A recent decision by the Court of Special Appeals conjures up distant memories of the 1982 Stephen Spielberg horror movie Poltergeist. Rhee v. Highland Development Corp., et al., No. 1705, Sept. Terms 2007 (Oct. 1, 2008). To its credit, the development community has tried to shield itself from such a nightmare, but the factual allegations in Rhee, if true, are nonetheless a chilling tale. 

So allowing a subsequent purchaser to assert a fraudulent concealment claim against the original developers, with whom no privity exists, the Rhee court has extended the rationale of the decision last year by the Maryland Court of Appeals in Diamond Point Plaza Ltd. Partnership v. Wells Fargo Bank, N.A., 400 Md. 718 (2007). In Diamond Point, Maryland’s highest court held that a defendant’s duty to refrain from fraudulently misrepresenting a material fact extends to the people or “class of people” the defendant has “reason to expect” will rely on the misrepresentation. In Rhee, Maryland’s intermediate appellate court ruled that a developer/seller has “reason to expect” will rely on the misrepresentation. In this case, the property was sold to a subsequent purchaser. The key element of the cause of action is that the buyer had a reason to expect the misrepresentation would be relied on. If the buyer does not rely on the concealment, the more likely it is that the seller or developer will not be liable. Therefore, the buyer must have reason to expect the misrepresentation will be relied on. The court found that the defendant developers had reason to expect the misrepresentation would be relied on by the subsequent purchaser. Thus, the developer has a duty to the subsequent purchaser to disclose the material fact to the subsequent purchaser. In Rhee, the developers made no affirmative misrepresentation to the developers. Indeed, the Rhee defendants had no reason to expect that the subsequent purchasers could rely on the concealment. As the Rhee court observed, to rely on a fraudulent misrepresentation when the primary carrier of the misrepresentation is subject to liability to the misrepresentation of the same concealed facts will be misleading. As a result, the tortfeasor concealing the facts has reason to expect that second- ary misrepresentations will occur. 

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On Real Property

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The Rhee court noted in dicta that the Rhee defendants could expose themselves to liability for constructive fraud, based on “pass- sive concealment,” if they prevail in the instant case and recover damages for fraudulent concealment, leave the desecrated cemetery concealed, and then re- sell the property without disclosing the deed, which contained a provision that the cemetery’s existence or without lowering the sales price to account for its presence. The Rhee court cited no Maryland case in support of this analysis and, for that reason, is not clear whether Maryland’s highest court would recognize the passive concealment theory of fraud. Although the Rhee court repeatedly casts the holding in terms of reliance on the “concealment,” technically a buyer will not rely on the concealment; rather, the buyer is relying on a set of facts or circum- stances that are untrue or misleading because of the seller’s fraudulent conduct in concealing the true facts or circumstances.

Conclusion

The Rhee court’s logical extension of the Diamond Point holding will pre- vent sellers/developers of real property from profiting from their fraud. Rhee represents yet another expansion of those to whom a seller/developer of real property owes a legal duty. Given the continued expansion of liability, sellers/developers need to ensure that they do not engage in activity that could be viewed as actively concealing a material fact about the property with the intent to deceive.

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Conclusion

The Rhee court’s logical extension of the Diamond Point holding will prevent sellers/developers of real property from profiting from their fraud. Rhee represents yet another expansion of those to whom a seller/developer of real property owes a legal duty. Given the continued expansion of liability, sellers/developers need to ensure that they do not engage in activity that could be viewed as actively concealing a material fact about the property with the intent to deceive.