STATE OF MINNESOTA
IN COURT OF APPEALS
A11-320

Krisanus Medlock,
Appellant,

vs.

Madison Meahyen,
individually and d/b/a Nimbatun Properties, Inc.,
Defendant,

Burnet Realty, Inc.,
d/b/a Coldwell Banker Burnet Realty,
Respondent.

Filed January 17, 2012
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-07-45

Craig D. Greenberg, James T. Smith, Huffman, Usem, Saboe, Crawford & Greenberg, P.A., Golden Valley, Minnesota (for appellant)

William L. Davidson, Timothy J. O'Connor, Teresa Knoedler, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

In this appeal from an order granting judgment as a matter of law (JMOL) to respondent real-estate agency, appellant asserts that the district court erred by (1) declining to apply the doctrine of collateral estoppel to preclude respondent from litigating whether defendant real-estate agent committed fraud; (2) excluding testimony by appellant's sister regarding her own interactions with defendant; (3) determining as a matter of law that defendant was not acting as appellant's real-estate agent at the time of defendant's alleged acts and omissions; (4) determining as a matter of law that appellant could not prove that defendant committed fraud or made negligent misrepresentations; and (5) determining as a matter of law that, even if defendant had been appellant's real-estate agent, defendant was not acting within the scope of his agency with respondent at the time of the alleged acts and omissions.

We affirm the district court's decisions declining to apply collateral estoppel, excluding testimony, determining as a matter of law that defendant was not appellant's agent, and determining as a matter of law that appellant could not prove that defendant committed fraud or made negligent misrepresentations. Because the underlying fraud tort fails, we do not address whether defendant acted within the scope of his agency with respondent, making respondent vicariously liable for defendant's actions.

FACTS

Defendant Madison Meahyen started purchasing and renovating rental properties in 1995. In 2003, Meahyen joined respondent Burnet Realty as a Realtor. Meahyen also

worked at the Star Tribune with appellant Krisanus Medlock's sister, who invested in rental properties upon Meahyen's advice.

In late 2004 or early 2005, Medlock's sister arranged a meeting between Medlock and Meahyen at a property owned by Meahyen at 1819 15th Avenue in Minneapolis (the 1819 property). At the meeting, Meahyen introduced himself as an agent of respondent Burnet Realty Inc. d/b/a Coldwell Banker Burnet Realty (Burnet) and said he wanted to sell the 1819 property to Medlock. Meahyen gave Medlock a Burnet folder, which contained Meahyen's Burnet business card; a document titled "Proposed Purchase & Renovation," which detailed the 1819 property's proposed purchase price ($203,000), renovation costs ($61,915), estimated market value after renovations ($340,000), and estimated equity upon resale ($68,885); and a document titled "1819 15th Ave.," which contained statements about earnest money and the need for a spouse's signature and the following statement: "Seller offers to help buyer manage and supervise the rehab project to ensure completion in a timely manner. Buyer may choose to *resell* property on completion, with Seller's help . . . . Seller believes this is a good rehab project . . . ." Meahyen's name and cell-phone number appeared at the end of the document, but no indicia of Burnet appeared on the document. The folder did not include an agency disclosure form, nor did Meahyen ever provide Medlock an agency disclosure form.

Meahyen and Medlock toured the 1819 property and discussed the needed renovations. Meahyen told Medlock that he was a "one-stop shop"; that he would help Medlock purchase the property; that his company, Nimbatun Properties, would rehabilitate the property; and that Meahyen would help resell it. In January 2005,

Meahyen presented Medlock with a purchase agreement for the 1819 property with a selling price of $203,000. The purchase agreement was prepared on a Miller/Davis form, not a Burnet form. Meahyen signed the purchase agreement on the line designated for the seller. The box for an agent's signature was left blank. Meahyen did not advise Medlock to hire a real-estate agent and did not disclose that he had recently purchased the 1819 property for $150,000. Medlock signed the purchase agreement and purchased the property on February 17, 2005, for $203,000.

After closing, Medlock commenced renovation of the 1819 property, using Nimbatun. Meahyen oversaw the entire project; Medlock only occasionally visited the property. In February, March, and April, Meahyen faxed to Medlock four draw requests on Medlock's construction loans to pay subcontractors. Only one of the draw requests contained any reference to Burnet—Burnet's fax stamp. And, during construction, Medlock met with Meahyen at Meahyen's Burnet office only once to discuss the 1819 property.

In May, Meahyen sold another of his properties to Medlock, a property located at 2640 Dupont Avenue North in Minneapolis (the 2640 property). Meahyen's sales approach was nearly identical to the one he employed for the 1819-property transaction. The only document that Meahyen gave Medlock that contained any reference to Burnet was the purchase agreement, which contained Burnet's fax stamp at the top of the first page.

In July 2005, the construction financing for the 1819 property was depleted, and many renovations were unfinished. Medlock fired Meahyen and completed the remaining

renovations on the 1819 and 2640 properties. Eventually, Medlock lost both properties to foreclosure.

Meahyen's Connection to Burnet

Meahyen's duties at Burnet were to assist clients in purchasing and selling properties. When Meahyen joined Burnet in 2003, he believed that "it was pretty well-known" that he held rental properties, but Burnet did not inquire about his ownership. Meahyen sometimes told his fellow real-estate agents that he was selling a property but did not discuss his rental properties with Burnet managers. When Meahyen began his employment with Burnet, he received an employee handbook, which included instructions on how employees were to sell their own properties to third parties.

Meahyen did not receive a Realtor's commission on the sale of the 1819 or 2640 properties, and Burnet did not receive any revenue from the sales. Burnet was not aware of the transactions until Medlock initiated this action.

Procedural History

Medlock sued Meahyen, Nimbatun Properties, and Burnet for breach of contract, unjust enrichment, breach of a fiduciary duty, conversion, fraud, and negligent misrepresentation. Meahyen declared bankruptcy, which automatically stayed prosecution of Medlock's claims. Medlock pursued his claims against Meahyen in bankruptcy court, which resulted in the bankruptcy court refusing to discharge Meahyen's debt to Medlock, finding that the debt was procured by fraud. But the bankruptcy court did not determine the amount of Meahyen's debt to Medlock, instead leaving that determination for the state district court.

Before trial in state district court, both parties moved in limine regarding the bankruptcy court order and argued about its preclusive effect. The district court ruled that collateral estoppel did not apply to the bankruptcy court's order, specifically the finding that Meahyen's debt was procured by fraud. Burnet also moved the court in limine for an order prohibiting Medlock's sister from testifying about her relationship with Meahyen or any of his alleged prior bad acts. The court granted Burnet's motion. Also, before the trial began, the district court granted Medlock's motion for default judgment against Meahyen.

At trial, Medlock, Medlock's sister, and Meahyen testified. At the close of Medlock's case-in-chief, Burnet moved for JMOL, and Medlock responded only in connection with his claims of breach of fiduciary duty, fraud and negligent misrepresentation, and vicarious liability. The district court granted Burnet JMOL. This appeal follows.

D E C I S I O N

Collateral Estoppel

Medlock argues the district court erred when it declined to apply the doctrine of collateral estoppel to the bankruptcy court's finding that Meahyen defrauded Medlock. The bankruptcy court found that Meahyen made false representations or false pretenses to Medlock, based on Meahyen's admission in his answer filed in bankruptcy court—that he had served as Medlock's real-estate agent. The bankruptcy court found that Meahyen breached his duties to fully disclose to Medlock the profit he made on the sales of properties to Medlock and "intentionally deceived [Medlock] in order to secretly profit

from the transactions." In his motion in limine, Medlock argued that the bankruptcy court's fraud finding should have preclusive effect under the doctrine of collateral estoppel. The district court concluded that Meahyen and Burnet lacked privity and therefore denied Medlock's motion.

The doctrine of collateral estoppel prevents parties from relitigating identical issues determined in a prior action. *Heine v. Simon*, 702 N.W.2d 752, 761 (Minn. 2005). "Whether collateral estoppel is available presents a mixed question of law and fact that we review de novo." *Id.* If the doctrine applies, the decision to apply it is left to the discretion of the district court. *In re Estate of Perrin*, 796 N.W.2d 175, 179 (Minn. App. 2011), *review denied* (Minn. June 28, 2011). To apply the doctrine of collateral estoppel, all four of the following prongs must be met:

> (1) the issue must be identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004) (quotation omitted). Because the district court based its decision on a lack of privity between Meahyen and Burnet, we first address the privity issue.

Privity

Privity is "a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." *Margo–Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 294

Minn. 274, 278, 200 N.W.2d 45, 47 (1972). Privity may exist for (1) those who control an action but are not parties to it, (2) "those whose interests are represented by a party," and (3) "successors in interest to those having derivative claims." *Rucker v. Schmidt*, 794 N.W.2d 114, 118 (Minn. 2011) (quotations omitted). Burnet asserts, and Medlock does not protest, that these three categories of privity do not apply to the circumstances in this action. Courts may find privity beyond these three categories if "a person is otherwise so identified in interest with another that he represents the same legal right." *Id*. (quotations omitted). Here, the dispositive question is whether Burnet is so identified in interest with Meahyen that they represented the same legal right. *See id*. Medlock argues that the interests of Burnet and Meahyen were aligned through the doctrine of vicarious liability because Burnet is liable to Medlock only if Meahyen is liable. We disagree. Privity requires "a mutuality of legal interests. That is, the legal interests of the principal and agent . . . are similarly affected by the outcome of a legal proceeding." *Id.* at 120. In this case, privity is lacking because Burnet was neither a party to Meahyen's bankruptcy proceeding nor Meahyen's creditor, and Burnet therefore did not have a common legal interest in the outcome of the bankruptcy proceeding.

We conclude that the district court did not err when it determined that Burnet and Meahyen were not in privity.

Identical Issues

For collateral estoppel to apply, "[t]he issue on which collateral estoppel is to be applied must be the same as that adjudicated in the prior action and it must have been necessary and essential to the resulting judgment in that action. The issue must have been

distinctly contested and directly determined in the earlier adjudication . . . ." *Hauschildt*, 686 N.W.2d at 837–38 (citations omitted).

Medlock argues that "Meahyen's liability for fraud and its underlying facts are identical in the instant case as the fraud liability determined during the bankruptcy proceedings." We disagree. Although the bankruptcy court found that Meahyen committed fraud against Medlock, it found that Meahyen made misrepresentations in breach of the fiduciary duties he owed to Medlock as Medlock's real-estate agent. The bankruptcy court found Meahyen served as Medlock's agent because Meahyen "admitted in his answer that he acted as [Medlock]'s real estate agent." But in the case before us, no such admission was made. Therefore, the issues before the district court and the bankruptcy court were not identical.

Full and Fair Opportunity

Burnet filed a cross-claim against Meahyen in the action before us but did not file its cross-claim in bankruptcy court; Burnet chose not to participate in the adversarial proceeding that determined Meahyen's fraud. Medlock argues that Burnet nonetheless was given a full and fair opportunity to be heard in the bankruptcy proceeding. We disagree. Burnet had no incentive to participate in Meahyen's bankruptcy proceeding because at issue in the proceeding were Meahyen's private affairs with his creditors, and Burnet was not a creditor. *See Bogenholm v. House*, 388 N.W.2d 402, 406 (Minn. App. 1986) (reasoning plaintiffs "were not obligated to intervene in the trial . . . simply because they were interested in proving the same set of facts"), *review denied* (Minn. Aug. 13, 1986). Moreover, Burnet's rights and liabilities were not expressly put in issue

in the bankruptcy proceeding, and therefore we conclude that Burnet did not have a full and fair opportunity to litigate the issues involved. *See Margo-Kraft*, 294 Minn. at 277−78, 200 N.W.2d at 47 (noting that supreme court had "held that the judgment in favor of the plaintiff against both defendants did not preclude a later personal injury action by one of the defendants against the other, because their rights and liabilities were not expressly put in issue in the first action by a cross-claim or other adversary pleadings").

Because all of the prerequisites for the application of collateral estoppel are not met, we conclude that the district court correctly declined to give preclusive effect to the bankruptcy court's order.

Limiting the Scope of Medlock's Sister's Testimony

The district court limited Medlock's sister's testimony by prohibiting testimony about Meahyen's past representation of her as a real-estate agent. The court ruled that the prohibited testimony was inadmissible because it was irrelevant and contrary to rules 403 and 404(b). But the court otherwise allowed Medlock's sister to

> testify regarding the nature of her relationship with Mr. Meahyen up to the point of the transactions in question because that relationship, coupled with Ms. Medlock's introduction of the plaintiff and Mr. Meahyen, is probative on the issue of reasonable reliance, which is one of the issues in fraud and misrepresentation counts in this case.

Medlock challenges the court's ruling, arguing that (1) his sister's testimony was relevant because it evidenced a common scheme or pattern of deceit and illustrated that Meahyen acted within the scope of his employment, (2) rule 403 does not apply because his sister's

testimony would not confuse the jury, and (3) rule 404(b) does not apply because his sister's testimony was not character evidence.

"The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45−46 (Minn. 1997) (quotations omitted). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id*. at 46. "In the absence of some indication that the trial court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.*

Here, we need not analyze Medlock's evidentiary claims because Medlock has failed to show prejudice. Medlock sought to offer testimony about Meahyen's past representation of his sister as a real-estate agent, but that fact has no bearing on whether Meahyen's relationship with Medlock was that of a principal and agent, and it has no bearing on the issue of Medlock's damages, an element necessary to Medlock's fraud claim. *See Melius v. Melius*, 765 N.W.2d 411, 418–19 (Minn. App. 2009) (reasoning that district court's exclusion of witnesses' testimony did not prejudice appellant because district court stated the testimony would not impact its decision). We conclude that the district court did not abuse its discretion when it limited Medlock's sister's testimony.

Fiduciary Duty

Medlock challenges the district court's grant of JMOL on his fiduciary-duty claim. "Agency is the fiduciary relationship that results from the manifestation of consent by

one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981). When determining whether an agency relationship exists, this court looks beyond mere labels and examines the "course of dealing between the two parties." *Id.* A district court may grant JMOL when a party "has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party." Minn. R. Civ. P. 50.01. "If reasonable jurors could differ on the conclusions to be drawn from the record, judgment as a matter of law is not appropriate." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). A district court's JMOL decision is reviewed de novo, and we view "the evidence in a light most favorable to the nonmoving party." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006).

Medlock argues that the district court erred when it concluded that although the "existence of an agency relationship is ordinarily a question of fact . . . [Medlock] has not produced any evidence that he was exercising control over Meahyen." Medlock argues that the facts demonstrate that "Meahyen was certainly acting as a real estate agent would normally act on behalf of a buyer." The facts emphasized by Medlock are that Meahyen told Medlock that he would act as his real-estate agent; Meahyen agreed to bring properties to Medlock's attention, advise him on properties, oversee rehabilitation of Medlock's purchased properties, and resell Medlock's properties; and "Meahyen guided . . . Medlock through all purchase agreements and closings associated with the properties, going so far as to facilitate the obtaining of mortgages for . . . Medlock."

But the evidence belies Medlock's arguments. Meahyen disclosed to Medlock that he owned the properties in question, he identified himself as the seller in written documentation he provided to Medlock, he signed the purchase agreements as the seller, he did not receive an agent's commission on the sale of either property, and he exercised virtual control over the timing and manner in which the properties were renovated. And Meahyen and Medlock never signed an agency agreement. The district court concluded that the evidence produced at trial did not prove the "requisite element of control" for the existence of a principal-agent relationship and that Meahyen "was acting on his own behalf as the seller." Medlock cites no authority to support his argument that the court erred, and we have found none. *See generally Fraser v. Fraser*, 702 N.W.2d 283, 291–92 (Minn. App. 2005) (noting respondents were not agents of appellant because, among other things, the purchase agreement was between respondents and the sellers and did not state that respondents were acting as agents for appellant), *review denied* (Minn. Oct. 18, 2005).

We conclude that the district court did not err in determining that reasonable jurors could not find that Meahyen was Medlock's agent.

Fraud and Negligent Representation

Medlock argues the district court erred when it granted Burnet JMOL and dismissed his fraud and negligent misrepresentation claims. Claims for fraud and negligent misrepresentation both require proof of damages. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009) (listing elements of fraud); *Florenzano v. Olson*, 387 N.W.2d 168, 174 n.3 (Minn. 1986) (listing elements of

negligent misrepresentation). In fraud and misrepresentation cases involving property, Minnesota's well-established out-of-pocket rule governs the measure of damages. *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988). Under this rule, damages consist of "the difference between the actual value of the property received and the price paid for the property, along with any special damages naturally and proximately caused by the fraud prior to its discovery." *Id.*

The district court noted that Medlock produced "no evidence of the properties' value at the time of the transactions. With no evidence of actual value, there's no evidence that Meahyen's representations concerning value . . . were false." We agree. Medlock failed to produce evidence of the fair market value of the properties at the time of his purchase from Meahyen and therefore failed to prove the necessary element of damages for his fraud and negligent misrepresentation claims. He contends that his damages consist of the recovery of secret profits, but his argument is unpersuasive. The recovery of secret profits occurs when a real-estate agent breaches a fiduciary duty. *Jensen v. Peterson*, 264 N.W.2d 139, 142 (Minn. 1978). Here, Meahyen was not Medlock's agent and therefore could not breach a fiduciary duty. Medlock's secret-profits argument is inapplicable.

Medlock also argues that Meahyen committed fraud or made negligent misrepresentations in the estimated costs of renovation because Meahyen did not base his estimates on actual bids made by subcontractors. Fraud requires a false representation of past or present fact. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 747 (Minn. 2000). But an allegation of fraud in a future event requires additional proof "that the party

making the representation had no intention of performing when the promise was made." *Id.* Negligent misrepresentation also requires proof that a person's conduct fell below "an objective standard of reasonable care or competence." *Florenzano*, 387 N.W.2d at 174. The district court concluded that Meahyen did not make a "representation of a past or present fact susceptible of knowledge because the improvements were yet to occur" and noted that the costs were "repeatedly referred to as estimates." We agree. Medlock did not prove fraud because Meahyen's cost estimates were assertions of future fact, and Medlock produced no evidence that Meahyen intended not to perform when he created the estimates. Moreover, Medlock did not prove negligent misrepresentation because Medlock did not produce evidence about an objective standard of reasonable care or competence.

We conclude that the district court did not err in determining that no reasonable jury could find that Meahyen committed fraud or made negligent misrepresentations.

Vicarious Liability

Medlock argues that Burnet can be held liable for Meahyen's fraud because Meahyen acted within the scope of his agency relationship with Burnet when he made fraudulent statements to Medlock. The doctrine of vicarious liability makes "a principal . . . liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992). But if the agent's underlying liability does not exist, there can be no vicarious liability. *See Reedon of Faribault, Inc. v. Fid. & Guar. Ins. Underwriters, Inc.*, 418 N.W.2d 488, 490 (Minn. 1988) (holding that release of insurance

agent from liability by *Pierringer* agreement released insurer from vicarious liability). Here, Medlock failed to prove that Meahyen breached a fiduciary duty or committed fraud. Because Medlock failed to prove an underlying tort, vicarious liability does not exist.

Affirmed.