IN THE UTAH COURT OF APPEALS

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David Anderson and Kristine Anderson, Plaintiffs and Appellants, v. Matthew Kriser, Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080989-CA F I L E D (November 5, 2009) 2009 UT App 319

Fourth District, Provo Department, 070401158
The Honorable Samuel D. McVey

Attorneys: Stephen Quesenberry and Charles L. Perschon, Provo, for Appellants
Robert L. Jeffs and Randall L. Jeffs, Provo, for Appellee

Before Judges Orme, Thorne, and McHugh.

THORNE, Judge:

David and Kristine Anderson appeal from the district court's order granting summary judgment in favor of Matthew Kriser. The summary judgment order dismissed the Andersons' fraudulent concealment claim because the Andersons failed to provide evidence that Kriser knew about collapsible soils on a bare residential lot (the property) sold by Kriser to the Andersons.[1] We affirm.

"An appellate court reviews a trial court's legal conclusions and ultimate grant or denial of summary judgment for correctness and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600 (internal quotation marks omitted). "[O]nce the moving party challenges an

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[1]Although there is some dispute as to whether Kriser sold the property to the Andersons as an individual developer or as an agent for Country Living Development, LLC, we treat Kriser as the seller and developer for purposes of this appeal.

element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact." Waddoups v. Amalgamated Sugar Co., 2002 UT 69, ¶ 31, 54 P.3d 1054.

The Andersons base their fraudulent concealment claim on Kriser's alleged knowledge and nondisclosure of a 1997 soils report (the report) that revealed collapsible soils on the property. "In order to prevail on a claim of fraudulent concealment, a plaintiff must prove (1) that the nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate." Yazd v. Woodside Homes Corp., 2006 UT 47, ¶ 10, 143 P.3d 283 (internal quotation marks omitted). The district court granted summary judgment in favor of Kriser, concluding that the Andersons failed to provide evidence that Kriser knew about the report and the collapsible soils. On appeal, the Andersons argue that (1) there is evidence that Kriser had actual knowledge of the contents of the report and (2) knowledge of the presence of the collapsible soils was imputed to him as a builder-developer.

We disagree that the Andersons presented evidence that Kriser actually knew the contents of the report. In support of his summary judgment motion, Kriser provided affidavit evidence that at the time of the sale he did not know about any soils testing that addressed the property's suitability for housing construction and, in particular, had not seen the report. In opposition, the Andersons argued that Kriser's admitted knowledge of his company's general practice of obtaining soils testing before development of a subdivision is evidence that he actually knew about the report and its contents. The Andersons also argued that, after the lawsuit had been filed, Kriser told them that he had seen the report.

This evidence is insufficient to prevent summary judgment on the issue of Kriser's actual knowledge of the contents of the report. Even assuming that Kriser's knowledge of a general practice of obtaining soils testing raises a factual question as to whether he knew of the report's existence, it does not follow that Kriser had actual knowledge of the contents of the report. Indeed, the Andersons asserted below--without supporting authority--only that Kriser's alleged knowledge of the existence of the report placed him on notice of its contents.[2] Such a

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[2]We note that there is nothing in the record to suggest that a reasonable person might suspect that a soils report on the (continued...)

theory of knowledge will not support a fraudulent concealment claim. See id. ("[T]o prevail on a claim of fraudulent concealment, a plaintiff must prove . . . that the nondisclosed information is known to the party failing to disclose . . . ." (emphasis added)). Additionally, Kriser's knowledge of the report and its contents after the Andersons initiated this lawsuit does nothing to establish Kriser's knowledge at the time of the sale because the report was attached to the Andersons' complaint as an exhibit. Under these circumstances, we agree with the district court that the Andersons have not established a material question of fact as to Kriser's actual knowledge of collapsible soils on the property.

The Andersons also argue that Kriser is a builder-developer to whom knowledge of the collapsible soils was imputed as a matter of law under Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283. See generally id. ¶¶ 18-26 (imposing certain legal duties on builder-contractors, with resulting imputed knowledge). However, it is undisputed in this case that Kriser did not construct the Andersons' home and, thus, was not in a builder-contractor relationship with the Andersons under Yazd at the time the Andersons purchased the property. It is clear from Smith v. Frandsen, 2004 UT 55, 94 P.3d 919, that ultimate responsibility for the settling and other damage to the Andersons' house lies with the builder-contractor who actually constructed it. See id. ¶¶ 14-27 (cutting off liability of developer to future homeowners upon purchase of lot by builder-contractor, stating that "as a matter of law, a builder of ordinary prudence would have discovered the insufficient compaction"); see also Yazd, 2006 UT 47, ¶ 21 ("Our reasons for [cutting off developer liability in Smith] had as much to do with the conclusions that we reached about the scope of knowledge acquired and the responsibility assumed by the Smiths' contractor-builder as with the issue of whether the developer knew of the poor soil conditions and whether that knowledge was material."). Because Kriser did not construct the Andersons' home, Yazd neither imposes a duty nor imputes any knowledge to Kriser. Accordingly, Yazd does not

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[2](...continued)
property would contain information indicating that the property was unsuitable for residential development. To the contrary, Kriser's deposition testimony indicates that land from which the property was ultimately subdivided was surrounded by existing housing at the time Kriser's company purchased it.

require us to disturb the district court's summary judgment ruling.[3]

Because the Andersons have not demonstrated a factual dispute about Kriser's actual knowledge of the collapsible soils, nor have they properly raised an argument of legal imputation of such knowledge, we decline to disturb the district court's order entering summary judgment in favor of Kriser. Affirmed.

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William A. Thorne Jr., Judge

WE CONCUR:

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Gregory K. Orme, Judge

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Carolyn B. McHugh, Judge

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[3]The Andersons argue for the first time in their reply brief that Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987), and Smith v. Frandsen, 2004 UT 55, 94 P.3d 919, impose upon developers "'a duty to exercise reasonable care to [e]nsure that the subdivided lots are suitable for construction of some type of ordinary, average dwelling house,'" Smith, 2004 UT 55, ¶ 16 (quoting Loveland, 746 P.2d at 769). However, arguments not raised in an appellant's initial brief are waived, and we do not consider this argument. See Allen v. Friel, 2008 UT 56, ¶ 8, 194 P.3d 903 ("It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court." (internal quotation marks omitted)).