STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0523

SRRT Properties, LP,
Respondent,

IDC Properties, LLC, Plaintiff,

vs.

Nova Consulting Group, Inc.,
Appellant.

Filed October 14, 2019
Affirmed
Bratvold, Judge
Concurring specially, Jesson, Judge

Hennepin County District Court
File No. 27-CV-17-9241

Curtis D. Smith, Moss & Barnett, Minneapolis, Minnesota (for respondent)

Paul V. Esposito (pro hac vice), Clausen Miller P.C., Chicago, Illinois; and

Michael W. Haag, Elena Harvey, Foley & Mansfield, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Appellant Nova Consulting Group, Inc. (Nova), a property-inspection company, challenges a final judgment entered after a jury verdict for respondent SRRT Properties, LP (SRRT), a real-estate-investment trust. Nova inspected a commercial building for a lender who was refinancing the mortgage and wrote a report about the condition of the building. SRRT wanted to purchase the company that owned the building and, before doing so, SRRT asked the lender to get Nova's approval to rely on its property-inspection report. Nova approved, and SRRT purchased the company that owned the building. Shortly after, SRRT discovered that the building required significant repairs not included in Nova's report. SRRT sued Nova for negligent misrepresentation and negligence.

On appeal, Nova argues that the district court erred in denying a posttrial motion for judgment as a matter of law (JMOL) or a new trial, arguing that: (1) Nova owed no duty to SRRT as a matter of law; (2) the evidence established that SRRT's reliance on the property-inspection report was not justifiable; (3) the district court applied the wrong measure of damages; (4) the district court abused its discretion by excluding evidence of Nova's contract with the lender; and (5) the district court abused its discretion when it denied Nova's motion for remittitur of damages. We conclude that Nova owed a duty to SRRT under the particular facts of this case; the evidence was sufficient to support the jury's verdict on justifiable reliance; the district court did not err in the measure of damages; and the district court did not abuse its discretion by excluding evidence and denying remittitur. Thus, we affirm.

FACTS

The International Design Center (the building) in Minneapolis was built in 1890 and significantly renovated in 2000. The building has four stories, a stone and brick façade with concrete masonry, and is occupied by commercial tenants. Between 1999 and 2015, IDC Properties, LLC (IDC) owned the building, which was IDC's only real-estate asset. SRRT became interested in acquiring IDC and the building in 2015.

Before it would buy IDC, SRRT required IDC to refinance the existing mortgage on the building. IDC applied for a loan from Redwood Commercial Mortgage Corporation (Redwood) on July 7, 2015. Later in July, Redwood contracted with Nova to prepare a property-condition report.[1] Nova's consultant inspected the building on August 7, 2015, and spent about one-and-one-half hours inside and outside the building.

Nova issued its property-condition report (the Nova report) to Redwood on August 17, 2015. The Nova report contained three sections relevant to the issues on appeal. First, section 2.2, which stated that the report's purpose "is to assess the general condition of the building, site, and other improvements" and "will identify those areas that will require remedial repair work and will assign them an associated estimated remedial cost." Second, section 2.3 was titled "Authorization/Reliance" and provided:

> [Redwood], its employees, agents, successors and assigns may rely upon this report in evaluating a request for an extension of credit to be secured by the property (the "Loan"). This report may also be used and relied upon by any actual or prospective purchaser, transferee, assignee, or servicer of the

[1] Nova charged $2,300 for the inspection and report. Redwood's contract with Nova included a limitation-of-damages provision that capped damages at that amount. SRRT paid for Nova's property-condition report when it closed on its purchase of IDC.

> Loan (or any portion thereof), any actual or prospective investor (including agent or advisor) in any securities evidencing a beneficial interest in or backed by the Loan (or any portion thereof), any rating agency actually or prospectively rating any such securities[.] . . . In addition, this report or a reference to this report may be included or quoted in any offering circular, private placement memorandum, registration statement or prospectus and [consultant] agrees to cooperate in answering questions by any of the above parties in connection with a securitization or transaction involving the Loan (or any portion thereof) and/or such securities. No additional approval or fees apply to any of the foregoing. This report has no other purpose and should not be relied upon by any other person or entity.

Third, section 2.5 stated that "the intent of this report [is] to reflect material physical deficiencies and [provide] the corresponding opinion of probable costs."

The Nova report assessed the building's exterior walls and side façades as being in "fair condition." The report described the building condition as "fair" and "satisfactory in general, however, [the building] may require short term and/or immediate attention." The Nova report also estimated that there were $22,000 in immediate repair costs for "limited tuck-pointing" of bricks, masonry cleaning, and painting.

SRRT's purchase process required its due-diligence officer to review two appraisals and a report assessing the building's condition. SRRT independently obtained two appraisals and then asked Redwood for the Nova report.

On September 4, 2015, SRRT emailed Redwood and stated:

> *[W]e do need copies of those reports in order to complete our underwriting process for the transfer of the property. Our transfer process dictates our reliance on [] those reports in determining the transfer va1ue between our internal partnership-Warehouse Properties to SRRT Properties*. We

> cannot sign off on the transfer va1ue unless we have reviewed the full reports, just as you need to review the reports.

(Emphasis added.) Redwood emailed Nova on September 9, 2015, and stated:

> *The Borrower has requested copies of the above referenced reports in order to complete their underwriting process for transfer of the property from an internal partnership to a new ownership entity, SRRT Properties*. Is NOVA willing to revise the reliance language within the Property Condition Report and Phase I Environmental Site Assessment Report as follows?
>
> An email response is adequate—we do not need a revised copy of the report.
>
> Redwood Commercial Mortgage Corporation, its employees, agents, successors and assigns **and SRRT Properties, LP** may rely upon this report in evaluating a request for an extension of credit to be secured by the property (the "Loan"). This report may also be used and relied upon by any actual or prospective purchaser, transferee, assignee, or servicer of the Loan (or any portion thereof), any actual or prospective investor (including agent or advisor) in any securities evidencing a beneficial interest in or backed by the Loan (or any portion thereof), any rating agency actually or prospectively rating any such securities, any indenture trustee, and any institutional provider(s) from time to time of any liquidity facility or credit support for such financing. In addition, this report or a reference to this report may be included or quoted in any offering circular, private placement memorandum, registration statement or prospectus and **Nova Consulting** agrees to cooperate in answering questions by any of the above parties in connection with a securitization or transaction involving the Loan (or any portion thereof) and/or such securities. No additional approval or fees apply to any of the foregoing. This report has no other purpose and should not be relied upon by any other person or entity.

(Emphasis added; bold in original.) The only proposed change to the report was the addition of SRRT as an entity that may rely upon it. Redwood copied SRRT on this email.

The same day, the Vice President of Nova responded by email with a single word: "Approved," and copied SRRT.

SRRT's due-diligence officer testified at trial that, once he had the approval to rely on the Nova report, he "had what [he] needed." SRRT obtained the Nova report, read it, and determined what it would offer to purchase IDC by averaging the two appraisals and subtracting the estimated building repair costs identified in the Nova report. The two appraisals, which assumed the completion of all repairs, led to an average market value of $6,350,000. After subtracting the $22,000 in repairs identified in the Nova report and adding a small reserve for other repairs, SRRT and IDC settled on a purchase price of $6,196,540. The SRRT board then voted to proceed with the acquisition of IDC.

IDC entered into a loan agreement with Redwood to refinance the existing mortgage on the building and SRRT closed on the purchase of IDC on October 1, 2015.

The next month, a pedestrian called the building's property manager and informed her that he had been hit when a brick fell off the building. The property manager promptly called AMBE, Ltd., (AMBE), which had previously done roof inspections on the building. AMBE arrived and erected netting to catch bricks. AMBE's consultant also performed an inspection using only a camera at ground level for 40-45 minutes. The consultant observed missing mortar between the bricks, which he described as "widespread" and concerning. AMBE followed up with a more extensive inspection in January 2016, using lifts and other tools. Ultimately, AMBE determined that the total cost would be $828,016 to repair the building's brickwork and pay related expenses for netting.

SRRT and IDC sued Nova, asserting claims of negligent misrepresentation and negligence. Nova moved for summary judgment, arguing that it owed no duty to SRRT or IDC and that SRRT's reliance on the Nova report was not foreseeable. After a hearing, the district court granted Nova's motion as to IDC because it determined that Nova owed no duty to IDC, but denied the motion as to SRRT because there were genuine fact issues as to whether "SRRT could have foreseeably relied upon the services performed" by Nova and whether it was foreseeable that SRRT "could have been harmed by the alleged negligence" of Nova.

SRRT moved in limine for the district court to exclude evidence of the contract between Nova and Redwood because SRRT was not a party to the contract. Nova opposed, arguing that it prepared its report based on the contract, and that SRRT was bound by the contract's limitation of liability.[2] The district court granted SRRT's motion to exclude evidence of the contract.

During a four-day jury trial, seven witnesses testified for SRRT and established the facts summarized above. After SRRT rested, Nova moved for JMOL, arguing that Nova did not owe SRRT a duty, Nova did not negligently misrepresent the condition of the building, SRRT failed to prove justifiable reliance on the Nova report as a matter of law, and SRRT failed to prove "recoverable" damages. The district court denied the motion on

[2] Nova's contract with Redwood limited damages for liability, as follows: "Nova's liability to [Redwood], and all persons claiming through [Redwood], for damages as to which the indemnification set forth in Section 10 does not apply, is not permitted by state law, or that arises out of breach of any other obligation to [Redwood] or others, will be limited to an amount not to exceed the cost of the reports."

all four issues. Nova then called the consultant who inspected the building and prepared the report, its vice president, and an independent property-inspection expert.

The jury returned its verdict and, on SRRT's negligent-misrepresentation claim, the jury answered special interrogatories finding that Nova provided false information to SRRT about the condition of the building, Nova failed to use reasonable care or competence in obtaining the information, SRRT relied on Nova's information, SRRT was justified in relying on Nova's information, SRRT's reliance on Nova's information was a "direct cause of harm to SRRT," and SRRT was not negligent in relying on Nova's information. On SRRT's negligence claim, the jury found that Nova was negligent in conducting its assessment of the building, Nova's negligence was a direct cause of SRRT's harm, and SRRT was not negligent in relying on Nova's report. The jury found that $718,000 would "fairly and adequately compensate" SRRT for the damages caused by Nova's negligent misrepresentation and negligence.

The district court issued findings of fact, conclusions of law, and an order for judgment. After inserting preverdict interest, the district court directed entry of judgment against Nova in the amount of $813,208.77. Nova renewed its motion for JMOL, and sought a new trial and remittitur. The district court denied Nova's motions and this appeal follows.

D E C I S I O N

JMOL is appropriate when there is "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Minn. R. Civ. P. 50.01(a). "We review de novo a district court's decision to deny a motion for judgment as a matter of law,

applying the same standard used by the district court and viewing the evidence in the light most favorable to [the nonmoving party]." *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted).

But a district court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *Id.* at 838. And it is within the district court's discretion to determine whether damages are excessive and whether the cure is a remittitur or a new trial. *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 368 (Minn. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004).

I. The district court did not err in denying Nova's motion for JMOL on Nova's duty to SRRT.

Nova argues that the district court erred in denying its motion for JMOL because it owed no duty to SRRT. Nova asserts that there "was no relationship between Nova and SRRT giving rise to a duty of care in tort" and SRRT was not a foreseeable plaintiff. SRRT argues that the district court correctly denied JMOL because there were "genuine issues of fact" for the jury as for "whether SRRT's claimed injury was foreseeable."

"To prevail on a negligent misrepresentation claim, the plaintiff must establish: (1) a duty of care owed by the defendant to the plaintiff; (2) the defendant supplies false information to the plaintiff; (3) justifiable reliance upon the information by the plaintiff; and (4) failure by the defendant to exercise reasonable care in communicating the

information." *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012). In this issue, we address the first element—the existence of a duty between Nova and SRRT.[3]

"[T]he existence of a duty of care is a threshold requirement." *Id.* at 816. A defendant owes "a general duty of reasonable care when the *defendant's own conduct* creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011) (emphasis added). "[W]hen duty depends on foreseeability, and the material facts regarding foreseeability are disputed, or there are differing reasonable inferences from undisputed facts (a 'close call'), . . . the issue of foreseeability[] should be tried." *Warren v. Dinter*, 926 N.W.2d 370, 380 (Minn. 2019). On appeal, when foreseeability is not a close question, appellate courts review the issue de novo. *Domagala*, 805 N.W.2d at 27.

The Minnesota Supreme Court has held that when a defendant has negligently supplied information for the guidance of others, a duty arises, as stated in Restatement (Second) of Torts § 552 (1976):

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

[3] Both parties briefed issues one through five with regard to negligent misrepresentation and negligence, since both theories were submitted to the jury and the jury's verdict found for SRRT on both theories. Because we affirm the judgment based on negligent misrepresentation, it is unnecessary to consider the parties' arguments about negligence. *See Olson v. Blesener*, 633 N.W.2d 544, 547 (Minn. App. 2001) (declining to address alternative theory of liability because judgment was affirmed under another theory), *review denied* (Minn. Nov. 13, 2001).

Williams, 820 N.W.2d at 815; *see also Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986) ("[O]ne making representations is held to [a] duty of care 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.").

If a person supplying the information "fails to exercise reasonable care or competence in obtaining or communicating the information," he is "subject to liability for pecuniary loss." *Bonhiver v. Graff*, 248 N.W.2d 291, 298 (Minn. 1976) (quoting Restatement (Second) of Torts § 552 (Tentative Draft No. 12, 1966)). But liability is limited to the "person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it." *Id.* at 298-99.

In *Bonhiver v. Graff*, the Minnesota Supreme Court determined that an accountant owed a duty to the creditors of an insolvent insurance company and affirmed an award of damages to the creditors. *Id.* at 296. The insurance company had hired the accountant to get its "books up to date," and the accountant "prepared workpapers." *Id.* at 295. State examiners began to review the company's books, and asked to see the accountant's workpapers, which he showed to them, and the state examiners "relied upon the entries he had made in the books." *Id.* Based on the workpapers, the state examiner communicated with the insurance commissioner, who determined that the company was solvent, conveyed this to others, and caused damages to the company's creditors. *Id.*

On appeal, the accountant argued that he owed no duty to the creditors because he only prepared workpapers for the insurance company and did not certify financial

statements for others to rely on. *Id.* at 297. The supreme court held that the accountant owed a duty to the creditors because the accountant "personally displayed [the] workpapers to the state examiners and knew that the examiners were relying upon them." *Id.* at 299. Adopting and quoting the Restatement (Second) of Torts § 552 (Tentative Draft No. 12), the supreme court reasoned that "[t]he defendants' actual knowledge that the commissioner [based on the state examiners] was relying upon these representations renders them liable for their negligence in making them." *Id.* at 298.

Similarly, in *Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assocs., Inc.*, we affirmed a jury's determination that an engineer was negligent in preparing specifications for a municipal public-works project and therefore liable to a subcontractor. 386 N.W.2d 375, 376 (Minn. App. 1986). The municipality hired the engineer to prepare specifications. *Id.* The engineer negligently drafted the specifications, and the subcontractor supplied pumps based on the specifications but later had to replace the pumps. *Id.* We held that the subcontractor "foreseeably relied on" the engineer's specifications in supplying the pumps even though there was no contract between the engineer and the subcontractor. *Id*. at 376-77.

Here, the question is whether a duty arose between Nova and SRRT when Nova approved giving SRRT its report on building conditions and anticipated repairs. The accountant in *Bonhiver* prepared the workpapers for the insurance company and not for the state examiners, but he showed the workpapers to the state examiners and knew they relied on the information. 248 N.W.2d at 291, 295. Similarly, the engineer in *Waldor Pump* prepared specifications for the municipality to build a project, but it was foreseeable that a

subcontractor hired to supply pumps for the project would rely on the specifications. 386 N.W.2d at 377. Nova prepared the report for Redwood and approved giving it to SRRT so that SRRT could rely on it. The accountant's actual knowledge of the state examiner's reliance on the workpapers in *Bonhiver* established a duty in the same way that Nova's actual knowledge of SRRT's reliance on the report established a duty.

Nova contends that *Bonhiver* and *Waldor Pump* are both distinguishable because the reliance was foreseeable in those cases for reasons not present here. Nova asserts that the engineer in *Waldor Pump* who drafted the specifications "could foresee that a subcontractor would rely on them." Likewise, Nova argues that the accountant in *Bonhiver* directly communicated with state examiners and "knew that his representations were being used to keep open a business." Nova asserts that SRRT's request is different because Nova "did not tell SRRT that its report could be used in deciding whether to buy the building or to set a purchase price." Nova argues that when it agreed to Redwood's request, it merely agreed to add SRRT in its "reliance language" in section 2.3, which limited the purpose for which the Nova report could be used. Nova contends that SRRT's use of its report to set the purchase price of the building was for an "other purpose" not covered by the report's language.

Minnesota law establishes that the scope of a defendant's duty for a negligent misrepresentation "depend[s] upon the *purpose for which the information is required to be furnished.*" *Schroeder v. White*, 624 N.W.2d 810, 812 (Minn. App. 2001) (quotations omitted). Thus, the scope of Nova's duty to SRRT turns on SRRT's purpose, which, under the facts here, is the foreseeability of SRRT's reliance on the report to set the building's

purchase price. The parties hotly contested this issue at trial. In its order denying JMOL, the district court determined that an ambiguity in the "September 2015 email exchange created a fact question" about whether Nova should have foreseen SRRT's reliance and whether the reliance was reasonable.

We agree with the district court. What was said in the email exchange is not in dispute, but there are "differing reasonable inferences from [the] undisputed facts." *Warren*, 926 N.W.2d at 380. The September 2015 email from Redwood to Nova repeated language from section 2.3 of the Nova report, stating that it could only be used to "evaluat[e] a request for an extension of credit to be secured by the property," and for "no other purpose." But Redwood's email to Nova also stated that SRRT intended to rely on the Nova report to "complete their underwriting process for transfer of the property from an internal partnership to a new ownership entity, SRRT Properties." Nova responded with one word: approved.

A common definition of "underwrite" is "[t]o undertake to pay." *Black's Law Dictionary* 1759 (10th ed. 2014). Based on this definition, one inference from the September 2015 email exchange is that SRRT intended to rely on the Nova report in underwriting or "undertak[ing] to pay" for IDC. In contrast, the language of section 2.3, which Redwood quoted in its email to Nova, supported a different inference: that Nova approved SRRT's limited reliance on the report to "evaluat[e] a request for an extension of credit." Based on these conflicting inferences, whether Nova should have foreseen SRRT's reliance on the report to set the building's purchase price is a "close call." *See Warren*, 926 N.W.2d at 380. Because foreseeability was a disputed issue and there is sufficient

record evidence to support the jury's verdict, we conclude that the district court did not err in denying Nova's motion for JMOL on this issue.[4]

Nova raises two other arguments relating to duty that we address briefly. First, Nova asserts that "the contractual relationship between Nova and Redwood did not support a duty to SRRT." But SRRT did not claim to be a third-party beneficiary of Redwood's contract with Nova and instead pursued tort claims, for which there is support in Minnesota law. *See Bonhiver*, 248 N.W.2d at 298; *Waldor Pump*, 386 N.W.2d at 376.

Second, Nova argues that, because it "lacked a pecuniary interest in SRRT's purchase, Nova did not have a duty needed to support a negligent misrepresentation action." But Nova did not raise this issue to the district court and we decline to consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court generally will not consider matters not argued to and considered by the district court).[5]

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[4] We observe that Nova did not challenge the jury instructions or special-verdict form on appeal. Whether Nova should have foreseen SRRT's reliance or owed SRRT a duty was not submitted as an interrogatory on the verdict form. Neither party requested a special interrogatory along these lines either before or after the case was submitted to the jury. Additionally, Nova did not challenge the jury instructions on duty or foreseeability on appeal, nor did Nova do so below. Generally, an appellant's failure to object to a special-verdict form or to the jury instructions is a failure to preserve an objection and forfeits review of the issue on appeal. *See* Minn. R. Civ. P. 51.04(a) (stating that a party must object to jury instructions at trial to preserve objection).

[5] Even if we were to address this issue, Minnesota had held that a duty arises "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*, 387 N.W.2d at 174 (emphasis added). Indeed, *Bonhiver* emphasizes this point since the accountant did not have a "pecuniary interest" in the insurance company or in showing their workpapers to state examiners. 248 N.W.2d at 291, 295.

II. The district court did not err in denying Nova's motion for JMOL on SRRT's justifiable reliance.

Nova argues that SRRT's reliance on the Nova report was not justifiable as a matter of law because "SRRT had prior knowledge about the building's condition" and "constructively knew the condition of the façades." Justifiable reliance is judged under the standard of "a person [with] the capacity and experience of the [plaintiff]." *Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 616 (Minn. 1980). "Ordinarily, the reasonableness of reliance is a fact question for the jury." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). Justifiable reliance, however, is a question of law if the "record is devoid of any facts which would support a conclusion that . . . reliance was reasonable." *Id.*

The record evidence, when viewed favorably to the verdict, supports the jury's determination that SRRT's reliance on the Nova report was justified: (1) SRRT had a due-diligence process that required a property-condition report, (2) the Nova report stated that it was "prepared in a manner consistent with generally accepted industry practices and standards," (3) Nova approved providing SRRT the report, following notice that SRRT intended to rely on it, and (4) SRRT's due-diligence officer stated he had "all he needed" once he had the Nova report. The evidence is sufficient to support the jury's verdict. *See Christie*, 911 N.W.2d at 838 n.5 (stating that, when reviewing a district court's order denying JMOL, appellate courts review the evidence in the light most favorable to the nonmovant).

We note that the record does not support Nova's contention that SRRT had actual or constructive knowledge of the façade's condition. Record evidence establishes that SRRT's owners, board members, and staff were not experts in "the physical condition of a building" and were "not architects" or building experts. One of SRRT's owners and board members, for example, testified that he had training in property management, not property condition. No evidence established that SRRT knew or should have known about the façade's deteriorating condition.[6]

We conclude that, when viewed in the light most favorable to the verdict, the record evidence supports the jury's determination that SRRT's reliance on the Nova report was justifiable.

III. The district court did not err in denying Nova's motion for JMOL on damages.

Nova recognizes that "SRRT brought claims for both negligence and negligent misrepresentation," and contends that the "out-of-pocket rule" controls the measure of damages. Nova argues that, to prove its damages, SRRT offered evidence of repair costs, but repair costs are not recoverable under the out-of-pocket rule. SRRT responds that the out-of-pocket rule does not apply to negligent-misrepresentation claims outside the buyer-seller context.

[6] Nova relies on caselaw recognizing a landowner's duty to warn of known dangers when opening their property to the public. *See Hanson v. Christensen*, 145 N.W.2d 868, 870 (Minn. 1966); *Zuercher v. N. Jobbing Co.*, 66 N.W.2d 892, 897 (Minn. 1954). But this caselaw has no bearing on SRRT's misrepresentation claim against Nova. Nor does this caselaw establish that landowners have constructive knowledge of property defects.

At the outset, we clarify Nova's request for relief. Nova objected in the district court to the jury instruction on damages, but Nova clarified at oral argument to this court that it is not challenging the jury instructions on appeal. Rather, Nova is asking this court to conclude that the district court erred in denying its motion for JMOL because there is no legally sufficient record evidence to establish damages under the out-of-pocket rule. *See* Minn. R. Civ. P. 50.01 (providing that a district court may grant a party's motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue").Whether a district court applied the correct measure of damages is a question of law that this court reviews de novo. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989).

"Minnesota recognizes the 'out-of-pocket-loss' rule as the proper measure of damages for misrepresentation." *Lobe Enters. v. Dotsen*, 360 N.W.2d 371, 373 (Minn. App. 1985) (quotation omitted). Out-of-pocket loss is "the difference between the actual value of the property received and the price paid for the property." *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988).[7]

Minnesota has also recognized exceptions to the out-of-pocket rule. Relevant to SRRT's claim against Nova, courts have held that the out-of-pocket rule does not apply to ascertain damages flowing from a misrepresentation related to a transaction but made by a

[7] Minnesota's pattern civil jury instruction for misrepresentation damages provides that damages are generally "[t]he difference between the actual value of the property received and the price paid for it" and "[a]ny other damages that were directly caused by relying on the fraud or misrepresentation." 4 *Minnesota Practice*, CIVJIG 57.25 (2018). The "use note" and "authorities" section of the pattern instruction states that the "out-of-pocket rule" is best applied in a transactional context between a buyer and seller. *See id.*

defendant not a party to a transaction. *Whitney v. Buttrick*, 376 N.W.2d 274, 280 (Minn. App. 1985), *review denied* (Minn. 1986). *Whitney* involved appellant's claim that respondent's representation induced appellant "to sell on the terms that he did," but respondent was not a party to the transaction. *Id.* at 281. We held that the district court erred in instructing the jury on the out-of-pocket rule and reasoned, as follows: "[T]he out-of-pocket measure of damages generally applicable to a misrepresentation between buyer and seller is irrelevant in this lawsuit. The harm to appellant arises not out of the sale, but rather out of the negligent misrepresentation of a third party in a collateral, but related, transaction to the sale." *Id.* at 280. Instead, "where the propriety of [a] sale is not at issue," a plaintiff that proves negligent misrepresentation is "entitled to damages flowing from [the defendant's] negligent misrepresentation." *Id.*; *see generally Bonhiver*, 248 N.W.2d at 304 (holding that plaintiff had a right to recover general damages for "loss of business reputation" for accountant's negligent misrepresentation).

Nova asserts that this case is like *Lobe Enters. v. Dotsen*, where the buyer of an apartment building sued the seller for fraudulently misrepresenting the age of a roof. 360 N.W.2d at 373. This court affirmed the judgment and concluded that the trial court appropriately applied the "out-of-pocket" rule for damages and properly excluded evidence of "repair costs." *Id.* We reasoned that "[t]he installation price of a new roof includes cost factors which have no effect upon the market value of the building," and that the buyer "offered no evidence to show the actual value of the property in the condition received." *Id.*

SRRT argues that *Lobe* is distinguishable because the plaintiff was a buyer suing a seller over a real-estate transaction.[8] SRRT relies on *Autrey v. Trkla*, where a buyer signed a contract for deed for a liquor store with a defendant, even though he lacked authority to sell the store. 350 N.W.2d 409, 411 (Minn. App. 1984). The contract for deed was deemed invalid after the buyer had made payments to the defendant. *Id.* After the contract was cancelled, the buyer entered into a new purchase agreement with the authorized seller. *Id.* The buyer then sued the defendant for misrepresentation. *See id.* at 412. This court held that, under these facts, where the buyer purchased the property from a third party, not the defendant, the out-of-pocket rule did not apply. *Id.* This is because "[t]he out-of-pocket damage rule assumes that the plaintiff received something from the defendant and that it was less than what he or she anticipated receiving." *Id.*

The district court correctly determined that the out-of-pocket rule does not apply here because "[t]his case does not involve a purchaser who relied upon the fraudulent representation of the seller." As in *Autrey*, SRRT did not purchase property from Nova. There is no difference between "what [SRRT] parted with and what [it] received" from Nova. *See Whitney*, 376 N.W.2d at 280. Instead, the correct measure of damages is what damages "flow[ed] from" Nova's negligent misrepresentation of the building's condition. *See id.* The record evidence establishes that if SRRT had known about the condition of the building façade, it would have adjusted the purchase price by the estimated cost of repairs.

[8] SRRT also argues that *Lobe* is inapposite because it was a fraudulent-misrepresentation case. But we are not convinced that fraudulent intent changes the damages analysis. The out-of-pocket rule generally applies to misrepresentation cases. *See id.*; *Snyder*, 441 N.W.2d at 789.

Thus, the district court correctly denied Nova's motion for JMOL because the cost of repairs were damages that "flow[ed] from" Nova's negligent misrepresentation. *See id.*

IV. The district court did not abuse its discretion by excluding evidence of the Redwood/Nova contract or in denying a motion for a new trial on this basis.

Nova asserts that the district court abused its discretion by excluding evidence of the contract between Redwood and Nova. Nova argues that the contract was "central to the dispute" because of its provision that limited damages to $2,300. "Rulings on evidentiary matters and the conduct of trial are left to the discretion of the trial court and will not be reversed absent an abuse of discretion." *Lundman v. McKown*, 530 N.W.2d 807, 829 (Minn. App. 1995), *review denied* (Minn. May 31, 1995).

The district court granted SRRT's motion in limine to exclude the contract, and later denied Nova's motion for a new trial on the same issue. When the district court granted SRRT's motion in limine, it stated: "The Court does find that [SRRT] was not a party to that contract. There are no claims as between Redwood and Nova that are involved in this case that would make that relevant . . . ." Because SRRT's action was a tort claim, and was not based in contract, we conclude that the district court did not abuse its discretion in excluding the contract. *See Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 164 (Minn. 2012) ("Evidence is irrelevant if it lacks 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" (quoting Minn. R. Evid. 401)). Therefore, a new trial is not warranted.

V. The district court did not abuse its discretion in denying Nova's motion for remittitur of damages.

Nova argues that "the verdict was excessive" and "remittitur should have been ordered because SRRT's damages, if any, were limited to $2,300." On appeal, a reviewing court should not set aside a jury verdict on damages "unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted). The district court exercises discretion in granting or denying remittitur, and appellate courts will not reverse unless there was a clear abuse of discretion. *Myers v. Hearth Techs., Inc.*, 621 N.W.2d 787, 792 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001).

Nova cites another case it was a party to, *Nova Consult. Group, Inc. v. Weston, Inc.*, to argue that the limitation-of-liability language in its contracts has been upheld. 2002 WL 418205 (Minn. App. Mar. 19, 2002). But *Weston* involved a breach-of-contract action between the parties to the contract. *Id.* at *1. SRRT was not a party to the Redwood/Nova contract, and the limitation-of-liability provision does not apply to SRRT.

Record evidence establishes that SRRT's estimated cost to repair the building was $828,016. The jury awarded $718,000 to SRRT. Based on the evidence, which we view favorably to the verdict, the damages award is not "manifestly and palpably contrary to the evidence." *See Raze*, 587 N.W.2d at 648. Thus, we conclude that the district court did not abuse its discretion in denying Nova's motion for remittitur. *See Myers*, 621 N.W.2d at 792.

Because the district court correctly applied the law to SRRT's negligent-misrepresentation claim and the record evidence supports the jury's verdict, we

conclude that the district court did not err in denying JMOL on the existence of a duty between Nova and SRRT, SRRT's reasonable reliance on the Nova report, and the measure of damages. And we conclude that the district court did not abuse its discretion in excluding evidence, and denying Nova's request for remittitur of damages and a new trial. Thus, we affirm.

Affirmed.

JESSON, Judge (concurring specially)

I concur with the result of the carefully written majority opinion. But I write separately to express concern over the district court's failure to submit the issue of foreseeability to the jury.

Did Nova owe a duty of care to SRRT? This question of duty (or lack thereof) hinges on foreseeability. Could SRRT have *foreseeably relied* on the services performed by Nova? Was it *foreseeable* SRRT *would have been harmed* by the alleged misrepresentations? Generally, this central question of whether to impose a duty of care is one of law, to be decided by the district court. *See Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998). But, as the majority observes, the Minnesota Supreme Court has recently reiterated that where the question of whether a defendant's conduct creates a foreseeable risk of injury to a foreseeable plaintiff is a "close call," that issue—upon which existence of a duty is premised—should be submitted to the jury. *See Warren v. Dinter*, 926 N.W.2d 370, 380 (Minn. 2019) (reversing summary judgment because the facts presented a close question on the issue of foreseeability "for the fact-finder to decide at trial"); *Montemayor v. Sebright Prod., Inc.*, 898 N.W.2d 623, 633 (Minn. 2017) (reversing summary judgment because the issue of foreseeability was "a close call" that is "for the factfinder to resolve"). Relying upon this directive, the district court denied SRRT's summary-judgment motion, concluding the issue of foreseeability was one for the jury.

Yet the district court did not squarely place the question of duty before the jury. Instead, the special interrogatories on negligent misrepresentation only addressed false

information, justifiable reliance, and whether Nova failed to exercise reasonable care. *See Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012) (outlining four elements for a negligent misrepresentation claim, including that the plaintiff must establish a duty of care). Nor did the special verdict form ask the jury to make a finding on the foreseeability of SRRT's reliance on Nova's report or damages.[9]

Had duty—premised on foreseeability—been properly submitted to the jury, it could have affected the jury's verdict. As the majority states, the parties hotly contested the issue of the foreseeability of SRRT's reliance on Nova's report to set the building's purchase price. Yet the jury never directly addressed this issue.

Despite these concerns, I concur. I concur because Nova did not ask the court to present the issue to the jury and did not object to the jury instructions and special verdict form. Nor does Nova's brief on appeal substantively address the issue. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that an appellant waives issues not briefed on appeal); *see also* Minn. R. Civ. P. 51.04(b) (providing that if the party did not preserve an objection to jury instructions, a court can consider only "a plain error in the instructions affecting substantial rights"). But as the judiciary moves toward submitting more questions of duty to juries, this case provides a word of caution: once a district court decides to submit a "close call" on foreseeability to the jury, it should do so.

[9] The only instruction on foreseeability followed the pattern instruction for negligence and stated: "Harm is foreseeable if a reasonable person in the same or similar circumstances would have foreseen it. The exact way harm would have occurred does not have to be foreseeable." *See* 4 *Minnesota Practice*, CIVJIG 25.10 (2018) (providing substantially the same language).