STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[FILED: August 8, 2013]

PAUL R. BOISSE AND MICHELE C. BOISSE	:	
v.	:	**C.A. No. WC 2003-0281**
JOSEPH R. MILLER, JR. d/b/a JOSEPH MILLER CONSTRUCTION; LYNNE N. MILLER; PLEASANT HILLS DEVELOPMENT, LTD.; MARK L. HAWKINS; THOMAS A. CHAMPLIN; and ASSURANCE COMPANY OF AMERICA	:	
v.	:	
ZURICH AMERICA INSURANCE COMPANY	:	

DECISION

SAVAGE, J. This matter, which involves the unfortunate tale of a dream home misplaced, is before the Court for decision following a non-jury trial as to liability. In their Revised Second Amended Complaint, Plaintiffs Paul R. Boisse and Michele C. Boisse seek damages as against all Defendants arising from the improper siting of their home in South Kingstown, Rhode Island. Plaintiffs first discovered this problem upon receiving notice from National Grid USA Service Company that their home encroached on an easement recorded in favor of Narragansett Electric Company.

Plaintiffs assert claims of negligence against: Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction, the bankrupt developer of the Property; Defendant Lynne N. Miller, his ex-wife, who owned the Property, executed the deed transferring the Property to Plaintiffs,

and granted Mr. Miller a limited power of attorney with respect to the sale of the Property to Plaintiffs; Defendant Pleasant Hills Development, Ltd., the developer of the subdivision who sold the Property to Ms. Miller; Defendant Mark L. Hawkins, sole director and shareholder of Pleasant Hills Development; and Defendant Thomas A. Champlin, the now-deceased surveyor who performed survey work on the Property. Plaintiffs also assert claims of breach of contract and breach of warranty deed covenants against Ms. Miller, claims of fraud, misrepresentation and deceptive trade practices against Mr. Miller, and claims of wrongful concealment against both Mr. and Ms. Miller. Finally, given Mr. Miller's bankruptcy, Plaintiffs seek to hold Defendant Assurance Company of America, Mr. Miller's insurer, liable for his negligence in a direct action under R.I. Gen. Laws § 27-7-2.4.

Defendant Champlin asserts a Cross-Claim against Mr. and Ms. Miller for negligence. In his Third-Party Complaint against Zurich America Insurance Company, Mr. Miller seeks to hold his insurer liable for the alleged breach of its duty to defend and indemnify him.[1]

For the reasons set forth in this Decision, this Court grants judgment in favor of Plaintiffs on their claim of breach of warranty deed covenants against Ms. Miller and their claims of fraud, misrepresentation, wrongful concealment, and deceptive trade practices against Mr. Miller. It grants judgment for the Defendants as to all other claims of the Plaintiffs.[2]

[1] While Mr. Miller named Zurich America Insurance Company as the third-party defendant in the Third-Party Complaint, the policies were actually issued by Assurance Company of America, a subsidiary of Zurich, and accordingly, any duty to defend and indemnify was owed by Assurance.

[2] As a result of the denial of Plaintiffs' other claims, this Court also denies both Defendant Champlin's Cross-claim for negligence against Mr. Miller and Mr. Miller's Third-Party Complaint against Zurich.

I

FACTS AND TRAVEL

The chronology pertinent to this case begins sometime in early October 1995. On October 13, 1995, Defendant Pleasant Hills Development purchased the Pleasant Hills subdivision in South Kingstown, Rhode Island with the intention of developing a number of residential lots. (Joint Ex. 6, Warranty Deed.) At trial, it was undisputed that the original Pleasant Hills subdivision plan showed the proposed location of a house, driveway, and well within the contours of Lot 15—the Property ultimately purchased by Plaintiffs that is at issue in this litigation. (Joseph Miller Trial Tr. 39:2-15, Dec. 5, 2011.) On June 2, 1997, Pleasant Hills Development obtained a permit from the Rhode Island Department of Environmental Management (DEM) for an individual sewage disposal system (ISDS) on Lot 15. (J. Miller Trial Tr. 41:16 – 43:23, Dec. 5, 2011; Joint Ex. 9, ISDS Application.) The ISDS permit application included an engineered plan prepared by Defendant Thomas A. Champlin, who is now deceased, showing the location of the proposed house, ISDS system and well within the boundaries of Lot 15. (Joint Ex. 9.) Champlin was deposed in 2006 during discovery and testified that he worked for Pleasant Hills and set the boundary points for the Pleasant Hills subdivision, including the points for Lot 15, in June and August of 1997. (Joint Ex. 62, Champlin Dep. 6:8-8:16, Aug. 22, 2006.) Champlin testified that he put four-foot high stakes at the corners of Lot 15. (Joint Ex. 62, Champlin Dep. 19:10-15, Aug. 22, 2006.) Champlin further stated that he also placed semi-permanent markers in the boundary corners which he described as being spikes "with a red plastic cap at the top or a nail head at the top, with a red plastic cap saying 'survey marker.'" (Joint Ex. 62, Champlin Dep. 19:16 – 20:4, Aug. 22, 2006.)

Following this initial approval from DEM, on January 22, 1998, Defendant Lynne N. Miller purchased Lot 15, located at 44 Erica Court in South Kingstown, Rhode Island, from Pleasant Hills Development through a limited power of attorney which Ms. Miller executed in favor of her ex-husband, Defendant Joseph R. Miller, Jr. (Joint Ex. 19, Warranty Deed; Joint Ex. 20, Limited Power of Attorney.) According to her testimony, Ms. Miller executed the power of attorney, dated January 21, 1998, to allow Mr. Miller to leverage her good credit to build a residence on the Property for sale to a third party. (L. Miller Trial Tr. 136:13 – 23, 153:24 – 154:10, Dec. 7, 2011.) Ms. Miller stated that her impetus for granting Mr. Miller a limited power of attorney was to provide him an opportunity to start a business that would make him a "better provider." (L. Miller Trial Tr. 155:14 – 156:1, Dec. 7, 2011.) Specifically, she envisioned the business producing income for Mr. Miller that would enable him to provide child support payments for the couple's daughter. (L. Miller Trial Tr. 155:14 – 156:1, Dec. 7, 2011.) Ms. Miller further affirmed that aside from providing Mr. Miller with a limited power of attorney for the purchase and sale of the lots in the Pleasant Hills subdivision, she had no other involvement with the construction of the houses built in the subdivision. (L. Miller Trial Tr. 154:7-23, Dec. 7, 2011.)

Mr. Miller retained Champlin as the surveyor for the lots that his ex-wife purchased in the Pleasant Hills development in order to obtain the necessary approvals from DEM for installation of the ISDS. (Ex. 62, Champlin Dep. 17:8-11, Aug. 22, 2006.) Champlin testified that he told Mr. Miller where the corner stakes were that marked the boundaries of the Property and that the corners were marked with four-foot high stakes. (Ex. 62, Champlin Dep. 19:11-15, Aug. 22, 2006.) At trial, Mr. Miller confirmed that he was familiar with surveyor stakes in the field, testifying that at the time he purchased Lot 15, he found all of the stakes at the corners,

describing the stakes as being about three feet high with the top painted orange or with an orange flag. (J. Miller Trial Tr. 8:1-20, Dec. 5, 2011.)

After securing a building permit from the Town of South Kingstown, Mr. Miller hired an excavation contractor, Michael Netro, to dig the foundation for a home on the Property. (J. Miller Trial Tr. 9:23-25, 51, 66, Dec. 5, 2011.) Mr. Miller also hired a well contractor to place a well on the Property in late June or early July of 1998. (J. Miller Trial Tr. 11:14-17, Dec. 5, 2011). While the engineered plan prepared by Champlin as part of the ISDS application showed the proposed home and well within the contours of Lot 15, Mr. Miller was responsible for siting the home on the Property and informing the contractors where to dig the foundation and well. (Joint Ex. 9; J. Miller Trial Tr. 9:14-17, 11:14-17, Dec. 5, 2011.) Additionally, Mr. Miller testified that the house and well were placed where he had directed the contractors. (J. Miller Trial Tr. 66:16 – 67:2, Dec. 5, 2011.)

At trial, Mr. Miller further testified that the distance from Erica Court to the house was meant to be fifty feet long. (Def.'s Ex. A, Soil Erosion Plan; J. Miller Trial Tr. 69:9-18, Dec. 5, 2011.) Mr. Miller then confirmed that according to the survey plan obtained by the Plaintiffs, the actual distance from Erica Court to the house appeared to be approximately 112 feet long. (Joint Ex. 53, Survey Plan; J. Miller Trial Tr. 71:2-13, Dec. 5, 2011.) Mr. Miller testified that along with siting the house and the ISDS, he also paid to have someone install and pave the driveway, the excavation of which was completed by July 24, 1998. (J. Miller Trial Tr. 72:1-4, Dec. 5, 2011; Joint Ex. 27, Building Permit.) Mr. Miller admitted that in building the driveway, he was off by a distance of approximately fifty feet. (J. Miller Trial Tr. 71:15-18; 72:14-18, Dec. 5, 2011.) Mr. Miller testified that he does not remember how much he was charged for having the driveway built, but he did not dispute the suggestion that a driveway is usually paid for by

the square foot. (J. Miller Trial Tr. 72:3-24, Dec. 5, 2011.) Upon being questioned as to whether he would notice a difference of fifty feet in the field, Mr. Miller tellingly responded, "You would think you would, yeah." (J. Miller Trial Tr. 73:8-9, Dec. 5, 2011.)

Seeking a larger home and a better school system for their two daughters, Plaintiffs Paul and Michele Boisse discovered the Pleasant Hills subdivision in South Kingstown toward the end of July in 1998. (Paul Boisse Trial Tr. 101:1 – 103:24, Dec. 5, 2011.) After negotiations with Mr. Miller and repeated visits to the subdivision, the Boisses decided to purchase Lot 15 and the home being built by Mr. Miller on the Property. (P. Boisse Trial Tr. 102:5-10, Dec. 5, 2011.) Mr. Boisse testified that according to his recollection, the Property had been cleared and a foundation laid at this time. (P. Boisse Trial Tr. 103:22-25, Dec. 5 2011.) Plaintiffs and Mr. Miller executed a Purchase and Sale Agreement for "Builder's Lot 15" on September 10, 1998. (Joint Ex. 28, 9/10/98 Purchase and Sale Agreement.) The Purchase and Sale Agreement named "Joseph Miller Construction" as the seller of the Property, even though Ms. Miller held title to the Property. Id. The Purchase and Sale Agreement included a guaranty that the seller would provide a "good, clear, insurable and marketable title" to the Property through a Warranty Deed. Id. The Purchase and Sale Agreement also included an attachment of General Specifications for the house, which Mr. Miller had contracted to build for the Boisses on the Property. Id.

On November 5, 1998, Champlin submitted an "As-Built" ISDS Plan to DEM certifying that the house had been sited in accordance with his previously approved ISDS Plan. (Joint Ex. 34, DEM ISDS "As-Built" Plan.) Although he acknowledged that he had a professional responsibility to check the accuracy of the "As-Built" Plan before stamping it, Champlin testified that he did not go out to the site before submitting the "As-Built" Plan to DEM. (Joint Ex. 61, Champlin Dep. 40:24-41:24, July 25, 2006.) Mr. Miller testified at trial that this "As-Built"

Plan—and the accompanying Certificate of Conformance issued by DEM—was a prerequisite to the issuance of a Certificate of Use and Occupancy that would allow Mr. Miller to sell the home to a prospective buyer. (J. Miller Trial Tr. 49:1 – 50:22, Dec. 5, 2011.)

Mr. Boisse testified that several times during the construction of the house and before the closing, he inquired as to the boundaries of the Property and asked Mr. Miller to show him the boundary markers that marked its corners. (P. Boisse Trial Tr. 107:7-10, Dec. 5, 2011.) Mr. Boisse stated that he had been able to locate only a single three-foot tall stake with an orange ribbon or flag attached to it during his own walks around the Property. (P. Boisse Trial Tr. 108:11-22, Dec. 5, 2011.) He testified that he could not locate any boundary markers in the rear of the Property and that he had asked Mr. Miller for a tour to locate these markers. (P. Boisse Trial Tr. 108:15-16, Dec. 5, 2011.)

Mr. Boisse testified that sometime in November of 1998, Mr. Miller agreed to walk the boundary lines of the Property with Mr. Boisse and that the actual site visit took place a few days later due to inclement weather.[3] (P. Boisse Trial Tr. 109:7-10, Dec. 5, 2011.) Mr. Boisse asserted that on the day of the site visit, he and Mr. Miller met at the Property and that Mr. Miller walked him directly back from the driveway to what Mr. Boisse described as a "dowel that was set in the ground" with a "little green flag on it." (P. Boisse Trial Tr. 109:19-22, Dec. 5, 2011.) Subsequently, Mr. Boisse testified that the two walked straight north to "[a]nother three-inch dowel banged into the ground with [a] little green flag on it." (P. Boisse Trial Tr. 110:21-24, Dec. 5, 2011.) Mr. Boisse stated that Mr. Miller had no trouble finding these dowels. (P. Boisse

[3] The Court notes that it does not know the exact date at which this event took place, but that according to Mr. Boisse's testimony, it was "a few days" before the closing, which was scheduled to take place on November 30, 1998, although it did not actually occur until December 4, 1998. In any event, the Court is satisfied that this particular visit occurred sometime in late November of 1998.

Trial Tr. 111:6-7, Dec. 5, 2011.) At trial, Plaintiffs submitted a photograph of one of the green dowels into evidence. (Pls.' Ex. 1.)

Mr. Miller testified that he was sure that Mr. Boisse saw the three-foot tall stakes on the day that the two of them walked the Property. (J. Miller Trial Tr. 32:10 – 33:3, Dec. 5, 2011.) Mr. Miller did not have a specific recollection of walking the easterly boundary of the Property with Mr. Boisse. (J. Miller Trial Tr. 33:4-8, Dec. 5, 2011.) Mr. Miller was not questioned regarding the green dowels.

Mr. Boisse testified that Mr. Miller notified the Boisses, prior to closing, that they would need to execute another purchase and sale agreement due to a "clerical error" with the September 10, 1998 version. The Boisses subsequently executed a second purchase and sale agreement on November 30, 1998 that named "Lynne Miller," Mr. Miller's ex-wife, as the seller. (Joint Ex. 37, Second Purchase and Sale Agreement.) The Second Purchase and Sale Agreement stipulated that "a good, clear, insurable, and marketable title to the Property" would be conveyed by warranty deed. (Joint Ex. 37, Second Purchase and Sale Agreement.) Although the Second Purchase and Sale Agreement bore a signature that purported to be that of Lynne Miller, Ms. Miller testified at trial that this signature was not hers. (L. Miller Trial Tr. 145:8-19, Dec. 7, 2011.) Mr. Miller testified that he did not know who signed the Second Purchase and Sale Agreement. (J. Miller Trial Tr. 23:15-22, Dec. 5, 2011.)

On December 1, 1998, the Town of South Kingstown issued a Certificate of Use and Occupancy with respect to the Property. (Joint Ex. 38, Certificate of Use and Occupancy.) (P. Boisse Trial Tr. 111:16-20, Dec. 5, 2011.) Two days later, Ms. Miller executed a second limited power of attorney granting Mr. Miller the authority to represent her at the closing. (Joint Ex. 39, Second Limited Power of Attorney.) The document authorized Mr. Miller to sign "all necessary

documents in conjunction [with the closing], including, without limitation, settlement statements authorizing the disbursement of funds, affidavits of title, and all other documents as may be required to consummate the sale." (Joint Ex. 39.) (Emphasis added.)

On December 4, 1998, the Boisses closed on the Property. (Joint Ex. 42, HUD Closing Statement.) They received a Warranty Deed, dated December 3, 1998, purporting to convey Lot 15 "together with all buildings and improvements thereon" that was signed by Ms. Miller and duly notarized. (Joint Ex. 40, Warranty Deed.)

Mr. Boisse testified that he was advised by closing counsel that, absent a survey, the Boisses would be unable to get title insurance insuring that there were no encroachments on the Property. (P. Boisse Trial. Tr. 125:3-12, Dec. 5, 2011.) The Boisses received a written title insurance disclosure and were specifically advised that their title search did not include any research or warranty as to the applicable zoning laws or use of the Property. (Joint Ex. 43, Notice to Owners of Real Property.) Mr. Boisse stated that it was his decision at the time of the closing to forego a survey. (P. Boisse Trial Tr. 125:13-16, Dec. 5, 2011.) He further testified that he understood that this decision would preclude coverage under the title insurance policy. (P. Boisse Trial. Tr. 125:13-16, Dec. 5, 2011.)

It is undisputed that the Boisses received title to all of Lot 15, the real estate Ms. Miller—as nominal record owner—conveyed to them by deed dated December 3, 1998. (Joint Ex. 40, Warranty Deed.) The title report and opinions issued by the closing attorney indicate that the parties believed that the Boisse home was situated entirely within the boundaries of Lot 15. (Joint Ex. 43, Notice to Owners of Real Property; P. Boisse Trial Tr. 125:2-16, Dec. 5, 2011.) Further, Mr. Boisse testified that he relied on an Affidavit dated December 4, 1998, signed both by Mr. Miller, as attorney-in-fact for Ms. Miller, and by the Boisses, which stated that "[t]he

undersigned have allowed no encroachments on the premises above described by any adjoining land owners nor have the undersigned encroached upon any property of adjoining land owners." (P. Boisse Trial Tr. 131:3-10, Dec. 5, 2011; Joint Ex. 41, Affidavit.)

Approximately four years later, in a letter dated November 7, 2002, National Grid informed the Boisses that their residence, deck, and well encroached on an easement recorded in favor of Narragansett Electric Company. (Joint Ex. 52, Letter dated Dec. 7, 2002 from National Grid to Boisses.) Mr. Boisse testified that the home extends about twenty feet over the property line. (P. Boisse Trial Tr. 127:20-25, Dec. 5, 2011.) National Grid is not a party to this action, and despite various demands in its November 7, 2002 letter, has not contacted the Boisses or taken any action with respect to the Property over the past decade. (P. Boisse Trial Tr. 127:7-19, Dec. 5, 2011.)

Plaintiffs initiated suit in this Court on May 5, 2003, asserting claims of negligence against Defendants Joseph R. Miller, Jr. d/b/a Joseph Miller Construction; Lynne N. Miller; Pleasant Hills Development; Mark L. Hawkins; and Thomas A. Champlin (Count I). The Boisses contend that Mr. Miller negligently sited the Boisse home such that it straddled Lot 15 and an adjacent lot subject to an easement recorded in favor of Narragansett Electric Company. With respect to Ms. Miller, Plaintiffs point to the December 4, 1998 Affidavit, signed by both Mr. Miller, as Ms. Miller's attorney-in-fact, and the Boisses, that states that the Property does not encroach on adjoining property. They assert that she was negligent in failing to ensure, contrary to the Affidavit, that the Boisse home was constructed entirely on Lot 15. Further, Plaintiffs maintain that Pleasant Hills Development and Hawkins were negligent in failing to ensure that the Boisses, as purchasers of a lot in the subdivision, did not end up with a house that encroached on adjacent property. Plaintiffs also assert that Champlin was negligent in his survey of the

Property and by certifying to DEM that the house, as built, had been sited in accordance with his previously approved ISDS plan.

Plaintiffs also assert a claim for breach of contract against Ms. Miller, arguing that she breached her contractual promise in the Second Purchase and Sale Agreement (Joint Ex. 37) to convey to them "good, clear, insurable, and marketable title" to the Property and that she breached her promise in the Affidavit that she had not encroached on adjoining property (Count II). The Boisses further allege that when she conveyed the Property, she breached the warranty covenants in the deed by which she promised to convey marketable title because the house encroached significantly on the neighboring land (Count III). Additionally, Plaintiffs assert claims of fraud and misrepresentation against Mr. Miller (Counts IV and V) and wrongful concealment against both Mr. and Ms. Miller (Count VI). They argue that Mr. Miller made intentionally false misrepresentations to them about the boundary line of the Property to induce them to purchase the Property and that both Mr. and Ms. Miller knowingly concealed their knowledge of the true boundary line from Plaintiffs for the same purpose. Finally, Plaintiffs claim that, for similar reasons, Mr. Miller violated the Rhode Island Deceptive Trade Practices Act (Count VII).

Defendants Lynne N. Miller, Pleasant Hills Development, Ltd. and Mark L. Hawkins filed an Answer on June 2, 2003. Subsequently, Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction filed an Answer on June 10, 2003. Neither Mr. Miller nor any other party filed a third-party complaint seeking contribution or indemnity for negligence against Champlin, as surveyor. Discovery ensued. Several years later, on February 22, 2007, Plaintiffs filed an Amended Complaint, bringing a claim of negligence against Defendant Champlin for failing to properly survey the Property. Defendant Champlin answered Plaintiffs' Amended Complaint on

April 9, 2007 and included a Cross-Claim against both Mr. and Ms. Miller for negligence in improperly siting the Boisse home. On October 20, 2008, Mr. Miller filed a Third-Party Complaint against Zurich America Insurance Company, alleging that Zurich had breached its duty to defend and indemnify him against the Boisses' negligence claims.[4] Zurich answered on December 8, 2008, raising various affirmative defenses, including a lack of policy coverage during the time period in question, the applicability of certain policy exclusions, and the absence of an occurrence that would trigger coverage under the policy.

Defendant Champlin died on January 5, 2010. On January 12, 2010, Champlin's counsel filed a "Motion Suggesting Death on the Record." A hearing justice first heard this motion on January 19, 2010 and requested a copy of Champlin's death certificate. At a subsequent hearing on the motion on March 15, 2010, the hearing justice took the position that no claims were pending against Champlin, as no estate had been opened. Plaintiffs never moved to substitute a personal representative for Champlin, as a named party defendant to this action, nor did any party seek to be substituted in his stead to perpetuate Champlin's Cross-Claim against Mr. and Ms. Miller.

During the pendency of this case, Mr. Miller filed for personal bankruptcy under Chapter 7 of the United States Bankruptcy Code. On January 23, 2003, Mr. Miller was discharged in bankruptcy. (Joint Ex. 55.) Accordingly, this Court later entered an Order on November 8, 2010, limiting Mr. Miller's potential liability in this case to intentional torts. (Order Limiting Mr. Miller's Liability Nov. 8, 2010.)

[4] As previously noted, the policies were actually issued by Assurance Insurance Company, a subsidiary of Zurich, and so Assurance is the company that owed any duty to defend and indemnify.

Given Mr. Miller's bankruptcy discharge, Plaintiffs filed an Amended Complaint on December 10, 2010 against Zurich America Insurance Company, seeking to hold Mr. Miller's insurer liable for his negligence under § 27-7-2.4, Rhode Island's direct action statute (Count VIII). Plaintiffs filed a Revised Second Amended Complaint on April 21, 2011, asserting this claim against Assurance Company of America as a successor-in-interest to Zurich. (Order Nov. 8, 2010.)

After the parties waived their rights to a trial by jury, this Court conducted a two-day, non-jury trial with respect to Plaintiffs' Revised Second Amended Complaint and Mr. Miller's Third-Party Complaint. With the parties' consent, the Court bifurcated the trial as to liability and damages, trying the liability issues and reserving any trial as to damages for the future, should liability be established as to any party. Mr. Miller, Mr. Hawkins, Mr. Boisse and Ms. Miller testified at trial. The parties submitted a number of joint exhibits, including numerous maps of the Property as well as town, state, and federal regulatory approvals. The parties also submitted Champlin's deposition testimony.

At the close of all of the evidence, Mr. Miller renewed his motion for summary judgment on which the Court had declined to rule prior to trial. This Court agreed to treat the motion for summary judgment as a motion for judgment as a matter of law and allowed the parties to submit post-trial memoranda. The Plaintiffs and Defendants thereafter filed post-trial memoranda and a copy of the official trial transcript. All Defendants then filed memoranda in reply to Plaintiffs' post-trial memorandum. This Court has jurisdiction of this action pursuant to R.I. Gen. Laws § 8-2-14.[5]

[5] "The superior court shall have original jurisdiction of all actions at law where title to real estate or some right or interest therein is at issue . . . [and] exclusive original jurisdiction of all other

II

STANDARD OF REVIEW

Rule 52(a) of the Rhode Island Superior Court Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." R.I. Super. R. Civ. P. 52(a). When deciding a non-jury case, "[t]he trial justice sits as a trier of fact as well as of law." Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)) (internal quotation marks omitted). "Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Hood, 478 A.2d at 184. "[A] trial justice 'need not engage in extensive analysis or discussion of all of the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" Parella, 899 A.2d at 1239 (R.I. 2006) (citing Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

Under R.I. Super. R. Civ. P. Rule 52(c), a party may move for judgment as a matter of law in a non-jury case after the presentation of evidence in an opposing party's case, but the standard to be applied to such a motion is different than in the jury context. Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008). The court may enter judgment as a matter of law against a party who has been fully heard on an issue, but "'[s]uch a judgment shall be supported by findings of fact and conclusions of law . . . .'" Id. (quoting Rule 52(c)). Unlike a jury trial, the trial justice sitting without a jury "need not view the evidence in the light most favorable to the nonmoving party." Id. (citing Estate of Meller v. Adolf Meller Co., 554 A.2d 648, 651 (R.I. 1989)). Instead, when deciding a Rule 52(c) motion, the trial justice considers "the credibility of

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actions at law in which the amount in controversy shall exceed the sum of ten thousand dollars ($10,000)." Sec. 8-2-14.

witnesses and determines the weight of the evidence presented by the plaintiff." Pillar Property Management, L.L.C. v. Caste's, Inc., 714 A.2d 619, 620 (R.I. 1998) (mem.).

III

ANALYSIS

A

Plaintiffs' Negligence Claims Against Multiple Defendants

In Count I of their Revised Second Amended Complaint, Plaintiffs assert claims of negligence against Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction, Lynne N. Miller, Pleasant Hills Development, Ltd., Mark L. Hawkins, and Thomas A. Champlin. Their theories of negligence differ as to each Defendant, but they seek to hold all of these Defendants jointly and severally liable for negligence as joint tortfeasors. Defendants characterize the Plaintiffs' attempt to hold them liable as "somebody must be to blame." (J. Miller Reply Br. 1).

It is well settled in Rhode Island that in a negligence action, "plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." Giron v. Bailey, 985 A.2d 1003, 1007 (R.I. 2009) (quoting Selwyn v. Ward, 879 A.2d 882, 886 (R.I. 2005) (internal quotation marks omitted)); see Willis v. Omar, 954 A.2d 126 (R.I. 2008). Where there is an intervening act on the part of a responsible third person, a defendant's negligence is considered remote—and not a proximate cause of the plaintiff's injury—unless the defendant reasonably should have anticipated that such intervening act would be a natural and probable consequence of his or her own act. See Nolan v. Bacon, 100 R.I. 360, 365, 216 A.2d 126, 129 (R.I. 1966). A defendant is "not bound to anticipate mischievous or wrongful acts on the part of others, and hence [is] not bound to guard against them." D'Ambra v. Peak Bldg. Corp., 680

A.2d 939, 941 (R.I. 1996) (citation omitted). "[F]or an independent intervening cause to replace a defendant's original negligence as the proximate cause of an injury, the original negligent conduct must have become totally inoperative as a cause of the injury." Contois v. Town of West Warwick, 865 A.2d 1019, 1027 (R.I. 2004) (quoting Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827, 830 (R.I. 1986)) (internal quotation marks omitted).

The Rhode Island Uniform Contribution Among Tortfeasors Act, R.I. Gen. Laws § 10-6-1 et seq., provides the framework for recovery against multiple tortfeasors. It defines the term "joint tortfeasors" as:

> two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them; provided, however, that a master and servant or principal and agent shall be considered a single tortfeasor.

Sec. 10-6-2.

The two foundational requirements for imposing joint liability and several liability on multiple defendants are that each defendant must be liable in tort to the plaintiff, and their conduct must have caused the same injury to the plaintiff. See Wilson v. Krasnoff, 560 A.2d 335, 339 (R.I. 1989). To be "liable in tort" means that each one negligently contributed to another's injury. Id. (citing Zarrella v. Miller, 100 R.I. 545, 548, 217 A.2d 673, 675 (1966)). The "same injury" requirement means that the injury is caused by parties who engaged in "common wrongs." Krasnoff, 560 A.2d at 339. "In determining whether an occurrence between two or more parties is a common wrong, two important factors are the time at which each party acted or failed to act and whether a party had the ability to guard against the negligence of the other party." Id. at 340.

1.

Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction

As to Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction, Plaintiffs claim that he owed them a legal duty to construct the Boisse home within the contours of Lot 15. They contend that he breached this duty by negligently signing permit applications containing incorrect information about the location of the house, instructing the excavator and well driller to place the foundation, septic system, and well in the wrong location, pointing out the wrong boundaries of Lot 15 to Mr. Boisse during a pre-closing tour, and using a power of attorney from his former wife to sign and swear in an Affidavit that the house did not encroach on any abutting property. Mr. Miller responds that, as a result of his discharge in bankruptcy, he may not be held liable in negligence.

The Boisses concede that Defendant Joseph R. Miller, Jr. d/b/a Joseph Miller Construction may be held liable only for intentional torts because of his discharge in bankruptcy. Thus, this Court holds that Mr. Miller may not be held individually liable for negligence.

2.

Defendants Pleasant Hills Development, Ltd. and Mark L. Hawkins

Plaintiffs next allege that Defendant Mark L. Hawkins and his solely-owned company, Defendant Pleasant Hills Development, Ltd., owed a duty of care to them, as purchasers of a lot in the Pleasant Hills subdivision, to ensure that their house did not encroach on adjacent property. Plaintiffs rely on paragraph 15(H) of the April 11, 1997 Declaration of Restrictions on the Pleasant Hills subdivision—requiring that the developer review and give written approval of plans showing the proposed location of buildings on all of the subdivision lots—to establish this duty. Plaintiffs further allege that Defendants Pleasant Hills Development, Ltd. and Hawkins

breached this duty by failing to give Defendant Joseph R. Miller, Jr. written approval of his plat plan showing the proposed location of the home planned for Lot 15. (See Joint Ex. 11, 4/11/97 Declaration of Restrictions).

Pleasant Hills Development, Ltd. and Hawkins respond that because Plaintiffs failed to present expert testimony to establish the standard of care applicable to builders, subdivision developers, and sellers of real estate with respect to ascertaining boundary lines and encroachments, Plaintiffs did not prove a prima facie case of negligence against these Defendants. Defendants Pleasant Hills Development, Ltd. and Hawkins further contend that the negligence of Defendant Joseph R. Miller, Jr. is an independent intervening cause of harm to the Boisses that absolves them of liability.

While Pleasant Hills Development, Ltd. and Hawkins had the obligation under paragraph 15(H) of the Declaration of Restrictions on the Pleasant Hills subdivision to approve plans showing the proposed location of buildings on the lots in the subdivision, there is no evidence, nor does this Court find, that this language imposed an independent obligation on these Defendants to ensure that Mr. Miller's proposed plat plan, as submitted, was accurate. Plaintiffs failed to present expert testimony at trial to establish the standard of care applicable to these Defendants or to prove that they deviated from the standard of care. As such, Plaintiffs failed to prove their claims of negligence against Defendants Pleasant Hills Development, Ltd. and Mark L. Hawkins.

3.

Defendant Thomas A. Champlin

Plaintiffs next claim that Defendant Thomas A. Champlin owed them a duty to accurately survey the Property and ensure that the location of the house, ISDS, and well were within the

boundary lines of the Property. They assert that Champlin negligently stamped and signed the "As-Built" ISDS Plan dated November 5, 1998. They allege that a proper survey would have revealed that the Boisses' home encroached on adjacent property. Plaintiffs thus contend that Defendant Champlin should have verified that the "as-built" drawings conformed to the actual location of the home and that his negligent failure to do so caused the Plaintiffs' injury.

Plaintiffs' claim against Champlin is mired by the fact that he died during the pendency of this action and Plaintiffs failed, prior to trial, to substitute a party defendant in his stead. In LesCarbeau v. Rodrigues, 109 R.I. 407, 286 A.2d 246 (1972), our Supreme Court stated that "[i]t is a basic common-law principle that if a party dies before a verdict or decision is rendered in an action against him, the action abates as to him and must be dismissed unless it is revived by substituting his personal representative." Id. 109 R.I. at 410-11, 286 A.2d at 258 (internal citations omitted). A motion to revive an action by substitution of the personal representative, pursuant to R.I. Super. R. Civ. P. 25(a), is "not a mere technicality but rather it is the sole means by which the court obtains jurisdiction over the personal representative." Id. Because the Plaintiffs did not file a motion to substitute a party defendant for Champlin or secure an order of substitution prior to this Decision, Plaintiffs' claim of negligence against him fails.

4.

Defendant Lynne N. Miller

Plaintiffs also assert a negligence claim against Defendant Lynne N. Miller in their Revised Second Amended Complaint for failing to ensure that the house that was being built on land owned by her and sold under her name was fully constructed on the Property that she owned. Yet, they fail to press this claim in their post-trial memoranda. This Court thus finds that Plaintiffs' negligence claim against Ms. Miller must fail on grounds of waiver. See Stebbins

v. Wells, 818 A.2d 711, 720 (R.I. 2003); Superior Group Ventures v. Apollo II Sign, 712 A.2d 359, 360 (R.I. 1998). Furthermore, this Court finds that the evidence adduced at trial fails to establish negligence on the part of Ms. Miller. Accordingly, Plaintiffs' negligence claim against her also must fail for want of proof.

For all of these reasons, Plaintiffs have failed to prove their negligence claims against Defendants Joseph R. Miller, Jr. d/b/a Joseph Miller Construction, Pleasant Hills Development, Ltd., Mark L. Hawkins, Thomas A. Champlin, and Lynne N. Miller. Accordingly, judgment may enter in favor of these Defendants with respect to Count I of Plaintiffs' Second Amended Complaint.

B

Plaintiffs' Breach of Contract Claims Against Ms. Miller

In Count II of their Revised Second Amended Complaint, Plaintiffs allege that Ms. Miller is contractually liable to them for promises she purportedly made in the November 30, 1998 Second Purchase and Sale Agreement. The Boisses claim that by signing the Agreement, Ms. Miller obligated herself, by its terms, to convey "good, clear, insurable, and marketable title" to them. Yet, Ms. Miller counters that, although she then held title to the Property, she did not sign the Second Purchase and Sale Agreement and did not execute a power of attorney granting Mr. Miller the authority to bind her to that agreement or to sell the Property to the Boisses. She argues that the power of attorney that she granted to Mr. Miller before the execution of the Second Purchase and Sale Agreement was limited to authorizing him to purchase Lots 14, 15, and 21 in the Pleasant Hills subdivision.[6]

[6] Although Mr. Miller testified at trial that he did not know who signed the Second Purchase and Sale Agreement, this Court did not find his testimony in this regard to be credible. It did find credible Ms. Miller's testimony that she did not sign the Agreement or grant Mr. Miller a power

Plaintiffs also advance a second theory of breach of contract against Ms. Miller arising from her December 4, 1998 Affidavit. They contend that Ms. Miller is liable for certain promises contained in the Affidavit, including her statement that she had not "done any act or allowed any act to be done which has changed or could change the boundaries of the premises" and that she had not "encroached upon any property of adjoining landowners." (See Joint Ex. 41). Ms. Miller did not respond to Plaintiffs' claim that she breached the terms of the December 4, 1998 Affidavit.

To prevail on a claim for breach of contract, a plaintiff must prove the existence of the contract, breach of the contract, and damages flowing from the breach. Petrarca v. Fidelity and Cas. Ins. Co., 884 A.2d 406, 420 (R.I. 2005). The Court must "make the predicate findings of offer, acceptance, consideration and breach requisite to determining a breach of contract claim." Gorman v. St. Raphael Academy, 853 A.2d 28, 33 (R.I. 2004). A breach of contract is defined as a "violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." Black's Law Dictionary 200-201 (8th ed. 2004); see Women's Dev. Corp. v. City of Cent. Falls, 764 A.2d 151, 158 (R.I. 2001). "Generally, whether a party materially breached his or her contractual duties is a question of fact." Parker v. Byrne, 996 A.2d 627, 632 (R.I. 2010).

The rules which govern the construction of instruments designating an attorney-in-fact are well settled. The primary object of such construction is to ascertain the intention with which the grant of powers was conferred and to give effect to that intent. Ricci v. Cappelluzzi, 90 R.I. 171, 173, 156 A.2d 207, 209 (1959) (citing McLaren Gold Mines Co. v. Morton, 124 Mont. 382, 391, 224 P.2d 975, 979 (1950)). In ascertaining intent, the instrument is to be construed as a

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of attorney authorizing him to sign it on her behalf. This Court thus deems it more probable that Mr. Miller did, in fact, sign the Second Purchase and Sale Agreement.

whole. Id. (citing Mook v. Humble Oil & Refining Co., 182 S.W.2d 255, 259 (Tex. Civ. App. 1944)). The instrument is to be construed strictly, without enlarging its language through broad interpretation. Id. (citing Orban v. State Automobile Ass'n, 127 A.2d 143, 146 (D.C. 1956)).

Plaintiffs' breach of contract claim arising out of the Second Purchase and Sale Agreement must fail pursuant to the doctrine of merger by deed. This doctrine "provides that once a warranty deed is accepted[,] it 'becomes the final statement of the agreement between the parties and nullifies all provisions of the purchase-and-sale agreement.'" Lizotte v. Mitchell, 771 A.2d 884, 887 (R.I. 2001) (quoting Haronian v. Quattrocchi, 653 A.2d 729, 730 (R.I. 1995)). As the parties here proceeded to a final closing and Plaintiffs accepted a warranty deed in exchange for purchasing the Property, any potential contract claims that they may have had arising out of the Second Purchase and Sale Agreement are barred by the doctrine of merger by deed. Id. at 887-88.

As to Plaintiffs' second theory of breach of contract, this Court finds that the December 4, 1998 Affidavit is not a contract. Simply stated, the Affidavit was not the product of a bargained-for exchange; therefore, the statements contained in the Affidavit do not constitute contractual promises. The required elements for contract formation, i.e., offer, acceptance, consideration, and mutuality of obligation, are not present. See Gorman, 853 A.2d at 33.

For all of these reasons, Plaintiffs' claims for breach of contract against Ms. Miller arising out of the November 30, 1998 Second Purchase and Sale Agreement must fail. Similarly, Plaintiffs' claims for breach of contract against her arising out of the December 4, 1998 Affidavit also must fail. Accordingly, judgment may enter in favor of Defendant Lynne N. Miller as to Count II of Plaintiffs' Revised Second Amended Complaint.

C

Plaintiffs' Claim of Breach of Warranty Deed Covenants Against Ms. Miller

Plaintiffs allege in Count III of their Revised Second Amended Complaint that Ms. Miller breached the warranty deed covenants contained in the December 3, 1998 Warranty Deed (Joint Ex. 40) because she did not in fact give them clear and marketable title to the house because the house encroached on the adjoining property. (See Revised Second Amended Complaint; Plaintiffs' Post-Trial Mem. at 17). Defendant counters that the warranty deed covenants do not encompass encroachments on adjoining property because the covenants only promise that the property conveyed is "free from all incumbrances."[7]

The Rhode Island statute concerning the meaning of warranty deed covenants states in pertinent part:

> In any conveyance of real estate the words "with warranty covenants" shall have the full force, meaning, and effect of the following words: "The grantor, for himself or herself and for his or her heirs, executors and administrators, covenants with the grantee and his or her heirs and assigns, that he or she is lawfully seised in fee simple of the granted premises; that the premises are free from all incumbrances; that he or she has good right, full power and lawful authority to sell and convey the premises to the grantee and his or her heirs and assigns; that the grantee and his or her heirs and assigns shall at all times hereafter peaceably and quietly have and enjoy the granted premises; and that the grantor will, and his or her heirs, executors and administrators shall, warrant and defend the premises to the grantee and his or her heirs and assigns forever against the lawful claims and demands of all persons."

[7] Defendant argues that the term "incumbrances" constitutes any interest that is not an ownership interest such that it does not encompass an encroachment. While the Court acknowledges that the encroachment at issue here does not constitute an "incumbrance," as defined, this Court notes that Defendant's focus on the term "incumbrance" is irrelevant to Plaintiffs' claim concerning a failure to convey marketable title. See Jerome v. Probate Court of Town of Barrington, 922 A.2d 119, 123 n.9 (R.I. 2007) (noting that an "incumbrance" is defined as a "property interest that is not an ownership interest.").

R.I. Gen. Laws § 34-11-16 (emphasis added). These covenants are generally known as the covenants of seisin and quiet enjoyment. By its terms, the statute provides that the grantor guarantees that he or she has lawful title to the premises being conveyed. See Bitting v. Gray, 897 A.2d 25, 35 (R.I. 2006) (stating that the statutory guarantee includes the "warranty of title"); see also Coco v. Jaskunas, 986 A.2d 531, 534 (N.H. 2009) (affirming that a statutory warranty includes covenants of title); 20 Am. Jur. 2d Covenants § 82. Accordingly, the statutory covenants may be breached if the grantor does not possess and convey clear and marketable title to the premises. See Alexander v. Blackstone Realty Associates, 684 A.2d 60, 62 (N.H. 1996) (recognizing that the covenant of seisin "is understood to mean that the grantor is the owner of the estate designated and has good title thereto."). In construing this covenant, it is recognized that the term "premises" is "an elastic and inclusive term" that generally includes "a house or building, along with its grounds." Black's Law Dictionary (9th ed. 2009).

In this case, the deed Ms. Miller conveyed to the Boisses stated that the Property was conveyed with warranty covenants. It thus embodied a guarantee from her, as grantor, that the conveyance of the Property to the Boisses met the requirements of § 34-11-16. The Warranty Deed specifically defined the premises being conveyed as "[t]hat certain lot or parcel of land, together with all buildings and improvements thereon. . . ." (Joint Ex. 40, Warranty Deed) (emphasis added). Thus, the Warranty Deed, by its very terms, conveyed the house that Mr. Miller constructed on Lot 15, as well as the real property that Ms. Miller owned on which he built the house.

It is well settled that in construing the subject of a conveyance in a warranty deed, a court will look to the language of the deed in conjunction with the circumstances at the time of its execution in order to determine the intent of the parties. See Bitting v. Gray, 897 A.2d at 31.

Here, it is apparent that both Ms. Miller and the Boisses intended the Warranty Deed to convey the house that Mr. Miller built. Moreover, it is undisputed that at the time Ms. Miller signed the Warranty Deed, both parties—Ms. Miller and the Boisses—believed that Ms. Miller was giving the Boisses title to the house as well as to Lot 15 itself. It is disingenuous, at best, to assert that in signing the Warranty Deed, Ms. Miller intended solely to convey legal title to the Property but not the house which she believed to be sited on the Property, especially in light of the language of the Warranty Deed that specifically includes "all buildings and improvements" on the Property. In signing the Warranty Deed, the Court is satisfied that Ms. Miller promised to convey clear and marketable title to both the house and the Property identified in the Deed. Accordingly, this Court will now look to whether Ms. Miller actually conveyed marketable title.

Marketable title is generally defined as a title that can be readily resold and is free from reasonable doubt as to validity of ownership. See Mishara v. Albion, 171 N.E.2d 478, 480 (Mass. 1961); Karl B. Holtzschue, Holtzschue on Real Estate Contracts and Closings (3rd ed. 2008) § 2:2.7 (2-48). It is well settled that title is generally not marketable where a building on the contracted-for land encroaches substantially on the adjoining lot. See 17 Williston on Contracts § 50:16, 322 (4th ed. 2000) ("Title is not merchantable where the buildings sought to be conveyed with the property encroach onto neighboring property."); 92 C.J.S. 2D VENDOR AND PURCHASER § 431 (2010). Title still may be marketable, however, where the encroachment is small or easily removable. See Mucci v. Brockton Bocce Club, Inc., 472 N.E.2d 966 (Mass. App. Ct. 1985).

In the instant case, it is undisputed that the encroachment onto the adjoining property is substantial. Mr. Miller built the house at least sixteen feet over the eastern boundary line of the Property, and the backyard extending beyond the wall of the house makes that encroachment

even more substantial. Indeed, Mr. Miller constructed nearly one-half of the Boisses' home on the utility easement belonging to the Narragansett Electric Company.

This Court thus finds that Ms. Miller did not convey marketable title to the premises to the Boisses as a result of this encroachment. Ms. Miller thus breached the covenants in the Warranty Deed. Accordingly, judgment may enter in favor of Plaintiffs and against Ms. Miller as to Count III of their Revised Second Amended Complaint.

D

Fraud, Intentional Misrepresentation and Willful Concealment

Counts IV and V of Plaintiffs' Revised Second Amended Complaint allege both fraud and misrepresentation, respectively, by Mr. Miller. Count VI alleges wrongful concealment by both Mr. and Ms. Miller. This Court will first address Plaintiffs' claims of fraud and misrepresentation.

Plaintiffs contend that Mr. Miller actually knew that the Boisse home encroached on adjacent property at the time he showed Mr. Boisse the Property. They argue that he intentionally deceived him about the location of the home to entice the Boisses to purchase the Property by showing them false boundary markers. Mr. Miller responds that there is no direct evidence that he knew that the Boisse home had not been properly sited within the boundaries of Lot 15 and encroached on adjoining property.

In Halpert v. Rosenthal, our Supreme Court clarified the law regarding the effect of an affirmative misrepresentation made during the course of a real estate transaction. 107 R.I. 406, 412-16, 267 A.2d 730, 734-35 (1970). There, the Court held that a party who has been induced by fraud to enter into a contract faces an election of remedies: the party may seek to rescind the contract to recover what it has paid under it, or it may affirm the contract and sue for damages in

an action for deceit. Id. 107 R.I. at 412, 267 A.2d 733; see also Goodwin v. Silverman, 71 R.I. 163, 164, 43 A.2d 50, 50 (1945) (identifying the choice of remedies available to a plaintiff alleging false representations during contract formation).

Deceit is a tort action, and it requires proof of some degree of culpability on the part of the person making the alleged misrepresentation. Halpert, 107 R.I. at 412, 267 A.2d at 733. An individual who sues in an action for deceit based on fraud has the burden of proving, by a preponderance of the evidence, that the defendant made a false representation with knowledge of its falsity and an intent to deceive. Id. at 412, 419 (internal citations omitted). More recently, our Supreme Court refined the test for common law fraud, stating that its elements consist of "a false or misleading statement of material fact that was known by the defendant to be false and was made with intent to deceive, upon which the plaintiff justifiably relied to its detriment." Nisenzon v. Sadowski, 689 A.2d 1037, n.11 (R.I. 1997) (internal citations omitted).

A misrepresentation is defined as "any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." Halpert, 107 R.I. at 413, 267 A.2d at 734. Fraud can be grounded in either affirmative acts or concealment, but concealment generally will not give rise to actionable fraud absent a duty to disclose. See Guilbeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 268-69 (D.R.I. 2000) (applying Rhode Island law). The Restatement (Second) of Torts provides:

> One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement 2d Torts § 551 (1977). Moreover, in Rhode Island, the Legislature has created "a duty on the part of real-estate agents and sellers to disclose material defects to buyers" under certain circumstances. Stebbins v. Wells, 818 A.2d 711, 717 (R.I. 2003). Under the Real Estate Sales Disclosures Act, R.I. Gen. Laws §§ 5-20.8-1 et seq., a "seller," defined as "any individual or entity seeking to transfer title to real estate to a buyer for consideration," has a duty to "notify the buyer of any known easements, encroachments, covenants or restrictions of the seller's real estate." § 5-20.8-2. This duty is equally placed on a seller's agent, and the seller herself, and an "agent" is defined as "any individual or entity acting on behalf of a seller or buyer to effect the transfer of real estate." § 5-20.8-1; see also Stebbins, 818 A.2d at 717-18.

This Court must begin by considering what affirmative misrepresentations or omissions of material fact were made by Mr. Miller, in his capacity as an agent for Ms. Miller as the seller of the Property, on which Plaintiffs base their claims of fraud and misrepresentation. Mr. Miller made an affirmative misrepresentation in pointing out the green dowels as marking the eastern boundary of the Property to Mr. Boisse. Further, it is undisputed that Mr. Miller failed to disclose to the Boisses, at any point in time prior to the closing, that the house encroached on adjoining property. Mr. Miller had an independent duty as an agent of Ms. Miller, the seller of the Property, to disclose any known encroachments to the Boisses. Accordingly, this Court is satisfied that Mr. Miller's failure to disclose the encroachment constituted an omission of a material fact on which a claim for fraud or misrepresentation may be based.

This Court will next examine whether the record supports a finding that Mr. Miller knew that the Boisse home had been improperly sited over the property line so as to encroach on the adjoining property, as knowledge of the falsity of the material fact that was not disclosed is necessary to support Plaintiffs' claims. Mr. Miller argues that absent direct evidence, a finding

of actual knowledge of falsity may not be made. "[A] trier of the facts, [however,] may draw reasonable inferences from evidentiary facts in order to establish legal proof." Menard v. Menard, 106 R.I. 709, 712, 263 A.2d 98, 100 (1970). Moreover, circumstantial evidence may be considered to establish fraud or misrepresentation, and reasonable inferences may be drawn from the evidence as long as they are not based on mere suspicion or conjecture. See Fricke v. Fricke, 491 A.2d 990, 994 (R.I. 1985). Finally, the knowledge necessary to establish fraud or misrepresentation may be constructive or implied from the circumstances. See Smith v. Rhode Island Co., 39 R.I. 146, 98 A. 1, 4 (1916) ("[F]raud must ordinarily be proved by circumstantial evidence, 'a concatenation of circumstances, many of which in themselves amount to very little, but in connection with others make a strong case.' In such circumstances it is necessary to carefully consider the evidence to see whether the facts proved are not reasonably reconcilable with fair dealing and honesty of purpose . . ."); 37 C.J.S. FRAUD § 41 (2008).

In determining Mr. Miller's state of mind, therefore, this Court must review the record pertinent to Plaintiffs' claims of fraud and misrepresentation and draw from it all reasonable inferences. A review of the testimony and evidence shows that Mr. Miller sited the home on the Property, telling the excavator where to dig the foundation and directing the well contractor where to place the well. (J. Miller Trial Tr. 9:14-19, 11:14-17, Dec. 5, 2011.) At the time he did so, he was aware of the four-foot high stakes and semi-permanent markings with orange caps that were placed at each of the boundary corners of the Property. (J. Miller Trial Tr. 8:1-20, Dec. 5, 2011.) Mr. Miller also hired a contractor to install a driveway. Preparations for construction of the driveway, however, revealed that it was 112 feet long, rather than a length of fifty feet as indicated by the survey. (J. Miller Trial Tr. 69:9-18, Dec. 5, 2011; Joint Ex. 53, Survey Plan.) A difference of that magnitude would have resulted in a significantly increased construction cost to

Mr. Miller, as he acknowledged that he would be charged by the square foot. (J. Miller Trial Tr. 72:3-24, Dec. 5, 2011.) At trial, he had to admit that he would notice such a difference in the field—a clear sign that the siting of the house had not gone according to plan. In fact, his testimony on this point signaled to this Court that the driveway had alerted Mr. Miller to a problem with where he had built the house or that he otherwise had knowledge of the problem prior to his dealings with the Boisses.

Notwithstanding this knowledge, Mr. Miller proceeded to sell the house to the Boisses. Yet, he did so by making his company the signatory on the Purchase and Sale Agreement as seller, even though his ex-wife owned the Property. (See Joint Ex. 28, First Purchase and Sale Agreement.) As such, he tried to make sure that the Agreement and its guaranty that the seller would provide "good, clear, insurable and marketable title" did not bind him personally (as he did not own the Property and did not sign personally) and did not bind his ex-wife as owner and seller of the Property because she did not sign the Agreement.

After signing this Purchase and Sale Agreement, Mr. Boisse went into the field and could only locate a single three-foot tall boundary stake with an orange ribbon or flag attached to it, even though Mr. Miller and Champlin testified as to the placement of four such semi-permanent stakes at each of the four corners of the Property. (P. Boisse Trial Tr. 107:7-10, Dec. 5, 2011; J. Miller Trial Tr. 8:1-20, Dec. 5, 2011.) He specifically could not locate the orange boundary markers at the rear of the Property—where the house encroached on neighboring land. He repeatedly asked Mr. Miller for a tour of the Property to locate those boundary markers. (P. Boisse Trial Tr. 119:18-21, Dec. 5, 2011.)

That tour did not occur, however, until after Champlin submitted an As-Built ISDS Plan to DEM certifying that the house had been sited in accordance with his previously-approved

ISDS plan (even though Champlin admitted that he did not go out to the site, as he should have, before stamping the plan). (See Joint Ex. 34, "As Built" Plan; Joint Ex. 61, Champlin Dep. 40:24-41:24, July 25, 2006.) The requirements then were complete for issuance of a Certificate of Occupancy that would allow Mr. Miller to proceed with the sale of the house to the Boisses. It was at that point that Mr. Miller finally agreed to walk the Property with Mr. Boisse to show him the property lines. That site visit was then delayed by Mr. Miller a few days more, ostensibly due to inclement weather.

During the ensuing tour of the Property, Mr. Miller walked Mr. Boisse back from the driveway directly to a dowel in the field with a little green flag on it, evidencing that he knew right where to find that boundary marker. (P. Boisse Trial Tr. 109:19-22, Dec. 5, 2011.) He then showed him another similar green dowel in the field. Significantly, however, Mr. Miller did not walk the eastern edge of the Property with Mr. Boisse—the area of encroachment. At trial, Mr. Miller characterized the green dowels as three-foot stakes, in an apparent attempt to suggest that they were the orange survey markers, but the evidence shows that the dowels were green, not orange, and were less than a foot high from the ground.

Mr. Miller then told Mr. Boisse that the Boisses would need to sign another purchase and sale agreement which he tried to explain was for "clerical reasons." He then listed his ex-wife as seller on the Second Purchase and Sale Agreement. Yet, at trial, she credibly denied signing this Agreement and he, suspiciously, could not say who signed her name to it. (Joint Ex. 37, Second Purchase and Sale Agreement; L. Miller Trial Tr. 145:8-19, Dec. 7, 2011; J. Miller Trial Tr. 23:15-22, Dec. 5, 2011.) It nonetheless contained a provision stipulating that good, clear, insurable, and marketable title would be conveyed by a warranty deed. While Mr. Miller had no power of attorney for his ex-wife authorizing him to sign the Second Purchase and Sale

Agreement on her behalf, he obtained a power of attorney from her two days later authorizing him to represent her at the closing and sign an Affidavit of title and other documents to consummate the sale. (Joint Ex. 39, Second Power of Attorney.) Mr. Miller then had Ms. Miller sign the Warranty Deed, appeared the following day at the closing on her behalf, and signed an Affidavit as her attorney-in-fact, indicating that she had not encroached on the property of any adjoining landowners. (Joint Ex. 41, Affidavit.)

From this evidence, this Court finds that Mr. Miller knew, at the time that he showed Mr. Boisse the green dowel boundary markers in the field and prior to the closing, that he had sited the house improperly and that it encroached on the adjoining property. While he did not set out to build the house in this manner—an irrational act by any builder or developer—he realized his error after he had already sunk money into the Property. The driveway would have alerted him to a problem with the siting of the house, and his attempt to suggest otherwise at trial displayed guilty knowledge.

This Court simply does not find it credible to believe that in the time during which Mr. Miller was overseeing the installation of the driveway and the building of the house, he never noticed that the driveway was approximately twice as long as it should have been. This Court finds that the extra distance of approximately fifty feet is not such a minimal amount as to escape a reasonable builder's notice, especially in light of Mr. Miller's previous construction experience. Mr. Miller himself candidly admitted that "you would think you would" notice such a difference in the field. (J. Miller Trial Tr. 73:8-9, Dec. 5, 2011.) Moreover, as the person responsible for the payment of the contractors who excavated and installed the driveway, the final cost of the driveway would have informed Mr. Miller of a problem in the siting of the house. This Court accepts that at the time of trial, more than a decade after the driveway had

been excavated and paid for, Mr. Miller may well have not remembered the cost of the driveway. This Court does not, however, find credible any assertion to the effect that at the time the driveway was installed and paid for during the summer of 1998, Mr. Miller did not notice that the cost of the driveway was significantly greater than it should have been, had the driveway been the correct length.

Mr. Miller then embarked on a series of dealings with the Boisses that were intended to conceal the problem with the encroachment and to make that problem theirs rather than his own in an effort to protect his financial investment in the Property. He falsely misrepresented to Mr. Boisse that the short green dowels were the boundary markers when he knew that they were not the taller orange surveyor stakes.

Mr. Miller acknowledged at trial that he was aware of the appearance of the surveyor stakes that Champlin had used to mark the corners of the Property. (J. Miller Trial Tr. 8:1-14, Dec. 5, 2011.) Defendant asserts that Plaintiffs' evidence is limited to a dispute over the difference in colors of orange and green, the significance of which was not presented at trial. This Court notes, however, that the distinction between the surveyor stakes, as described by Mr. Miller himself, and the green dowels as submitted into evidence, is not only the colors but the difference in height. The stakes, as described by Mr. Miller, are "about three feet high usually" with "either orange or [an] orange flag" on top. (J. Miller Trial Tr. 8:8-17, Dec. 5, 2011.) By no stretch of the imagination can this Court find that Mr. Miller mistook the green dowels that are less than a foot high from the ground to be the surveyor stakes that marked the corners of the lot. Defendant's emphasis on the colors is both misleading and unavailing. By pointing out the green dowels to Mr. Boisse and representing that they marked the corners of the lot, Mr. Miller made an affirmative misrepresentation regarding the location of the boundary lines. See Hydro

Manufacturing, Inc. v. Kayser-Roth Corp., 640 A.2d 950, 955 (R.I. 1994) (stating that a seller who does not answer truthfully to a buyer's inquiries about a property may be liable for misrepresentation.).

Indeed, this Court suspects that Mr. Miller himself placed the green dowels in the field. Mr. Boisse testified that during the late summer and fall of 1998, while the house was being built and prior to the closing, he repeatedly inquired as to the boundaries of the lot because he was unable to locate the rear boundary stakes. The Court emphasizes that at least several days passed between Mr. Boisse's inquiries and the tour Mr. Miller gave Mr. Boisse on which Mr. Boisse was shown the green dowels. This time lapse gave Mr. Miller the opportunity to place the dowels in the ground. Moreover, Mr. Boisse testified that Mr. Miller knew exactly where the dowels were located. The Court notes, in particular, that the dowels were only a few inches off the ground and, as such, would not be noticed from any distance away or easily located by someone without prior knowledge of their location.

A definite finding by this Court that Mr. Miller was in fact responsible for the placement of the dowels, however, is not necessary to prove knowledge of falsity at the time Mr. Miller walked the property lines with Mr. Boisse. The difference in appearance between the surveyor stakes and the dowels, when combined with Mr. Miller's admitted familiarity with the appearance of the stakes and his admitted failure to walk the eastern boundary of the Property with Mr. Boisse, where the house encroached, is sufficient to find that Mr. Miller knew that the dowels did not actually mark the corners of the lot. See, e.g., Zimmerman v. Kent, 575 N.E.2d 70, 75-77 (Mass. App. Ct. 1991) (finding that a knowledge of the false statement may be inferred if it was reasonably within the knowledge of the speaker).

Regardless, the Court finds that Mr. Miller knew that the green dowels did not mark the actual boundaries of the Property when he falsely misrepresented the contrary to Mr. Boisse. He then tried to insulate himself from liability for the known encroachment by not signing or getting his ex-wife to sign either of the purchase and sale agreements and using a power of attorney to sign an Affidavit in his ex-wife's name that he knew misrepresented the absence of an encroachment of which she had no direct knowledge. At no time prior to the closing, even though he knew the house encroached on the adjacent property, did he inform the Boisses of that fact.

This Court will next consider whether Mr. Miller intended to deceive the Plaintiffs into believing that the house was properly sited and did not encroach upon neighboring property. The intent to deceive may be inferred from circumstantial evidence. See Fleet Nat'l Bank v. Anchor Media Television, Inc., 831 F. Supp. 16, 40 (D.R.I. 1993) ("Rarely do perpetrators of fraud announce to the world that by their actions they intend to deceive."). This Court finds that Mr. Miller's knowledge that the house had been improperly sited at the time he was negotiating the sale of the Property to the Boisses is sufficient to support an inference of intent to deceive. Mr. Miller, as a builder who had purchased the Property for the sole purpose of building a house for which he could find a buyer, had a financial incentive to conceal the fact of an encroachment on the boundary to any potential buyers, including the Boisses. See id. (holding that a motive to profit supports a finding of knowledge and an intent to deceive.)

The Court acknowledges that Mr. Miller may not be held directly liable for the affirmative misrepresentation made in the Affidavit, as Mr. Miller signed it in his capacity as Ms. Miller's attorney-in-fact. Indeed, it appears to this Court that Mr. Miller, in asking for and obtaining the power of attorney from Ms. Miller, was ensuring that he himself did not sign any

legal documents making affirmative misrepresentations. This Court notes, in particular, that the Affidavit was the only document which was signed under the power of attorney. The other document regarding the final sale of the property—the Warranty Deed—was signed by Ms. Miller herself. It appears to this Court, then, that Mr. Miller obtained the power of attorney from Ms. Miller for the purpose of shielding himself from direct liability as to the misrepresentations made in the Affidavit. As this Court has discussed, however, Mr. Miller had made affirmative misrepresentations regarding the boundary lines of the Property in pointing out the green dowels to Mr. Boisse. Moreover, Mr. Miller's failure to disclose the encroachment is an omission of a material fact that supports a claim of fraud and misrepresentation by Mr. Miller. Thus, Mr. Miller's attempt to evade legal responsibility for the affirmative misrepresentations made in the Affidavit is unavailing.

The Court notes that an intent to deceive also may be inferred from the questionable actions of Mr. Miller with regard to the purchase and sale of the Property to the Boisses. Mr. Miller characterized signing the first Purchase and Sale Agreement in his company's name as an "oversight," which this Court deems a suspicious way of phrasing such a fundamental error as the legal ownership of the Property. (Joint Ex. 28, First Purchase and Sale Agreement; J. Miller Trial Tr. 15:9-13, Dec. 5, 2011.) In addition, despite his protestations to the contrary, it appears probable to this Court that Mr. Miller signed the second Purchase and Sale Agreement in his ex-wife's name, without her knowledge or consent. The Court notes, in this regard, that the Second Purchase and Sale Agreement is dated prior to the second power of attorney which Ms. Miller gave to Mr. Miller to authorize the sale of the Property and that her testimony denying that she signed the Agreement was credible. (Joint Ex. 39, Second Power of Attorney.) Significantly, the Second Purchase and Sale Agreement is the only document that specifically promises that the

seller will convey "a good, clear, insurable, and marketable title to the Property." (Joint Ex. 37, Second Purchase and Sale Agreement.) By not securing a power of attorney from his ex-wife before signing the Agreement and then denying he signed it, and by having his ex-wife sign the Warranty Deed, Mr. Miller hoped to evade responsibility for agreeing to convey clear title. (Joint Ex. 40, Warranty Deed.) The chain of events surrounding these documents generally is consistent with the actions of someone trying to avoid liability for signing any legal document that makes material misrepresentations. This Court is thus satisfied that Mr. Miller's machinations associated with the purchase and sale documents and his incredible testimony regarding the same "are not reasonably reconcilable with fair dealing and honesty of purpose" so as to support an inference of an intent to deceive. Smith v. Rhode Island Co., 98 A. at 4.

Lastly, this Court will address whether Plaintiffs justifiably relied on the misrepresentations. Defendant emphasizes that the Boisses never asked for a survey of the Property before closing on its purchase and sale. This argument fails, however, as it is well settled that a person transacting business with a property owner may justifiably rely on the property owner's representations without investigating or verifying the accuracy of the claim. See Travers v. Spidell, 682 A.2d 471 (R.I. 1996); see also Restatement (Second) Torts § 540 (1977). The Boisses were not required to make an independent investigation into the boundaries of Lot 15 nor did they unjustifiably rely on Mr. Miller's representation as to the location of those boundaries. Moreover, the Court notes that the representations made by Mr. Miller were neither preposterous nor so palpably false that a reasonable person would not have believed them. Finally, the Court notes that Mr. Boisse testified that he repeatedly asked Mr. Miller about the boundary lines of the Property and insisted that its eastern boundary line be pointed out to him

before closing.[8] Mr. Boisse's duty to inspect the land and make reasonable inquiry was fulfilled by walking the Property himself in order to try to find the boundary markers and then repeatedly asking Mr. Miller to show him the boundary lines. The Boisses were under no affirmative duty to get a survey of the land performed themselves. Cf. § 5-20.8-2 (stating that a buyer "is advised not to rely solely upon the representation of the seller" but otherwise placing no affirmative duty on a buyer); see also Hydro-Manufacturing, Inc., 640 A.2d at 956 (R.I. 1994) (stating that a buyer had "an affirmative duty to inspect the land and make reasonable inquiry" about the land and its actual value).

This Court next turns to Plaintiffs' claims of wrongful concealment against both Mr. and Ms. Miller. As previously stated, a claim of wrongful concealment must be predicated on a duty to disclose. See Williston on Contracts § 69:17. Plaintiffs allege that Mr. and Ms. Miller wrongfully concealed certain known defects in the Property. Specifically, Plaintiffs claim that Mr. and Ms. Miller failed to disclose to them, prior to their purchase of the Property, that the home encroached on adjacent property. Mr. and Ms. Miller respond that they did not know about the encroachment until the present litigation and therefore may not be found liable for wrongful concealment.

At trial, both Mr. and Ms. Miller testified that they had no idea that the Boisse home actually encroached on the adjoining property at the time the parties closed on the purchase and sale of the Property on December 4, 1998. (J. Miller Trial Tr. 60:25 – 61:2, Dec. 5, 2011; L. Miller Trial Tr. 156:9-21, Dec. 7, 2011). Ms. Miller's testimony indicates that she had no direct

[8] With regard to Mr. Miller's affirmative misrepresentation that the green dowels marked the eastern boundary of the Property, it is not necessary to establish that, but for the pointing out of the green dowels, the Boisses would not have closed on their purchase of the Property. Under Rhode Island law, it is sufficient to establish reliance if the representations had a material influence in inducing the purchase. See Handy v. Waldron, 19 R.I. 618, 35 A. 884 (1896).

involvement with either the construction or the sale of the house aside from giving a power of attorney to Mr. Miller to make the required transactions on her behalf. This Court is satisfied that Ms. Miller had no knowledge of the encroachment and indeed is guilty of nothing beyond an unwise trust in Mr. Miller. Moreover, the Real Estate Sales Disclosure Act as applied to Ms. Miller only placed a duty to disclose known encroachments on the real estate. See § 5-20.8-2. Because this Court finds that Ms. Miller had no knowledge of the encroachment, she had no duty to disclose on which Plaintiffs' claim of wrongful concealment could be based. Accordingly, Plaintiffs have failed to prove their claim of wrongful concealment against Ms. Miller as alleged in Count VI of their Revised Second Amended Complaint.

As previously noted, however, this Court finds that Mr. Miller's testimony that he had no idea, prior to the closing, that the Boisse home had been improperly sited on the Property and encroached on neighboring land is not credible. Indeed, the weight of the evidence at trial suggests the contrary.[9] The Court notes in particular that Mr. Miller was not inexperienced as a builder so as to make such a significant error in the placement and construction of the Boisse home an understandable example of an oversight. Mr. Miller himself acknowledged that he had built five houses before the Boisse home. (J. Miller Trial. Tr. 4:8-10, Dec. 5, 2011.) Accordingly, this Court finds that Mr. Miller did indeed know that the house had been improperly sited and encroached upon the boundary line prior to the closing on the Property. Having realized that the house had been improperly sited, Mr. Miller should have disclosed the

[9] The Court finds it significant in this regard that Mr. Miller never argued that Champlin had erred in surveying the Property or in placing the original orange surveyor stakes in the corners of the Property. Indeed, Champlin remained certain in his deposition testimony that he had placed the boundary stakes in the correct locations to mark the boundary of the easement and the Property. (Joint Ex. 62, Champlin Dep. 68:11-15, Aug. 22, 2006.) Mr. Miller's silence tacitly acknowledges that the house was improperly sited on the Property, not that the Property had been incorrectly surveyed.

encroachment to the Boisses, as it would have significantly affected their decision to close on the purchase of the Property. Moreover, in his capacity as Ms. Miller's agent responsible for the sale of the Property, Mr. Miller had an affirmative duty to inform the Boisses of the known encroachment. Instead, Mr. Miller made both affirmative misrepresentations concerning the placement of the boundary lines with respect to the house and failed to disclose the encroachment. This Court thus holds that Mr. Miller may be held liable for fraud, misrepresentation, and wrongful concealment of the material facts regarding the placement of the Boisse home on the Property as set forth in Counts IV-VI of Plaintiffs' Revised Second Amended Complaint.

E

Violation of Deceptive Trade Practices Act

Plaintiffs also claim in Count VII of their Revised Second Amended Complaint that Mr. Miller violated the Rhode Island Deceptive Trade Practices Act, §§ 6-13.1-1 et seq., in his dealings with them regarding the Property. Specifically, the Boisses contend that Mr. Miller engaged in "conduct that . . . create[d] a likelihood of confusion" and "act[s] or practices that [were] unfair or deceptive" by stating or implying that the Boisse home was located entirely on Lot 15, when in fact it encroached on adjacent property. See §§ 6-13.1-1(6) (xii, xiii) (definition of unfair methods of competition and unfair or deceptive acts or practices).

Section 6-13.1-2 provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." To determine whether a practice is "unfair" under the statute, the court is to consider: "(1) [w]hether the practice . . . offends public policy as it has been established by statutes, the common law . . . or other established concept[s] of unfairness; (2) whether it is immoral, unethical, oppressive, or

unscrupulous; and (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." See Ames v. Oceanside Welding and Towing Co., Inc., 767 A.2d 677, 681 (R.I. 2001).

As previously explained, this Court finds that Mr. Miller intentionally misrepresented to and willfully concealed from the Boisses the fact that the house that he built and sold to them encroached over the eastern boundary line of the Property. As such, his actions were unfair and offend the public policies reflected in the common law precepts of fraud, intentional misrepresentation and willful concealment. By knowingly selling the Boisses a home that he mistakenly built substantially on the property of another person, Mr. Miller put his own financial interests above theirs. In so doing, he engaged in unscrupulous conduct as a builder that presumably caused substantial injury to the Boisses. This conduct by Mr. Miller can only be described as a deceptive trade practice. To find otherwise would defeat the purpose of the Deceptive Trade Practices Act to provide additional protection to consumers from persons conducting unfair and deceptive business activities. See Glickman v. Brown, 486 N.E.2d 737, 741 (Mass. App. Ct. 1985) (abrogated on other grounds). Accordingly, Mr. Miller may be held liable for a violation of the Deceptive Trade Practices Act as alleged in Count VII of Plaintiffs' Revised Second Amended Complaint.

F

Plaintiffs' Direct Action Against Mr. Miller's Insurer

While the Boisses concede that Mr. Miller may not be held liable in negligence because of his discharge in bankruptcy, they have filed a direct action against his insurer, Assurance Company of America, in Count VIII of their Revised Second Amended Complaint, arguing that it should be liable for his negligence under R.I. Gen. Laws § 27-7-2.4. That statute authorizes a

plaintiff in a tort action to file a direct action against a defendant's insurance company when the defendant files for bankruptcy. See § 27-7-2.4. Plaintiffs contend that the only limitation on their right to recover in such a direct action against the insurer is that the recovery cannot exceed the coverage limits stated in the subject insurance policies.

In an Order dated November 8, 2010, this Court previously found that Assurance may not be held liable for any "willful or malicious acts" of Mr. Miller. To the extent, therefore, that this Court has found that Mr. Miller willfully misrepresented the location of the boundary markers and intentionally concealed the fact that the house encroached on adjoining property, Assurance may not be held liable. To the extent that Mr. Miller's actions in siting the house were negligent, however, this Court must consider whether Mr. Miller's insurance policies provide coverage for Plaintiffs' alleged injuries.

Assurance argues that the policies at issue do not provide coverage for Plaintiffs' alleged loss. Specifically, the insurer claims that Mr. Miller did not cause bodily injury or property damage to Plaintiffs, faulty workmanship is not covered under a commercial general liability policy, and faulty workmanship is not an occurrence within the meaning of the policies. Further, Assurance contends that any alleged property damage did not occur during the time period in which the policies were in effect. Finally, with respect to Mr. Miller's Third-Party Complaint against Zurich for defense and indemnification, Assurance argues that even if the policies were applicable, Mr. Miller's late notice of claim and suit should preclude his recovery.

Rhode Island's direct action statute provides, in pertinent part, as follows:

> Any person, having a claim because of damages of any kind caused by the tort of any other person, may file a complaint directly against the liability insurer of the alleged tortfeasor seeking compensation by way of a judgment for money damages whenever the alleged tortfeasor files for bankruptcy, involving a chapter 7 liquidation, a chapter 11 reorganization for the benefit of

> creditors or a chapter 13 wage earner plan, provided that the complaining party shall not recover an amount in excess of the insurance coverage available for the tort complained of.

Sec. 27-7-2.4. While the statute thus allows an injured party to sue an insurer directly when an alleged tortfeasor files for bankruptcy, it does not enlarge the liability of an insurer beyond the terms and limits stated in the insurance policy. See D'Amico v. Johnston Partners, 866 A.2d 1222, 1226 n.4; see generally Clausen v. New England Ins. Co., 254 F.3d 331, 336 (1st Cir. 2001) (decided under § 27-7-2, "Remedies of injured party against insurer").

Both Assurance policies at issue in this case were commercial general liability policies, one of two common types of insurance policies often relied upon in construction disputes. (See Joint Ex. 59; Joint Ex. 60). The first policy covered Mr. Miller between July 7, 1997 and July 7, 1998. The second policy covered Mr. Miller between September 8, 1998 and September 8, 1999. Both policies state that Assurance "will pay those sums that [Mr. Miller] is legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." (Joint Ex. 59, Form 760203 Ed. 1-94, p. 2; Joint Ex. 60, Form 760203 Ed. 6-96, p. 2). The policies then narrow this coverage by providing that the insurer will pay for "bodily injury" or "property damage" only if: "(1) the 'bodily injury' or 'property damage' is caused by an 'occurrence' . . .; and (2) the 'bodily injury' or 'property damage' occurs during the policy period." (Joint Ex. 59; Joint Ex. 60). An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Joint Ex. 59, Form 760203 Ed. 1-94, p. 14; Joint Ex. 60, Form 760203 Ed. 6-96, p. 16). The policies define property damage as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Joint Ex. 59, Form 760203 Ed. 1-94, p.15; Joint Ex. 60, Form 760203 Ed. 6-96, p. 17). The policies further exclude coverage of property damage to an "impaired property" arising out of a failure by the insured "to perform a contract or agreement in accordance with its terms." (Joint Ex. 59; Joint Ex. 60).

In this case, the Boisses do not allege that Mr. Miller's purported negligence in siting their home caused them to suffer any bodily injury. They also do not suggest that his alleged negligence caused them to sustain any physical injury to their tangible property or a loss of use of that property. Instead, the Boisses style their injury from Mr. Miller's alleged negligence as an economic loss resulting from the diminution in the value of their Property and the potential for future costs associated with relocating their home within the boundaries of Lot 15.

In Amtrol, Inc. v. Tudor Insurance Co., 2002 WL 31194863 (D. Mass. 2002), however, the United States District Court for the District of Massachusetts stated that "the physical injury requirement in standard [commercial general liability] policies exists to prevent recovery of mere economic loss." Id. at *6 (internal citations omitted). In other words, commercial general liability policies:

> are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products, which are purely economic losses. Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.

Id. (internal citations and quotations omitted).

Thus, Plaintiffs' claim for pure economic injury allegedly resulting from Mr. Miller's incorrect siting of the home must fail. As Plaintiffs do not claim and cannot prove that they sustained physical injury to their tangible property or loss of use of such property as a result of his alleged negligence, there is no coverage under the Assurance policies at issue for their alleged loss.

Moreover, even if this Court were to find that Mr. Miller caused property damage to Plaintiffs within the meaning of the policies at issue, it is satisfied that Mr. Miller's work was negligent but not accidental. In Employers Mutual Cas. Co. v. Pires, 723 A.2d 295 (R.I. 1999), our Supreme Court examined a painting subcontractor's coverage under policy exclusions identical to those in the instant case. There, a subcontractor was hired to paint replacement windows and doors installed by a general contractor. The subcontractor sought coverage for damage done to window panes allegedly caused by him in the course of remodeling work. Id. at 296-97. The Court observed that if the damage were caused by negligently or incorrectly performed work, it would be excluded from coverage, but if the damage was "accidental," it would be covered. Id. at 299. The Court explained:

> If [the subcontractor] performed work on the window panes in connection with painting the window frames . . . and he negligently damaged the panes as part of such a preparation or cleanup operation, then the damage would fall within the exclusion for incorrectly performed work. If, on the other hand, [the subcontractor] did not intentionally perform work on the window panes in connection with painting the window frames, but only damaged them accidentally when he was performing work on the frames, then such damage would not fall within the policy's exclusion for 'incorrectly performed' work on the property.

Id.[10]

Here, it is undisputed that Mr. Miller was in charge of every aspect of the development of the Property, including taking down trees on the Property and siting the driveway, well, and ISDS. (J. Miller Trial. Tr. 8:24 – 9:23, Dec. 5, 2011). Most importantly, Mr. Miller was solely responsible for siting the Boisse home. (J. Miller Trial Tr., 9:14-17, Dec. 5, 2011). Thus, this Court finds that Mr. Miller's siting the Boisse home in a location that encroached on the Narragansett Electric easement constitutes incorrectly performed work and not an accident within the meaning of the policies. See Pires, 723 A.2d at 299; see also Fire Insurance Exchange v. The Superior Court of San Bernadino County, 181 Cal. App. 4th 388, 390 (2010), reh'g denied (Feb. 22, 2010), review denied (Apr. 22, 2010) ("[b]uilding a structure that encroaches onto another's property is not an accident even if the owners acted in the good faith but mistaken belief that they were legally entitled to build where they did."). As such, this work—even if negligent—is not covered under the Assurance policies at issue here.

In addition, Mr. Miller's incorrectly performed work cannot be considered an "occurrence" under the Assurance policies. The United States District Court for the District of Massachusetts has stated that most commercial general liability policies "exclude the insured's faulty workmanship from coverage . . . [because] faulty workmanship fails to constitute an accidental occurrence in a commercial general liability policy." American Home Assurance Co. v. AGM Marine Contractors, Inc., 379 F. Supp. 2d 134, 136 (D. Mass. 2005), aff'd 467 F.3d 810 (1st Cir. 2006). As such, poor workmanship is a business risk to be borne by the insured; construing a policy as providing coverage for faulty workmanship, therefore, would improperly

[10] The Court in Pires ultimately concluded that fact questions existed as to this issue, vacated the judgment entered in favor of the insured and remanded the case for further proceedings. Id. at 299-300.

transform the insurer into a guarantor of the insured's work. See Pursell Constr. Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999); Kvaerner Metals Div. of Kvaerner U.S. Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 899 (Pa. 2006). Following this logic, Mr. Miller's incorrectly performed work does not constitute an "occurrence" under the Assurance policies.

Finally, even if this Court were to consider that the injury that the Boisses allegedly suffered constitutes damage to an impaired property, the policies explicitly exclude coverage for any damage caused by a failure to perform a contract in accordance with its terms. It is undisputed that Mr. Miller contracted to build a single-family residence on the Property. See General Specifications attached to Purchase and Sales Agreement, Joint Ex. 28.[11] In siting the house partially on the adjoining property, Mr. Miller failed to perform in accordance with the terms of the contract. Thus, any injury the Boisses suffered as a result of the negligent siting of the house was explicitly not covered by the insurance policies at issue. Accordingly, Assurance cannot be liable for Mr. Miller's alleged negligence under § 27-7-2.4, as asserted by Plaintiffs in Count VIII of their Revised Second Amended Complaint.[12] It necessarily follows, therefore, that Assurance is not liable to Mr. Miller for defense and indemnification, as alleged in his Third-Party Complaint.

[11] This Court acknowledges that this first Purchase and Sales Agreement as to the Property is invalid because it was signed by Joseph R. Miller, Jr. in his business name when the Property itself was actually owned by Lynne N. Miller. The contract to build the residence, as attached to the Agreement, is unaffected by this defect, however, as it was made between Joseph Miller Construction and the Boisses, and Ms. Miller was not involved in any part of the construction of the house. Furthermore, the parties do not dispute the existence of a contract between Joseph Miller Construction and the Boisses to build the residence on the Property.

[12] As a result of this Court's determination that the Assurance policies at issue do not cover Plaintiffs' alleged loss, it need not reach the additional issues of whether the policies were in effect during the time period in question or whether, assuming coverage did exist, Mr. Miller's alleged late notice of claim would preclude his recovery.

IV

CONCLUSION

For all of these reasons, this Court finds that Plaintiffs have failed to prove their claims of negligence in their Revised Second Amended Complaint as against all named Defendants (Count I). The Court further finds that Plaintiffs have not proven their claims against Defendant Lynne N. Miller for breach of contract (Count II) and wrongful concealment (Count VI). Plaintiffs also have not proven their claims against Defendant Assurance Company of America for the negligence of Mr. Miller under § 27-7-2.4 (Count VIII). As Plaintiffs have failed to prove their direct action claim against Defendant Assurance, Mr. Miller's Third-Party Complaint against Assurance likewise is denied and dismissed. Similarly, Defendant Champlin's Cross-Claim against Mr. Miller for negligence is denied and dismissed.

Accordingly, with respect to Plaintiffs' Revised Second Amended Complaint, Judgment shall enter in favor of Defendant Joseph R. Miller Jr. d/b/a Joseph Miller Construction as to Count I (negligence);[13] Defendant Lynne N. Miller as to Count I (negligence), Count II (breach of contract), and Count VI (wrongful concealment); Defendant Pleasant Hills Development, Ltd. as to Count I (negligence); Defendant Mark L. Hawkins as to Count I (negligence); Defendant Thomas A. Champlin as to Count I (negligence); Defendant Assurance Company of America as to Count VIII (direct action under § 27-7-2.4); Defendant Joseph R. Miller, Jr. as to the Cross-Claim of Defendant Thomas A. Champlin; and Defendant Assurance as to the Third-Party Complaint of Defendant Joseph R. Miller, Jr.

[13] Following the non-jury trial of this case, this Court opts to make its findings of fact and conclusions of law and render judgment under Rule 52(a). It would reach the same conclusion were it to decide this case as a matter of law under Rule 52(c).

This Court further finds that Plaintiffs have proven liability with respect to their claims in their Revised Second Amended Complaint against Defendant Joseph R. Miller, Jr. for misrepresentation (Count IV), fraud (Count V), wrongful concealment (Count VI), and violation of the Rhode Island Deceptive Trade Practices Act (Count VII). In addition, Plaintiffs have proven their claims against Defendant Lynne N. Miller for breach of warranty deed covenants (Count III). Having proven liability, Plaintiffs' claims in Counts IV-VII of their Revised Second Amended Complaint remain for trial as to damages.

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of Order and Judgment that is consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Paul R. Boisse and Michele C. Boisse v. Joseph R. Miller, Jr. d/b/a Joseph Miller Construction, et al.
CASE NO:	WC 03-0281
COURT:	Washington County Superior Court
DATE DECISION FILED:	August 8, 2013
JUSTICE/MAGISTRATE:	Savage, J.
ATTORNEYS:	
For Plaintiff:	Turner C. Scott, Esq.
For Defendant:	Peter J. Comerford, Esq.; William R. Landry, Esq.; Patrick L. McKinney, Esq.; Daniel F. Sullivan, Esq.; Dana M. Horton, Esq.