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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1432**

James Alexander, et al.,
Appellants,

vs.

Christopher C. Raps, et al.,
Respondents.

**Filed July 15, 2013
Affirmed in part, reversed in part, and remanded
Schellhas, Judge**

St. Louis County District Court
File No. 69DU-CV-09-852

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Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

After a bench trial involving alleged fraudulent misrepresentation in the sale of a home, appellant-home-buyers challenge the district court's damages award of \$100. Because we conclude that the district court abused its discretion by excluding appellants'

testimony about the value of the home and denying appellants' motion for a new trial, we affirm in part, reverse in part, and remand for a new trial on the issue of damages.

FACTS

In September 2008, appellants James Alexander and Joydell Alexander (Alexanders) sued respondents Christopher Raps and Amanda Raps (Rapses) for fraudulent misrepresentation, negligence, and negligent misrepresentation arising out of Rapses' sale and conveyance of a home on Lake Vermillion to Alexanders in March–May 2007 (the property). All of Alexanders' allegations pertained to water leakage in the property. The Rapses moved for summary judgment. The district court granted summary judgment to Rapses on Alexanders' negligence and negligent-misrepresentation claims but denied summary judgment on Alexanders' fraudulent-misrepresentation claim.

After a bench trial, the district court concluded that Alexanders proved their fraudulent-misrepresentation claim by a preponderance of the evidence but awarded them only \$100 in nominal damages on the basis that Alexanders did not present “any evidence of what the fair market value of the property was *in the condition received*.” The court denied Alexanders' motion for a new trial.

This appeal follows.

DECISION

As an initial matter, we conclude that Rapses waived any challenge to the district court's conclusion that Alexanders proved their claim of fraudulent-misrepresentation against them. The district court entered judgment against Rapses on February 23, 2012; Alexanders filed their notice of appeal from that judgment on August 15, 2012; and

Rapses filed a notice of related appeal on August 24, 2012. “After one party timely files a notice of appeal, any other party may seek review of a judgment or order in the same action by serving and filing a notice of related appeal.” Minn. R. Civ. App. P. 103.02, subd. 2. In their statement of the case, Rapses stated that they planned to challenge the district court’s damages award *and* finding that Alexanders relied on Rapses’ representations. But, in their brief, Rapses state that they declined to file “a cross-appeal” “in light of the [district court’s] determination as to damages.” *Cf.* Minn. R. Civ. App. P. 131.01 (“A cross-appeal, for the purpose of this rule, exists when a notice of appeal and at least one notice of related appeal or separate notice of appeal are filed by parties adverse to each other on appeal.”). Nowhere in Rapses’ brief do they challenge the district court’s fraudulent-misrepresentation determination. During oral argument, Rapses requested that we remand for a trial on all issues in the event that we reverse the judgment. We conclude that Rapses waived their challenge to the district court’s fraudulent-misrepresentation finding by failing to raise arguments regarding the issue in their brief. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) (“[F]ailure to address an issue in brief constitutes waiver of that issue.”).

Alexanders purchased the property for \$690,000. The district court concluded that Alexanders failed to prove the property’s actual value when they received it in May 2007, stating that Alexanders “have not presented any evidence of what the fair market value of the property was *in the condition received.*” Therefore, although the court concluded that Alexanders proved their claim of fraudulent misrepresentation against Rapses, the court awarded Alexanders only “nominal damages” in the amount of \$100 and denied

Alexanders' motion for a new trial. Alexanders challenge the district court's evidentiary rulings at trial and its \$100 nominal-damages award as insufficiently low, arguing that they are entitled to reversal and a new trial on the issue of damages.

An appellate court reviews for an abuse of discretion a district court's "decision to grant or deny a motion for a new trial," *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012), and "evidentiary rulings," *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012), which an appellate court may disturb if they are "based on an erroneous view of the law," *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45 (Minn. 1997) (quotation omitted). "An error in the exclusion of evidence is grounds for a new trial if it appears that the evidence might reasonably have changed the result of the trial if it had been admitted," *Becker v. Mayo Found.*, 737 N.W.2d 200, 214 (Minn. 2007) (quotation omitted), which the complaining party bears the burden to prove, *Kroning*, 567 N.W.2d at 46 ("Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." (quotation omitted)). *See also* Minn. R. Civ. P. 61 ("No error in . . . the . . . exclusion of evidence . . . is ground for granting a new trial . . . , unless refusal to take such action appears to the court inconsistent with substantial justice."); *accord* Minn. R. Evid. 103(a) ("Error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected . . .").

Determination of Damages

Determining damages in misrepresentation actions generally requires ascertaining the difference between "the price paid for the property" and "the actual value of the

property received.” *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988) (quotation omitted) (referring to this calculation method as “‘out-of-pocket’ damages rule”); see *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1977) (“Where the case involves a fraudulent misrepresentation to a buyer of real estate, the measure of damages is the amount paid less the fair market value of the property.”); *Lobe Enters. v. Dotsen*, 360 N.W.2d 371, 373 (Minn. App. 1985) (“Minnesota recognizes the ‘out-of-pocket-loss’ rule as the proper measure of damages for misrepresentation.”). Generally, “repair costs alone are not sufficient to show damages for fraudulent misrepresentation in a real-estate transaction.” *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. App. 2009), review denied (Minn. Sept. 16, 2009); see *Lobe Enters.*, 360 N.W.2d at 373 (explaining that repair costs “include[] cost factors which have no effect upon the market value of the building”).

Sufficiency of Evidence

“In an ordinary civil action, the plaintiff has the burden of proving damages caused by the defendant by a fair preponderance of the evidence,” *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997), and a “party asking for damages must prove the . . . duration . . . of his or her (injury) (harm),” 4A *Minnesota Practice*, CIVJIG 90.15 (4th ed. 1999), quoted in *Rowe v. Munye*, 702 N.W.2d 729, 735 (Minn. 2005). “Questions regarding the sufficiency of foundational evidence are largely left to the sound discretion of the trial court.” *Senescall v. Olson*, 292 Minn. 477, 479, 194 N.W.2d 762, 763 (1972). “[A]n owner of property may as a rule testify to its value without any particular foundation being laid” and “is presumptively acquainted with its

value and may testify as to its value.” *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 6, 74 N.W.2d 305, 309 (1955); *see Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984) (“An owner is competent to express an opinion on the market value of his or her property, and ordinarily any weakness in the foundation for that opinion goes to its weight, not its admissibility.” (citing *Jackson v. Buesgens*, 290 Minn. 78, 82, 186 N.W.2d 184, 186–87 (1971) (similar)). “[A] denial of [a property owner’s] right to testify constitutes reversible error.” *Hous. & Redevelopment Auth. In & For City of Minneapolis v. Zweigbaum*, 257 Minn. 233, 235, 100 N.W.2d 719, 721 (1960).

When Ms. Alexander was asked on direct examination whether she had an opinion about the fair market value of the property in May 2007, Rapses’ counsel objected on the basis of lack of foundation. The district court sustained the objection, disallowing any testimony by Ms. Alexander about the fair market value of the property. Alexanders argue that the court abused its discretion by disallowing Ms. Alexander’s testimony about the fair market value of the property. We agree. Ms. Alexander testified about her ownership of the property; that, before purchasing the property in May 2007, she personally inspected it and received a seller’s disclosure report about it; that she began searching for the property three to five months before she and her husband executed the March 18, 2007 purchase agreement; and that the property was one of eight properties that she and her husband considered purchasing.

“[O]rdinarily any weakness in the foundation for [a property owner’s] opinion [on the market value of his or her property] goes to its weight.” *Vreeman*, 348 N.W.2d at 757 (discussing *H.P. Droher & Sons v. Toushin*, 250 Minn. 490, 501, 85 N.W.2d 273, 281

(1957) (concluding that property owner’s testimony, although admissible, had “little probative value” when no foundation indicated his familiarity with similar real-estate market value)).

The district court concluded in its post-trial order that its exclusion of Ms. Alexander’s testimony resulted in no prejudice. We disagree. A denial of a property owner’s right to testify about her property’s value is “reversible error.” *Zweigbaum*, 257 Minn. at 235, 100 N.W.2d at 721. Here, one of the bases for the court’s nominal-damages award was the court’s determination that Alexanders failed to present “any evidence of what the fair market value of the property was *in the condition received*.”

Because Rapses waived any challenge to the district court’s fraudulent-misrepresentation determination, we affirm that determination. But, because the district court abused its discretion by disallowing Ms. Alexander’s opinion testimony about the fair market value of the property and denying Alexanders’ new-trial motion, we reverse the court’s damages award and remand for a new trial on the issue of damages.

We therefore need not reach Alexanders’ remaining arguments on appeal. But we do address Alexanders’ argument that their August 2010 property appraisal was sufficient to satisfy their burden to prove the fair market value of the property in May 2007, when they received it. Alexanders argue that the August 2010 appraisal was sufficient evidence because Rapses failed to prove that the condition of the property changed after the occurrence of property damage in 2007 and 2008. The district court rejected Alexanders’ August 2010 appraisal “as a basis for damages,” in part, because “the leakage [causing the property damage] grew substantially worse” and “the overall housing market declined

in value some 10-20%” between 2007 and 2010. Record evidence reasonably supports both of the court’s findings. Moreover, although Alexanders’ appraiser estimated that damage to the property had diminished its value by \$130,000, he declined to infer the fair market value of the property in May 2007 from his August 2010 appraisal because to do so “would involve some speculation or guessing on [his] part.”

Alexanders argue that requiring them to provide an appraisal of the property relative to May 2007 is unfair, arguing that they had no way of knowing in May 2007 that they would eventually require “court intervention.” But the purpose of the out-of-pocket-damages rule is “to avoid speculative damages and assure that the award is measured by the natural and proximate loss sustained by the defrauded party.” *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986). And even Alexanders’ appraiser declined to infer from his 2010 appraisal the fair market value of the property in May 2007 because doing so “would involve some speculation or guessing on [his] part.”

The district court’s ruling that Alexanders must satisfy their burden of proof as to the fair market value of the property in 2007, when they received it, is not unfair. We conclude that the district court was within its discretion to reject the August 2010 appraisal as evidence of the fair market value of the property in May 2007. *See Senescall*, 292 Minn. at 479, 194 N.W.2d at 763 (“Questions regarding the sufficiency of foundational evidence are largely left to the sound discretion of the trial court.”).

Affirmed in part, reversed in part, and remanded.