

**ANSWER TO QUESTION NO. 11**

(a) Parker cannot prevent people from walking along land held in public trust by the state. The Great Lakes, as large navigable bodies of water, are natural resources and routes of commerce that are held in trust by the state for the benefit of the public. The state may convey "littoral" property (land abutting the Great Lakes) to private citizens, but only subject to the public trust. Pursuant to the public trust doctrine, the land between the "ordinary high water mark" and the water's edge is held in trust by the state for the use of all citizens. The "ordinary high water mark" is created by the changing water levels in the Great Lakes over time (not by the actions of tides as occurs for ocean-side property). That mark is described as the point where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." *Glass v Goeckel*, 473 Mich 667 (2005).

Parker has fee simple title to the water's edge. However, that fee simple overlaps with the public trust between the water's edge and the "ordinary high water mark." Parker may prevent the public from trespassing onto his private property above the "ordinary high water mark," but has no recourse to prevent the public from walking the shore between the "ordinary high water mark" and the water's edge.

(b) Whether Parker has a claim against Drake for the incorrect statement on the Seller's Disclosure Statement depends on whether Drake had knowledge of the termites. Under the Seller Disclosure Act, MCL 565.950 et seq., a party transferring property is required to provide a written disclosure statement to the purchaser. MCL 565.954(1). The statutory disclosure form requires the transferor to disclose any history of infestation, including termites. MCL 565.957(1). The party transferring the property is required to make each disclosure in "good faith," defined as "honesty in fact in the conduct of the transaction." MCL 565.960. However, the transferor is not liable for inaccuracies or errors in the disclosure statement if the information "was not within the personal knowledge of the transferor, or was based entirely on information provided by . . . [an expert], and ordinary care was exercised in transmitting the information." MCL 565.955(1). The transferor also cannot be held liable if the failure to disclose related to information "that could be obtained only through inspection or observation of inaccessible portions of real estate

or could be discovered only" by an expert. MCL 565.955(1), (3).

Drake asserted that she had recently installed fresh wall paneling in the home. When that paneling was removed, the structural damage caused by the since-departed termite infestation was immediately visible. This evidence suggests that the damage and prior infestation by termites was within the personal knowledge of Drake and that she did not act honestly in failing to disclose that information in the Seller's Disclosure Statement.

Consistent with the Seller Disclosure Act, Parker can pursue a claim against Drake for fraudulent misrepresentation alleging that Drake (1) made a material representation; (2) that was false; (3) that Drake knew the representation was false at the time or recklessly made the statement as a positive assertion without knowledge; (4) Drake intended Parker to act on the statement; (5) Parker actually did act in reliance; and (6) Parker was injured as a result. However, if Parker cannot prove that Drake actually knew about the prior termite infestation, Parker's claim will fail. The provisions of the Seller Disclosure Act preclude a claim for "innocent misrepresentation" because that claim does not require proof of knowledge. *Roberts v Saffell*, 280 Mich App 397 (2008), affd 483 Mich 1089 (2009).