STATE OF MINNESOTA
IN COURT OF APPEALS
A11-614

Alan J. Roers, et al.,
Respondents,

vs.

Michael B. Pierce,
Appellant,

Robert P. Hare, et al.,
Defendants.

Filed April 9, 2012
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-08-15730

Lee A. Lutton, III, Kay N. Hunt, Lomen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for respondents)

Patrick D. Reilly, Erstad & Riemer, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Cleary, Judge.

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

PETERSON, Judge

In this home-sale dispute, appellant-seller argues that the district court (1) erred in ruling that appellant's violation of Minn. Stat. § 513.55 (2010), which addresses the

disclosure a home seller must execute, constituted an intentional tort and required appellant to pay 100% of the damages, despite being found only 13% at fault; and (2) should have granted appellant judgment as a matter of law when respondents failed to present adequate proof of damages. We affirm.

FACTS

In 1999, appellant Michael B. Pierce bought a house for $2.1 million. In June 2001, the house was damaged by hail, including damage to the roof, and appellant's homeowner's-insurance carrier paid appellant $90,971.41. In September 2005, appellant listed the house for sale with real estate agent Robert Hare. Hare explained to appellant that a seller is required to fill out a disclosure statement about the house's condition. Hare provided appellant with the disclosure form and instructed him that it is "better to over disclose than under disclose." Before the listing with Hare expired, appellant told Hare that he did not want to sell the house and took it off the market.

After the house was taken off the market, a window in a second-floor apartment and the dining-room windows were replaced. On two occasions before the windows were replaced, the woman who cleaned appellant's house every other week saw rain coming in through patio doors in the dining room and water puddles on the dining-room floor. Appellant's handyman told the cleaning woman that the windows were replaced due to water damage and intrusion. The cleaning woman noticed staining at the bottom of curtains outside the master bedroom and also saw mold on a wall in the master bathroom. After she told appellant about the mold, she noticed that the wall was patched where the mold had been.

In July 2006, appellant again listed the property for sale with Hare and filled out a second disclosure statement. In response to the question whether "there had been any damage by wind, fire, flood, hail or other cause(s)," appellant answered "no." Appellant answered "no" to the questions asking whether the structure had been altered and whether there had "been any damage to the flooring or floor covering." Appellant represented that there were no cracked floors or walls and that there had been no flooding, leakage, seepage, or wet walls or floors in the basement or crawlspace. Appellant denied that there had been interior or exterior roof damage, repairs or replacements made to the roof, or mold. Appellant answered "no" to the question whether he was aware "of any other material facts that could adversely and significantly affect an ordinary 'buyer's use or enjoyment of the property or intended use of the property.'" Appellant denied having the prior seller's disclosure statement, but it was later learned that appellant did have the statement.

Appellant did not tell Hare that the dining-room windows had been replaced, which is information that a seller typically would tell a real estate agent because improvements increase real estate value. Hare testified that it is sometimes necessary to open up walls to determine the extent of water-intrusion damage. Hare testified that, if appellant had told him about the windows being replaced, he would have advised appellant to disclose that. After this lawsuit began, Hare went to the house and saw damage in the dining room and master bathroom. He testified that, if a seller knew of those issues, the seller should have disclosed them. Hare also testified that appellant should have disclosed the hail damage to the house.

In July 2006, respondents Alan J. and Cynthia L. Roers entered into a purchase agreement to buy the house for $4.1 million. The closing occurred in December 2006. Alan Roers testified that respondents met with appellant at the house in August 2006 and that appellant described the house as "painted, prime and pristine." Appellant did not mention that he had replaced the dining-room windows or that he originally listed the house for sale in 2005 but then took if off the market. Cynthia Roers saw a large squeegee in the basement and asked appellant if there had been water in the basement. When appellant said that he was unaware of any water in the basement, Cynthia Roers asked why a big squeegee was needed, and appellant claimed that he did not know that it existed.

Respondents moved into the house in January 2007. Beginning in February, respondents had water coming into the house through the walls and patio doors. Respondents contacted Hare, who contacted appellant. Shortly after moving into the house, respondents decided to replace the kitchen appliances and hired a contractor, who had worked in the construction business for 40 years, to do some work in the kitchen area. The contractor noticed an area on the exterior siding where the nails had sunk into the cedar siding, which is a sign of water intrusion. When he removed some of the siding, he discovered that the wall was "mushy with water and rot." In the dining room, the contractor found damage around the windows that had been replaced and around the patio doors. The contractor inspected the exterior wall outside the bathroom. He climbed up a ladder and, when he put his hand on a beam to pull himself up, the beam "just fell off." The interior of the bathroom had to be gutted because the drywall was saturated.

There was also water intrusion in the laundry room. The contractor was at the house during a rain and noticed that the floor in the entryway was wet. He looked up and saw water coming in through tower windows and running down the walls.

Respondents hired a forensic inspector to track down water-leakage sources and determine the extent of damage. He inspected the exterior of the house and found that, generally, the walls' sheathing, studs, and insulation "had been wet for a very extended period of time and were rotting" and that, in several locations, structural integrity "had been severely compromised." The crawl space under the porch was damp, wet, and moldy and smelled like it had been that way for a long time. The floor and floor joists under the porch were deteriorated. There was extensive damage within the master-bathroom walls. Large beams and decorative rafters were rotted almost completely through. The inspector also found water damage in the laundry room.

The inspector testified that, after inspecting the dining-room windows, it was his opinion

> that when the windows were being installed and the contractor got out into some other areas that needed to be repaired, that there was a decision to stop those repairs. That you can see where there's new materials and old materials, yet there's deterioration there. And it to me and what I've seen in the past and even in working on my house at home is, you open up things, you take out the windows, you find a mess, you got a mess, you know, what are you going to do? Are you going to tear it all apart and fix everything or are you going to just say, hey, I got to stop the bleeding now. I'm just going to fix this enough to get it so that I can get the windows in and get it back together.

The inspector testified that a building permit was required for the replacement of the windows, but the City of Minnetrista had no record of one. The inspector testified that the dining room was in need of immediate repair: "There were structural members in the wall at the corners and spanning the top that, yes, were a life safety issue. They were deteriorated to the point where they had lost their capacity."

Respondents brought this action against appellant. The case was tried to a jury on the theories of negligent misrepresentation, fraud, and breach of the seller-disclosure statute. The district court ruled that, under the seller-disclosure statute, respondents could not recover their repair costs and were limited to their out-of-pocket loss, which in a real estate transaction is "the difference between the price paid and the fair market value at the time of the transaction."

Alan Roers testified that, when they bought the house, appraisals valued the house and outbuildings at $2.8 million and the land at $1.3 million. Roers testified that the valuation was premised on everything being "in prime condition." With the extensive water damage, Roers opined that $800,000 would be a high price to pay for the house.

On the seller-disclosure claim, the jury found that appellant failed to disclose all material facts of which he was aware that could adversely and significantly affect an ordinary buyer's use and enjoyment of the property or any intended use of the property of which he was aware and awarded respondents $732,250 in damages. On the negligent-misrepresentation claim, the jury found that appellant provided false information to respondents, appellant failed to use reasonable care in obtaining that information, and respondents justifiably relied on the information. The issue of comparative negligence

was submitted to the jury, and the jury attributed 12% of the fault to respondents, 13% to appellant, and 75% to contractors that had performed repairs for appellant. The district court applied comparative negligence only to the negligent-misrepresentation claim. On the fraud claim, the jury found that appellant knowingly made a false representation regarding material facts to respondents but that respondents were not justified in relying on the false representation. Judgment was entered in the amount of $732,250 for respondents on the seller-disclosure claim.

Appellant moved for judgment as a matter of law or, alternatively, a new trial on the seller-disclosure claim. Appellant argued that Alan Roers's testimony on the value of the house was insufficient evidence to support the damages award; the evidence was insufficient to support the jury's determination that appellant violated the seller-disclosure statute; and comparative fault applied to the seller-disclosure claim and, therefore, respondents' damages are limited to the amount awarded for the negligent-misrepresentation claim. The district court denied appellant's motion. This appeal followed.

D E C I S I O N

I.[1]

Statutory interpretation is a question of law, which this court reviews de novo. *Eagan Econ. Dev. Authority v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 529 (Minn. 2010).

Minn. Stat. § 513.55, subd. 1 (2010), states:

> (a) Before signing an agreement to sell or transfer residential real property, the seller shall make a written disclosure to the prospective buyer. The disclosure must include all material facts of which the seller is aware that could adversely and significantly affect:
>
> (1) an ordinary buyer's use and enjoyment of the property; or
>
> (2) any intended use of the property of which the seller is aware.
>
> (b) The disclosure must be made in good faith and based upon the best of the seller's knowledge at the time of the disclosure.

The district court determined that a violation of Minn. Stat. § 513.55, subd. 1(a), is not subject to apportionment of fault because failure to comply with the statutory disclosure requirement is an intentional act. *See Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 350 (Minn. App. 2001) (recognizing that "suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the

[1] Respondents argue that appellant waived the issue of whether comparative fault applies to the seller-disclosure claim by failing to object to the special-verdict form or request a jury instruction applying comparative fault to the seller-disclosure claim. But appellant is not objecting to the special-verdict form or the jury instructions. Appellant argues that the district court erred in not applying comparative fault to the seller-disclosure claim, and it is not apparent from the special-verdict form or the instructions that comparative fault applied only to the negligent-misrepresentation claim. The issue, therefore, is not waived.

other party is entitled to have communicated to him" is "central to" a claim for "fraudulent misrepresentation based on the concealment of a material fact" (quotation omitted)). Fraud is an intentional tort. *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). "Fraudulent intent is, in essence, dishonesty or bad faith. What the misrepresenter knows or believes is the key to proof of intent. Wrongful intent, as a state of mind, is rarely proved directly, e.g. by an admission of bad faith, but is normally established through circumstantial evidence." *Id.* "An intentional tortfeasor is prohibited from seeking contribution from other joint tortfeasors." *Oelschlager v. Magnuson*, 528 N.W.2d 895, 899 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

Appellant argues that a violation of Minn. Stat. § 513.55, subd. 1(a), could be based on negligent or reckless nondisclosure. But the statute only applies to "material facts of which the seller is aware," and the statute mandates the disclosure of those facts. The negligence standard, in contrast, applies to facts that could have been discovered by exercising reasonable care. *See Larson v. Wasemiller*, 738 N.W.2d 300, 311 (Minn. 2007) (construing statute precluding liability when person acts in reasonable belief that action or recommendation is warranted by facts known to person or review organization after reasonable efforts to ascertain facts upon which review organization's action or recommendation is made as codifying common-law ordinary-negligence standard); *State v. Al-Naseer*, 734 N.W.2d 679, 688 (Minn. 2007) (stating that, when legislature intends to include negligence in a criminal mens rea standard, it expressly includes "reason to know" or "should have known" standard); *Hurley v. TCF Banking & Sav., F.A.*, 414 N.W.2d 584, 586 (Minn. App. 1987) (stating that negligent misrepresentation occurs

when party "supplies false information . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information"); *see also Chafoulias v. Peterson*, 668 N.W.2d 642, 654 (Minn. 2003) (stating that ordinary meaning of recklessness is extreme negligence).

Appellant argues that the district court's failure to apportion liability is inconsistent with the jury's finding of no liability on the fraud claim. But on the fraud claim, the jury found that appellant knowingly made a false representation regarding material facts to respondents. Appellant prevailed on that claim because the jury found that respondents were not justified in relying on the false representation. Reasonable reliance by the buyer is not required under Minn. Stat. § 513.55.

Appellant argues that the general rule in Minnesota is that a "violation of a statutory standard of conduct does not differ from ordinary negligence and principles of comparative fault apply." Appellant relies on *Zerby v. Warren*, 297 Minn. 134, 139, 210 N.W.2d 58, 62 (Minn. 1973) (citing *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947)). The *Dart* court stated:

> We will first consider the general classification of the statute under consideration. Broadly speaking and subject to exceptions and limitations as applied to it, when a statute is passed the courts generally tend to associate it with the type of common-law liability most closely related to the statute. For example, a statute prohibiting going on property and cutting timber is thought of in the classification of a trespass statute; one prohibiting the receiving of bank deposits after insolvency as a fraud statute; one prohibiting the blocking of public highways as a public nuisance statute; and one laying down rules of safety for the protection of the public or any class or group of individuals, as a negligence statute.

Dart, 223 Minn. at 532, 27 N.W.2d at 558; *see also Zerby*, 297 Minn. at 139-41, 210 N.W.2d at 62-63 (addressing duty of care created by statute as negligence standard). The standard stated in Minn. Stat. § 513.55 is most closely related to fraud.

Appellant also argues that imposing absolute liability on him ignores *Pierringer* principles and results in an inequitable outcome. The record does not show the terms of the settlements with the other tortfeasors. And "[a]n intentional tortfeasor is prohibited from seeking contribution from other joint tortfeasors." *Oelschlager*, 528 N.W.2d at 899.

Because the statutory standard is most closely related to fraud, the district court did not err in not applying comparative fault to the seller-disclosure claim.

II.

A reviewing court does 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) (quotations omitted).

Appellant argues that the evidence was insufficient to support the damages award. Alan Roers testified that, when they bought the property, appraisals valued the house and outbuildings at $2.8 million and the land at $1.3 million. Roers testified that the valuation was premised on everything being "in prime condition." With the extensive water damage, Roers opined that $800,000 would be a high price to pay for the house. An "owner of property either real or personal is presumptively acquainted with its value and may testify as to its value." *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 6, 74

N.W.2d 305, 309 (1955). Weakness in the foundation for the opinion goes to weight, not admissibility. *Jackson v. Buesgens*, 290 Minn. 78, 82, 186 N.W.2d 184, 186-87 (1971).

Although Roers acknowledged that the cost of repairs affected his understanding of the house's value, he did not testify that his valuation was based solely on repair costs. Appellant argued in closing argument that "the only thing they can identify is the repair costs for the difference in the value. And if that's true, if that's your recollection, then they've not sustained their burden of proof." The district court instructed that "[r]epair costs alone are not sufficient to show damages for misrepresentation in a real estate transaction" and on how to weigh Roers's valuation testimony. Jurors are presumed to follow the district court's instructions. *Johnson v. Wash. Cnty.*, 506 N.W.2d 632, 639 (Minn. App. 1993), *aff'd* (Minn. June 30, 1994). The evidence was sufficient to support the damages award.

Affirmed.