STATE OF MINNESOTA
IN COURT OF APPEALS
A09-543

Gary A. Lawrence, et al.,
Appellants,

vs.

Justin Forthun, et al.,
Respondents.

Filed December 15, 2009
Affirmed
Connolly, Judge

Mower County District Court
File No. 50-CV-08-855

James C. Ohly, Ohly Law Office, 1850 North Broadway, Rochester, MN 55906 (for appellants)

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Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellants challenge the district court's decision on their fraudulent-misrepresentation, consumer-fraud, and nondisclosure claims in a real-estate transaction

after a bench trial. Appellants allege various errors, which include the measure of damages applied by the district court, the district court's finding that appellants failed to prove damages, and the district court's award of statutory fees and costs. Because the district court applied the correct measure of damages, did not clearly err in finding that appellants failed to prove damages, and did not abuse its discretion in deciding that respondents were the prevailing party, we affirm.

FACTS

Appellants Gary A. Lawrence and Christie L. Hughes initiated an action in district court against respondents Justin and Stacy Forthun. Appellants purchased a home from respondents and subsequently sued them for fraudulent misrepresentation, fraud in violation of Minn. Stat. § 325F.69 (2008), and nondisclosure in violation of Minn. Stat. § 513.55 (2008). A bench trial was held. The district court determined that respondents committed fraud and violated sections 325F.69 and 513.55, but that appellants failed to prove any damages. The district court made detailed findings of fact. With the exception of whether appellants proved damages, none of the district court's factual findings are disputed.

The real property at issue is a house located in Dexter. Respondents originally purchased the home from Justin Forthun's parents in August 2000 for $90,000; it was appraised at $125,000. Justin Forthun intended to improve the home and sell it for a profit. He had owned four homes previously, at least one of which he improved and sold for a profit. In the summer of 2001, Justin Forthun noticed water seeping into the basement through cracks in the floor. He spent approximately $10,000 on repairs and

improvements, which included reshingling the roof, installing gutters and downspouts, sloping the yard, and pouring a sidewalk that sloped away from the house. He also spent approximately $10,000 finishing the basement, which included installing tiles in a number of areas, replacing paneling with sheetrock, and installing carpet and trim.

Justin Forthun listed the home for sale with Edina Realty on September 1, 2004. The house was listed at $179,900. Later in September, Justin Forthun noticed water leaking into the basement after a heavy rainstorm. He did some cleaning himself and hired a remediation company after the 2004 incident. He also installed a tile line to carry water away from the house; it connects to the downspouts and runs about 75 feet into the backyard.

After completing the repair work, Justin Forthun relisted the home for sale in 2005 with realtor Richard Rieken. Rieken was aware of the 2004 incident but not the 2001 incident. On Rieken's suggestion, Justin Forthun reduced the listing price from $179,900 to $169,900.

As part of the listing process, respondents completed and signed a seller's disclosure statement dated May 18, 2005. Respondents answered "yes" to the question about the basement that asked whether there had been problems with "cracked floor/walls," "leakage/seepage," or "wet floors/walls." The explanation on the disclosure statement was that they "got water in basement last year [through] the cracks in basement floor with the big rainstorm." Respondents answered "no" to the question, "Are you aware of any other material facts that could adversely and significantly affect an ordinary

buyer's use or enjoyment of the property or any intended use?" Respondents never provided appellants with a written disclosure of the 2001 incident.

Over the course of negotiations, which were communicated solely through the parties' real-estate agents, appellants asked about the 2004 incident and were told that it was a one-time incident and that remedial measures had been taken. Appellants used concern with the water issues as leverage in the negotiations, and in September 2005, the parties agreed on a final selling price of $155,000. Later that month, appellants visited the house and became concerned that the downstairs carpet was wet. Appellants attempted to negotiate an amendment to the purchase agreement that would have made respondents liable for costs associated with necessary repairs if the basement leaked two or more times during the next year. Respondents refused to sign appellants' proposed amendment and the parties proceeded with the sale.

Appellants took possession of the property in October 2005 and began experiencing serious water issues in the spring of 2006, discovering evidence of a recurring water problem. Appellants subsequently hired numerous professionals to inspect and repair the basement, incurring $14,762 in repair costs.

At the conclusion of the trial, the district court found that respondents had committed common-law fraud; violated the Consumer Fraud Act, Minn. Stat. § 325F.69; and violated the seller's disclosure statute, Minn. Stat. § 513.55. The district court held that appellants failed to carry their burden of proving the amount of damages with sufficient specificity and denied recovery. The district court denied appellants' request for attorney fees under the private-attorney-general statute, Minn. Stat. § 8.31, subd. 3a

(2008). The district court also determined that respondents were the prevailing party for purposes of awarding fees and costs under Minn. Stat. §§ 549.02, .04 (2008).

D E C I S I O N

I. The district court did not err in holding that appellants were not entitled to damages.

Appellants challenge the district court's findings of fact as well as its conclusions of law. Appellants argue that the district court's finding that appellants failed to prove diminution-in-value damages is clearly erroneous. Appellants also argue that the correct measure of damages for a common-law-fraud claim includes reasonable repair costs.

a. Factual findings—proof of damages

The amount of damages is a question of fact. *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989). On appeal, the district court's findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. Under the clearly erroneous standard of review, we view the record in the light most favorable to the judgment of the district court. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We will reverse the district court's findings only if the findings are not reasonably supported by the evidence as a whole, such that we are "left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted).

A plaintiff must prove every element of a claim, including the existence of damages, by a preponderance of the evidence. *Hill v. Tischer*, 385 N.W.2d 329, 332 (Minn. App. 1986). Speculative damages, or those based on an "off-the-cuff estimate," may not be recovered. *Id.* Although damages need not be proved with certainty, the

amount of the damages must be established to a reasonable probability. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 920 (Minn. 1990).

The district court found that appellants failed to prove the fair market value of the home. It found that appellants invested $14,762 "to place the property in 'leak proof' condition," which constituted an improvement over the property as represented by respondents (i.e., a house where there had been "a single leak incident, with some remedial measures," but no guarantee that the basement would not leak in the future) and did not establish the difference between the sale price and the fair market value of the home. The district court expressly found that the testimony of appellants and appellants' expert witness was not credible, rejecting their testimony "that the property had no value whatsoever with a basement in leaky condition." The district court also considered respondents' real-estate agent's testimony that he reduced the home's listing price by $10,000 based on his knowledge only of the 2004 incident. The district court declined to infer that the fair market value of the home, taking into account the 2001 incident, would therefore have been $10,000 less than the $155,000 purchase price.

Appellants argue that the district court clearly erred by finding that the fair market value of the house should take into account the undisclosed 2001 incident rather than a recurring and ongoing water-intrusion problem. According to appellants, this caused the district court to "ignore significant and uncontradicted testimony regarding diminution in value." Appellants refer to testimony that the flooding problem prevented appellants from using the lower level of the home, which therefore had no value to them. Lawrence

also testified that, without correcting the water problem, "I know we couldn't have sold it."

The district court did not ignore this testimony, but instead determined that it was not credible, explaining that appellants' investment in placing the property in a leak-proof condition showed that the property, even with a leaky basement, "obviously had a value in excess of $100,000, not zero." Appellants' testimony can be interpreted two ways. First, that the entire property had zero value. Second, that the lower level of the house could not be used by appellants and thus had zero value in its defective condition. The district court clearly considered—and rejected—the first. Even if the district court should have considered the second but did not, the evidence in that light does not establish the fair market value of the property. A house is not divisible. Even if it were divided in two, appellants would be deemed to have paid $77,500 for that half of the property, and given that it could be remediated and made relatively leak-proof for under $15,000, the district court was justified in concluding that its fair market value was not zero.

Appellants' argument confuses the property's fair market value with the property's subjective use value to them. Appellants failed to present evidence of the property's fair market value. To find damages, the district court needed to find that appellants were damaged in a certain amount. As the district court recognized, it is clear that water-intrusion problems are not good for the value of a house. But the district court found that appellants failed to prove by a preponderance of the evidence how much less the property was worth than the amount appellants paid for it, and based on the record, we conclude that this finding is not clearly erroneous.

b. Legal standard

Whether a district court used the correct measure of damages is a question of law. *Snyder*, 441 N.W.2d at 789. We review questions of law de novo. *Carlson v. Dep't of Employment & Econ. Dev.*, 747 N.W.2d 367, 371 (Minn. App. 2008).

The measure of damages for fraudulent representations inducing a contract is out-of-pocket loss. *Yost v. Millhouse*, 373 N.W.2d 826, 830 (Minn. App. 1985). Minnesota's out-of-pocket-loss rule contrasts with the benefit-of-the-bargain rule, which is followed by the majority of jurisdictions. *Id.* at 831. Out-of-pocket loss "is the difference between what the defrauded person paid and what he or she received." *Id.* at 830. Generally, this is the difference between the actual value of the property and the price paid for it, as well as other proximately caused damages, such as reasonable mitigation expenses. *Id.* at 830-31. "Where the case involves a fraudulent misrepresentation to a buyer of real estate, the measure of damages is the amount paid less the fair market value of the property." *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1977); *see also Nave v. Dovolos*, 395 N.W.2d 393, 398 n.1 (Minn. App. 1986) ("More precisely, in cases involving a fraudulent misrepresentation to a buyer of real estate, the measure of damages is the amount paid less the fair market value of the property.").

Appellants concede that the out-of-pocket-loss rule applies, but argue that water-damage repairs are reasonable and necessary mitigation expenses that may be recovered in this case. In *Lobe Enterprises*, we held that a plaintiff failed to prove loss by offering evidence of the cost of repairing a roof where the plaintiff failed to offer "evidence to show the actual value of the property in the condition received," noting that the cost of

repairs "includes cost factors which have no effect upon the market value of the building." *Lobe Enters. v. Dotsen*, 360 N.W.2d 371, 373 (Minn. App. 1985). We recently reiterated this principle: "In jurisdictions like Minnesota that follow the 'out-of-pocket' rule, if the property is worth what a party paid for it, then that party has suffered no damages. [R]epair costs alone are not sufficient to show damages for fraudulent misrepresentation in a real-estate transaction." *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. App. 2009) (citation omitted). Thus, appellants cannot recover repair costs, and were required to prove damages through evidence of the property's fair market value at the time of the transaction.

II. The district court did not err in denying appellants damages and attorney fees under the private-attorney-general statute for respondents' violation of the Consumer Fraud Act.

Determination of whether appellants' lawsuit benefited the public, as required for standing under the private-attorney-general statute as outlined in *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000), involves the interpretation and application of existing caselaw, and the appropriate standard of review is de novo. *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 329 (Minn. 2003).

The attorney general has broad statutory authority to enforce laws regarding unlawful business practices, including the Consumer Fraud Act. Minn. Stat. § 8.31, subds. 1, 3. Additionally, the private-attorney-general statute provides that "any person injured by a violation of [the Consumer Fraud Act] may bring a civil action and recover damages, together with costs and disbursements, including . . . reasonable attorney's fees." Minn. Stat. § 8.31, subd. 3a. The Minnesota Supreme Court has clarified that the

scope of a private citizen's claim under the private-attorney-general statute is limited by "the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws." *Nystrom*, 615 N.W.2d at 313. The supreme court held that "the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public." *Id.* at 314.

A cause of action does not benefit the public where it is based on "a single one-on-one transaction in which the fraudulent misrepresentation . . . was made only to [the injured party]." *Id.* But even if the group of injured persons is small, a successfully prosecuted claim under the private-attorney-general statute and the Consumer Fraud Act does benefit the public if the misrepresentation is presented to the public at large. *Collins*, 655 N.W.2d at 330.

It is doubtful that an unsuccessful prosecution of a fraudulent-misrepresentation claim can benefit the public, which is required in order to recover attorney fees under the private-attorney-general statute. *See id.* ("We hold that respondents' *successful* prosecution of their claims benefited the public and therefore respondents are entitled to reasonable attorney fees." (emphasis added)). It is difficult to see how appellants' unsuccessful lawsuit—in which no legal or equitable relief was granted—benefits the public.

Appellants argue that respondents "potentially defrauded a number of potential consumers," and that "a number of other consumers will be potentially defrauded in the future." The district court, in its thoughtful and well-reasoned opinion, found that

> the fraud was perpetrated only after [respondents] did not disclose, in writing, the 2001 incident. There is no telling whether [respondents] would have disclosed the incident in writing to another buyer. Further, there is no evidence that [respondents] were asked by anyone but [appellants] regarding the 2004 incident, and there is no evidence that [respondents] told anyone but [appellants] about the remedial measures supposedly undertaken after the 2004 incident. Finally, the fact that [respondents] would like to buy more homes to fix up and sell does not mean that [respondents] will perpetrate fraud in the future.

We agree. Appellants are simply unable to point to specific evidence in the record to negate these findings. Appellants emphasize a real-estate listing, which merely gives a brief overview of the property and does not discuss water-invasion incidents or the structural integrity of the basement. This evidence only shows that respondents' house was listed for sale and that persons other than appellants could have considered purchasing it. Appellants also emphasize the disclosure statement, which misrepresents the extent of the property's history of water problems. The disclosure statement is signed by appellants and respondents, as buyer and seller, and there is no evidence that a similarly fraudulent disclosure was presented to anyone other than appellants and appellants' real-estate agent. Because appellants did not show that the property was fraudulently presented to the public at large, appellants have failed to demonstrate that the cause of action benefited the public.

Even assuming that respondents made the same misrepresentation to "a number of" other people that they made to appellants, this does not meet *Nystrom*'s public-benefit standard. In *Collins*, the supreme court found that the Minnesota School of Business presented its program to the public at large, but the court stressed that the school made

misrepresentations through a television advertisement, offered its programs to the general public, enrolled over 1,200 students, and provided its students with a misleading "career opportunities" sheet. 655 N.W.2d at 330. This is an important distinction: in *Collins*, many members of the public at large could have been consumers; in this case, the eventual buyer of the house was necessarily going to be the sole consumer. The case before us is closer to *Nystrom*, in which the supreme court found that there was no public benefit where the tortfeasor fraudulently induced the injured party to nullify the contract of sale of a restaurant and sold the same restaurant to another purchaser later the same day. 615 N.W.2d at 306-07, 314. Further, the Eighth Circuit has persuasively explained that "[t]he class of plaintiffs under the private attorney general statute would be limitless if we assumed that one individual's negative experience with a [tortfeasor] was necessarily duplicated for every other individual and on that basis treated personal claims as benefitting the public," since this "might well render nearly every private suit alleging fraud a public benefit case." *Davis v. U.S. Bank Corp.*, 383 F.3d 761, 768 (8th Cir. 2004). The sale of a house is a quintessentially private transaction, and holding that appellants' action benefited the public merely because respondents could have sold the property to someone other than appellants would effectively negate the public-benefit requirement attached to the private-attorney-general statute. Because there was no public benefit to appellants' suit, the district court did not err in denying appellants attorney fees.

Appellants are also not entitled to damages for respondents' violation of the Consumer Fraud Act. The only remedy available directly under the Consumer Fraud

Act, Minn. Stat. §§ 325F.68-.70 (2008), is an injunction in a civil action brought by the attorney general or a county attorney. Minn. Stat. § 325F.70, subd. 1; *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 389 n.3 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004). Damages are available under the private-attorney-general statute if the plaintiff demonstrates that the action benefits the public as a whole. *Duxbury*, 681 N.W.2d at 388 n.3. Because there is no public interest at stake, damages for a consumer-fraud action are also not available.

Appellants argue that damages under the Consumer Fraud Act are broader than the out-of-pocket damages which are recoverable in an action for common-law fraud. Specifically, appellants argue that consequential and mitigation damages are included. Appellants incorrectly assume that damages are available directly under the Consumer Fraud Act. Because appellants' lawsuit did not benefit the public, appellants may not recover damages through the private-attorney-general statute for respondents' violation of the Consumer Fraud Act. We therefore need not decide whether the measure of damages potentially available in a consumer-fraud claim based on a real-estate transaction goes beyond out-of-pocket loss. *See Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 383 (Minn. App. 2009) (finding it unnecessary to decide an issue because resolving the issue would leave the court's decision unchanged).

III. The district court did not err in holding that appellants were not entitled to damages as a result of respondents' violation of the seller's disclosure statute.

Questions of law are subject to de novo review. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001). "Statutory construction is a question of law, fully reviewable

under a de novo standard when applied to undisputed facts." *Lundberg v. Jeep Corp.*, 582 N.W.2d 268, 270 (Minn. App. 1998). Whether a district court applied the correct measure of damages is a question of law. *Snyder*, 441 N.W.2d at 789.

The seller's disclosure statute, Minn. Stat. §§ 513.52-.60 (2008), requires a seller of residential real property to make a written disclosure to the prospective buyer, disclosing all material facts that the seller is aware of. Minn. Stat. § 513.55, subd. 1. A seller who fails to make this disclosure is liable to the prospective buyer, and the injured person may "recover damages and receive other equitable relief as determined by the court." Minn. Stat. § 513.57, subd. 2. "Nothing in sections 513.52 to 513.60 precludes liability for an action based on fraud, negligent misrepresentation, or other actions allowed by law." *Id.*, subd. 3. The district court found that respondents violated section 513.55's disclosure requirement, but that appellants failed to prove out-of-pocket loss with sufficient specificity.

Appellants' main argument is one of statutory construction. First, a seller of residential real estate is affirmatively required to make disclosures. Second, damages may be recovered where the plaintiff does not prove the other elements of fraud. Third, "nothing in the statute indicates that those damages must be the same as the damages available under common law fraud theories." Fourth, "the statute makes it clear that a claim for liability for damages is in addition to a claim based on other legal theories, including the claim for damages for common law fraud." Applying the rule of statutory construction that we read a statute as a whole and give effect to all of its provisions, appellants argue that using the same measure of damages for statutory nondisclosure

would make section 513.57, subdivision 3 (expressly *not* precluding recovery for actions based on fraud, misrepresentation, or other theories) "extraneous."

Appellants' argument is not persuasive. The seller's disclosure statute creates liability for failure to disclose certain facts. This is different than fraud insofar as different transactions or occurrences may create liability; the statute creates a separate cause of action. Using the same measure of damages under this statute as in a fraud action does not fail to give effect to all provisions of the statute. Minn. Stat. § 513.57, subd. 3 merely states that the seller's disclosure statute is not eliminating causes of action such as fraud and negligent misrepresentation. In a case in which a single transaction creates liability, it is true that a plaintiff will not recover separate damages under this statute as opposed to a fraud action. But because the elements of the offenses are not the same, some transactions or occurrences will constitute fraud but not statutory failure to disclose—*those* are the cases in which subdivision 3 has an important effect.

It is most logical to use the same measure of damages in a real-estate transaction where injury is caused by the seller's failure to disclose, as required by the seller's disclosure statute, as in an action arising out of a real-estate transaction where the injury is caused by the seller's fraud or misrepresentation. "Words and phrases are to be construed according to their plain and ordinary meaning." *Minn. Equal Access Network Services v. Burlington N. & Santa Fe R.R. Co.*, 646 N.W.2d 911, 914 (Minn. App. 2002). "Generally, statutes are presumed to be consistent with the common law and will not be construed to modify or alter the common law unless they expressly so provide." *Id.* Common-law fraud allows an injured party to recover out-of-pocket loss, which in the

case of real-estate transactions consists of the difference between the price paid and the fair market value at the time of the transaction. Essentially, this rule allows the injured party a full recovery in tort for damages actually caused by the fraud—the injured party paid too much because of the fraud, and therefore receives the difference between what he paid and what he should have paid had there been no fraud. Given no textual indication that the legislature intended statutory consumer-fraud "damages" to be anything different than common-law-fraud "damages," we are not convinced that we should create a different measure of damages for statutory violations.

IV. The district court did not abuse its discretion in determining that respondents were the prevailing party.

The district court has discretion to determine who the prevailing party is for purposes of awarding statutory fees and costs under Minn. Stat. §§ 549.02, .04 (2008). *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). The district court abuses its discretion if it acts in an arbitrary and capricious manner, if its decision is against logic and the facts on the record, or if it based its ruling on an erroneous view of the law. *Id.* "A plaintiff who succeeds on the merits but recovers no damages may not be considered a prevailing party." *Id.*

Here, the district court found that appellants failed to prove damages at trial. Because appellants were not entitled to damages, the district court did not abuse its discretion in finding respondents to be the prevailing party.

Affirmed.