DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ALAN LARKEY, an Arizona resident, Plaintiff/Appellant, v. HEALTH NET LIFE INSURANCE COMPANY, a foreign insurer; HEALTH NET OF ARIZONA, INC., an Arizona corporation; SHERI LYNN EDDY and JOHN DOE EDDY, husband and wife, Defendants/Appellees.	No. 1 CA-CV 11-0523 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-024014

The Honorable J. Richard Gama, Judge

REVERSED AND REMANDED

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T I M M E R, Presiding Judge

¶1 Plaintiff/Appellant Alan Larkey appeals the superior court's dismissal of his claims for consumer fraud and negligent misrepresentation against Defendants/Appellees Health Net Life Insurance Company, Health Net of Arizona, Inc. (collectively, "Health Net"), and Sheri Lynn Eddy. For the following reasons, we reverse and remand this matter for further proceedings.

BACKGROUND[1]

¶2 Health Net is an insurance company licensed to transact business in Arizona. Eddy is a licensed insurance agent and representative of Health Net.

¶3 Larkey previously contracted with Blue Cross Blue Shield ("Blue Cross") for health insurance. In 2001, Larkey determined he wished to replace his Blue Cross health insurance policy with "an equal policy in terms of benefits but which had a smaller or lower deductible." Larkey's mother contacted Eddy for the purpose of assisting Larkey in purchasing a new health insurance policy. Eddy represented that Health Net's health insurance policy was "just as good as" Larkey's Blue Cross policy. In reliance on this representation, Larkey cancelled his Blue Cross policy and purchased Health Net's health

[1] We assume the truth of all facts alleged and construe them in the light most favorable to Larkey. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 50, ¶ 7, 31 P.3d 821, 824 (App. 2001).

insurance policy (the "Policy"). According to Larkey's allegations, neither Health Net nor Eddy provided him with a copy of the Policy at the time of the transaction.

¶4 In October 2009, Larkey was diagnosed with advanced Hepatitis C and requested precertification from Health Net for liver transplant surgery. Health Net denied coverage for the procedure on the basis that the Policy specifically excludes adult liver transplants from its covered services. Larkey later verified that his previous Blue Cross health insurance policy provided coverage for liver transplants for persons with Larkey's condition.

¶5 Larkey filed this action for violation of Arizona's Consumer Fraud Act, Arizona Revised Statutes ("A.R.S.") sections 44-1521 to -1534 (West 2012),[2] and negligent misrepresentation.[3] In particular, he alleged that Eddy, while acting as Health Net's agent, had misrepresented the Policy's coverage by stating the Policy was "just as good as" Larkey's Blue Cross insurance and that he had reasonably relied to his detriment on that misrepresentation.

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[2] Absent material revision after the events at issue, we cite a statute's current version.

[3] Larkey also asked the court to declare that he was entitled to coverage of his liver transplant under the Policy based upon the doctrines of waiver, estoppel, and reasonable expectations. That claim is not at issue in this appeal.

¶6 Eddy moved to dismiss both counts on the basis they failed to state a claim upon which relief could be granted. She argued Larkey's allegation that Eddy made a misrepresentation of fact failed as a matter of law because the statement Larkey attributed to her - that the Health Net Policy was "just as good as" Larkey's Blue Cross policy - was too vague to constitute a factual misrepresentation. Health Net joined the motion.

¶7 The superior court ruled, as a matter of law, Larkey had not pled facts that could establish he justifiably relied on Eddy's alleged misrepresentation. In addition, the court determined that Eddy's alleged statement was "overly vague and not sufficiently specific to establish the requisite elements for liability" under either theory. The court granted the motion to dismiss and entered its decision as a final, appealable order pursuant to Arizona Rule of Civil Procedure 54(b). Larkey timely appealed.

DISCUSSION

¶8 We review an order dismissing a complaint for failure to state a claim for an abuse of discretion, although we review issues of law and statutory interpretation de novo. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). We will affirm only if "satisfied as a matter of law that [Larkey] would not be entitled to relief under any

interpretation of the facts susceptible of proof." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391, ¶ 18, 121 P.3d 1256, 1261 (App. 2005) (citation omitted).

A. Consumer fraud

¶9 Arizona's Consumer Fraud Act ("Act") "is a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen v. W. Am. Mortg. Co.*, 143 Ariz. 614, 618, 694 P.2d 1228, 1232 (App. 1985). It provides:

> The act, use or employment by any person of any deception, deceptive act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.

A.R.S. § 44-1522(A). Thus, a party violates the Act if, in connection with the sale or advertisement of merchandise, it either performs a deceptive act or practice, or omits any material fact with the intent that the buyer rely on the omission. *State ex rel. Horne v. AutoZone, Inc.*, 634 Ariz. Adv. Rep. 42, ¶ 12 (May 15, 2012).

¶10 Larkey alleged in his complaint that Health Net, through its agent Eddy, violated the Act by representing the

Policy was "just as good as" Larkey's Blue Cross health insurance policy. He argues the superior court erred in determining he had not pled facts that could establish the requisite element of justifiable reliance because Arizona's consumer fraud law does not require that a plaintiff's reliance have been "justifiable." We agree with Larkey that the court's determination he had not pled facts from which he could establish that he justifiably relied on Eddy's statement did not defeat his consumer fraud claim as a matter of law. *See Kuehn v. Stanley*, 208 Ariz. 124, 129, ¶ 16, 91 P.3d 346, 351 (App. 2004) ("An injury occurs when a consumer relies, even unreasonably, on false or misrepresented information."); *Peery v. Hansen*, 120 Ariz. 266, 270, 585 P.2d 574, 578 (App. 1978) (holding, "the right to rely, though a necessary element in a common law fraud action, is not essential to a statutory fraud action in Arizona.").

¶11 In addition to ruling that Larkey's reliance was not justified, however, the court also determined Eddy's "alleged statement [was] overly vague and not sufficiently specific" to establish liability. We therefore consider whether to affirm the court's ruling on that basis. *Long v. Napolitano*, 203 Ariz. 247, 253, ¶ 12, 53 P.3d 172, 178 (App. 2002) (holding appellate

court will affirm the superior court's judgment if it is correct on any ground).

¶12 The term "deceptive," as used in the Act, has been "interpreted to include representations that have a 'tendency and capacity' to convey misleading impressions to consumers even though interpretations that would not be misleading also are possible." *Madsen*, 143 Ariz. at 618, 694 P.2d at 1232. "The meaning and impression are to be taken from all that is reasonably implied, not just from what is said . . . and in evaluating the representations, the test is whether the least sophisticated reader would be misled." *Id.* (citations omitted).

¶13 According to the complaint, Larkey, through his mother, informed Eddy he "wished to purchase a policy that was 'as good as Blue Cross Blue Shield,' only one that had a lower deductible." Eddy was "licensed to sell insurance such as health insurance in the State of Arizona and [held] herself out as an insurance agent with superior knowledge in the realm of insurance." In response to Larkey's inquiry, Eddy recommended the Policy and represented it was "just as good as" the Blue Cross policy Larkey desired to replace. Eddy's representation, combined with her expertise in evaluating policies and Larkey's explicit inquiry, could convey the impression Eddy had investigated the coverage contained in Larkey's Blue Cross

policy and determined the Policy offered the same coverage. Larkey alleges Health Net and Eddy knew the Policy was inferior to his Blue Cross policy but intentionally promoted it in a deceptive manner to induce Larkey to purchase the Policy. This is sufficient to state a claim pursuant to the Act.

¶14 Health Net and Eddy argue that Eddy's statement that the Policy was "just as good as" Larkey's Blue Cross policy is mere opinion or puffery and therefore non-actionable under the Act. "'Puffing' denotes the exaggerations reasonably to be expected of a seller as to the degree of quality of his or her product, the truth or falsity of which cannot be precisely determined." *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 846 (2005); *see also Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 866 (7th Cir. 1999) ("Puffing in the usual sense signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud."). Arizona courts have repeatedly held that a claim for fraud may not be based on subjective characterizations of value, which are regarded as mere puffing. *See, e.g.*, *Law v. Sidney*, 47 Ariz. 1, 4, 53 P.2d 64, 66 (1936) (stating that fraud "cannot be predicated upon the mere expression of an opinion or upon representations in regard to matters of estimate or judgment"; "'seller's statements' or

'puffing,' do not amount to actionable misrepresentations"); *Sorrells v. Clifford*, 23 Ariz. 448, 457-60, 204 P. 1013, 1017 (1922) (holding seller's statement that his cattle were "as good as" another brand was a representation as to value that could not constitute fraud because it was an opinion or "trade talk"); *Ellis v. First Nat'l Bank*, 19 Ariz. 464, 471, 172 P. 281, 284 (1918) ("When persons are compos mentis and deal at arm's length, the law does not regard mere 'puffing' as to the value of stock as an investment the same as a false representation or the positive affirmation of a specific fact, but rather as a mere expression of opinion or 'trade talk' which men of ordinary intelligence in their business dealings always receive cum grano salis.").[4]

¶15 In this case, under the circumstances as pled in the complaint, the statement Larkey attributes to Eddy was not a subjective characterization of Health Net's Policy that any reasonable person would recognize as "puffing" or "sales talk."

[4] Health Net and Eddy cite *Stanley Fruit Co. v. Ellery*, 42 Ariz. 74, 77, 22 P.2d 672, 674 (1933), to support their argument that Eddy's alleged statement was, as a matter of law, an un-actionable opinion. They contend the Arizona Supreme Court held in that case that a statement to a prospective ranch buyer that the ranch was "as good as" an adjacent ranch was not actionable in fraud. In fact, the court's opinion in *Stanley Fruit* reveals it was the buyer's employee, not the seller, who made the "as good as" statement and the court referenced it simply to show the buyer made his own evaluation of the property. *Id*. The court did not hold that such a statement was not actionable as a matter of law.

Larkey advised Eddy he was seeking a health insurance policy "as good as" his Blue Cross policy with a lower deductible and Eddy represented the Policy satisfied those requirements. We recognize Eddy's statement was not specific concerning *in what respect* the Policy was "just as good as" Larkey's Blue Cross policy, but this is not fatal to Larkey's claim at this stage in the proceedings. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 50, ¶ 7, 31 P.3d 821, 824 (App. 2001) (when reviewing an order granting a motion to dismiss for failure to state a claim, appellate court construes all facts alleged in the complaint in the light most favorable to the plaintiff). Eddy's statement, when viewed in the light most favorable to Larkey, could be construed as a representation that the Policy offered the same coverage as the Blue Cross policy. Accordingly, we reject Health Net's and Eddy's argument that the alleged statement was not the type of statement that could induce reliance by a reasonable consumer.

¶16 Larkey adequately stated a claim for consumer fraud and the superior court erred in dismissing that claim.

B. Negligent misrepresentation

¶17 Larkey next argues the superior court improperly dismissed his negligent misrepresentation claim.

¶18 Arizona recognizes a claim for negligent misrepresentation:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 29, 945 P.2d 317, 340 (App. 1996) (quoting Restatement (Second) of Torts § 552(1) (1977)); *Donnelly Const. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 188-89, 677 P.2d 1292, 1296-97 (1984), *overruled on other grounds*, *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007).

¶19 Larkey argues the court erred because he alleged in his complaint that Eddy, while acting as Health Net's agent, negligently misrepresented the Policy was "just as good as" his Blue Cross policy and he justifiably relied on this misrepresentation to his detriment. Health Net and Eddy argue Larkey's claim for negligent misrepresentation fails as a matter of law because Eddy's statement was not in the nature of a misrepresentation of material fact.

¶20 As discussed, Eddy's alleged statement may be construed as an affirmative factual representation that the Policy offered the same coverage as Larkey's Blue Cross policy. *Albers*, 201 Ariz. at 50, ¶ 7, 31 P.3d at 824. In addition, a claim for negligent misrepresentation may be based on false information given in the form of an opinion. Restatement (Second) of Torts § 552 cmt. b. ("The rule stated in this Section applies not only to information given as to the existence of facts but also to an opinion given upon facts equally well known to both the supplier and the recipient.").[5]

¶21 Health Net and Eddy also argue that Eddy's statement the Policy was "just as good as" Larkey's Blue Cross policy was mere opinion or puffery and therefore Larkey's reliance was not justified as required for a negligent misrepresentation claim. As discussed, under the circumstances alleged in the complaint, Eddy's statement was not a subjective characterization of Health

[5] We are not persuaded by Eddy's citation to *DeWyngaerdt v. Bean Ins. Agency, Inc.*, 855 A.2d 1267 (2004). In that negligence case, the New Hampshire Supreme Court held that an insured must make a "*specific* request for a particular type of insurance coverage in order to impose a duty upon an agent to procure that particular coverage or to inform the insured that such coverage is excluded," and rejected the notion that the agent's knowledge of the plaintiff's business, coupled with its request for "full coverage" was sufficient to create a duty. *Id*. at 1271. Viewing the complaint in the light most favorable to Larkey, *Albers*, 201 Ariz. at 50, ¶ 7, 31 P.3d at 824, he did not make a vague request as discussed in *DeWyngaerdt*, but he specifically asked Eddy for a policy that was "as good as" his Blue Cross policy.

Net's Policy that any reasonable person would recognize as "puffing" or "sales talk."

¶22 Moreover, we disagree with Health Net and Eddy that Larkey's reliance on Eddy's representation was not justified because the Policy terms placed him on notice it excluded coverage for adult liver transplants. "In the absence of circumstances putting a reasonable person on inquiry, a person is justified in relying on a misrepresentation of a material fact without making further inquiry." *St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 316, 742 P.2d 808, 817 (1987). Larkey alleged in the complaint he communicated to Eddy the type of health insurance policy he desired to purchase and, in response to his inquiry, Eddy provided the allegedly false information for Larkey's guidance with the intention that he rely on it when deciding whether to purchase the Policy. Under such circumstances, including the fact Eddy was a licensed agent with expertise in recommending health coverage policies, Larkey was entitled to rely on Eddy's representation the Policy was "just as good as" his Blue Cross policy without conducting his own investigation. *Cf. Carrel v. Lux*, 101 Ariz. 430, 435, 420 P.2d 564, 569 (1966) (citing Restatement (Second) of Torts § 540) (stating the recipient of a false representation of fact in a business transaction may rightfully rely on the truth of the

representation, even when he may have discovered the falsity of the statement by making an investigation). Further, according to Larkey's allegations, he was unable to investigate the Policy's coverage because Health Net did not provide a copy of the Policy to him until nine years after he purchased it when it denied coverage of his liver transplant surgery.

¶23 Assuming the truth of all facts alleged and construing them in the light most favorable to Larkey, *see Albers*, 201 Ariz. at 50, ¶ 7, 31 P.3d at 824, we decide the complaint sets forth a cause of action for negligent misrepresentation.[6]

CONCLUSION

¶24 For the foregoing reasons, we reverse and remand this matter for further proceedings.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia K. Norris, Judge

/s/
Donn Kessler, Judge

[6] We reject Eddy's argument that allowing Larkey's consumer fraud and negligent misrepresentation claims to proceed will result in an "illogical and unfair anomaly" because his declaratory judgment claim regarding coverage under the Policy based upon the doctrine of reasonable expectations will require him to show that he would not have accepted the Policy if he had known that it contained the particular exclusion for adult liver transplants. Whether Larkey may ultimately prevail on his claim for declaratory judgment is irrelevant to whether he has properly stated a claim for relief for consumer fraud and negligent misrepresentation.