroom, missing ceiling register cover missing at lower level. HVAC filter missing, and filter door is missing at lower level. H[VAC] return duct has a hole and should be sealed, repair or replace.
 - 9.5 Chimney needs to be cleaned and brought up to working order.
 - 9.8 Heat pump air compressor power wires in the green fields are not in the connector at rear of house. Bring compressor up to working order.
- A. Back yard is in need of grading to allow proper water run off and even flow throughout the back yard.
 - B. Concrete driveway to be installed on property.
 - C. Fence is to be installed in back yard portion of the property as agreed previously with diagram. (Not in front yard)

The copy of the addendum introduced into evidence did not include a response from the seller, and it was unsigned.

The Millers testified that Mr. Jewell told them that he would complete all of the repairs listed in the addendum prior to closing. Mrs. Miller testified that Mr. Jewell told

them over the phone that he would fix all the items on the list, including the roof. Mr. Miller stated that Mr. Jewell said that he would sign the document and send it to the Millers' agent, but they never received a signed copy.

Prior to closing, the Millers conducted a walk-through of the Property with their real estate agent. They checked whether the repairs listed on the inspection report and addendum had been completed, but some of the key items were not visible or accessible at that time. Their agent did not raise any concerns about moving to closing after the walk-through.

On June 26, 2017, the Millers closed on the Property. Immediately after moving in, they discovered that many of the promised repairs had not been done, and there were numerous outstanding issues with the house. On July 3, 2017, Mr. Miller sent an e-mail to their realtor stating that the sump pump, dishwasher, HVAC, duct system, and certain light switches did not work.

The Millers subsequently identified additional problems, including kitchen tiling that cracked, plumbing issues and clogged sewer lines, an improperly sealed toilet that leaked and caused water damage to the ceiling below, numerous electrical problems and unsecured lighting fixtures, broken windows and doors, loose railings, a leaky roof, and an improperly installed built-in microwave that fell and revealed exposed wiring. There also was severe flooding in the basement, including one time that the basement flooded with human waste.

The Millers were told that most of these problems were not covered by their home warranty. The warranty did, however, cover the costs to fix the HVAC and the dishwasher and to clear the basement water line. They paid a \$100 deductible on July 12, 2017, to fix the HVAC and the dishwasher, and another \$100 on August 3, 2017, to clear out the “main line” from the basement. On July 6, 2018, the Millers signed a contract with Long Roofing to replace the roof for \$27,936.²

II.

Proceedings Leading to Appeal

A.

Complaint

On August 13, 2017, the Millers filed a Complaint with the Commission seeking \$50,000 in reimbursement from the Guaranty Fund. They described their claim as follows:

The listing said newly renovated house. We moved into a house full of unfinished projects. The air condition [sic] doesn't work and is not covered. We have been here for a little over a month and already the house is falling apart. There are electrical and plumbing problems. The bathrooms are unfinished. There are shower knobs falling off; towel racks laying to the side and toilet paper rolls not put up. Tiles that are suppose [sic] to last 15 years and cracking all over the house because it is not properly grouted. Sump pump doesn't work and is not covered under warranty. Some electrical sockets were left uncovered. None of the fire alarms work. The panel is a mess. They didn't fix anything on the inspectors [sic] list like the railing in

² The Millers introduced a signed contract with the roofing company to replace the roof for \$27,436. The contract provided that the company would remove the existing roof, install new roofing and underlayment with drip edge, add an intake ridge vent, replace rotted sheathing, add a chimney cricket, apply new flashing to the two chimneys, and install new gutter and ventilation systems. It noted that work would begin on July 6, 2018, i.e., the signing date, and be completed in five to seven weeks. The Millers did not present evidence to the ALJ regarding whether the work was completed.

the back is still loose. I can't use my kitchen or my bathrooms because the basement floods and there is a massive leak in the downstairs bathroom. And they left a huge dumpster in our yard along with glass and other sharp objects.

B.

Commission's Order for a Hearing

On June 25, 2018, the Commission ordered a hearing. The order stated that, to establish eligibility for payment, the Millers had the burden to show a loss as a result of conduct of Mr. Jewell that constituted "theft, embezzlement, forgery, false pretenses, fraud, or misrepresentation."

C.

ALJ Hearing

On November 19, 2018, the ALJ held a hearing. The Millers, unrepresented litigants, Mr. Jewell, represented by counsel, and the Commission, represented by an assistant attorney general, appeared for the hearing.

The Millers testified consistent with the facts previously set forth. Mrs. Miller also testified that the appraiser for the FHA loan inspected the Property twice, the second time "[t]o make sure that everything on the punch list" was done and "up to code." She then stated that she questioned whether the FHA inspector actually inspected the house because, with all that was wrong with the house, she could not understand how it would pass inspection.

Mr. Miller testified that Mr. Jewell said he would make the repairs listed in the inspection report, and he said he would sign it, but he did not sign it. The FHA inspector

rescheduled her inspection, stating that “they [were] dragging their feet,” but he never got a new scheduled date from her, or their third-party inspector, to return. He stated that he asked his agent about a signed copy of the addendum, but she did not respond.

Mr. Jewell testified that he was the agent who listed the Property. He also was a minority owner of RedShift, LLC, the company that owned the Property. He conducted a walk-through of the Property prior to listing it for sale, and he concluded that it needed updating and “some cosmetic stuff.” He stated that his contractors usually completed “basic renovations” before listing a property, but he was unable to recall what updates were made to this specific Property.³

Mr. Jewell did not recall doing a walk-through with the Millers, and he did not remember receiving a request for repairs from the Millers. On cross-examination by the attorney representing the Commission, the following exchange occurred:

[ATTORNEY]: [D]o you remember getting a copy of the home inspection report from the agent of the Millers?

[MR. JEWELL]: I don't -- I don't remember it. I'm not saying I didn't. I'm sure I -- I probably did. You're asking me to remember things that I don't remember.

[ATTORNEY]: Okay. But --

[MR. JEWELL]: But I know that there was work that we went back and did on the house. I know that.

[ATTORNEY]: Okay. Well what work did you agree to do when you went back into the house?

[MR. JEWELL]: We had several items that needed to be taken care of.

³ Mr. Jewell stated that he was 80 years old and “didn't have a great memory.”

[ATTORNEY]: Okay. Do you have any documents here showing that you took care of them?

[MR. JEWELL]: I have -- the contractor -- the contractor did the work. Then they did a reinspection and there were a couple more items that had to be done and I understand that they were done.

[ATTORNEY]: How -- what's the basis --

[MR. JEWELL]: And -- but it -- I --

[ATTORNEY]: -- of that understanding?

[MR. JEWELL]: I couldn't communicate -- my contractor said they were done.

[ATTORNEY]: Do you have something in writing showing --

[MR. JEWELL]: No.

[ATTORNEY]: -- that they were done?

[MR. JEWELL]: No.

[ATTORNEY]: Was the roof something that you remember agreeing to fix?

[MR. JEWELL]: Yeah, and I was told the roof was fixed.

[ATTORNEY]: Who told you that?

[MR. JEWELL]: The contractor. . . .

* * *

[ATTORNEY]: . . . I'm asking you what reason you have to believe that the roof was ever fixed by your contractor.

[MR. JEWELL]: I was told it was fixed.

[ATTORNEY]: Okay.

* * *

[ATTORNEY]: You do have documents?

[MR. JEWELL]: No. I mean, I have -- he -- he went over the list and he gave me a list and he said he did it. It was on the list -- on the list. He said he did something with the chimney[.]

Mr. Jewell reiterated that he “firmly believe[d]” that the roof was fixed because his contractor told him it was done.

During closing argument, counsel for Mr. Jewell argued that there was no evidence that Mr. Jewell, in his role as a real estate agent, made any misrepresentation that caused damage to the Millers. With respect to the inspection addendum, counsel noted that it was unsigned, and it did not “commit anyone to do anything.”

Counsel for the Commission conceded that it was “a problem that there’s nothing in writing from [Mr. Jewell] saying exactly what he would fix.” She asserted, however, that Mr. Jewell’s credibility was “seriously lacking” because he came to the hearing unprepared to address the specific property or provide any information in his defense. She further noted that Mr. Jewell had admitted on cross-examination that he agreed to make some repairs, including the repairs to the roof. Counsel argued that Mr. Jewell did not have “any information” whether the repairs were completed; he had nothing in writing and no roof certification, which were “basic real estate procedures.” Counsel recommended that the Millers be awarded \$27,000, “at least for the amount of the roof.”

D.

The ALJ's Proposed Decision

On February 12, 2019, the ALJ submitted a Proposed Decision and Order to the Commission. The ALJ found that the Millers provided a list of needed repairs as an addendum to the contract, and Mr. Jewell agreed to complete the repairs listed in the addendum prior to settlement. She further found that, on the date of settlement, Mr. Jewell informed the Millers that all repairs had been completed and “the Property had passed the follow-up inspection.” The ALJ stated that she found the Millers to be “very credible witnesses,” and she accepted their testimony that they had relied on Mr. Jewell’s representations that all of the items would be repaired prior to closing. Mr. Jewell, by contrast, was “unprepared and sometimes evasive in his responses.” The ALJ noted that Mr. Jewell “did not dispute the [Millers’] testimony, only that he did not remember any of the interactions or promises that they attributed to him.” He did recall, however, that some items “needed to be taken care of” prior to settlement, and his contractors told him that the repairs, including those to the roof, had been completed.

The ALJ found that Mr. Jewell was a licensed real estate salesperson providing real estate brokerage services related to the sale of the Property, and he listed the Property and engaged in negotiations with the Millers. She concluded that he “misrepresented that the Property was ‘newly renovated’ and that certain repairs had been completed prior to the settlement.” She found that the Millers believed that the repairs had been completed, and they established, by a preponderance of the evidence, that due to Mr. Jewell’s

misrepresentation as a real estate agent, they sustained an actual loss compensable by the Guaranty Fund. She awarded them \$27,636 (\$100 to clean out the basement water line, \$100 to repair the dishwasher, and \$27,436 to repair the roof).⁴

E.

The Commission's Order

On March 22, 2019, the Commission issued a Proposed Order. It adopted the ALJ's decision, with several modifications, not relevant to this appeal, to the ALJ's proposed findings of fact. The Commission advised that, if no exceptions were filed within 20 days, the proposed order would be deemed final.

III.

Petition for Judicial Review

On April 16, 2019, Mr. Jewell filed a Petition for Judicial Review in the Circuit Court for Montgomery County, arguing that the ALJ erred in awarding compensation to the Millers. Initially, he argued that the ALJ erroneously concluded that he was the owner and seller of the Property, when he was only the listing agent, and therefore, he was not responsible for the condition of the Property. Moreover, he argued that his use of the phrase "newly renovated" in the listing did not constitute fraud or misrepresentation because it accurately reflected that there had been upgrades to the Property, and in the real estate

⁴ The Order provided that, pursuant to Md. Code Ann., Bus. Occ. & Prof. ("BOP") § 17-411(a) (2018 Repl. Vol.), Mr. Jewell would be "ineligible for any Maryland Real Estate Commission license until [he] reimburse[d] the Fund" for the award plus interest.

industry, the phrase commonly is used when there are “any sort of” renovations to a property.

Mr. Jewell then addressed the ALJ’s finding that he misrepresented that the repairs listed in the addendum had been completed prior to closing. Initially, he argued that the Millers failed “to provide dispositive evidence of an actual agreement to make specific repairs,” noting that the addendum was unsigned. Although he acknowledged that he agreed to make some repairs, he asserted that there was no evidence regarding what repairs he agreed to make.

Mr. Jewell further argued that the Millers failed to establish that they relied on his alleged representations, asserting that, because the Property passed the FHA inspection and they conducted a walk-through of the Property on the day of settlement, the Millers had other professionals advising that the Property “met basic threshold conditions.” Additionally, even if he had promised certain repairs that were not completed, the Millers’ would only have a breach of contract claim against the seller, i.e., RedShift, LLC.

With respect to both the “newly renovated” listing and the alleged agreed-upon repairs, Mr. Jewell argued that the Millers failed to offer any evidence that he had knowledge that the house was not “newly renovated” or that the repairs were not completed. In that regard, he cited to his own testimony that “he trusted his contractors and was told that the repairs were complete, including the roof repairs.”

Finally, Mr. Jewell argued that the ALJ’s factual findings regarding damages were against the weight of the evidence because the repairs listed in the addendum did not justify

replacing the entire roof, and in any event, \$26,000 for a new roof was an unreasonable amount for such a project. In a reply motion, he further asserted that the roofing contract provided to support this total was only an estimate and not did not represent the actual loss incurred.

The Millers and the Commission filed response memoranda asking the circuit court to affirm the ALJ's decision. The Millers argued that Mr. Jewell was introduced as the "real estate agent and owner/seller of the property." They asserted that, based on the listing, they were under the impression that the Property was newly renovated. They stated that Mr. Jewell had "agreed that he was at least responsible for the repair of the roof," and he had failed to provide any evidence before the ALJ that those repairs had been completed. The Millers stated that, based on his testimony, they felt Mr. Jewell had "something to hide," and they wanted to pursue their claim "to make sure this does not happen to someone else."

The Commission argued that the ALJ properly awarded the Millers \$27,636 because there was substantial evidence to show that, contrary to the listing, the Property was not "newly renovated," and Mr. Jewell "compounded this misrepresentation when he agreed to repair [the] items listed in the [a]ddendum" and then failed to do so prior to settlement. It asserted that there was substantial evidence to support the damages awarded.

On October 25, 2019, the circuit court held a hearing on Mr. Jewell's petition. Counsel for Mr. Jewell reiterated the arguments made in his petition. Moreover, with respect to actual loss, counsel highlighted, as he did in his memorandum, that the roofing

contract provided an estimate and did not reflect a sum that the Millers had actually paid. He also reiterated the argument that attributing the cost of a new roof to him was disproportionate to the roof repairs called for in the addendum.

The Millers appeared *pro se* at the hearing and provided a statement for the court.

Mrs. Miller stated:

So the roof, he said he was going to pay for the roof. But he did not fix the roof when he said that he was going to fix it. We got into the house, the roof is leaking. So if you make these problems or if you make these repairs that you claim that you made, why is the roof leaking within two weeks that we moved into the house? It doesn't make sense to me.

* * *

. . . So FHA rewards you a new roof if the roof is over two years old. Was the roof over two years old? Nobody told us this. But being that it's leaking into the attic, that tells me that it's over two years old. Somebody comes up to the . . . house -- the first week that we're in there and says oh you need a new roof. This roof was just put in. How do we need a new roof already. And he said just from the street[.] We got Long Roofing to come and look at the roof. They inspected the roof. They went on top of the roof. They're the ones that told us how much this roof would cost. So how is it just a few shingles? It can't be just a few shingles if the roof is leaking. It's pouring down inside. It can't be just a few shingles. It's more than what you guys are making it out to be. This house was supposed to be newly renovated, but it wasn't.

Counsel for the Commission argued that there was substantial evidence to support the ALJ's finding that Mr. Jewell had promised to make the repairs, that the Millers relied on those statements when moving to closing, and that Mr. Jewell had knowledge that the repairs were in fact incomplete. With respect to the asserted distinction between a seller and a listing agent, counsel argued that the Millers could not be expected to know which role Mr. Jewell was assuming when he made the alleged misrepresentations. He conceded,

however, that the Millers could only recover from the Guaranty Fund if they understood Mr. Jewell to be acting in his capacity as the listing agent at the time of the statements.

On January 27, 2020, the circuit court issued a written Opinion and Final Order affirming the ALJ's decision. The court stated that the record contained substantial evidence supporting the ALJ's conclusion that the Millers had shown, by a preponderance of the evidence, "that they sustained a loss totaling \$27,636.00 resulting from acts constituting false pretenses, fraud, or misrepresentation by Petitioner."⁵ The court determined that the evidence supported a finding of misrepresentation as it related to the completion of the repairs listed on the addendum.⁶

With respect to Mr. Jewell's specific arguments, the court stated that his assertion "regarding the distinction between an owner and a real estate agent overlooks the fact that the action before the Commission" was focused on Mr. Jewell's statements to the Millers, not merely the condition of the Property. The court noted that the ALJ accepted Mr. Miller's testimony that Mr. Jewell agreed that "all repairs on the Addendum would be

⁵ The court issued an oral ruling at the conclusion of the hearing that was subsequently revised by the written opinion and final order. In that oral ruling, the court ordered that the case be reversed and remanded because the ALJ had erroneously applied a preponderance of the evidence standard rather than a clear and convincing standard. In the written opinion, however, the court corrected this finding and clarified that preponderance of the evidence was the proper standard pursuant to Md. Code Ann., State Gov. Article § 10-217 (2014 Repl. Vol.), and therefore, the ALJ did not err in this regard. The court's written order also provided that the erroneous docket entry for the oral ruling must be amended to read "Oral Ruling" rather than "Final Disposition."

⁶ The court found that there was no reliance on the reference in the listing that the house was newly renovated because the Millers had an independent inspection before going to closing. The court ultimately, however, affirmed the ALJ's opinion in full.

completed.” It stated that Mr. Jewell did not dispute that he told the Millers that the repairs were completed, and he argued only that it was unclear what repairs the parties agreed he would make.

The court also rejected Mr. Jewell’s argument that there was no evidence to show that he did not know that the repairs had not been completed. It stated that Mr. Jewell had contracted to have the repairs completed, and a reasonable inference could be drawn that he knew the condition of the Property when he misrepresented that the repairs had been completed.

The court then determined that there was substantial evidence to show that the Millers relied on Mr. Jewell’s misrepresentations. It rejected Mr. Jewell’s argument that they instead relied on the FHA appraisal and loan approval, noting that the Millers’ testimony showed that they were confused about the FHA process.

With respect to the amount of damages, the court stated that there was substantial evidence to support the ALJ’s finding that the Millers were entitled to receive \$27,636 from the Guaranty Fund. With respect to the roof, the court noted that, contrary to Mr. Jewell’s assertion that the proffered cost of the roof was based only on an estimate, the signed contract with the roofing company obligated the Millers to pay \$27,436 for the new roof. Moreover, the court found that the “work described in the contract parallel[ed] the work the Miller[s]’ Inspection Report stated needed to be done.” Accordingly, the circuit court affirmed the Commission’s decision.

This appeal followed.

STANDARD OF REVIEW

The Court of Appeals has explained the standard of review applicable to an administrative agency’s final decision:

On review, we look “through the circuit court’s . . . decision [], although applying the same standard of review, and evaluate[] the decision of the agency.” *People’s Counsel for Baltimore County v. Loyola College in Md.*, 406 Md. 54, 66, 956 A.2d 166, 173 (2008) (citations omitted). Our role is thus “limited to determining if there is substantial evidence in the record as a whole to support the [ALJ’s] findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.” *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 67–68, 729 A.2d 376, 380 (1999). In applying the substantial evidence test to the ALJ’s factual findings, we ask “whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Id.* at 68, 729 A.2d at 380. We treat the ALJ’s decision as prima facie correct and presumed valid, as “it is the agency’s province to resolve conflicting evidence and to draw inferences from that evidence.” *Id.* at 68, 729 A.2d at 381 (citations omitted).

Lawson v. Bowie State University, 421 Md. 245, 256 (2011). *Accord McDonnell v. Harford Cty. Hous. Agency*, 462 Md. 586, 619–20 (2019).

As this Court has explained, however, for a reviewing court to “perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency’s rationale.” *Md. Real Estate Comm’n v. Garceau*, 234 Md. App. 324, 349 (2017) (quoting *Fowler v. Motor Vehicle Admin.*, 394 Md. 331, 342 (2006)). “[W]here an administrative . . . agency draws impermissible or unreasonable inferences and conclusions . . . or where an administrative agency’s decision is based on an error of law, we owe the agency’s decision no deference.” *Id.* at 349–50 (quoting *Bereano v. State Ethics Comm’n*, 403 Md. 716, 756 (2008)).

DISCUSSION

Mr. Jewell contends that the Commission erred in awarding compensation to the Millers, alleging numerous errors in this regard. Initially, he asserts that, to the extent the claim is that repairs to the Property listed in the inspection addendum were not completed, this is an allegation of breach of contract against the owners, which is a matter not within the jurisdiction of the Commission. Moreover, he contends that there was no evidence to support the conclusion that he made any misrepresentation, and even if he did, there was no evidence that he knew it was false or that the Millers relied on it. Finally, Mr. Jewell asserts that the damages awarded did not “match the claim.”

I.

Jurisdiction

We begin with Mr. Jewell’s contention that the Commission did not have jurisdiction to hear the Millers’ claim. To address that argument, we give a brief description of the Commission and the Guaranty Fund.

“The Maryland Real Estate Commission maintains a [G]uaranty [F]und to protect persons who suffer financial loss due to the misconduct of a real estate broker” or salesperson. *Lewis v. Long & Foster Real Estate, Inc.*, 85 Md. App. 754, 761, *cert. denied*, 323 Md. 34 (1991). A claimant “may recover compensation from the Guaranty Fund for an actual loss” that is “based on an act or omission that occurs in the provision of real estate brokerage services by . . . a licensed real estate salesperson.” Md. Code Ann., Bus. Occ. &

Prof. (“BOP”) § 17-404(a)(1)–(2) (2018 Repl. Vol.).⁷ The claim must “involve a transaction that relates to real estate that is located in the State” and “be based on an act or omission . . . that constitutes fraud or misrepresentation.” BOP § 17-404(a)(2)(ii)–(iii). If, after filing a complaint with the Commission, the claimant satisfies their burden of proving the validity of the claim against the licensee, *see* BOP § 17-407, they are paid from the Commission’s Guaranty Fund, and the licensee must subsequently reimburse the Fund, plus interest. BOP § 17-411(a).

The purpose of the Guaranty Fund is to protect the public, and therefore, the statutory scheme is remedial in nature. *See Md. Real Estate Comm’n v. Johnson*, 320 Md. 91, 101 (1990) (The Real Estate Guaranty Fund statute “makes clear that the fund was established to provide security for members of the public involved in real estate transactions.”); *Langston v. Riffe*, 359 Md. 396, 408 (2000) (“[R]emedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries.”). Remedial statutes generally are construed liberally in favor of claimants. *Washington Sub. Sanitary Comm’n v. Phillips*, 413 Md. 606, 620 (2010). *See, e.g., Brzowski v. Md. Home Imp. Comm’n*, 114 Md. App. 615, 628, 633, *cert. denied*, 346 Md. 238 (1997) (The statutory scheme establishing the

⁷ BOP § 17-101(j) defines a “licensed real estate salesperson” as “a real estate salesperson who is licensed by the Commission to provide real estate brokerage services on behalf of a licensed real estate broker with whom the real estate salesperson is affiliated.” Real estate brokerage services include selling real estate. BOP § 17-101(l). Mr. Jewell does not dispute that he is a licensed real estate salesperson who provided real estate brokerage services to the Millers.

Home Improvement Guaranty Fund was “enacted for the protection of the public” and is remedial in nature, and therefore, it “should be liberally construed.”).

Mr. Jewell is correct that the Millers are limited in any recovery from the Guaranty Fund to actual losses incurred as a result of Mr. Jewell’s acts or omissions in his role as a real estate agent. That, however, was the claim and ruling here. The ALJ did not find a breach of contract by the owners. Rather, the ALJ found that the Millers incurred losses because Mr. Jewell made misrepresentations to the Millers in his capacity as a real estate agent. The finding that Mr. Jewell was acting in his capacity as an agent is supported by Mr. Miller’s testimony that Mr. Jewell introduced himself as the agent and owner of the house. Moreover, there is no dispute that he was the listing agent for the Property. Mr. Jewell’s contention that the Commission did not have jurisdiction over the Millers’ claim is without merit.⁸

II.

Misrepresentation

Mr. Jewell next contends that the ALJ erred in finding that he made misrepresentations to the Millers. He asserts that there was no evidence to support that finding.

In assessing Mr. Jewell’s challenge to the finding of misrepresentation, we begin by noting that, in one respect, the issues have been narrowed on appeal. The ALJ found

⁸ That the Millers also may have had a breach of contract action against the owners in another forum does not divest the jurisdiction of the Commission to provide relief for claims against Mr. Jewell for misrepresentation in his capacity as the real estate agent.

against Mr. Jewell on the ground that he made two misrepresentations to the Millers: (1) that the Property was “newly renovated”; and (2) that certain repairs had been completed prior to settlement. At oral argument, however, counsel for the Commission advised that it was pursuing only the claim regarding misrepresentation relating to the completion of repairs prior to settlement. Counsel acknowledged that, as the circuit court found, the Millers could not show reliance on the reference in the listing that the house was newly renovated because they had an independent inspection before closing on the house. Accordingly, we will limit our analysis to the misrepresentation finding pursued on appeal, that Mr. Jewell misrepresented to the Millers that the requested repairs had been completed prior to settlement.

A misrepresentation can be fraudulent or negligent. *Goldstein v. Miles*, 159 Md. App. 403, 435 (2004), *cert. denied*, 384 Md. 581 (2005). The parties here focused on fraudulent misrepresentation in their briefs.

The Court of Appeals has explained that the elements of a claim of fraudulent misrepresentation are as follows:

To prove an action for civil fraud based on affirmative misrepresentation, the plaintiff must show that (1) the defendant made a false representation to the plaintiff, (2) the falsity of the representation was either known to the defendant or the representation was made with reckless indifference to its truth, (3) the misrepresentation was made for the purpose of defrauding the plaintiff, (4) the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) the plaintiff suffered compensable injury as a result of the misrepresentation. *See Nails v. S & R*, 334 Md. 398, 415, 639 A.2d 660, 668 (1994); *VF Corp. [v. Wrexham Aviation Corp.]*, 350 Md. 693, 703, 715 A.2d [188,] 193 (1998); *Environmental Trust v. Gaynor*, 370 Md. 89, 97, 803 A.2d 512, 516 (2002).

Hoffman v. Stamper, 385 Md. 1, 28 (2005) (footnote omitted). *Accord Nails v. S & R*, 334 Md. 398, 415 (1994).

Mr. Jewell argues that several of these elements were not shown here. Initially, he asserts that there was no evidence that he made a representation, much less a misrepresentation. He asserts that, even if he promised, but failed to complete, the list of repairs, that would be a “forward-looking promise,” which is not a misrepresentation, and any misrepresentation based on the inspection addendum is “null and void” because it was unsigned and its admission into evidence violated the statute of frauds. He further asserts that there was no evidence to support the ALJ’s finding that he told the Millers that the repairs from the addendum had been completed prior to settlement.

Mr. Jewell further contends that the Millers failed to produce evidence that they relied on any claims or representations he may have made. He asserts that the Millers had a “plethora of professionals” on which to rely that the Property was in an acceptable condition, including their real estate agent, who went with them for the final walk-through, and the FHA appraiser, who “advised them, directly and/or indirectly, that the Property met basic threshold conditions.”

Finally, Mr. Jewell argues that the Millers failed to introduce any evidence that he “knew of any falsity in any representation he allegedly made.” In that regard, he cites to his testimony that contractors advised him that the repairs had been made.

The Commission contends that there was substantial evidence in the record to support the decision that the Millers were entitled to compensation. It contends that there

was substantial evidence to support a finding that Mr. Jewell told the Millers that certain repairs identified in the addendum would be completed prior to settlement. It argues that, given Mr. Jewell’s agreement to make the repairs and his claim that he hired contractors to make the repairs, the Commission “reasonably inferred that [Mr.] Jewell intentionally gave the Millers the false impression that the repairs had been made prior to settlement.” At oral argument, counsel for the Commission conceded, appropriately, that there was no evidence before the ALJ that Mr. Jewell told the Millers that the repairs were completed. Counsel argued, however, that Mr. Jewell’s promise to fix those items, followed by his silence at closing when the repairs were not completed, constituted fraudulent misrepresentation.

The Commission further asserts that there was substantial evidence to show that the Millers relied upon Mr. Jewell’s misrepresentations. It contends that the evidence supports the conclusion that the Millers purchased the home in “substantial part because they believed that . . . agreed-upon repairs would be made.” That the Millers’ realtor and the FHA appraiser failed to catch that the repairs were not made does not equate with the conclusion that the Millers did not rely on Mr. Jewell’s statements.

We address first the element that the “defendant made a false representation to the plaintiff.” *Hoffman*, 385 Md. at 28. “A ‘false representation’ is a statement, conduct, or action that intentionally misrepresents a material fact.” *Sass v. Andrew*, 152 Md. App. 406, 429 (2003). “A ‘material’ fact is one on which a reasonable person would rely in making a decision.” *Id.* at 430.

The ALJ found, and there was substantial evidence to support the finding, that Mr. Jewell agreed to complete the repairs noted in the addendum, including the repairs to the roof. The Millers, who the ALJ found to be credible witnesses, both testified that Mr. Jewell orally promised to make the repairs before settlement on the Property. Mr. Jewell did not deny making such statements. Indeed, he stated that he probably did agree, although he did not remember doing so. He later stated that he had agreed to fix the roof. Accordingly, there was substantial evidence to support the ALJ’s finding that Mr. Jewell agreed to make the repairs listed in the addendum.⁹

The question, though, is whether Mr. Jewell committed fraudulent misrepresentation when he promised to make the repairs. This Court has explained that, ordinarily, fraud “cannot be predicated on statements which are promissory in their nature, and therefore an action for deceit will not lie for the unfulfillment of promises or the failure of future events to materialize as predicted.” *Sass*, 152 Md. App. at 438 (quoting *Appel v. Hupfield*, 198 Md. 374, 379, (1951)). *Accord Oyebade v. Boston Scientific Corp.*, 955 F.Supp.2d 920, 945 (S.D. Ind. 2013) (“Actual fraud may not be based on representations

⁹ Mr. Jewell’s argument that the statute of frauds barred any claim because the addendum was unsigned is without merit. Although Md. Code Ann., Real Prop. (“RP”) § 5-104 (2015 Repl. Vol.), provides that “[n]o action may be brought on any contract for the sale or disposition of land . . . unless the contract on which the action is brought . . . is in writing and signed by the party to be charged,” the claim here was based on misrepresentation by a licensee, not breach of contract. *See Greenfield v. Heckenbach*, 144 Md. App. 108, 139–40, *cert. denied*, 370 Md. 269 (2002) (RP § 5-104 and “the statute of frauds [do] not bar a tort suit for either fraud or negligent misrepresentation because those counts are not based [on the contract] between the parties but are based on misrepresentations that induced the contract.”).

regarding future conduct, or on broken promises, unfulfilled predictions or statements of existing intent which are not executed.”); *Abazari v. Rosalind Franklin Univ. Of Med. & Sci.*, 40 N.E.3d 264, 270 (Ill. App. Ct. 2015) (Generally, “there is no action for promissory fraud, meaning that the alleged misrepresentations must be statements of present or preexisting facts, and not statements of future intent or conduct.”), *cert. denied*, 136 S.Ct. 1526 (2016).

There is, however, an exception to this general rule when there is evidence of an intent to deceive or to not perform at the time the promise was made. “Maryland law recognizes ‘a cause of action for fraud predicated upon a promise made with a present intention not to perform it.’” *Sass*, 152 Md. App. at 436 (quoting *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 232 (1984)). *Accord Gross v. Sussex, Inc.*, 332 Md. 247, 258 (1993) (“[M]aking a promise as to a matter material to the bargain with no intention to fulfill it is an actionable fraud.”) (quoting *Carozza v. Peacock Land Corp.*, 231 Md. 112, 121 (1963)); *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 472 (1977) (“A promissory representation made with an existing intention not to perform is actionable for fraud.”).

Here, the Commission suggested at argument that Mr. Jewell may not have had the intent to complete the repairs when he agreed to do so. As we explained in *Sims*, 37 Md. App. at 472, however, an “allegation of an intention not to perform must be predicated on sufficient facts and not be phrased in merely conclusory terms.” There were no such facts presented here.

There was no evidence of statements or conduct by Mr. Jewell that indicated an intent not to make the repairs requested. The only evidence in this regard was Mr. Jewell's testimony that he retained a contractor to make the repairs. To the extent that the Commission argues that the ALJ's finding that Mr. Jewell was liable for misrepresentation can be upheld on the ground that he fraudulently misrepresented that he would make the repairs with no intent to do so, there was no evidence to support that argument. *See Weir v. McGill*, 417 S.E.2d 57, 59 (Ga. 1992) ("The record is devoid of any evidence which would suggest that [the seller] fraudulently induced plaintiffs to consummate the sale of their home by promising at the time of closing to complete certain repairs in the home without a present intent to do so."). Indeed, the ALJ did not make such a finding.¹⁰

Rather, the ALJ found a misrepresentation at a later time. She found that Mr. Jewell misrepresented that the repairs had been completed prior to settlement.

Our review of the record, however, does not disclose evidence to support that finding. At oral argument, the Commission acknowledged that there was no evidence that Mr. Jewell told the Millers that the repairs had been completed. It argues, however, that

¹⁰ We also note that a representation by Mr. Jewell that he would make the repairs, when he had no intent to make them, could not amount to negligent misrepresentation. "[A] promise made with the present intention not to perform is perforce, an intentional misrepresentation, not a negligent one." *200 North Gilmor, LLC v. Capital One, Nat. Ass'n*, 863 F.Supp.2d 480, 492-93 (D. Md. 2012) (Under Maryland law, a promissory representation made with an existing intention not to perform is not actionable for negligent misrepresentation.). *Accord Meyer v. Santema*, 559 N.W.2d 251, 254-55 (S.D. 1997) ("Generally, [negligent] representations as to future events are not actionable and false representations must be of past or existing facts.").

there was a fraudulent misrepresentation where, after Mr. Jewell promised to repair the items on the list, he failed to do so and then moved ahead with closing without disclosing that fact to the Millers.

This argument relies on Mr. Jewell's silence, as opposed to a misrepresentation. Arguably, there might be a claim for fraud on this ground. The elements of a cause of action for fraudulent concealment are as follows:

- (1) [T]he defendant owed a duty to the plaintiff to disclose a material fact;
- (2) the defendant failed to disclose that fact;
- (3) the defendant intended to defraud or deceive the plaintiff;
- (4) the plaintiff took action in justifiable reliance on the concealment; and
- (5) the plaintiff suffered damages as a result of the defendant's concealment.

Rhee v. Highland Dev. Corp., 182 Md. App. 516, 524 (2008) (quoting *Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 138 (2007)).

The ALJ, however, did not find against Mr. Jewell on the ground of fraudulent concealment, and this basis for liability was not raised prior to oral argument. Accordingly, we decline to address this claim. See *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 111 n.1 (2001) (declining to address an argument that was not the basis of the administrative agency's finding because an "agency may be affirmed only on the basis of the grounds on which it decided the case."); *Swoboda v. Wilder*, 173 Md. App. 615, 635 (An appellate court may uphold the decision of an agency "only on the basis of the agency's

reasons and findings.”) (quoting *Umerley v. People’s Couns. for Baltimore Cty.*, 108 Md. App. 497, 504 (1996)), *cert. denied*, 400 Md. 649 (2007).¹¹

Accordingly, because the finding of liability was based on a finding that Mr. Jewell misrepresented to the Millers that the repairs had been completed, and the evidence does not support that finding, we must reverse the Commission’s decision awarding the Millers damages due to misrepresentation by Mr. Jewell.¹²

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
REVERSED; CASE REMANDED TO THAT
COURT WITH INSTRUCTIONS TO
REVERSE THE DECISION OF THE
MARYLAND REAL ESTATE
COMMISSION. COSTS TO BE PAID BY
APPELLEE.**

¹¹ To the extent that the Commission indicated that silence on the part of Mr. Jewell leading up to the settlement constituted negligent misrepresentation, we also decline to address that issue. We do note, however, that the issue whether there is a viable claim for “negligent misrepresentation by silence” appears to be undecided in Maryland. *See Leonard v. Sav-A-Stop Servs., Inc.*, 289 Md. 204, 213 (1981) (“Only express representations have been involved in the Maryland appellate cases in which recovery on a theory of, or akin to, negligent misrepresentation was advanced.”); *Lubore v. RPM Assoc., Inc.*, 109 Md. App. 312, 340–42 (“*Leonard* expressly left undecided the viability of a ‘negligent misrepresentation by silence’ claim.”), *cert. denied*, 343 Md. 565 (1996).

¹² Given the resolution of the misrepresentation claim, we need not address Mr. Jewell’s contentions regarding damages. We do note, however, that he did not argue before the ALJ that the damages sought were not appropriate, and therefore, any claim in this regard is unpreserved for appellate review. *See* Md. Rule 8-131(a); *State Comm’n on Hum. Rels. v. Kaydon Ring & Seal, Inc.*, 149 Md. App. 666, 699–700 (2003) (Failure to raise an issue before the ALJ constitutes a waiver of the issue on appeal.); *Brzowski v. Md. Home Imp. Comm’n*, 114 Md. App. 615, 636–37 (1997) (“Generally, objections that have not been raised in proceedings before an agency will not be considered by a court reviewing an agency order.”).