This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1178

Cornerstone Home Builders, Inc., et al.,
Respondents,

vs.

Guyers Development, LLC, et al.,
Appellants.

Filed April 20, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-07-11965

Thomas P. Malone, Karen K. Kurth, Susan E. Tegt, Barna, Guzy & Steffen, Ltd., Minneapolis, MN 55433 (for respondents)

David K. Nightingale, Mark E. Greene, Sarah L. Krans, Bernick, Lifson, Greenstein, Greene & Liszt, P.A., Minneapolis, MN 55416 (for appellants)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Crippen, Judge.[*]

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

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

WORKE, Judge

Appellants challenge the district court's judgment in favor of respondents, arguing that the court erred in: (1) concluding that appellants committed fraud; (2) concluding that appellants committed negligent misrepresentation; (3) determining damages; (4) piercing the corporate veil; and (5) dismissing appellants' recoupment defense. We affirm.

FACTS

In 2005, appellant Alan J. Roers and his business partner Mark Litherland[1] incorporated a single-purpose entity, appellant Guyers Development, LLC (appellants). Ramsey Town Center LLC (RTC) approached appellants about marketing the residential lots in the 8th and 10th additions of the proposed Ramsey Town Center project to local builders. RTC suggested that each of the 56 residential lots could be sold to developers for $73,000 with the anticipated resale value to builders of $80,000. Appellants decided to purchase all of the residential lots directly from RTC and resell them, instead of simply marketing the lots for a fee as initially proposed.

RTC and appellants entered into a purchase agreement (RTC/Guyers purchase agreement) in March 2005 for 56 lots priced at $73,000 each, with the potential to sell 11 additional lots that had not yet been platted. The RTC/Guyers purchase agreement provided that the sale was contingent on appellants finding a second buyer for each lot, and that the closing would be contemporaneous with the subsequent closings of the resale

[1] Litherland was not named individually as a party to this lawsuit.

of the lots. Appellants were not required to pay any earnest money up front or make any financial commitment until they had secured a second buyer.

Under the master agreement RTC entered into with the city of Ramsey, RTC was required to escrow adequate security interests to ensure that the development would be completed. Accordingly, the RTC/Guyers purchase agreement also contained an escrow provision stating that RTC and appellants would escrow $15,000 from the sale of each lot. The city, RTC, and appellants entered into the individual escrow agreements for each addition, requiring RTC to post sums provided in the master agreement before the city would release money to fund the infrastructure improvements. The escrow agreements contained an attached project schedule which outlined the anticipated duration and completion dates for the infrastructure improvements. The improvements were to begin on September 23 and the projected completion dates were November 25 for the 8th addition and December 22 for the 10th addition.

Between March and June of 2005, appellants and respondent-builders Cornerstone Home Builders, Inc., Monarch Homes Inc., Gilmore Construction, Inc., New Dimension Homes Inc., and Purmort Homes Inc. entered into purchase agreements for 56 lots at $80,000 per lot ("respondents' purchase agreements").[2] Appellants were responsible for the completion of the infrastructure improvements under the terms of respondents' purchase agreements. At no point were respondents aware that appellants intended to purchase the properties from RTC and contemporaneously resell them.

[2] The remaining 10 lots were purchased at the same price by Sorteberg Homes, Inc., which was initially a party along with respondents but was dismissed without prejudice during the trial for failing to appear.

The closings of the RTC/Guyers purchase agreement and respondents' purchase agreements occurred on September 23 and 26, 2005. When respondents arrived at the closings, they noticed that the infrastructure improvements had not yet begun. Appellants assured respondents that the infrastructure improvements would be completed in three weeks. These assurances intimated that the completion date of the infrastructure improvements would be October 13, despite the project schedule projecting otherwise. In addition to the standard mortgages signed at closing, appellants also granted respondents special fee mortgages to cover the trunk and lateral charges due at the closing of each lot under respondents' purchase agreements. The special fee mortgages were intended to delay respondents' payment of the trunk and lateral charges until respondents received building permits.

The infrastructure improvements had not begun prior to the closings because the requisite security had not yet been deposited into the escrow accounts. RTC deposited $15,000 from the sale of each lot and obtained a bank loan to cover the remaining amount required under the escrow agreements. The city approved final construction plans in late September. The infrastructure improvements began incrementally and behind the project schedule, greatly exceeding the three-week estimation guaranteed by appellants.

In the spring of 2006, the city grew suspicious of the transactions between RTC and the project excavator and began withholding funds from the escrow. As a result, contractors working on the infrastructure improvement were not paid, stopped working, and foreclosed on their mechanics' liens. With the lots rendered useless due to the incomplete infrastructure, respondents sued appellants for breach of contract, negligent misrepresentation, fraud, and also brought a claim to pierce the corporate veil to hold Roers personally liable for damages.

Following a court trial, the district court dismissed respondents' breach-of-contract claim, but ruled in favor of respondents on the negligent-misrepresentation and fraud claims. The court found that, with winter approaching and the window for construction closing, appellants' assurances that the infrastructure improvements would be completed within three weeks induced respondents to close. The court awarded out-of-pocket damages in the amount of $15,000 per lot—the money earmarked for infrastructure improvements that were never completed. The court granted respondents' motion to pierce the corporate veil, holding Roers personally responsible for $840,000 in damages. The court also dismissed appellants' affirmative defense of recoupment. This appeal follows.

D E C I S I O N

In a case tried without a jury, we assess whether the district court erred in its findings of fact and conclusions of law. *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Findings of fact will be upheld unless clearly erroneous and are viewed in the light most favorable to the district court's determination. Minn. R. Civ. P. 52.01; *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (noting that an application of rule 52.01 should be made in the light most favorable to the district court's judgment). Questions of law are reviewed de novo. *Great Lakes Gas Transmission L.P. v. Comm'r of Revenue*, 638 N.W.2d 435, 438 (Minn. 2002).

Fraud

A successful claim for fraud requires: (1) a false representation of a past or existing material fact susceptible to knowledge; (2) made with knowledge of the falsity or without knowing whether the representation was true or false; (3) with intent to induce another to act in reliance of the misrepresentation; (4) reasonable reliance caused by the misrepresentation; and (5) damages. *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007). "[T]he standard of proof in all fraud cases is the preponderance of the evidence standard." *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993). Appellants challenge only the district court's conclusions pertaining to the first and fourth elements.

False Representation

Appellants challenge whether the assurances that the infrastructure improvements would be completed within three weeks qualify as actionable false misrepresentations of *past or existing* material facts as a matter of law. The Minnesota Supreme Court has stated that

> [i]t is a well-settled rule that a representation or expectation as to future acts is not a sufficient basis to support an action for fraud merely because the represented act or event did not take place. It is true that a misrepresentation of a present intention could amount to fraud. However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made.

Vandeputte v. Soderholm, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). The supreme court revisited this principle in *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359 (Minn. 2009). In *Valspar*, the alleged misrepresentation was Valspar's assurance that it could fix inadequacies in its paint products cited as a concern by Gaylord's during product testing. 764 N.W.2d at 363. Based on this assurance, the parties entered into a five-year contract for Valspar to be the exclusive provider of paint for Gaylord's truck-bed lids. *Id.* Product-quality problems persisted throughout the first year of the contract, leading Gaylord's to finally purchase paint through another supplier. *Id.* Valspar sued Gaylord's for breach of contract, prompting Gaylord's to assert fraud as a counterclaim. *Id.* at 364. The supreme court concluded that Gaylord's fraud claim failed, in part, because Gaylord's did not demonstrate a misrepresentation concerning a past or existing material fact. *Id.* at 368.

The assurances at issue in this case differ from the *Valspar* assurance because the district court found that when appellants assured respondents that the infrastructure improvements would be completed within three weeks, appellants had no intention to perform this promise. Indeed, it would have been impossible for appellants to ensure that the infrastructure improvements were completed within this timeframe. The project schedule provided that the improvements would not be completed until November 25 for the 8th addition and December 22 for the 10th addition—timeframes that targeted the completion of the infrastructure improvements at two and three *months* from the closing date, not weeks. Although appellants' misrepresentations did not implicate past or existing material facts, appellants had no intention to complete the infrastructure improvements within three weeks of the closing. Thus, these assurances were actionable present intentions. The district court therefore did not err as a matter of law in concluding that respondents demonstrated the first fraud-claim element.

Reliance

Appellants argue that the district court erred in concluding that the respondents reasonably relied on the misrepresentation that the improvements would be completed within three weeks. In a fraud claim, reliance is measured in the context of the aggrieved party's intelligence, experience, and ability to investigate the facts underpinning the alleged misrepresentation. *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976); *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 118-19, 149 N.W.2d 37, 39 (1967). Appellants argue that respondents failed to demonstrate a reasonable reliance and, even if the reliance was reasonable, respondents were nevertheless compelled to close on the purchase agreement when they arrived at the closing and the misrepresentations would have been moot.

Appellants claim that respondents' reliance was unreasonable because it was contrary to the language of respondents' purchase agreements; no schedule for the infrastructure improvements was provided therein, whereas the agreements stated that the properties were being sold "as is" and required any and all modifications to be in writing. Appellants contend that the three-week assurances constituted oral representations in complete contradiction to the written language of respondents' purchase agreements, and such reliance is unjustifiable. *See Boyd v. DeGardner Realty & Constr.*, 390 N.W.2d 902, 904 (Minn. App. 1986) (stating that reliance on an oral representation that contradicts a written contract is unjustifiable as a matter of law) *review denied* (Minn. Sept. 24, 1986).

But appellants fail to illustrate explicit contractual language which would be contradicted by the oral assertion that the infrastructure improvements would be completed within three weeks. Conversely, respondents' purchase agreements provide that "after [c]losing, [appellants] shall cause the [p]roperty to be improved, at [appellants'] expense, not to exceed the escrow amount of $15,000 . . . . The obligations of [appellants] under this [s]ection [ ] shall survive after [c]losing." An inquiry and corresponding representation as to the targeted completion of the infrastructure improvements flows naturally from this contractual language. As appellants fail to address the relation between this contractual language and their misrepresentations of the improvement schedule, their argument is unconvincing.

Appellants' second argument is equally unavailing. Appellants claim that longstanding caselaw disallows a party from relying on a representation that had not yet been made when he acted. *See Rien v. Cooper*, 211 Minn. 517, 527, 1 N.W.2d 847, 853 (1942) (stating that "[a] party cannot rely on a representation which had not been made when he acted"). Because respondents signed purchase agreements and arrived at the closing ready to complete the transactions, appellants contend that they were obligated to close on that date and had effectively "acted" prior to hearing the three-week assurances.

As respondents correctly argue, however, the notion that a party is required to close on a real-estate transaction by virtue of signing a purchase agreement is contrary to standard real-estate precepts. Respondents had no obligation to close on the transactions solely by arriving at the closing; respondents could have simply forfeited the earnest money deposited in conjunction with signing the purchase agreements if they believed that the infrastructure improvements would be significantly delayed. The district court did not err in determining that respondents reasonably relied on appellants' representation. Accordingly, the district court did not err in concluding that respondents successfully demonstrated a claim for fraud.

Negligent Misrepresentation

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). Appellants challenge only the district court's conclusion that a duty was owed to respondents. Whether a duty of care exists is a conclusion of law reviewed de novo. *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995), *review denied* (Minn. July 20, 1995).

Appellants rely on our decision in *Safeco* to support their contention that they did not owe a duty of reasonable care to respondents. In *Safeco*, we noted that

> [i]t 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. We further concluded that no duty was owed between "sophisticated equals negotiating a commercial transaction." *Id.* at 872. Because this was a commercial transaction between sophisticated equals, appellants argue that the district court erred by according a duty of reasonable care to appellants.

This argument is unconvincing for two reasons. First, the parties were not equals in negotiating this transaction. Respondents had no knowledge of appellants' purchase agreement with RTC, much less the escrow agreements entered into by appellants, RTC, and the city. Without knowledge of the project schedule attached to the escrow agreements, respondents were left to rely solely on appellants' assertions regarding the anticipated completion of the infrastructure improvements.

Second, *Safeco* still "imposes a duty on parties providing information for the guidance of others in the course of business or where there is a pecuniary interest." *Id.* at 873. Appellants unquestionably possessed a pecuniary interest in the transaction—they stood to profit $7,000 from each lot sold. As such, appellants had a duty to provide guidance in this transaction due to their undeniable pecuniary interest. Accordingly, the district court did not err in according a duty of reasonable care to appellants in providing information to respondents.

Damages

Damage awards are reviewed for abuse of discretion. *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 407 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001). "Speculative, remote, or conjectural damages are not recoverable at law." *Lassen* *v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994), *review denied* (Minn. June 29, 1994).

Minnesota recognizes the "out-of-pocket" rule as the proper measure of damages for misrepresentation. *Lobe Enters. v. Dotsen*, 360 N.W.2d 371, 373 (Minn. App. 1985). "Damages in an action for false representation and deceit are the natural and proximate loss sustained by the party because of reliance thereon." *Id.* at 372 (quotation omitted). The rule generally assumes that the plaintiff received a value less than what was anticipated or paid for, and the loss is calculated by the difference between the value paid and the value received. *Autrey v. Trkla*, 350 N.W.2d 409, 412 (Minn. App. 1984). A review of an application of the out-of-pocket rule must be construed in light of the facts then under consideration. *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 201, 235 N.W.2d 831, 835 (1975).

The district court's damage award was based on respondents purchasing property that was "worth less than it would have been worth had [appellants] followed through on their statements." The court determined that the difference between the $80,000 respondents paid per lot and the value of the lots received without any infrastructure improvements was $15,000—the same amount escrowed for each lot in order to secure completion of the improvements. Accordingly, the court calculated $840,000 in damages ($15,000 multiplied by the 56 lots sold to respondents).

Appellants first argue that *Lobe* isn't applicable because the infrastructure improvements were technically "repair costs," which were expressly excluded by *Lobe*. *See* 360 N.W.2d at 373. *Lobe* involved a fraud claim brought by a buyer of an apartment complex after installing a new roof on the building despite the seller's misrepresentation that the roof was recently replaced. *Id.* at 372. The principal difference between the costs at issue in *Lobe* and the damages awarded to respondents here is that there were never any repairs made—the infrastructure improvements remain incomplete. Although the record reflects that respondents were able to build a few homes, the development as a whole was rendered useless due to the uncompleted infrastructure improvements. Accordingly, any attempt to classify these damages as repair costs is unconvincing.

Appellants also challenge the assessment of damages at $15,000 per lot, arguing that respondents should have presented expert testimony regarding the actual value of the lots without the infrastructure improvements. While expert testimony may have been helpful, the district court did not abuse its discretion by determining damages without it. The district court rationally calculated the damages caused by appellants' misrepresentations about the infrastructure improvements never completed as the escrow amount. Thus, the district court did not abuse its discretion in awarding damages.

Piercing the Corporate Veil

Piercing the corporate veil is an equitable remedy. *Roepke v. W. Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn. 1981). A court may pierce the corporate veil to hold a party liable for the acts of a corporate entity if the entity is used for a fraudulent purpose or the party is the alter ego of the entity. *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509, 512 (Minn. 1979); Minn. Stat. § 322B.303, subd. 2 (2008) (stating that veil-piercing also applies to limited liability companies). "When using the alter ego theory to pierce the corporate veil, courts look to the reality and not form, with how the corporation operated and the individual defendant's relationship to that operation." *Hoyt Props.*, 736 N.W.2d at 318 (quotation omitted). Piercing the corporate veil is appropriate when: (1) the shareholder disregards the corporate entity as a mere "instrumentality" or "alter ego," and (2) a failure to impose personal liability would result in a fundamental unfairness to the other party. *Victoria Elevator*, 283 N.W.2d at 512; *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997) (interpreting *Victoria Elevator* as requiring "[a] two-prong test to determine whether a shareholder can be liable for corporate obligations"). "Granting equitable relief is within the sound discretion of the [district] court. Only a clear abuse of that discretion will result in reversal." *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

Disregard for the Corporate Entity

Whether a corporate entity is a mere "instrumentality" or "alter ego" involves a balancing test of several considerations, including:

> insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the corporation at time of transaction in question, siphoning of funds by a dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings.

Victoria Elevator, 283 N.W.2d at 512. Here, the district court concluded that Guyers was an alter ego of Roers, specifically considering the insufficient capitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency at the time of the transactions, and the existence of the corporation merely as a facade for individual dealings. Because the business was never profitable, there were no dividends to pay and this factor should not be weighed either in favor of or against piercing the veil. Our review is therefore confined to the remaining four factors.

Insufficient Capitalization

At the time of incorporation, Roers and Litherland contributed only $100 each in start-up capital. Moreover, the company was a single-purpose entity intended to be used to facilitate a multi-million-dollar real-estate transaction. Only when appellants needed to issue the special fee mortgages to respondents in order to facilitate the closings did Roers allege to contribute more capital: a $108,000 loan that appeared on the company's balance sheet but was never actually proved at trial.

Appellants claim that a small initial contribution by shareholders may constitute sufficient capitalization if the company's total equity matches the company's liabilities. Appellants argue that the company's balance sheet demonstrated solvency through the company's accounts receivable derived from respondents' special fee mortgages. This argument is misleading, however.

Appellants generated $462,000 in gross profits through the sale of the lots, but effectively loaned $521,974.64 to respondents through the special fee mortgages. Two of the special fee mortgages were granted by Crestand Mortgage, another business owned by Roers, totaling $212,055.29. According to appellants' year-end balance sheet as of December 31, 2005, appellants maintained total assets in the amount of $575,100.51 to match total liabilities of the same amount. Of these assets, $521,974.64 was tied up in accounts receivable. Of these accounts receivable, only $309,919.35 was allocated to the special fee mortgages issued to respondents. The remaining $212,055.29 of accounts receivable is titled an "Acquisition," which Roers admitted at trial represented the special fee mortgages Cresland issued to New Dimension and Purmort. Assets belonging to another company, regardless of whether Roers owns the other company, cannot be included on appellants' balance sheet. Excluding the improper inclusion of Crestland's accounts receivable, appellants only maintained true accounts receivable in the amount of $309,919.35 and total assets of $363,045.22 compared to total liabilities of $575,100.51. This represents a *grossly* undercapitalized operation, and the district court did not clearly err by weighing this factor in favor of piercing the corporate veil.

Failure to Observe Corporate Formalities

Appellants produced no business plan, maintained minimal financial records, and commingled corporate funds with another entity. Additionally, appellants transferred the property titles from RTC to respondents directly, thereby avoiding paying real-estate taxes on a multi-million dollar transaction. There was also no record maintained of the purported $108,000 loan made by Roers to the company. The district court did not err in determining that this factor weighs in favor of piercing the corporate veil.

Insolvency at the Time of the Transaction

Appellants argue that because the district court found that they received gross profits of $462,000 on the day of the closing, they could not have been insolvent at the time of the transaction. But appellants conveniently ignore that the company issued $521,974 in special fee mortgages to respondents in order to expedite the closing, which required an unsubstantiated individual contribution from Roers as well as mortgages granted by Cresland. Due to the woeful lack of start-up capital and no attempt to ever obtain any outside financing, appellants' grant of the mortgages left the company insolvent at the time of the transaction, and the district court did not err in weighing this factor in favor of piercing the corporate veil.

Facade for Individual Dealings

Roers admitted that Guyers was formed for the singular purpose of the Ramsey Town Center project. Neither Roers nor Litherland had any experience in property development. Guyers never hired any employees. Since the Ramsey Town Center transactions, Guyers has not undertaken any other development projects. Guyers never obtained any financing in order to fund the transactions. Moreover, the closing date was specified to be contemporaneous with appellants' sale of the lots to other builders at the stipulated price of $80,000 per lot, and appellants' obligation to purchase the lots did not even vest until a second buyer was secured for each lot at the $80,000 price point. Essentially, appellants had zero financial risk and the opportunity to earn $7,000 profit on up-to 67 lots—a potential gross margin of $469,000. The district court considered Guyers to be nothing more than a "pass through" operation, and did not err in its conclusion that the company was merely a facade for Roers's individual dealings. Accordingly, four factors demonstrate Roers disregard for the corporate entity, and the district court did not err in concluding that the first prong necessary to pierce the corporate veil was satisfied.

Fundamental Unfairness

The second prong of the test requires a showing that piercing of the corporate veil is necessary to avoid injustice or fundamental unfairness. *Victoria Elevator*, 283 N.W.2d at 512. "[P]roof of strict common law fraud is not required, but [ ] evidence that the corporate entity has been operated as a constructive fraud or in an unjust manner must be presented." *Groves v. Dakota Printing Servs., Inc.*, 371 N.W.2d 59, 62-63 (Minn. App. 1985) (quotation omitted). The district court found that appellants' assurances that the infrastructure improvements would be completed within three weeks of the closing constituted fraud and negligent misrepresentation. Thus, the district court did not err in finding that fundamental unfairness was present. Because the district court did not err in determining that respondents proved both *Victoria Elevator* factors, the district court did not abuse its discretion in granting respondents' motion to pierce the corporate veil and hold Roers personally liable.

Recoupment

The final issue raised by appellants is whether the district court erred in dismissing appellants' claim of recoupment due to respondents' breach of the special fee mortgages issued at closing. Recoupment is the right of a defendant in a contract action to plead and prove as a defense, separate and distinct from other defenses, that the plaintiff breached a contract resulting in damages incurred by the defendant which should reduce or eliminate the plaintiff's recovery. *Household Fin. Corp. v. Pugh*, 288 N.W.2d 701, 704 (Minn. 1980). Recoupment is properly pleaded as a defense. *Hoppman v. Persha*, 190 Minn. 480, 482, 252 N.W. 229, 230 (1934). "An affirmative defense must be pleaded specifically and failure to do so constitutes a waiver of the defense." *Bradley v. First Nat'l Bank of Walker, N.A.*, 711 N.W.2d 121, 128 (Minn. App. 2006). Appellants never pleaded recoupment as a defense, and never moved to amend its pleadings; thus, appellants effectively waived the affirmative defense of recoupment. This court will not consider matters not properly raised or argued before the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed.