STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1620

Monti A. Moreno, et al.,
Appellants,

vs.

Wells Fargo Bank, N.A.,
Respondent,

Central Bank,
Respondent,

Land Title, Inc.,
Respondent,

Chicago Title Insurance Company,
Respondent.

Filed April 8, 2013
Affirmed
Schellhas, Judge

Washington County District Court
File No. 82-CV-11-1855

Richard L. Morris, Aaron Michael Lorentz, Morris Law Group, P.A., Edina, Minnesota (for appellants)

Charles F. Webber, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for respondent Wells Fargo Bank, N.A.)

T. Chris Stewart, Garth G. Gavenda, Anastasi & Associates, P.A., Stillwater, Minnesota (for respondent Central Bank)

James E. Blaney, Blaney & Ledin, Ltd., Lake Elmo, Minnesota (for respondent Land Title, Inc.)

Bradley N. Beisel, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondent Chicago Title Insurance Company)

Considered and decided by Worke, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellants challenge the district court's grant of summary judgment, dismissing their claims against respondents. We affirm.

FACTS

This appeal arises out of a mortgage obtained by appellants Monti Moreno and Nancy Moreno on real estate located in Marine on St. Croix. The Morenos' relevant involvement with the property began in April 2003 when appellant Revocable Trust Agreement of Nancy A. Moreno purchased 22 acres of real estate located at 14890 Ostrum Trail North in Marine on St. Croix, consisting of four contiguous parcels described in a single metes-and-bounds description (the property). To secure short-term financing for the purchase of the property, the trust[1] conveyed a mortgage to respondent Central Bank. The mortgage encumbered all of the property, i.e., parcels one through four, plus the Morenos' residence in Stillwater and other real estate in Stillwater. Respondent Land Title closed the mortgage on behalf of Central Bank. In connection with the mortgage financing, appellants purchased an owner's title-insurance policy and mortgagee's title insurance for Central Bank through Land Title, acting as agent for

[1] Nancy Moreno signed the mortgage as trustee, and Monti Moreno and Nancy Moreno also signed as husband and wife.

respondent Chicago Title. Chicago Title issued the final owner's title-insurance policy to "Nancy A. Moreno, Trustee of the Revocable Trust Agreement of Nancy A. Moreno dated October 1, 1997," on November 4, 2003. The policy insured title to the property for $420,000.

On January 27, 2004, the trust transferred its interest in parcels one and three of the property to the Morenos, who refinanced the 2003 mortgage with respect to those parcels and conveyed a new mortgage to Central Bank to secure a loan of $333,700. By its terms, the 2004 mortgage encumbered parcels one and three of the property. Unlike the 2003 mortgage, it did not encumber parcels two and four of the property or the Morenos' Stillwater real estate. Land Title closed the 2004 mortgage on behalf of Central Bank, and Central Bank immediately assigned the loan to respondent Wells Fargo.

Sometime in 2007, the Morenos attempted to sell parcel three but were unsuccessful because parcel three was encumbered by the 2004 mortgage in favor of the assignee-mortgagee, Wells Fargo. Maintaining that the 2004 mortgage encumbrance against parcel three was erroneous, the Morenos unsuccessfully sought a release of parcel three from Wells Fargo.[2] The Morenos also sought assistance from Central Bank and Land Title and claimed that Land Title suggested that they contact Chicago Title in regard to their 2003 title-insurance policy. On September 17, 2007, the Morenos sent a claim letter to Chicago Title on the basis that title to parcel three of the property was

[2] In February 2007, the Morenos received notice of their default on the mortgage, and an elongated period of foreclosure proceedings ensued. The district court's order reflects that Wells Fargo eventually postponed its mortgage foreclosure proceedings pending resolution of the case now before us. The foreclosure proceedings are not the subject of this appeal.

unmarketable because it was encumbered—erroneously—by Wells Fargo's mortgage. The Morenos claimed that the legal description for the mortgage was changed at the mortgage closing. Chicago Title denied the Morenos' claim on two bases: (1) the trust, not the Morenos, was the named insured in the title policy and, upon the trust transferring its interest to the Morenos, the title policy terminated under its own terms; and (2) the allegedly erroneous legal description attached to the 2004 mortgage occurred after the effective date of the policy, November 4, 2003, and was outside the insurance coverage because the policy only insured covered deficiencies in title that occurred prior to its effective date of November 4, 2003.

In March 2011, appellants sued respondents, seeking various forms of relief. The district court granted summary judgment to respondents on all claims.

This appeal follows.

D E C I S I O N

"On appeal from summary judgment, we must review the record to determine whether there is any genuine issue of material fact and whether the district court erred in its application of the law." *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). The district court properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. We conduct a de novo review of the district court's summary judgment decision. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We "view the evidence in the light most

favorable to the party against whom judgment was granted." *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012) (quotations omitted).

Summary Judgment to Central Bank

Appellants sued Central Bank on claims of slander of title, defamation, and negligence. The district court granted summary judgment to Central Bank, concluding that the claims were barred by statutes of limitations, the parole-evidence rule, and the statute of frauds. The court also concluded that the claims failed on their merits. Because we conclude that the district court properly granted summary judgment on the statute-of-limitations grounds, we do not reach the district court's other grounds for dismissing appellants' claims against Central Bank.

The district court concluded that the six-year statute of limitations under Minn. Stat. § 541.05 (2012)[3] barred appellants' negligence claim and that the two-year statute of limitations under Minn. Stat. § 541.07(1) (2012) barred appellants' defamation and slander-of-title claims. Appellants argue that the court erred in its application of the statutes of limitations because Central Bank waived the statute-of-limitations defense when it failed to raise it in its answer and that, even if properly raised, the statutes of limitations did not bar appellants' claims against Central Bank.

[3] We cite the most recent version of Minn. Stat. § 541.05 because it has not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case"). For the same reason, we also cite the current versions of other statutes cited in this opinion.

A statute of limitations is an affirmative defense. Minn. R. Civ. P. 8.03. A "failure to plead an affirmative defense, without later amendment of the pleading, waives the defense." *Rehberger v. Project Plumbing Co.*, 295 Minn. 577, 578, 205 N.W.2d 126, 127 (1973). The Eighth Circuit has stated that this "pleading requirement is intended to give the opposing party both notice of the affirmative defense and an opportunity to rebut it" and therefore has "eschewed a literal interpretation of the Rule that places form over substance." *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 622 (8th Cir. 2007); *see Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350, 91 S. Ct. 1434, 1453 (1971) (noting that purpose of requiring pleading of affirmative defenses of res judicata and estoppel is to "give the opposing party notice" of affirmative defense and "chance to argue" that it should not be imposed); *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989) (noting that Fed. R. Civ. P. 8(c) is "identical" to Minn. R. Civ. P. 8.03, considering policies underlying rule 8.03, and stating that rule 8(c) "serves the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be barred completely." (quotation omitted)). "Where the language of the Federal Rules of Civil Procedure is similar to language in the Minnesota civil procedure rules, federal cases on the issue are instructive." *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 n.3 (Minn. 2009).

Negligence Claim

The district court concluded that the six-year statute of limitations began to run on appellants' negligence claim on the date on which appellants executed the 2004

mortgage, January 24, 2004, and that therefore the period within which to assert a negligence claim had expired by 2011, when appellants attempted to assert their negligence claim.

Central Bank did not specifically raise the statute-of-limitations affirmative defense in its answer to appellants' complaint; it merely pleaded that appellants' claims were "barred in whole, or in part, as a result of [their] failure to state a claim against Central for which relief can be granted" and "reserve[d] the right to assert additional affirmative defenses, as may be determined during the course of additional investigation and discovery in this litigation." But Central Bank did raise the statute-of-limitations defense in its memorandum of law supporting its motion for summary judgment as to appellants' negligence claim, and appellants addressed the merits of the defense in their responsive memorandum.

The district court concluded that summary judgment based on the statute of limitations was appropriate even if it was not initially pleaded by Central Bank. Because the parties litigated the issue by consent, we agree. "'Issues litigated by either express or implied consent are treated as if they had been raised in the pleadings.'" *Septran, Inc. v. Indep. Sch. Dist. No. 271, Bloomington, Minn.*, 555 N.W.2d 915, 919 (Minn. App. 1996) (quoting *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954)), *review denied* (Minn. Feb. 26, 1997). "Consent may be commonly implied where the parties fail to object to issues not raised by the pleadings." *Id.* Appellants therefore consented to Central Bank raising the statute-of-limitations defense by addressing the merits of the defense in their responsive memorandum, and the district

court properly dismissed appellants' negligence claim against Central Bank on that ground. *See id.* at 919–20 (concluding that "appellant consented" to litigating affirmative defense raised by district court at motion hearing by not objecting to court raising issue or court "requesting . . . additional briefs").

Appellants claim that they first became aware that the 2004 mortgage encumbered parcel three in 2007, and they argue that the six-year statute of limitations did not begin to run until they incurred damages in 2007 when they attempted to sell parcel three. Appellants' argument is unavailing. "A cause of action accrues when all of the elements of the action have occurred, such that the cause of action could be brought and would survive a motion to dismiss for failure to state a claim." *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 832 (Minn. 2011). "The damage triggering the accrual of a negligence cause of action may be any damage caused by the negligent act and is not limited to the damage or cause of action specifically identified in the complaint." *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 720 (Minn. 2008) (quotation omitted) (emphasis omitted). The damage must be "compensable" and not "abstract." *Id.* (quotation omitted). "[I]gnorance of a cause of action does not toll the running of the statutory limitations period." *Id.* at 719. Here, appellants' negligence claim could have survived a motion to dismiss for failure to state a claim on January 27, 2004, the date appellants executed the 2004 mortgage with the allegedly erroneous legal description. Central Bank's allegedly negligent acts took place during the drafting of the mortgage, and appellants sustained "compensable damage," *id.* at 720 (quotation omitted), when the mortgage was recorded because it encumbered parcel three.

We conclude that the district court properly dismissed appellants' negligence claim on the basis that the six-year statute of limitations began to run on January 27, 2004, and expired before appellants attempted to assert their claim against Central Bank. The court properly concluded that appellants' negligence claim against Central Bank was time-barred.

Slander-of-Title and Defamation Claims

Appellants similarly argue that Central Bank waived the statute-of-limitations defense to the slander-of-title and defamation claims by not pleading the defense in its answer. We disagree. Central Bank raised the statute-of-limitations defense in its summary-judgment reply memorandum to which appellants orally objected at the summary-judgment hearing on April 27, 2012. The district court therefore allowed appellants until May 8 to submit a written response regarding the statute of limitations. Appellants submitted nothing, and the court dismissed appellants' slander-of-title and defamation claims as time-barred under Minn. Stat. § 541.07(1).

As to their slander-of-title and defamation claims, the record reflects that appellants had ample notice and an opportunity to respond to Central Bank's statute-of-limitations defense. Moreover, appellants do not argue that they did not have notice or lacked an opportunity to respond to Central Bank's statute-of-limitations defense. We will not assume that appellants were prejudiced or surprised by Central Bank's statute-of-limitations defense in the absence of evidence of prejudice or surprise. To assume prejudice or surprise would place the form of Minn. R. Civ. P. 8.03 over its substance. *See Love v. Anderson*, 240 Minn. 312, 314, 61 N.W.2d 419, 421 (1953) (noting that rules

of civil procedure "reflect a well-considered policy to discourage technicalities and form"); *see also Snyder*, 441 N.W.2d at 788 (considering policies underlying rule 8.03 and noting that "identical" Fed. R. Civ. P. 8(c) "serves the purpose of giving the opposing party notice of the defense and an opportunity to argue why his claim should not be barred completely," among other things (quotation omitted)).

The district court determined, and no party contests, that appellants' slander-of-title and defamation claims fall under the two-year statute of limitations provided in Minn. Stat. § 541.07(1). *See Hamann*, 808 N.W.2d at 832 (stating that it was unnecessary to determine which statute of limitations applied to the claims asserted because the parties did not contest the issue). The district court also determined that the claims began to run, at the latest, in 2007, when appellants attempted to sell parcel three. Appellants disagree, arguing that the district court erred because the "false and defamatory statements and the harm arising therefrom are ongoing." But appellants fail to cite a single published case that supports their argument that their claims are not time-barred by the statute of limitations because the harm incurred is ongoing.[4]

Appellants cite to three published cases to support their argument that the statute of limitations does not bar their slander-of-title and defamation claims. But all three cases are readily distinguishable and therefore not persuasive. In each case, whether a statute of limitations barred a claim depended on whether a defendant owed a continuing obligation or duty to the plaintiff, or some other relevant person. *See Fabio v. Bellomo*, 504 N.W.2d

[4] Appellants cite to an unpublished case, but we decline to consider it because "[u]npublished opinions of the [c]ourt of [a]ppeals are not precedential." Minn. Stat. § 480A.08, subd. 3(c) (2012).

758, 762 (Minn. 1993) (stating that "statute of limitations will be extended when doctor's negligence is part of continuing course of treatment" but determining that doctor's relevant conduct was not part of continuing course of treatment); *M. A. D. v. P. R.*, 277 N.W.2d 27, 28 (Minn. 1979) (noting that six-year statute of limitations does not apply to paternity action because father has ongoing obligation to child); *Kline v. Doughboy Recreational Mfg. Co., a Div. of Hoffinger Indus., Inc.*, 495 N.W.2d 435, 440 (Minn. App. 1993) (discussing case in which two-year statute of limitations in Minn. Stat. § 541.051, subd. 1, did not apply to claim that involved "defendant's alleged ongoing duty to use due care"). Here, appellants have not alleged that Central Bank had any continuing duty or obligation to them.

We conclude that the district court did not err by dismissing appellants' slander-of-title and defamation claims against Central Bank as time-barred. *Cf. Church of Scientology of Minn. v. Minn. State Med. Ass'n Found.*, 264 N.W.2d 152, 155 (Minn. 1978) (adopting "'single-publication rule'" regarding mass publication, and rejecting "'multiple-publication rule,'" which provides that "each repetition of a libel constitutes a separate and distinct publication giving rise to a cause of action," because multiple-publication rule would render two-year statute of limitations a nullity).

Statutes-of-Limitations Dismissal of Claims against Wells Fargo and Land Title

Appellants argue that neither Wells Fargo nor Land Title[5] pleaded the statute-of-limitations defense or otherwise raised the defense in the district court. Only Wells Fargo

[5] Neither the district court file nor the appendices in the record before us include Land Title's answer to appellants' complaint. But Land Title does not dispute appellants' claim that it did not plead a statute-of-limitations defense.

argues the issue on appeal. The record reflects that appellants had no opportunity to argue the statute-of-limitations issue to the district court and no notice that the district court would apply the statute of limitations to bar their claims against Wells Fargo or Land Title. Because appellants had no opportunity to respond to the statute-of-limitations defense and no notice that the district court would apply the statute of limitations to bar their claims, we conclude that appellants were unduly prejudiced and that the district court erred in its application of the statute of limitations to bar appellants' claims against Wells Fargo and Land Title. *See Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 620−21 (Minn. App. 2000) (concluding that district court abused its discretion by permitting respondent, on oral motion at summary-judgment hearing, to amend its answer to assert statute-of-limitations defense and then granting summary judgment to respondent on that basis).

Wells Fargo argues that the district court did not err by granting summary judgment sua sponte on the statute of limitations, citing *Mercer v. Anderson*, 715 N.W.2d 114, 119 (Minn. App. 2006), for the proposition that the district court has the authority to grant summary judgment sua sponte on the basis of the statute of limitations. But in *Mercer*, the plaintiff did not argue that the defendant had waived his statute-of-limitations defense, and this court explicitly stated that, while the "statute of limitations is a waivable affirmative defense," it was not waived in that case because the defendant "immediately raised the issue as a bar to the claim in his first motion to the court, thereby bringing the issue into controversy." *Mercer*, 715 N.W.2d at 119. Here, Wells Fargo did not raise the

statute-of-limitations defense to the district court, orally or in writing. *Mercer* is not persuasive authority in this case.

We conclude that Wells Fargo and Land Title waived the affirmative defense of the statute of limitations in the district court and that the court therefore erred by dismissing the claims against them as time-barred under the applicable statutes of limitations. *See Rehberger*, 295 Minn. at 578, 205 N.W.2d at 127 (stating that "failure to plead affirmative defense, without later amendment of pleading, waives defense"). But the district court nevertheless properly dismissed all claims against these respondents on other grounds as discussed below.

Summary Judgment on Other Grounds to Wells Fargo, Land Title, and Chicago Title

On summary judgment, the district court dismissed appellants' following claims: (1) unjust enrichment against Wells Fargo, (2) quiet title against Wells Fargo, (3) slander of title and defamation against Wells Fargo and Land Title, (4) negligence against Land Title, and (5) declaratory judgment against Chicago Title. We address these claims in turn.

(1) *Unjust-Enrichment Claim against Wells Fargo*

The district court dismissed appellants' unjust-enrichment claim against Wells Fargo because of the existence of a contract between the parties. The court concluded that "[a]ny payments made by the Morenos were on a debt that is undisputedly owed to Wells Fargo."

"'To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the

defendant in equity and good conscience should pay.'" *City of Maple Grove v. Marketline Constr. Capital, LLC*, 802 N.W.2d 809, 817 (Minn. App. 2011) (quoting *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (quotation omitted)). Unjust-enrichment claims "do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was 'unjustly' enriched in the sense that the term unjustly could mean illegally or unlawfully." *Id.* (quotation omitted). Where an "express contract" exists, to "award . . . compensation under a quasi-contract or unjust enrichment theory" would be "contrary to well-established Minnesota case law." *Sharp v. Laubersheimer*, 347 N.W.2d 268, 271 (Minn. 1984) (quotation omitted); *see Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012) (stating unjust enrichment "does not apply when there is an enforceable contract that is applicable").

Appellants do not dispute the existence of an express contract between Wells Fargo, as a mortgagee, and the Morenos, as the mortgagors. Therefore, we conclude that the district court did not err by granting summary judgment to Wells Fargo on appellants' claim of unjust enrichment.

(2) *Quiet-Title Claim against Wells Fargo*

The district court concluded that appellants' quiet-title claim against Wells Fargo failed as matter of law because Wells Fargo was a bona-fide purchaser, i.e., a good-faith purchaser.

Minn. Stat. § 507.34 (2012) provides:

> Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate . . . whose conveyance is first duly recorded.

A good-faith purchaser is one "who gives consideration in good faith without actual, implied, or constructive notice of inconsistent outstanding rights of others," and a purchaser "with actual, implied, or constructive notice of the outstanding rights of others is not entitled to the protection of the Recording Act." *MidCountry Bank v. Krueger*, 782 N.W.2d 238, 244 (Minn. 2010) (quotations omitted).

The party asserting good-faith-purchaser status has the burden of proving its good-faith-purchaser status. *Id*. "Whether one is a good-faith purchaser is a factual determination that will be sustained unless the reviewing court has a firm and definite impression that a mistake has been made." *Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 488 (Minn. App. 2007). But, where no genuine issue of material fact exists, summary judgment is proper. *See* Minn. R. Civ. P. 56.03. The only dispute here is whether Wells Fargo had actual or implied notice that the 2004 mortgage purportedly wrongfully encumbered parcel three.

"Actual knowledge is generally given directly to, or received personally by, a party." *Wash. Mut. Bank, F.A. v. Elfelt*, 756 N.W.2d 501, 507 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Dec. 16, 2008). "'Implied notice charges a person with notice of everything that he could have learned by inquiry where there is

sufficient actual notice to put him on guard and excite attention."' *Id*. at 508 n.5 (quoting *In re Vondall*, 364 B.R. 668, 671 (B.A.P. 8th Cir. 2007)).

Appellants argue that Wells Fargo had notice of the allegedly erroneous legal description in the 2004 mortgage and therefore is not a good-faith purchaser. Appellants based their argument on the fact that, in connection with the 2004 mortgage, Central Bank, at the Morenos' expense, obtained a survey and appraisal of the property. In the request for appraisal, Central Bank described the property by its street address, estimated the value at $550,000, and set forth the loan amount as $333,700. In the summary appraisal report addendum, the appraiser included the following comment: "THE SUBJECT PROPERTY WAS APPRAISED USING ONLY 9.87 ACRES, HOWEVER THERE IS ADDITIONAL ACREAGE NOT INCLUDED IN THIS REPORT." The appraised value of that property was $515,000. Appellants argue that, because Central Bank provided Wells Fargo with the appraisal, which covered only 9.87 acres of the property, Wells Fargo had notice of the alleged error in the legal description in the 2004 mortgage because the mortgage covered more than 9.87 acres of property. Appellants argue that Wells Fargo therefore was not a good-faith purchaser. We conclude that the appraisal report did not constitute actual or implied notice of an error in the legal description of the property encumbered by the 2004 mortgage—it expressly stated that additional acreage was not included in the report.

Appellants argue that Wells Fargo was aware, or at least on notice, of the alleged error in the legal description in the 2004 mortgage on the bases that its first two mortgage-default letters in 2007 stated that the property was 9.87 acres in size and

included a property identification number pertaining only to parcel one of the property. These facts simply are not probative of Wells Fargo's status as a good-faith purchaser of Central Bank's mortgage in 2004. No representative of Wells Fargo attended the 2004 mortgage closing. Moreover, the record does not reflect that anyone informed Wells Fargo, prior to 2007, of the alleged error in the legal description in the 2004 mortgage, and appellants do not argue to the contrary.

We conclude that the district court did not err by rejecting appellants' argument that Wells Fargo was not a good-faith purchaser of Central Bank's mortgagee's interest in the 2004 mortgage, and the district court therefore did not err by granting summary judgment to Wells Fargo on appellants' quiet-title claim.

(3) *Slander-of-Title and Defamation Claims against Wells Fargo and Land Title*

The district court granted summary judgment to Wells Fargo and Land Title on appellants' slander-of-title and defamation claims based on (a) the parol-evidence rule, (b) the statute of frauds, and (c) the court's conclusion that the claims could not survive summary judgment on their merits.

As noted by the district court in its order, appellants "essentially contend[ed] that some type of oral agreement was made to [encumber] only a portion of the property (either Parcel One, or only a portion of Parcel One)." Monti Moreno testified that he told representatives of Land Title that he wanted the mortgage to encumber only parcel one but admitted that he never advised anyone in writing at Land Title or Wells Fargo that only parcel one should be encumbered. And he testified at his deposition that he did not believe that anyone at Land Title intentionally deceived him and that the Land Title

representative at the closing was "absolutely truthful and forthright" and not "lying . . . in any way, shape, or form. She was honest, and she was sincere." Moreover, the Morenos reviewed and signed the 2004 mortgage at the closing. Reviewing the evidence in the light most favorable to appellants, we conclude that the district court did not err in concluding that appellants failed to present sufficient evidence for their slander-of-title and defamation claims against Land Title and Wells Fargo to survive summary judgment.

(a) *Parol-Evidence Rule*

> The parol-evidence rule is not a rule of evidence, but a substantive rule of contract interpretation. It prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing. Accordingly, when parties reduce their agreement to writing, parole evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement.

Danielson v. Danielson, 721 N.W.2d 335, 338 (Minn. App. 2006) (quotation and citations omitted).

Here, stating that a "breach of contract does not give rise to a tort claim where the breach of duty is indistinguishable from the breach of contract," the district court concluded that the parol-evidence rule applied to appellants' claims, even though they were alleged as tort claims. Appellants do not challenge the district court's conclusion that their tort claims sounded in contract. Instead, citing *Phoenix Publ'g Co. v. Riverside Clothing Co.*, 54 Minn. 205, 55 N.W. 912 (1893), in their reply brief, appellants argue that an exception to the parol-evidence rule exists and that the district court therefore erred by granting summary judgment to Wells Fargo based on the parol-evidence rule.

Because appellants did not raise this argument in the district court and raised it for the first time in their reply brief, we decline to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court "must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it" (quotation omitted)); *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 166 (Minn. App. 2012) ("[I]ssues not raised or argued in appellant's brief cannot be raised in a reply brief." (quotation omitted)), *review denied* (Minn. Apr. 17, 2012).

We conclude that the district court did not err in concluding that appellants' slander-of-title and defamation claims were barred by the parol-evidence rule.

(b) *Statute of Frauds*

Minnesota Statutes section 513.04 (2012) states:

> No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing. This section shall not affect in any manner the power of a testator in the disposition of real estate by will; nor prevent any trust from arising or being extinguished by implication or operation of law.

The purpose of the statute of frauds is to "defend against frauds and perjuries by denying force to oral contracts of certain types which are peculiarly adaptable to those purposes." *Alamoe Realty Co. v. Mut. Trust Life Ins. Co.*, 202 Minn. 457, 459, 278 N.W. 902, 903 (1938). An "'agreement to give a real estate mortgage is within the statute of

frauds.'" *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 423 (Minn. App. 2000) (quoting *Hecht v. Anthony*, 204 Minn. 432, 435, 283 N.W. 753, 754 (1939)).

The district court concluded, and appellants do not contest, that, through their slander-of-title and defamation claims, appellants essentially attempted to enforce against Wells Fargo and Land Title an oral agreement for a mortgage. The court concluded that such an agreement would be void under the statute of frauds and that, despite appellants' attempt to assert their contract claims as torts, their claims were barred by the statute of frauds. We agree with the district court. *See* 37 C.J.S. *Frauds, Statute of*, § 154 (2008) (noting that, while the statute of frauds "is not applicable to tort actions," a plaintiff "should not be permitted to do indirectly what is directly forbidden by the statute of frauds; thus, the statute of frauds bars those tort claims that require an oral contract as an essential element to maintaining the claim" (footnote omitted)); 73 Am. Jur. 2d *Statute of Frauds* § 409 (2012) (noting that the provision of the statute of frauds that "prohibit[s] an action on an oral contract," which "includes actions based indirectly on the contract," "ordinarily precludes recovery in a tort action based upon a breach of any oral agreement").

For the first time in their reply brief, appellants argue that the doctrine of equitable estoppel renders the statute of frauds inapplicable to their case. Appellants did not present this argument in the district court. We therefore decline to consider it. *See Thiele*, 425 N.W.2d at 582; *Anderson*, 811 N.W.2d at 166.

We conclude that the district court did not err by granting summary judgment to Wells Fargo and Land Title on appellants' slander-of-title and defamation claims on the basis of the statute of frauds.

(c) *Merits*

(i) *Slander-of-Title and Defamation Claims against Wells Fargo and Land Title*

The district court also granted summary judgment to Wells Fargo and Land Title on the merits of appellants' slander-of-title and defamation claims. The court concluded that the slander-of-title claim failed on its merits because "no evidence support[s] the contention that [Wells Fargo or Land Title] acted maliciously in publishing any of the documents in question." Appellants argue that sufficient evidence exists to create a genuine issue of material fact as to whether Wells Fargo and Land Title acted maliciously.

The elements required for a slander-of-title claim are:

> (1) [t]hat there was a false statement concerning the real property owned by the plaintiff;
>
> (2) [t]hat the false statement was published to others;
>
> (3) [t]hat the false statement was published maliciously;
>
> (4) [t]hat the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages.

Paidar v. Hughes, 615 N.W.2d 276, 279−80 (Minn. 2000). Malice will exist where there is a "reckless disregard concerning the truth or falsity of a matter . . . despite a high degree of awareness of probable falsity or entertaining doubts as to its truth." *Brickner v.*

One Land Dev. Co., 742 N.W.2d 706, 711–12 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Mar. 18, 2008). Malice requires that the party made the disparaging statement without a good-faith belief in its truth. *See Quevli Farms, Inc. v. Union Sav. Bank & Trust Co.*, 178 Minn. 27, 30, 226 N.W. 191, 192 (1929) (stating that plaintiff must show defendant made false statement "without probable cause therefor"); *Kelly v. First State Bank of Rothsay*, 145 Minn. 331, 333, 177 N.W. 347, 348 (1920) (holding that district court correctly directed verdict for defendant on slander-of-title claim when supreme court "f[ou]nd no evidence of bad faith"). "It is clear however, that if a man does no more than file for record an instrument which he has a right to file, he commits no wrong." *Kelly*, 145 Minn. at 333, 177 N.W. at 347.

Here, appellants cite to no record evidence, and we have located none, that shows that Wells Fargo and Land Title acted maliciously in any way in connection with the 2004 mortgage. We therefore conclude that the district court properly granted summary judgment to Wells Fargo and Land Title on appellants' slander-of-title claim.

As to appellants' claims that Wells Fargo and Land Title made defamatory statements, the alleged defamatory statements pertained to the allegedly erroneous legal description in the 2004 mortgage. The district court noted in its order that the alleged statements by Wells Fargo "are not actionable because they were, in fact, true. The 2004 mortgage, the Trustee's Deed, and the home equity loan mortgage all contain the exact same property description." "To establish a defamation claim, a plaintiff must prove three elements: (1) the defamatory statement is communicated to someone other than the plaintiff, (2) the statement is false, and (3) the statement tends to harm the plaintiff's

reputation and to lower the plaintiff in the estimation of the community." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919−20 (Minn. 2009) (quotation omitted). "Truth, however, is a complete defense, and true statements, however disparaging, are not actionable." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980).

We conclude that the district court did not err by granting summary judgment to Wells Fargo and Land Title on appellants' defamation claim.

(ii) *Negligence Claim against Land Title*

The district court dismissed appellants' negligence claim against Land Title because appellants failed to "set forth sufficient evidence to demonstrate Land Title owed any duty to [appellants], or that Land Title breached such a duty." The district court did not err.

"The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury." *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). The court may grant summary judgment when "the record reflects a complete lack of proof on any of the four elements of a prima facie case [of negligence]." *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). "Duty is a threshold question . . . ." *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012). "If no duty exists, a court need not reach the remaining elements of a negligence claim." *Kellogg v. Finnegan*, 823 N.W.2d 454, 458 (Minn. App. 2012).

Here, the district court determined that Land Title's role as a title agency was essentially that of an intermediary that performed only ministerial and administrative tasks. The record supports the district court's conclusion. Monti Moreno testified that he

did not hire Land Title to draft the legal description. Further, appellants signed a closing acknowledgement form, which specifically stated that "Land Title, Inc., its agent, acting as real estate closing agent in the above transaction, has not and, under applicable state law, may not express opinions regarding the legal effect of the closing documents or of the closings itself."

We conclude that the district court did not err by granting summary judgment to Land Title on appellants' claim of negligence.

(iii) *Declaratory Judgment Action against Chicago Title*

Appellants asked the district court to declare that Chicago Title improperly denied them coverage under the 2003 title-insurance policy. The district court concluded that because the effective date of the title-insurance policy was November 4, 2003, and all of appellants' claims arose after November 4, 2003, Chicago Title was entitled to summary judgment under the terms of the policy and as a matter of law. Appellants make various arguments, but none of them is persuasive because each ignores the clear and unambiguous language in the trust's title-insurance policy, issued by Chicago Title, that excluded coverage for matters occurring after the effective date of the policy. Appellants do not, and cannot, argue that the allegedly erroneous legal description in the 2004 mortgage occurred before November 4, 2003.

Appellants argue that Chicago Title should be equitably estopped from denying them title-insurance coverage because, at the closing of the mortgage on January 27, 2004, Land Title made material misrepresentations to the Morenos about the coverage under the title-insurance policy—specifically, that the title-insurance policy was a

"forward-looking policy" that would cover any errors that arose from the 2004 mortgage—and the Morenos relied on Land Title's misrepresentations when purchasing the policy. Appellants raised this argument in their responsive memorandum to Chicago Title's summary-judgment motion, but the district court did not address the argument. We reject appellants' argument because the trust purchased the title-insurance policy in 2003, when it purchased the real estate.

First of all, the Morenos were not insureds under the title-insurance policy; the trust was the named insured. Secondly, appellants could not possibly have relied on representations by Chicago Title or its agent, Land Title, because the alleged misrepresentations took place *after* the trust had purchased the title-insurance policy.

Further, appellants' equitable-estoppel argument fails because they could not have relied reasonably on Land Title's alleged misrepresentation. A party seeking to assert equitable estoppel must prove that the party reasonably relied on the other party's representations. *Anderson v. Minn. Ins. Guar. Ass'n*, 534 N.W.2d 706, 709 (Minn. 1995). In *Anderson*, the supreme court concluded that the language of the subject insurance policy was clear and ambiguous and therefore that "reliance on any explanations contrary to the unambiguous meaning of the policy language is, as a matter of law, unreasonable." *Id.* Here, the title-insurance policy "expressly excluded" coverage of all "[d]efects, liens, encumbrances, adverse claims or other matters" that were "attach[ed] or created subsequent to [November 4, 2003]," and the alleged "defect" in title allegedly arose at the closing on January 27, 2004. The language of the title-insurance policy clearly and unambiguously states that appellants' claim is not covered under the policy. Appellants'

equitable-estoppel argument fails as a matter of law. *See Anderson*, 534 N.W.2d at 708–10 (concluding that plaintiff's equitable-estoppel claim failed as matter of law because policy "unambiguously exempts from coverage expected pollution released gradually over time" when policy only covered release of pollutants where escape was "'sudden and accidental'"); *see also Wanzek Constr., Inc. v. Emp'rs Ins. of Wausau*, 679 N.W.2d 322, 324 (Minn. 2004) ("When insurance policy language is clear and unambiguous, the language used must be given its usual and accepted meaning." (quotation omitted)).

We conclude that the district court did not err by granting summary judgment to Chicago Title on appellants' declaratory-judgment action.

Affirmed.