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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0030**

David Penn, et al.,
Appellants,

vs.

Maximillion M. Wexler, et al.,
Respondents,

Virginia M. Lord, et al.,
Defendants,

Jo-Bar, Inc., d/b/a AmeriSpec Home Inspection Service, et al.,
Respondents,

The Relocation Center, Inc. d/b/a The Relocation Center, Realtors,
Respondent,

John Doe, et al.,
Defendants.

**Filed September 10, 2012
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-07-24374

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Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellants David and Lily Penn challenge the district court's award of summary judgment to respondents Maximillion and Marianne Wexler, Jo-Bar, Inc. d/b/a AmeriSpec Home Inspection Service (AmeriSpec), and The Relocation Center, Inc. d/b/a The Relocation Center, Realtors (TRC). The Penns sued respondents after they discovered that the home they purchased from the Wexlers had problems with mold and water intrusion. Because there are no genuine issues of material fact that preclude summary judgment and because respondents are entitled to judgment as a matter of law, we affirm.

FACTS

In 2007, the Penns contracted with TRC to represent them through the process of finding and purchasing a new home. One of the Penns' top priorities for their new home was that it be mold free, due to health concerns associated with their daughter. Lily Penn located the Wexlers' home in an online search and the Penns eventually became

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

interested in purchasing the Wexlers' home. The Wexlers completed a seller's property disclosure statement, which indicated that the Wexlers were unaware of any mold problems, any "leakage/seepage," or "wet floors/walls." But the disclosure statement also indicated that the roof was 15 years old and that there had been "interior or exterior damage," "interior damage from ice buildup," and "leakage."

The Penns made an offer to buy the Wexlers' home. The offer was contingent on an inspection, and a subsequent counter-offer addendum indicated that the Penns would conduct mold testing in addition to a standard pre-purchase home inspection. The Penns and TRC had discussions about how to best conduct the mold testing. The Penns initially wanted invasive testing, but they were unwilling to pay for any damage to the Wexlers' home. Ultimately, the Penns agreed to "fungal air screening," which was described to them by TRC as a non-invasive equivalent mold test.

Respondent AmeriSpec performed an inspection of the property on March 31, 2007. The same day, the Penns hired Building Environmental Management Corp. (BEM) to conduct a fungal air screening at the home. David Penn testified at his deposition that at the close of the inspections, he arrived to pay the inspectors and that John Kaiser from AmeriSpec gave him a walk-through of the home, identifying issues of concern. David Penn testified that this walk-through led him to believe that the property was in "tip-top" shape. He then asked Kaiser directly if he should buy the house, and Kaiser responded that he was not supposed to give conclusive answers like that. But David Penn pushed him, and David Penn testified that Kaiser eventually stated, "Yes, the house is fine. You should feel completely comfortable buying it." At that point, David Penn remembers the

Penns' real estate agent, Jim Hockert, saying, "Hallelujah, you finally found a house. Let's get some champagne and celebrate." Although both AmeriSpec and BEM provided written reports of the inspections, the Penns have maintained throughout litigation that they did not read either the AmeriSpec or BEM report prior to closing.

The Penns moved into the home in July 2007. At some point after moving in, the Penns returned home during a rainstorm to find water coming into the house through a light fixture. The Penns arranged for additional inspections of the house, which revealed significant water and mold problems. In a letter dated September 4, 2007, Kaiser stated that he returned to the home after heavy rains and noted areas of fresh paint. He then stated:

With all the freshly painted areas and the fact that the first heavy rain allowed the water to penetrate, it appears that the leaking had been happening in the past. . . . If there were no mention of this issue in the disclosure by the seller, I would have to question the honesty and accuracy of the disclosure itself.

In November 2007, the Penns sued respondents. The Penns asserted various claims against the Wexlers, the seller's real estate agent Virginia Lord and Burnet Realty,¹ AmeriSpec, and TRC. Eventually all of the Penns' claims against the respondents were dismissed by the district court on motions for summary judgment or by stipulation. This appeal follows.

¹ On March 20, 2012, this court received a stipulation for dismissal of the Penns' claims against Lord and Burnet Realty.

DECISION

Minn. R. Civ. P. 56.03 provides that “[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.”

On appeal from a grant of summary judgment, we must determine whether any genuine issues of material fact exist and whether the district court erred in its application of the law. . . . We construe the facts in the light most favorable to the party opposing summary judgment and review questions of law . . . de novo.

Bearder v. State, 806 N.W.2d 766, 770 (Minn. 2011) (quotation and citations omitted).

I. Claims against the Wexlers

The Penns argue that the district court erred by dismissing their negligent-misrepresentation and fraud claims² against the Wexlers. A negligent-misrepresentation claim requires: (1) a duty of reasonable care in conveying information owed by one party to another in the course of a transaction where pecuniary interests are at stake; (2) breach of that duty by negligently providing false information; (3) reasonable reliance on the misrepresentations, which was the proximate cause of damages; and (4) damages. *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350-51 (Minn. App. 2001). The Penns challenge the district court’s conclusion that the Wexlers did not owe them a duty of care.

Whether a duty of care exists is a conclusion of law, which we review de novo. *Safeco*

² The Penns also claim to be appealing the district court’s dismissal of their breach-of-contract claim against the Wexlers, but they failed to brief this issue on appeal. The breach-of-contract issue is therefore waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Ins. Co. of Am. v. Dain Bosworth Inc., 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

In *SafeCo*, this court concluded that parties in an arm's length transaction do not owe each other a duty of care beyond honesty. *Id.* at 871.

It would be unreasonable to impose a duty whenever a party gives *any* information to another party. That is why the law of negligent representation imposes a duty on parties providing information for the guidance of others in the course of business or where there is a pecuniary interest. In other commercial relationships, for example between parties to a contract, the aggrieved party is limited to suit in contract or in fraud.

Id. at 873. Central to this court's decision in *SafeCo* was the fact that the alleged tortfeasor was not "supplying information for the guidance of" the aggrieved party. *Id.* at 872. Here, too, the Wexlers were not providing guidance to the Penns. They were engaged in an arm's length, adversarial negotiation process—precisely the type of situation the *SafeCo* court excluded from claims of negligent misrepresentation.

The Penns rely on several unpublished cases to argue that because the Wexlers stood to profit from the sale of their house—thereby creating a pecuniary interest—they owed a duty of care to the Penns. We are not persuaded. The cases relied on by the Penns, besides lacking precedential value, *see* Minn. Stat. § 480A.08, subd. 3(c) (2010), involve parties with unequal footing. There are no such facts present here. The district court did not err by dismissing the Penns' negligent-misrepresentation claim against the Wexlers because the Wexlers did not owe them a duty of care.

But unlike negligent misrepresentation, a fraud claim does not require that one party owes a duty of care to the other. A claim of fraud requires proof of: (1) a false representation of a past or existing material fact susceptible of knowledge; (2) that is made with knowledge of the falsity of the representation or made without knowing whether it was true or false; (3) with the intention to induce another person to act in reliance thereon; (4) that the representation caused that person to act in reliance thereon; and (5) that the person suffered pecuniary damages as a result of the reliance. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). Whether a party's reliance is reasonable is a fact question unless the record reflects a complete failure of proof. *Hoyt Props, Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 321 (Minn. 2007). Reliance in fraud cases is generally evaluated in the context of the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue. *Valspar*, 764 N.W.2d at 369.

As the non-moving parties in a summary-judgment proceeding, the Penns are entitled to have any factual disputes resolved in their favor. *See Bearder*, 806 N.W.2d at 770. At this stage of the case, therefore, we must assume that the Penns would be able to prove that the "strategic application of paint" by the Wexlers was fraudulent concealment of a known defect.

But "[w]hen a party conducts an independent factual investigation before it enters into a commercial transaction, that party cannot later claim that it reasonably relied on the alleged misrepresentation." *Valspar*, 764 N.W.2d at 369. The Penns argue that they made only a partial independent investigation into the facts, and were therefore

influenced to buy the property, at least in part, by the Wexlers' fraudulent act of concealment.

In our analysis of this issue, we look to *Berryman v. Riegert*, where the supreme court upheld a jury verdict in favor of home buyers who asserted a claim of fraudulent representations by the real estate agent that induced them to buy the property. 286 Minn. 270, 277, 175 N.W.2d 438, 443 (1970). In that case, the supreme court stated:

[I]f the buyer, instead of investigating as fully as he might, made only a partial investigation, and relied in part upon such investigation and in part upon the representations of the adverse party, and was deceived by such representations to his injury, he may maintain an action for such deceit.

Id. (quotation omitted).

In *Berryman*, the buyers did not have the home inspected by professionals, but instead had conducted "cursory" walkthroughs on their own. *Id.* Here, the Penns had two different companies inspect the property prior to their purchase. One of the companies was specifically hired to detect any problems with mold or water intrusion. These inspections can hardly be classified as "cursory." Any deficiencies in the inspections are properly remedied in a suit against the inspectors, not against the Wexlers. The thorough independent factual investigations show that there was no reliance by the Penns on any statements made by the Wexlers. Because there is a complete lack of proof as to any reliance by the Penns on statements or omissions by the Wexlers, the district court properly awarded summary judgment to the Wexlers on the Penns' fraud claim.

II. Claims against AmeriSpec

The Penns claim that the district court erred by awarding summary judgment to AmeriSpec on their breach-of-contract, negligence, and negligent-misrepresentation claims. To establish a prima facie case of negligence, a plaintiff must show that a duty was owed, breach of that duty, causation, and damages. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Similarly, “[l]iability for breach of contract requires proof that damages resulted from or were caused by the breach.” *Border State Bank*, 690 N.W.2d at 336. Because the Penns chose not to read the report prepared by AmeriSpec, they are unable to prove that the damages they suffered as a result of any alleged breach of duty or breach of contract were caused by the allegedly deficient inspection report.

Instead, the Penns concede that they relied on Kaiser’s oral summary of the report on site, and particularly his statement that they should “go ahead and buy” the house. David Penn testified that they closed “based on the recommendation of Kaiser.” The Penns attempt to circumvent the causation or reliance elements of negligence and breach of contract by arguing that Kaiser’s statement was merely a reflection of the allegedly flawed contents of the written report. They argue, therefore, that the district court erred by dismissing their negligent misrepresentation claim against AmeriSpec because Kaiser was communicating the negligent results of AmeriSpec’s inspection. We are not persuaded.

A person can be liable for negligent misrepresentation only “when supplying information, either for the guidance of others in the course of a transaction in which one has a pecuniary interest, or in the course of one’s business, profession or employment.”

Florenzano v. Olson, 387 N.W.2d 168, 174 (Minn. 1986). Kaiser had no pecuniary interest in whether or not the Penns purchased the house. And although he was in a position to answer David Penn's inquiry in his professional capacity, he refused to do so. Instead he stated that he was "not supposed to give a definitive answer" as to whether the Penns should buy the house. David Penn then attempted to solicit Kaiser's opinion by stating, "It's just you and me talking, I'm asking you man to man, tell me, should I buy the house based on the concerns I had?" Accordingly, David Penn asked Kaiser to step out of his professional role. Minnesota law does not support a negligent misrepresentation claim in that circumstance. *See id.* We therefore conclude that the district court properly awarded summary judgment to AmeriSpec.

III. Claims against TRC

The Penns' negligent-misrepresentation and misrepresentation claims against TRC are based on five alleged acts or omissions by TRC: (1) the failure to discover and disclose defects in the home; (2) the failure to provide the name of a reasonably competent inspector; (3) the failure to perform its contractual duty to accurately summarize the inspection reports; (4) the failure to act within its qualifications when describing and recommending non-invasive mold testing; and (5) the failure to provide a mold-free home.

TRC's alleged failure to discover and disclose defects within the home

Hockert had a duty to communicate any facts that would affect the Penns' rights or interests. *See Magee v. Odden*, 220 Minn. 498, 503, 20 N.W.2d 87, 90 (1945) (stating that "it is the duty of [a real estate] agent to communicate to his principal all facts of

which he has knowledge which might affect the principal's rights or interests"). And although a real estate agent should disclose facts that are known or should be known, a real estate agent without special knowledge of a material fact is not liable for a failure to disclose that fact when it is accessible or discoverable with reasonable inquiry. *Hommerding v. Peterson*, 376 N.W.2d 456, 459 (Minn. App. 1985).

Even if we assume that Hockert either knew of additional water intrusion problems because of a conversation with the sellers' real estate agent or was negligent in his failure to discover the problems on his own, neither of these alleged failures caused the Penns' injuries. Despite the alleged lack of information about possible mold or water problems, the Penns nevertheless requested an inspection and additional mold testing and made their purchase agreement contingent on the results of the testing. In *Hommerding*, this court held that when the dispute centers on "the kind of fact open to discovery upon reasonable inquiry by the vendee" summary judgment was properly awarded to the real estate agent on an alleged failure to disclose. *Id.* Because Hockert's alleged failure to detect or disclose water and mold problems was not the cause of the Penns' injuries, the district court did not err in its award of summary judgment to TRC on this claim.

TRC's alleged failure to provide the name of a competent inspector

The only evidence presented regarding the competence of the inspectors was specific to the inspection of the Penns' home, which was an isolated incident. Therefore, even if TRC had a duty to provide the name of a competent inspector, the Penns cannot succeed on this claim without evidence of a breach of that duty.

TRC's alleged failure to accurately summarize the inspection reports

The Penns' claim that TRC negligently summarized the inspection reports is based on Hockert's statement: "Hallelujah, you finally found a house. Let's get some champagne and celebrate." We disagree that Hockert was "summarizing" the contents of any yet-to-be-written reports through this statement, and the Penns presented no other evidence that TRC was otherwise obligated to provide such a summary. We therefore conclude that the district court properly awarded summary judgment to TRC on this claim.

TRC's alleged failure to act within its qualifications when describing and recommending non-invasive mold testing

The Penns claim that TRC negligently misrepresented the quality of the fungal air screening test. But because the Penns never read the report provided by BEM, they cannot prove that they relied on the recommendation of TRC. The Penns attempt to get around this significant hurdle by arguing that they could not have read the report because they did not receive it and by returning to their claim that it was Hockert's duty to summarize the report for them. But both of these arguments would establish liability at the point of TRC's failing to comply with its alleged duty to accurately provide or summarize the inspection reports. Because there was no such duty, the Penns cannot attach liability to the recommendation to have fungal air screening performed rather than invasive mold testing. They failed to avail themselves of the results of this testing—whether sufficient or insufficient.

TRC's alleged failure to provide a mold-free home

The Penns claim that TRC's alleged promise to provide them a mold-free home was not fulfilled and that TRC should therefore be liable for negligent misrepresentation. Because the Penns did not make any legal argument to support this claim, it has been waived. *Melina*, 327 N.W.2d at 20.

Because the Penns made a thorough, independent factual investigation into the property before purchasing it but then chose not to read the results of those reports and instead unjustifiably relied on a statement that they should "go ahead and buy the house," they are now barred from recovering their losses under any of the theories presented.

Affirmed.