

Buyers Beware: Real Estate Sellers Can Misrepresent the Condition of Known Defects

[*Alires v. McGehee*, 85 P.3d 1191 (Kan. 2004)]

Adam T. Pankratz*

I. INTRODUCTION

Homeownership in the United States is at its highest rate ever.¹ In fact, the July 2004 homeownership rate of 69.2%, or 73.4 million homeowners, shattered the previous record by 0.6%, or 783,000 homeowners.² As a result, there are more first-time, inexperienced homebuyers.³ Additionally, the number of new and existing home sales continues the trend upward.⁴ Incidents of fraud between lenders and debtors have also increased sharply.⁵ Yet, Kansas courts continue to grapple with holding defrauders liable for the damages they cause, including those who induce another party into a contract by intentionally misrepresenting the condition of the property they are selling.⁶

The Kansas Supreme Court recently addressed one such fraud in *Alires v. McGehee*.⁷ The court mistakenly found that the buyers' reliance on the real estate sellers' representations was unreasonable.⁸ The court determined that the buyers' reliance was unreasonable despite the misrepresentations made by the sellers before the contract

* B.B.A. 2002, Wichita State University; J.D. Candidate 2006, Washburn University School of Law. To the *Washburn Law Journal* editors and Professors David Pierce and Alex Glashauser, thank you for your patience and guidance throughout this project. I also want to thank the phenomenal teachers at the Lyndon School District in Lyndon, Kansas—may we never underestimate the value of great teachers. I dedicate this work to my parents, John and Marty Tremblay, and my great uncle and aunt, Don and Ruth Brooks, for their support and for teaching me the value of hard work.

1. LEMAR WOOLEY, NEWS RELEASE, U.S. DEP'T OF HOUS. & URBAN DEV., STATEMENT FROM SEC'Y ALPHONSO JACKSON ON THE NEW RECORD HOMEOWNERSHIP RATE (July 29, 2004), at <http://www.hud.gov/news/release.cfm?CONTENT=PR04-074.cfm>.

2. See *id.*

3. See *id.*

4. NAT'L ASS'N OF REALTORS®, NEW HOME SALES, at [http://www.realtor.org/Research.nsf/files/NHS.pdf/\\$FILE/NHS.pdf](http://www.realtor.org/Research.nsf/files/NHS.pdf/$FILE/NHS.pdf) (last visited Feb. 11, 2005); NAT'L ASS'N OF REALTORS®, EXISTING HOME SALES, at [http://www.realtor.org/Research.nsf/files/EHS.pdf/\\$FILE/EHS.pdf](http://www.realtor.org/Research.nsf/files/EHS.pdf/$FILE/EHS.pdf) (last visited Jan. 4, 2005).

5. Associated Press, *FBI: Mortgage Fraud Is Rampant in U.S.*, (Sept. 18, 2004), available at <http://asia.news.yahoo.com/040917/ap/d855h7ig0.html>.

6. See, e.g., *Alires v. McGehee*, 85 P.3d 1191 (Kan. 2004) (determining whether reliance on misrepresentations in the inducement is reasonable and, therefore, justified based on the contract language that was later agreed to); *Green v. Geer*, 720 P.2d 656 (Kan. 1986) (determining whether the buyers had any reason not to believe the sellers who said the basement was leaky but would be fixed); *Fox v. Wilson*, 507 P.2d 252 (Kan. 1974) (determining whether the buyer had a right to rely on the sellers' representations without an inspection); *Sippy v. Cristich*, 609 P.2d 204 (Kan. Ct. App. 1980) (determining whether the buyers, who failed to obtain an inspection, justifiably relied on the sellers' representations that the roof was repaired, even where there were warning signs of leaks).

7. 85 P.3d 1191 (Kan. 2004).

8. See *id.* at 1200.

was formed.⁹ In essence, the court found that even for fraud in the inducement, contract language governs whether the buyers' reliance was reasonable.¹⁰

Focusing on contract language, the court in *Alires* ruled that if the buyers did not obtain an inspection, then the buyers could not have *reasonably* relied on the sellers' representations if an inspection could have found the defect.¹¹ Instead, the court should have focused on the reliance in the inducement because the fraud was in the inducement, not in the execution of the contract.¹² The Kansas Supreme Court should have determined the right to rely on representations in the inducement by determining: (1) whether warning signs existed to suggest the representation was false; (2) whether the representation was obviously false; (3) whether the receiving party was skeptical of the representation; or (4) whether the party giving the representation lacked the requisite knowledge to represent the condition of the real estate.¹³

If the court's decision in *Alires* goes unchecked, real estate sellers will have free rein to intentionally misrepresent a home's defects to induce buyers into contracts. As a result, buyers are left without an adequate remedy despite the sellers' intentional fraud to induce the buyers into contracts without inspections, and those sellers have no incentive to tell the truth.

II. CASE DESCRIPTION

James and Dorothy McGehee listed their home in Liberal, Kansas for sale in June 2000.¹⁴ Tim and Loretta Alires entered into a contract with the McGehees to purchase the home that same month.¹⁵ The Alireses took possession of the home, despite the McGehees' attempt to cancel the contract.¹⁶ The Alireses did not have a buyer's real estate agent; the McGehees' real estate agent provided the standard form contract approved by the Kansas Association of Realtors.¹⁷

9. *Id.*

10. *See id.*

11. *Id.*

12. *See id.* at 1193-94.

13. *See* Slaymaker v. Westgate State Bank, 739 P.2d 444, 453 (Kan. 1987); Fox v. Wilson, 507 P.2d 252, 266 (Kan. 1974); Sippy v. Cristich, 609 P.2d 204, 208 (Kan. Ct. App. 1980); Yoakum v. Newman, No. 65,393, 1991 Kan. App. LEXIS 1039, at *13-*14 (Dec. 6, 1991).

14. *See Alires*, 85 P.3d at 1193; Petition for Review app. 2, at 2, *Alires* (No. 88,514).

15. Real Estate Contract between James & Dorothy McGehee and Tim & Loretta Alires (June 29, 2000) (on file with author).

16. *Alires*, 85 P.3d at 1194; Petition for Review app. 2, at 3, *Alires* (No. 88,514).

17. Telephone Interview with Clinton B. Peterson, Partner, Brooks, Olson & Peterson (Sept. 28, 2004); Real Estate Contract between James & Dorothy McGehee and Tim & Loretta Alires (June 29, 2000) (on file with author). Neither party was represented by counsel throughout the transaction. Telephone Interview with Clinton B. Peterson, Partner, Brooks, Olson & Peterson (Sept. 28, 2004).

Mr. Alires was particularly worried about leaky basements.¹⁸ In fact, while first touring the home, he specifically asked about the condition of the basement and whether it leaked.¹⁹ Ms. McGehee made several representations about the condition of the home, including that the basement did not leak.²⁰ Ms. McGehee also indicated on the Seller's Property Disclosure Statement that the basement had leaked, but that the leak was from a broken pipe, which had since been repaired.²¹ The disclosure statement included a buyer's acknowledgment and agreement, which stated that the seller provided no warranties and advised the buyer to have an inspector examine the property.²² The completed disclosure statement was blank where the Alireses could have written in any representations, other than those already listed, upon which they relied.²³

The Alireses relied on the information from the disclosure statement and statements by Ms. McGehee; they purchased the home without obtaining a basement inspection.²⁴ Three days after they moved into the home, the basement leaked.²⁵ It leaked twice more in the next month.²⁶ The Alireses contacted the McGehees' real estate agent, who then contacted Ms. McGehee.²⁷ Ms. McGehee stated that

18. *Alires*, 85 P.3d at 1194.

19. *Id.* at 1193.

20. *Id.*; Seller's Property Disclosure Statement (June 29, 2000) (on file with author).

21. *Alires*, 85 P.3d at 1193.

22. *Id.* at 1197. The additional terms on the Seller's Property Disclosure Statement provided in pertinent part:

2. I have carefully inspected the property. Subject to any inspections allowed under my contract with Seller, I agree to purchase the property in its present condition only, without warranties or guarantees of any kind by Seller or any real estate licensee concerning the condition or value of the property.

3. I agree to verify any of the above information that is important to me by an independent investigation of my own. I have been advised to have the property examined by professional inspectors.

4. I acknowledge that neither Seller nor any real estate licensee involved in this transaction is an expert at detecting or repairing physical defects in the property. I state that no important representations concerning the condition of the property are being relied upon by me except as disclosed above or as fully set forth as follows:

Id. The top of the Seller's Property Disclosure Statement provided: "THIS STATEMENT . . . IS NOT A WARRANTY OF ANY KIND BY THE SELLER(S) OR ANY REAL ESTATE LICENSEE IN THIS TRANSACTION, AND SHOULD NOT BE ACCEPTED AS A SUBSTITUTE FOR ANY INSPECTIONS OR WARRANTIES THE BUYER MAY WISH TO OBTAIN" *Id.* (quoting Seller's Property Disclosure Statement). The contract also contained a paragraph stating that the buyers should obtain an inspection and that failure to do so waived any claims arising from any defects the inspection would have revealed. *Id.* at 1198.

23. *Id.* at 1195.

24. *See id.* at 1194.

25. *Id.* at 1193; Petition for Review app. 2, at 3, *Alires* (No. 88,514). The basement first leaked three days after the Alireses took possession of the house. *Id.* After Mr. Alires watered the front yard the basement carpet was wet. *Alires*, 85 P.3d at 1193.

26. *Alires*, 85 P.3d at 1193; Petition for Review app. 2, at 3, *Alires* (No. 88,514). The basement leaked again when "water came in along the basement wall in the front of the house." *Id.* "A few weeks after moving into the house[,] a water main in the alley behind the house broke, causing water to enter the basement along the back of the house and in a different location from the leaking in the front yard." *Id.*

27. *Alires*, 85 P.3d at 1194.

there were no warranties and indicated that they avoided watering near the house because the foundation was cracked.²⁸ Ms. McGehee later denied making this statement and said that there was a crack in the ground near the foundation, but that concrete work was done to alleviate the problem.²⁹

The Alireses filed suit against the McGehees, alleging that the McGehees intentionally misrepresented the home's condition, specifically that of the basement.³⁰ At trial, Ms. McGehee testified that the basement had leaked on several occasions.³¹ She had discovered carpet stains in two basement rooms during the past two or three years, and the water heater had leaked in the utility room.³² Another time, water had leaked into the basement from a broken pipe.³³ Additionally, a contractor testified that he had installed a new concrete patio for the McGehees to help slope water away from the house and prevent future basement leaks.³⁴

The McGehees used the contract to attempt to limit their liability.³⁵ After a bench trial, the trial court entered judgment in favor of the Alireses for \$25,621.68.³⁶ The court found that the McGehees had superior knowledge of past leaks.³⁷ The McGehees' fraudulent misrepresentations invalidated the contract provisions.³⁸ The Kansas Court of Appeals reversed the trial court's decision, finding that the McGehees did not intend to defraud the Alireses and that the Alireses were not justified in relying on the McGehees' representations.³⁹ The Kansas Supreme Court affirmed, but on different grounds.⁴⁰

III. BACKGROUND

Causes of action for misrepresentation, or fraud, may arise from false statements or information given either intentionally or negli-

28. *Id.*

29. *Id.* at 1194, 1196.

30. *Id.* at 1193.

31. *Id.* at 1194.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1197.

36. *Id.* at 1193; Petition for Review app. 2, at 8-9, *Alires* (No. 88,514) (damages included \$17,649.18 "to stop the basement from leaking" and \$7,972.50 to fix the interior and exterior of the home; install new carpet and sheetrock; reset the air condensing unit; and reinstall the fence, porch, concrete sleeve, water heater, shower, vanity, laundry cabinets, and two doors).

37. *Alires*, 85 P.3d at 1195.

38. *See id.*

39. *Id.* The court of appeals asserted that because the McGehees tried to back out of the contract, they did not have the intent to deceive. *Id.* The court also determined that the Alireses were not justified in relying on Ms. McGehee's representations because the Alireses did not write in the space provided on the disclosure statement that they relied on any specific information provided by the McGehees. *Id.*

40. *Id.* at 1200.

gently.⁴¹ Kansas has long recognized both types of fraudulent misrepresentation.⁴² Fraud is a question of fact decided on a case-by-case basis.⁴³ The standard of review on appeal is “whether the district court’s findings of facts are supported by substantial competent evidence and whether the findings are sufficient to support the district court’s conclusions of law.”⁴⁴ In Kansas, negligent or intentional defrauders traditionally have been held responsible for any damages resulting from their fraud.⁴⁵

Actionable fraud is an “untrue statement of fact, known to be untrue by the party making it, which is made with the intent to deceive or recklessly made with disregard for the truth, where another party justifiably relies on the statement and acts to his or her injury and damage.”⁴⁶ For a claimant to prove actionable fraud by intentional misrepresentations the claimant must prove each element by clear and convincing evidence.⁴⁷

Early in the twentieth century, Kansas was more buyer-friendly.⁴⁸ In *Murray v. Davies*,⁴⁹ the land buyer sued the seller and the seller’s agent to rescind the contract because of fraudulent misrepresentations.⁵⁰ The court held the seller and his agent liable because they had procured the contract using intentional misrepresentations.⁵¹ Therefore, the seller could not avoid liability by showing that the buyer had relied on the misrepresentations and had failed to take the opportunity to learn the truth.⁵²

Kansas courts went on to decide a line of cases that allowed a buyer to rely on the seller’s representations, and prohibited a seller from using the buyer’s failure to inspect as a defense to a fraud or

41. See James R. Ahrens, *Some Observations on the Law of Misrepresentations in Kansas*, 9 WASHBURN L.J. 315, 315 (1970); William E. Westerbeke, *Survey of Kansas Tort Law: Part II*, 50 KAN. L. REV. 225, 275-80 (2002).

42. See Ellen Byers, *Addressing the Consumer’s Worst Nightmare: Toward a More Expansive Development of the Law of Tortious Fraud and Deceptive Practices in Kansas*, 38 WASHBURN L.J. 455, 462-70 (1999).

43. See *Alires*, 85 P.3d at 1195.

44. *Waxse v. Reserve Life Ins. Co.*, 809 P.2d 533, 536 (Kan. 1991) (citations omitted).

45. Kansas has long recognized a negligent misrepresentation cause of action. See, e.g., *Mahler v. Keenan*, 876 P.2d 609, 610 (Kan. 1994); *Topinka v. Am. Eagle Fire Ins. Co.*, 205 P.2d 991, 994 (Kan. 1949); *Dodd v. Boles*, 21 P.2d 364, 367 (Kan. 1933); *Becker v. McKinnie*, 186 P. 496, 496 (Kan. 1920); *Westerman v. Corder*, 119 P. 868, 869 (Kan. 1912).

Kansas has also long recognized an intentional misrepresentation cause of action. See, e.g., *Green v. Geer*, 720 P.2d 656, 657, 659 (Kan. 1986); *Fox v. Wilson*, 507 P.2d 252, 265 (Kan. 1974); *Martin v. Hughes*, 131 P.2d 682, 683, 685 (Kan. 1942); *Murray v. Davies*, 94 P. 283, 283-84 (Kan. 1908); *Sippy v. Cristich*, 609 P.2d 204, 207 (Kan. Ct. App. 1980).

46. *Gerhardt v. Harris*, 934 P.2d 976, 981 (Kan. 1997) (citation omitted).

47. *Alires*, 85 P.3d at 1195.

48. See *Murray*, 94 P. at 284; *Speed v. Hollingsworth*, 38 P. 496, 497; Byers, *supra* note 42, at 462-70.

49. *Murray*, 94 P. at 283.

50. *Id.*

51. *Id.* at 284.

52. *Id.*

misrepresentation action.⁵³ In fact, as long as the buyer relied in good faith on the seller's representations, a failure to inspect was not detrimental to the buyer's cause of action.⁵⁴ Additionally, a seller was bound to tell the truth, whether he spoke willfully or in response to an inquiry.⁵⁵ Kansas refused to follow the caveat emptor doctrine.⁵⁶ Further, sellers could not claim that a buyer lacked due diligence in failing to discover the seller's misrepresentations.⁵⁷ The buyer's reliance was justified if the information provided was reasonably within the seller's knowledge.⁵⁸ However, if the representation was not likely to be within the seller's knowledge and the buyer could investigate the truthfulness of the representation, then the buyer's failure to do so would render the reliance unreasonable.⁵⁹

When the representation was likely to be within the seller's knowledge, a buyer could not justifiably rely on the representations if warning signs suggested that the seller's representations were false.⁶⁰ For example, in *Sippy v. Cristich*,⁶¹ the court stated that the test for justifiable reliance is "whether the recipient has information which would serve as a danger signal and a red light to any normal person of his age and experience."⁶² The Cristiches, the sellers, had the roof extensively repaired after buying the home from another seller who misrepresented the condition of the roof to them.⁶³ The Cristiches disclosed to the Sippys, the buyers, that the roof had leaked but had

53. *Fox v. Wilson*, 507 P.2d 252, 266 (Kan. 1973); see also *Martin v. Hughes*, 131 P.2d 682, 684-85 (Kan. 1942) (holding the seller liable for representations on which the buyer relied, even though the buyer could have discovered the falsity of the seller's representations through an inspection of the car); *Anderson v. Heasley*, 148 P. 738, 739 (1915) (following *Epp v. Hinton*, 138 P. 576 (Kan. 1914)); *Epp*, 138 P. at 577 ("The modern tendency—a wholesome one—is to restrict rather than extend the immunity of one who gains an advantage over another by purposely misleading him.").

54. *Martin*, 131 P.2d at 684.

55. *Sparks v. Guaranty State Bank*, 318 P.2d 1062, 1066 (Kan. 1957). The court framed the issue as whether the seller had a duty to speak, but found that even if he did not have such a duty, the seller must speak truthfully. *Id.*

56. *Fox*, 507 P.2d at 266.

57. See *id.* (quoting *Speed v. Hollingsworth*, 38 P. 496, 497-98 (Kan. 1894)); *Martin*, 131 P.2d at 684.

58. See *Green v. Geer*, 720 P.2d 656, 659 (Kan. 1986).

59. *Boegel v. Colo. Nat'l Bank of Denver*, 857 P.2d 1362, 1363-64 (Kan. Ct. App. 1993) (finding that the buyer was experienced with irrigation wells, that the buyer had driven through the farm three of four times before signing the agreement, and that the seller bank only characterized the well conditions as the tenant's opinions). The buyer did not speak to any of the tenants who worked the wells until after signing the purchase agreement. *Id.* at 1364. When evaluating the buyer's reliance, the court considered his "intelligence, education, [and] business experience" and found that the buyer was an experienced irrigation farmer and businessman. *Id.* at 1363, 1367 (citation omitted). Interestingly, the court in *Boegel* also determined that the buyer's reliance was unreasonable based on his experience because he contracted for a duty to inspect the property. See *id.* at 1366.

60. *Goff v. Am. Sav. Ass'n. of Kan.*, 561 P.2d 897, 903 (Kan. 1977); *Sippy v. Cristich*, 609 P.2d 204, 208 (Kan. Ct. App. 1980).

61. 609 P.2d 204 (Kan. Ct. App. 1980).

62. *Id.* at 208.

63. *Id.* at 206-07.

been repaired and was in good condition.⁶⁴ While touring the house, the Sippys noticed several stains on the ceilings and floors.⁶⁵ The Cristiches' real estate agent contacted Ms. Cristich.⁶⁶ Ms. Cristich assured the agent that the roof was in good repair and that some of the stains were from watering plants.⁶⁷ Mr. Sippy testified that they did not purchase an independent inspection because he had been assured that the roof was in good condition.⁶⁸ The Kansas Court of Appeals found that, despite the presence of warning signs and the lack of a professional inspection, the Sippys had justifiably relied on the misrepresentations.⁶⁹

A buyer's reliance is also unreasonable when he lacks confidence in or is skeptical about the representations.⁷⁰ In *Slaymaker v. Westgate State Bank*,⁷¹ the buyer, Mr. Slaymaker, saw a sign posted on a 1962 car that represented that the car was original and had been driven only 528 miles.⁷² Mr. Slaymaker spoke with the owner and voiced his concerns, yet he agreed to purchase the car.⁷³ Even after they made the agreement, Mr. Slaymaker was concerned that the car was not original.⁷⁴ The court determined that "[t]here is no justifiable reliance where the party alleging he was defrauded by the misrepresentations of another was so skeptical as to its truth that he reposed no confidence in it."⁷⁵

Later, the court of appeals again found that a buyer's reliance would be unreasonable if the representation was obviously false.⁷⁶ In its unpublished opinion, *Yoakum v. Newman*,⁷⁷ the court found that the buyers had justifiably relied on the sellers' misrepresentations without further investigation because of the lack of evidence to suggest the representations were false.⁷⁸ Mr. Yoakum specifically asked if the basement leaked, and the seller assured him that it did not.⁷⁹ The seller's agent ordered an inspection report which noted cracks in the basement and a high moisture content in the soil.⁸⁰ Additionally, the "water leakage was not readily apparent . . . other than at the

64. *Id.* at 207.

65. *Id.*

66. *Id.* at 208.

67. *Id.* at 207-08.

68. *Id.* at 208.

69. *Id.* at 207, 208. The warning signs included stains and past leaks. *Id.*

70. *Slaymaker v. Westgate State Bank*, 739 P.2d 444, 452-53 (Kan. 1987).

71. 739 P.2d 444 (Kan. 1987).

72. *Id.* at 447.

73. *Id.*

74. *Id.* at 448.

75. *Id.* at 453 (citing *McIntyre v. Lyon*, 37 N.W.2d 903, 905 (Mich. 1949)).

76. *Yoakum v. Newman*, No. 65,393 1991 Kan. App. LEXIS 1039, at *13-*14 (Dec. 6, 1991).

77. 1991 Kan. App. LEXIS 1039 (Dec. 6, 1991).

78. *Id.* at *13-*14.

79. *Id.* at *4.

80. *Id.* at *13-*14.

electrical outlet.”⁸¹ Despite the notations of the cracks in the basement and the high moisture content, the court found the Yoakums’ reliance justified.⁸²

Kansas has had a rich buyer-friendly tradition that has held misrepresenting sellers liable for inducing another into a contract regardless of whether the buyers could have discovered the falsity through further inspection.⁸³

IV. ANALYSIS

In their appeal to the Kansas Supreme Court, the Alireses argued that the court of appeals set a dangerous precedent by deciding that one party’s attempt to cancel a contract proved that the party did not have the intent to deceive or fraudulently induce the other into a contract.⁸⁴ Therefore, the Alireses asked the Kansas Supreme Court to reinstate the judgment of the trial court.⁸⁵ The McGehees argued that the evidence at trial did not establish the elements of fraud, specifically Ms. McGehee’s knowledge.⁸⁶ The McGehees argued that the reliance was unreasonable because of the contract provisions limiting the McGehees’ liability and the waiver of any claims against the seller.⁸⁷ The Kansas Supreme Court held that the McGehees’ attempt to cancel the contract did not prove a lack of intent to deceive.⁸⁸ The court denied the Alireses’ recovery, however, because it determined that the Alireses unjustifiably relied on the McGehees’ representations.⁸⁹

A. *Parties’ Arguments*⁹⁰

1. Tim and Loretta Alires

The Alireses argued that the Kansas Court of Appeals incorrectly found that the evidence did not establish the elements of fraud because the court applied the wrong standard of review.⁹¹ Further, the Alireses argued that the court of appeals isolated certain facts but ignored others when it determined that sufficient evidence did not exist

81. *Id.* at *10-*11.

82. *Id.* at *13-*14.

83. See *Fox v. Wilson*, 507 P.2d 252, 266 (Kan. 1973); *Martin v. Hughes*, 131 P.2d 682, 684-85 (Kan. 1942); *Westerman v. Corder*, 119 P. 868, 870 (Kan. 1912); *Murray v. Davies*, 94 P. 283, 284 (Kan. 1908); *Sippy v. Cristich*, 609 P.2d 204, 208 (Kan. Ct. App. 1980).

84. *Alires v. McGehee*, 85 P.3d 1191, 1195 (Kan. 2004).

85. *Id.* at 1193.

86. *Id.* at 1197.

87. *Id.*

88. *Id.* at 1195-96.

89. *Id.* at 1200.

90. The Kansas Supreme Court examined issues outside the scope of those decided by the Kansas Court of Appeals. *Id.* at 1196. Therefore, this section includes the parties’ arguments made both to the Kansas Supreme Court and the Kansas Court of Appeals.

91. Petition for Review at 4-8, *Alires v. McGehee*, 85 P.3d 1191 (Kan. 2004) (No. 88,514).

to support the lower court's findings.⁹² The court set a dangerous precedent, the Alireses posited, by finding that a seller could not intentionally deceive or fraudulently induce another into a contract if the seller at any time tried to cancel the contract.⁹³ The Alireses argued that the McGehees' attempt to cancel the contract had nothing to do with the misrepresentations made by Ms. McGehee and should not have been used to negate intent.⁹⁴

The Alireses asserted that the fraudulent statements that misrepresented the condition of the home trumped the contract's "as is" language and the other contract provisions.⁹⁵ They urged the court to ignore any contract provision in which the sellers tried to limit their liability.⁹⁶ Further, the Alireses argued that they justifiably relied upon the McGehees' representations despite the failure to list oral representations on the disclosure form and despite waiving claims for defects that an inspection could have found.⁹⁷ The Alireses argued that to affirm the court of appeals' ruling would allow the seller to make misrepresentations to induce the buyer to contract for the home and later attempt to cancel the contract to avoid liability.⁹⁸

2. James and Dorothy McGehee

The McGehees argued that the district court's finding of knowledge of the leaky basement was implied and did not meet the required clear and convincing evidence standard.⁹⁹ The McGehees argued that the contract provisions should have been enforced as written.¹⁰⁰ They argued that the Alireses bargained for a right to inspect the property and should not have relied on representations by Ms. McGehee when they decided not to purchase an inspection.¹⁰¹ The McGehees argued that they bargained for, and the court should enforce, their contractually created limited liability.¹⁰² In short, the McGehees argued that the buyers' reliance on Ms. McGehee's representations was unreasonable because the Alireses decided not to purchase an inspection, despite the contract provisions.¹⁰³ The sellers concluded by asserting

92. *Id.* at 7-8.

93. *Id.* at 11.

94. *See id.* at 11-12.

95. *See* Brief of Appellees at 16, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514).

96. *Id.* at 11-15.

97. Petition for Review at 12-13, *Alires v. McGehee*, 85 P.3d 1191 (Kan. 2004) (No. 88,514).

98. *Id.* at 11.

99. Supplemental Brief of Defendants-Appellants at 7-8, *Alires* (No. 88,514).

100. *Id.* at 3-4.

101. Brief of Appellants at 18-20, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514).

102. *Id.* at 6-9.

103. *Id.* at 9.

that “[they] could have told [the Alireses] anything at all or nothing at all prior to the execution of the subject agreement.”¹⁰⁴

B. *The Kansas Supreme Court’s Opinion*

Justice Marla Luckert delivered the unanimous opinion of the Kansas Supreme Court.¹⁰⁵ The court held that the McGehees’ attempt to cancel the contract did not relieve them of liability for their fraudulent misrepresentations about the home’s condition.¹⁰⁶ Attempting to cancel the contract had nothing to do with the McGehees’ lack of intent to deceive the buyers; instead, their own fear of not finding another place to live motivated them to try to cancel the contract.¹⁰⁷

The court determined that the Seller’s Property Disclosure Statement was integrated into the contract.¹⁰⁸ The disclosure statement had a space for the buyers to fill in any information on which they relied that was not listed on the form.¹⁰⁹ The court found no reason for the buyers to list the representations about the basement on the form because the misrepresentation that the only leak in the basement was from a broken pipe was already listed.¹¹⁰

The court next addressed the issue of whether the Alireses presented substantial competent evidence to prove that Ms. McGehee knew about the prior water leaks.¹¹¹ The court determined that despite the McGehees’ arguments, substantial competent evidence existed to support the findings that Ms. McGehee knew the basement leaked and made false statements about the prior water leakage.¹¹²

The court also upheld the majority rule of not barring claims based on intentional misrepresentation, despite “as is” provisions.¹¹³ The McGehees bargained for limited liability, and the Alireses bargained for a right to inspect although the Alireses failed to exercise their right.¹¹⁴ The court further found that for it to ignore the waiver of claims, the Alireses must have proven that an inspection would not have discovered that the basement had leaked.¹¹⁵ The court determined that the Alireses’ reliance on Ms. McGehee’s statements was

104. *Id.* at 20.

105. *Alires v. McGehee*, 85 P.3d 1191, 1193 (Kan. 2004).

106. *Id.* at 1196.

107. *Id.*

108. *Id.*

109. *Id.* at 1195, 1196.

110. *Id.* at 1196.

111. *Id.* at 1196-97.

112. *Id.* at 1197.

113. *Id.* at 1198-99.

114. *See id.* at 1199.

115. *Id.*

unreasonable because the Alireses could have discovered the truthfulness of the statements by an inspection.¹¹⁶

C. Commentary

The Kansas Supreme Court erred when it decided that the real estate seller could intentionally make false statements about the condition of a known defect and then contract away any reliance on, and subsequent damages from, those representations.¹¹⁷ In *Alires*, the court held that reliance on a seller's contract-inducing misrepresentations was unreasonable when the buyer did not get a professional inspection, and that the buyer unjustifiably relied on those representations.¹¹⁸ The court had previously held that when a buyer obtained an inspection, he did not rely on the representations made by the real estate agents or the sellers.¹¹⁹ Now the court has allowed the sellers to blatantly misuse the Seller's Property Disclosure Statement and later use the contract to shield themselves from liability for fraud in the inducement.¹²⁰ The court has effectively eliminated the buyers' remedy for relying on reasonable, yet fraudulent, statements that induced them into the contract.

1. Justifiable Reliance

Justifiable reliance is necessary to prove actionable fraud.¹²¹ When a party sues for fraud in the execution of the contract, courts use the contract language to aid in determining whether the reliance was justified.¹²² However, when the remedy sought resulted from fraud in the inducement, the court should not make the contract language determinative when deciding whether the reliance was justified.¹²³

In *Alires*, the court analyzed whether it was *reasonable* to rely on the representations in light of the contract language when determining whether the Alireses were *justified* in relying on the McGehees' statements.¹²⁴ Examining the contract language to determine reasonableness of reliance was "contrary to a modern trend to ignore contract

116. *Id.* at 1200.

117. *See generally id.* (allowing the seller to misrepresent the known defect of a basement and finding that the reasonableness of any reliance on misrepresentations made prior to the formation of the contract should be determined based on the contract language).

118. *See id.* at 1200.

119. *Hamtil v. J.C. Nichols Real Estate*, 923 P.2d 513, 516 (Kan. 1996).

120. *See Alires*, 85 P.3d 1191.

121. *Gerhardt v. Harris*, 934 P.2d 976, 981 (Kan. 1997).

122. *See Boegel v. Colo. Nat'l Bank of Denver*, 857 P.2d 1362, 1364 (Kan. 1993); *Munkres v. McCaskill*, 68 P. 42, 42 (Kan. 1902).

123. *See Slaymaker v. Westgate State Bank*, 739 P.2d 444 (Kan. 1987); *Fox v. Wilson*, 507 P.2d 252 (Kan. 1973); *Speed v. Hollingsworth*, 38 P. 496 (Kan. 1894); *Sippy v. Cristich*, 609 P.2d 204 (Kan. Ct. App. 1980).

124. *Alires*, 85 P.3d at 1196-98.

language in cases of alleged fraud.”¹²⁵ Because of the fraud in the inducement, the Alireses sought damages sufficient to repair the defective basement.¹²⁶ In addition, because “misrepresentations often cause the party to whom they are addressed not to use the means of knowledge within its power,” the court in *Alires* should have determined the justifiableness of the Alireses’ reliance based on the information they had when they entered into the contract.¹²⁷ Therefore, for fraud in the inducement, an interpretation of the contract language is unnecessary.

Kansas courts should apply different methods to determine the justifiableness of reliance based on whether the party is suing for fraud in the inducement or fraud in the execution.¹²⁸ A leading treatise defines justifiable reliance for a tort action of fraud as comprised of two elements: reliance and the right to rely.¹²⁹ Kansas courts have held that buyers are justified in relying on representations without investigation unless they know or have reason to know something that would make reliance unreasonable.¹³⁰ The right to rely is destroyed when the buyers’ reliance was unreasonable.¹³¹ The Kansas Supreme Court found that the Alireses did rely on the McGehees’ representations, which induced the contract.¹³² However, the court mistakenly found that the reliance was unjustified because the contract language, which provided an opportunity to inspect, made the reliance unreasonable.

The Kansas Supreme Court should have determined the reasonableness of the reliance on the representations in the inducement based on whether the Alireses had a right to rely on those representations.¹³³ When buyers rely on misrepresentations in the inducement, the contract language should not eliminate this right. The Kansas Supreme Court should have determined the right to rely by determining (1) whether there were warning signs to suggest that the representation was false; (2) whether the representation was obviously false; (3)

125. Daniel B. Bogart, *Keeping Current—Property Offers a Look at Selected Recent Cases, Literature, and Legislation*, 18 PROB. & PROP. 24, *26 (Sept./Oct. 2004) (discussing *Alires*).

126. Petition for Review app. 2, at 5, 8, *Alires* (No. 88,514).

127. 27 RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS BY SAMUEL WILLISTON § 69:33, at 23 (4th ed. 2003).

128. Compare *Boegel v. Colo. Nat’l Bank of Denver*, 857 P.2d 1362, 1365 (Kan. 1993), and *Munkres v. McCaskill*, 68 P. 42, 42 (Kan. 1902), with *Slaymaker*, 739 P.2d at 447, and *Fox*, 507 P.2d at 254-56, and *Speed*, 38 P. at 497-98, and *Sippy*, 609 P.2d at 207.

129. 9 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 32:56, at 313 (1992). Justifiable reliance, as defined by the Colorado Court of Appeals, “is not whether a reasonably prudent man would be justified in relying, but whether the particular individual had the ability and right to so rely.” *Monte Verde v. Moore*, 539 P.2d 1362, 1365 (Colo. Ct. App. 1975).

130. *Goff v. Am. Sav. Ass’n of Kan.*, 561 P.2d 897, 903 (Kan. 1977) (citing RESTATEMENT (SECOND) OF TORTS § 540); *Sippy*, 609 P.2d at 208.

131. See *supra* text accompanying notes 58-82.

132. *Alires v. McGehee*, 85 P.3d 1191, 1200 (Kan. 2004).

133. See SPEISER, *supra* note 129, § 32:56, at 313.

whether the receiving party was skeptical of the representation; or (4) whether the party giving the representation lacked the requisite knowledge to represent the condition of the real estate.¹³⁴ If any of these conditions existed, the reliance was unreasonable, and therefore, the relying party had no right to rely on the representations.

a. *Warning Signs Make Reliance Unreasonable*

In *Sippy*, the Kansas Court of Appeals stated that the test of whether “a recipient of a fraudulent misrepresentation is justified in relying” on it is “whether the recipient has information which would serve as a danger signal and a red light to any normal person of his intelligence and experience.”¹³⁵ The Sippys noticed stains, a warning sign of leaks, which should have put them on notice to inspect further.¹³⁶ The Sippys questioned the sellers about the stains but were told that the roof was in good condition and that some of the stains were from watering plants.¹³⁷ The court determined, however, that the buyers’ reliance was justified when the seller disclosed a defect but represented it as repaired.¹³⁸ The buyers did not get an inspection because the sellers assured them that no defects existed.¹³⁹ The court found that the Sippys had justifiably relied on the misrepresentations despite the presence of warning signals, including stains and past leakage problems, and their failure to purchase a professional inspection.¹⁴⁰

In *Alires*, there were no visible stains on the walls or floor, and there was no disclosure of past problems with leaks.¹⁴¹ The Alireses, like the Sippys, did not get an inspection because the seller assured them that there were no defects.¹⁴² The Alireses’ reliance was more justifiable than the Sippys’ reliance because, unlike in *Sippy*, there were no warning signs to indicate a leaky basement.¹⁴³ Without warning signs, the Alireses’ reliance was reasonable.

134. See *Slaymaker v. Westgate State Bank*, 739 P.2d 444, 453 (Kan. 1987); *Fox v. Wilson*, 507 P.2d 252, 266 (Kan. 1973); *Sippy*, 609 P.2d at 208; *Yoakum v. Newman*, No. 65,393, 1991 Kan. App. LEXIS 1039, at *13-*14 (Dec. 6, 1991).

135. *Sippy*, 609 P.2d at 208 (internal quotations omitted).

136. See *id.* at 207.

137. *Id.* at 208.

138. *Id.*

139. *Id.*

140. See *id.* at 207-08.

141. See *Alires v. McGehee*, 85 P.3d 1191, 1193-95 (Kan. 2004); Brief of Appellants at 12, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514) (stating that the only stains on the carpet were covered by furniture).

142. See *Alires*, 85 P.3d at 1194.

143. Compare *Sippy*, 609 P.2d at 208, with *Alires*, 85 P.3d at 1193-95.

b. *Obviously False Representations Cannot Be Reasonably Relied Upon*

There was no obvious falsity about the McGehees' representations. The Alireses could not have recognized a defect during a walk-through inspection or from their knowledge of the house.¹⁴⁴ Without obvious deception by the sellers about the condition of the real estate, a buyer should have a right to rely on the sellers' statements without being required to "check out all statements made to induce the transaction."¹⁴⁵

In *Yoakum*, the Kansas Court of Appeals found that the buyers had justifiably relied on the sellers' misrepresentations without further investigation because there was no evidence to suggest the representations were false.¹⁴⁶ Mr. Yoakum, the buyer, much like Mr. Alires, specifically asked whether the basement leaked and received the same assurance that the basement did not leak.¹⁴⁷ Unlike the court in *Alires*, however, the court in *Yoakum* found that the buyers' reliance was justified despite an inspection report ordered by the seller's agent, which noted cracks in the basement and a high moisture content in the soil.¹⁴⁸ In *Yoakum*, the "water leakage was not readily apparent . . . other than at the electrical outlet" where water occasionally leaked in.¹⁴⁹ Likewise, in *Alires*, there was no obvious falsity in the McGehees' representations when the Alireses toured the home.¹⁵⁰ In fact, furniture hid the only water stains on the carpet.¹⁵¹ Because the representations were not obviously false, the Alireses' reliance was reasonable.

c. *The Buyer's Skepticism About the Representations Makes Reliance Unreasonable*

A buyer's reliance on a seller's representations is unreasonable when the buyer was "so skeptical as to its truth that he reposed no

144. Brief of Appellants at 12, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514); see also *Goff v. Am. Sav. Ass'n of Kan.*, 561 P.2d 897, 903 (Kan. Ct. App. 1977) (finding that the buyers' reliance was unreasonable because they had knowledge that the basement was cracked during construction and would never be watertight).

145. Ahrens, *supra* note 41, at 332-33 nn.66-70; see also *Fox v. Wilson*, 507 P.2d 252, 266 (Kan. 1973) (quoting *Speed v. Hollingsworth*, 38 P. 496, 498 (Kan. 1894)) ("[I]t is no defense . . . that the party to whom the representations were made might, with due diligence, have discovered their falsity . . .").

146. *Yoakum v. Newman*, No. 65,393, 1991 Kan. App. LEXIS 1039, at *13-*14 (Dec. 6, 1991).

147. See *id.* at *4; *Alires*, 85 P.3d at 1193.

148. See *Yoakum*, 1991 Kan. App. LEXIS 1039 at *13-*14.

149. *Id.* at *10.

150. See *Alires*, 85 P.3d at 1193.

151. Brief of Appellants at 12, *Alires v. McGehee*, 77 P.3d 1008, (Kan. Ct. App. 2003) (No. 88,514) (stating that the only stains on the carpet were covered by furniture). *Alires*, 85 P.3d at 1194.

confidence in it.”¹⁵² For example in *Slaymaker*, since the buyer was skeptical that the twenty-year-old car had been driven only 528 miles, his reliance on the seller’s representations was unreasonable.¹⁵³ In *Alires*, however, the Alireses were not skeptical: the seller explained on the disclosure statement that the basement had leaked only when a pipe broke, which the McGehees had fixed.¹⁵⁴ When specifically asked whether the basement leaked, Ms. McGehee simply replied, “No.”¹⁵⁵ Mr. Alires testified that he did not have the house structurally inspected because he “put [his] trust in Mr. and Mrs. McGehee to be honest with [him], when they said that the basement did not leak.”¹⁵⁶ The Alireses did not doubt Ms. McGehee’s representations about the condition of the basement.¹⁵⁷ Indeed, they expressed faith in the McGehees to tell them the truth about the basement.¹⁵⁸ Without skepticism about the representations, the Alireses’ reliance was reasonable.

d. *Reliance on Representations Not Within the Sellers’ Knowledge Is Unreasonable*

Kansas decisions have also held that buyers have the right to rely on the sellers’ representations if the defect was the type that would have been within the sellers’ knowledge.¹⁵⁹ Reliance is unreasonable and no right to rely exists if the representation is not reasonably within the sellers’ knowledge.¹⁶⁰ In *Alires*, however, the Seller’s Property Disclosure Statement together with Ms. McGehee’s intentional representation that the basement did not leak suggest that the McGehees knew the condition of the basement. Further, a buyer should be able to rely on a seller to disclose when a basement leaks as much as the McGehees’ basement did.¹⁶¹ The Alireses’ reliance was

152. *Slaymaker v. Westgate State Bank*, 739 P.2d 444, 453 (Kan. 1987).

153. *See id.* at 446-47.

154. *Alires*, 85 P.3d at 1193.

155. *Id.*

156. Brief of Appellees at 9; *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514) (internal citation omitted).

157. *Alires*, 85 P.3d at 1194 (noting Mr. Alires’ testimony that he trusted Ms. McGehee’s representation).

158. *See id.*

159. *See Boegel v. Colo. Nat’l Bank of Denver*, 857 P.2d 1362, 1363-64 (Kan. 1993) (recognizing that plaintiff was an experienced irrigation farmer who did not test the equipment during his examination of well pumps prior to the contract formation, despite knowing that it was the bank, and not an operator, that was selling the land); *Fox v. Wilson*, 507 P.2d 252, 255-56, 265 (Kan. 1973). Fox claimed to have operated the ranch and represented the amount of income he received from farming, and the court found that these representations were representations of fact that a buyer could expect a seller to know. *Id.*

160. *Compare Boegel*, 857 P.2d at 1365, with *Fox*, 507 P.2d at 265.

161. The basement leaked when the Alireses watered the lawn. *Alires*, 85 P.3d at 1193. The Alireses also provided video footage that showed “massive leak[age] . . . pouring into the basement . . .” Brief of Appellees at 7, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514).

reasonable, and therefore justified, because the McGehees' efforts alleviated the Alireses' fears of a leaky basement.¹⁶² The fraud was that the sellers used their superior knowledge of the home's defects to make affirmative misrepresentations and to provide a false disclosure statement to induce the buyers into the contract.

When buyers claim fraud in the inducement of the contract, to determine whether the buyers justifiably relied on the representations the court should determine whether the buyers had a right to rely and whether they did rely on the sellers' representations.¹⁶³ The right to rely would be destroyed if the buyers' reliance was unreasonable.¹⁶⁴ The Alireses retained their right to rely on the representations they received during the inducement because their reliance was reasonable. The court mistakenly looked to the contractually created right to inspect the property to excuse the sellers' affirmative misrepresentations about the basement.¹⁶⁵ This analysis presupposes that the defrauded buyers knew or had reason to know that the sellers' statements were false.

2. Public Policy

There is no public policy rationale to justify laws that allow a party to limit its liability for intentional fraudulent representations. In *Alires*, the court ignored the public policy implications of its decision. Instead, the court allowed deception about the condition of a home to increase its perceived value.¹⁶⁶ The court promoted the use of contract language to limit liability for intentional fraud, thus undercutting reliance and eliminating a fraud cause of action.¹⁶⁷ In addition, the court's decision encourages sellers to do everything short of intentionally concealing a defect to convince buyers to enter into a contract and eliminates any incentive for sellers to tell the truth. There is no social utility to giving the loss to those unsuspectingly deceived by intentional fraudulent representations before entering into a contract.

162. The trial court properly stated that "[t]he fact that the basement leaked should have been disclosed by Sellers and Buyers would have been put on notice to check it out or live with the decision to buy the house without an inspection. They were not given that opportunity." Petition for Review app. 2, at 7, *Alires*, 85 P.3d. 1191 (No. 88,514).

163. See SPEISER, *supra* note 129, § 32:56, at 313.

164. See *supra* text accompanying notes 58-82.

165. The court referred to the Alireses as having a "duty" and later a "right" to inspect the property. *Alires*, 85 P.3d at 1199-1200. Fraud is a determination of fact. *Id.* at 1195. The court, however, looked to the contract language to determine whether the buyers' reliance was justified. See *id.* at 1197-98.

166. See *Alires*, 85 P.3d at 1193 (noting that the trial court found damages totaling \$25,621.28).

167. See *Alires*, 85 P.3d at 1197-98, 1200 (allowing the seller to misrepresent the known defect of a basement and finding that the reasonableness of any reliance on misrepresentations made prior to the formation of the contract should be determined based on the contract language, including the right to inspect and the waiver of claims).

a. *Contractually Limiting Liability for Fraud in the Inducement*

Through its decision in *Alires*, the Kansas Supreme Court has left buyers without an adequate remedy when buyers rely on sellers' fraudulent misrepresentations in the inducement of the contract. If a home has no apparent signs of defects, and the sellers claimed there were no defects, the buyer is not justified in relying on the sellers' representations if the buyer did not purchase a professional inspection.¹⁶⁸ If the buyer purchased an inspection, the court has held that the buyer did not rely on any representations the seller or the real estate agent made.¹⁶⁹ Further, if the buyers purchased a professional inspection, many inspectors contractually "limit their liability to the fee paid for the inspection."¹⁷⁰ Thus, if the buyer sued based on breach of contract, the buyer could recover only the inspection fee.¹⁷¹ If, however, the buyer sued the inspector based on the inspector's negligence, the buyer could possibly recover the value of the property damage.¹⁷² The likely result is that if a buyer could successfully recover the full value of the property damage, it would be from the negligent inspector, rather than the defrauding seller.¹⁷³

b. *No Social Utility in Allowing Misrepresentations*

Kansas recognizes the freedom to contract and the duty to fulfill contract obligations, even if they are disadvantageous.¹⁷⁴ Nevertheless, when a contract is subject to fraud or is contrary to public policy, it is unenforceable.¹⁷⁵ Furthermore, a party cannot limit liability for intentional wrongdoing.¹⁷⁶ In *Alires*, the court allowed the sellers to limit their liability despite the sellers' intentional misrepresentation of a known defect in violation of public policy. The McGehees best stated the violation of public policy: "[We] could have told [the Alirese] anything at all or nothing at all prior to the execution of the agreement."¹⁷⁷ While the court has an interest in promoting real estate transactions, there is no public policy that supports fraudulent

168. *Id.* at 1200.

169. See *Hamtil v. J.C. Nichols Real Estate*, 923 P.2d 513, 516 (Kan. Ct. App. 1996).

170. George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All,"* 39 REAL PROP., PROB. & TR. J. 193, 240, 240 n.190 (Summer 2004). Further, Kansas is one of only twenty-two states that do not regulate home inspections. See AM. SOC'Y OF HOME INSPECTORS, POSITION STATEMENT ON REGULATION OF HOME INSPECTORS 22 (July 2004), at http://www.ashi.org/documents/pdf/ASHI_Position_Statement.pdf.

171. *Moler v. Melzer*, 942 P.2d 643, 646 (Kan. Ct. App. 1997).

172. See *Horsch v. Terminix Int'l Co.*, 865 P.2d 1044, 1047-49 (Kan. Ct. App. 1993).

173. See *Hamtil*, 923 P.2d at 516.

174. See *id.* at 517 (quoting *Adams v. John Deere Co.*, 774 P.2d 355 (Kan. 1989)); *Moler*, 942 P.2d at 645.

175. *Hamtil*, 923 P.2d at 517 (quoting *Adams*, 774 P.2d 355).

176. *TBG, Inc. v. Bendis*, 845 F. Supp. 1459, 1461 (D. Kan. 1994).

177. Brief of Appellants at 20, *Alires v. McGehee*, 77 P.3d 1008 (Kan. Ct. App. 2003) (No. 88,514).

transactions. Intentional misrepresentations to induce a party into a contract taint the entire transaction with fraud.¹⁷⁸ The court in *Alires*, however, made the contract provisions determinative on the issue of reliance, even though the *Alireses* based their cause of action on the fraud that occurred before the contract formation.¹⁷⁹ There is no social utility in allowing sellers to intentionally misrepresent the known defects in their property to induce the buyers into a contract.

The Kansas Consumer Protection Act, although inapplicable to real estate transactions in which the seller is not a supplier,¹⁸⁰ seeks to protect consumers from deceptive practices.¹⁸¹ The Kansas Supreme Court, however, has moved away from a buyer-friendly approach to a more seller-friendly approach to real estate contracts by making reliance on a seller's intentional misrepresentations unreasonable if the buyer did not obtain a professional inspection.¹⁸²

In effect, the court has created a *duty* to purchase a professional inspection based on clauses in a Kansas Association of Realtors-approved standard form contract, regardless of whether there were warning signs suggesting a defect.¹⁸³ A professional inspection is required when there is no reasonable skepticism about the seller's representations. This professional inspection is required even when the defect is such that the seller knew about it, affirmatively misrepresented its existence, and fraudulently alleviated the buyer's fears of its existence. The court in *Alires* changed the contractual right-to-inspect language from an opportunity for the buyer to gain additional assurances into a required purchase of a professional inspection, even without a perceived need.¹⁸⁴ The court's holding contravenes an interest of Kansans: preventing deceptive sellers from using standard form contracts to limit their liability for intentional misrepresentations.

V. CONCLUSION

The Kansas Supreme Court incorrectly held that the buyers' reliance on oral and written representations by the real estate sellers was unreasonable when the misrepresentations induced the buyer to enter

178. *McDonald v. Swisher*, 57 P. 507, 510 (Kan. 1899).

179. *See Alires v. McGehee*, 85 P.3d 1191, 1199-1200 (Kan. 2004).

180. "Supplier" means a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer." KAN. STAT. ANN. § 50-624(j) (Supp. 2003) (emphasis added).

181. *Id.* § 50-623(b) (1994). "This act shall be construed liberally to promote the following policies: . . . (b) to protect consumers from suppliers who commit deceptive and unconscionable practices . . ." *Id.*

182. *See Alires*, 85 P.3d at 1200 (finding that the reliance is unjustified because it was unreasonable to rely on the misrepresentations based on the contract provisions).

183. *See Alires*, 85 P.3d at 1199 (holding that reliance without a professional inspection is not justified even though no warning signs or obvious falsity in the representations existed).

184. *See id.* at 1199-1200.

into the real estate contract without purchasing an inspection. In essence, the court found that before a real estate buyer even knew that she was defrauded, she had already given up any reliance on, or remedies arising from, the false representations that induced her into the damaging contract.

By allowing sellers to limit their liability for intentional misrepresentations, the court in *Alires* turned the tables on buyers in real estate contracts. No longer is there a right to inspect the property. Instead, what was once a right is now a duty to purchase a professional inspection. To act otherwise, according to *Alires*, is unreasonable. It is unreasonable even without warning signs to suggest that the sellers were lying; without buyer skepticism about the sellers' representations; and without some obvious falsity about the representations. Finally, it is unreasonable even if the misrepresentation was about a defect that likely was within the sellers' scope of knowledge.

A buyer today must get a professional inspection, not only to examine for defects outside the seller's knowledge, but also to search for defects within the seller's knowledge that the seller misrepresented or failed to disclose. Nearly every party involved in the formation of real estate contracts, including the real estate agent, is protected. The only party not protected is the buyer, the party who has the least amount of knowledge about the real estate and the most to lose. There is no social utility in denying a buyer a remedy when the seller has used his misrepresentations to induce the buyer into the contract.