STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0718

ARF, LLC, a Minnesota limited liability company,
Respondent,

vs.

SAMS Enterprises, LLC, et al.,
Appellants,

Creekside Office Warehouse Condominium Association,
Defendant.

Filed January 21, 2020
Reversed
Reilly, Judge

Hennepin County District Court
File No. 27-CV-16-16675

Aaron A. Dean, Kelly C. Engebretson, Moss & Barnett, Minneapolis, Minnesota (for respondent)

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota; and

Mark E. Greene, Bernick Lifson, P.A., Minneapolis, Minnesota (for appellants)

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and Klaphake, 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

REILLY, Judge

In this appeal following a court trial, appellants challenge the district court's decision granting relief to respondent on its misrepresentation claim. Because the district court erred as a matter of law by sua sponte granting a new trial, we reverse.

FACTS

This dispute arises from the sale of two business condominium units in a building with a leaky roof. Appellant Mark Senn (Senn) is the sole owner and shareholder of appellant SAMS Enterprises, LLC (SAMS). SAMS is a limited liability company and the seller of the condominium units. Respondent ARF, LLC (ARF) is a limited liability company that purchased the two business condominium units.

In 2006, SAMS purchased the commercial building and redeveloped it into 12 business condominium units known as the Creekside Office Warehouse Condominium Building. SAMS also created the Creekside Office Warehouse Condominium Association (the Association), a nonprofit corporation formed to own, administer, and maintain the building. The individual condominium owners are members of the Association. The Association is subject to a declaration of condominiums, which defines the building as a single structure and provides that the Association is responsible for the maintenance, repair, and replacement of the building's common elements, including its roof.

In March 2015, shortly after ARF closed on the purchase of the two units, it discovered roof leaks. ARF's owners learned that other Association members also experienced leaking from the roof and that the building had experienced problems with a

leaky roof in the past. In September 2016, the Association unanimously resolved to replace the roof above eight of the twelve units in the Association, including the units owned by ARF. The cost of the new roof was assessed to the condominium owners that benefited from the new roof proportionate to their square footage. ARF was assessed $49,000 for its share of the replacement cost.

In November 2016, ARF initiated a civil lawsuit against SAMS, the Association,[1] and Senn, asserting numerous causes of action, including intentional misrepresentation. At trial, the district court was informed that ARF decided not to pursue every count in the complaint and that "the focus on the trial will be on the misrepresentation claims" against Senn and SAMS. The district court conducted a two-day court trial in October 2017 and issued findings of fact, conclusions of law, and order in early March 2018. The district court determined that Senn was liable for intentional misrepresentation for failing to "disclose to [ARF] the numerous problems with the roof." The district court further determined that Senn's intentional misrepresentation regarding the condition of the roof was also a breach of an express warranty.[2] The district court did not find SAMS liable under any of ARF's theories. Acting sua sponte, the district court determined that ARF

[1] The only claim asserted against the Association was for an equitable accounting. ARF did not present any testimony on this claim at trial and the district court's order did not address it. We therefore consider it waived. *See Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (declining to consider claim that was not presented or litigated at trial).

[2] ARF's complaint asserted a cause of action against SAMS for breach of an express warranty. The complaint did not assert this same cause of action against Senn. While the district court determined that Senn was liable under an express-liability theory claim, it did not make a specific finding that SAMS was liable.

was entitled to a new trial under Minnesota Rule of Civil Procedure 59.01, "limited to presenting evidence regarding the proper measure of damages" for the misrepresentation.[3]

The parties filed posttrial motions. Senn and SAMS moved for amended findings of fact and conclusions of law, and objected to the district court's decision to sua sponte grant a new trial on damages. The district court denied the motion. ARF moved for leave to amend its pleadings to add a claim for punitive damages. The district court granted ARF's motion to amend and permitted the parties to engage in limited discovery related to ARF's punitive-damages claim.

The district court conducted a two-day court trial on damages in November 2018. The district court issued an order determining that ARF was entitled to judgment against appellants in the amount of $194,034.01. The judgment included $45,000 in compensatory damages, $7,800 in expert costs, and $141,234.01 in punitive damages. This appeal follows.

D E C I S I O N

I. The district court erred as a matter of law by granting a new trial on damages.

Appellants challenge the district court's sua sponte grant of a new trial on damages. "We review a district court's decision to grant or deny a new trial for an abuse of discretion." *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). An appellate court will not disturb a district court's decision to grant a new trial absent a clear

[3] Neither party had filed a motion for a new trial at the time of the district court's March 2018 order.

abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Questions of law are reviewed de novo. *Vadnais v. Am. Family Mut. Ins. Co.*, 243 N.W.2d 45, 48 (Minn. 1976).

The trial in this case centered on ARF's claims for intentional and negligent misrepresentation.[4] A misrepresentation claim requires the plaintiff to demonstrate that it was damaged and its damages were caused by the defendant's wrongful conduct. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 369 (Minn. 2009) (articulating elements of negligent misrepresentation); *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 318 (Minn. 2007) (discussing intentional misrepresentation). Minnesota adopts "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). Under this rule, loss is determined by calculating "the difference in value of what was given and what was received." *Id.* at 373 (quotation omitted). The purpose of the out-of-pocket-loss rule is "to avoid speculative damages and assure that the award is measured by the natural and proximate loss sustained by the defrauded party." *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986). Generally, "repair costs alone are not sufficient to show damages for [intentional] misrepresentation in a real-estate transaction." *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. App. 2009), *review denied* (Minn. Sept. 16, 2009).

[4] ARF asserted claims for intentional misrepresentation and for negligent misrepresentation against both Senn and SAMS. The district court's March 2018 order did not appear to specifically address ARF's negligent misrepresentation claims. Our analysis applies with equal force to all of ARF's misrepresentation claims.

At the first trial, ARF offered evidence of repair costs as well as a capitalization rate analysis, but did not offer evidence of out-of-pocket damages. ARF's co-owner testified, "I'm solely seeking my out of pocket costs for the roof assessment that I was assessed, interest on that, which I've been paying to the Association. I want to recover my engineers report cost and I want to recover my legal fees, that's it." On rebuttal, the co-owner testified regarding an alternate theory of damages based on a capitalization rate analysis. He testified that he performed "a valuation of what the price difference would be based upon . . . the additional debt of the roof, the monthly cost of the roof on an amortization schedule." The co-owner testified that he calculated his capitalization rate damages to be $48,553.00, based upon lost income on the two units. However, he acknowledged on cross-examination that his capitalization rate analysis was not a measure of the diminution in value on the market value of the property.

After trial, the district court requested simultaneous proposed findings of fact and conclusions of law from the parties. Regarding damages, ARF proposed a finding that it was damaged because it "had to pay a $49,000 assessment" for its proportionate share of the roof repair. ARF's proposed findings also referenced its co-owner's testimony that he "performed a valuation of what the price difference would be for the ARF Units based on the additional debt of the roof, and calculated that the loss of income on the ARF Units [under a capitalization rate analysis is] $48,553."

Appellants also submitted proposed findings of fact and conclusions of law. On the issue of damages, appellants requested a finding that ARF failed to provide "relevant factual support for [its] capitalization rate analysis." Appellants requested a finding that

ARF failed to offer "any evidence regarding the fair market value of the property in the condition it was purchased," and failed to perform "any market analysis" related to the building. Appellants assert that, "[c]ritically, and by ARF's own admission, the testimony about capitalization rate does not show the fair market value of the property at the time ARF purchased it."

The district court issued its order ruling in ARF's favor on liability. The district court noted that ARF's proposed measure of damages was "improper and cannot be awarded" under Minnesota law. The district court determined that "[t]he proper measure of damages, if any, would be the amount paid by ARF for its units less the actual fair market value of those units in the condition they were in when ARF purchased them." *See Lobe Enters.*, 360 N.W.2d at 373 (adopting the out-of-pocket-loss rule as the proper measure of damages in misrepresentation cases). But despite ARF's failure to establish a required element of its claim, the district court sua sponte granted ARF a new trial to "present[] evidence regarding the proper measure of damages."

The district court's new-trial order was erroneous as a matter of law. Minnesota Rule of Civil Procedure 59.01 establishes the causes for which a district court may grant a new trial and limits the grounds for a new trial to those specifically enumerated causes. *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 686 (Minn. 2004). On its own initiative, a district court may order a new trial "for any reason for which it might have granted a new trial on motion of a party." Minn. R. Civ. P. 59.05. The district court "ha[s] no power to grant a new trial for a cause not enumerated by the rules," and any court order purporting to do so is "ineffective and void." *Ginsberg v. Williams*, 135 N.W.2d 213, 221 (Minn.

1965) (noting that district court's power to grant a new trial is limited to those reasons articulated in rule 59.01 and a new trial cannot be granted for a reason not enumerated in the rules).

Here, ARF failed to prove a necessary element of its misrepresentation claim and it is not entitled to a second trial to remedy that failure. A plaintiff in a civil action bears the burden of proving damages caused by the defendant by a fair preponderance of the evidence. *Canada By & Through Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). We recognize that a property owner "is competent to express an opinion on the market value of his or her property, and ordinarily any weakness in the foundation for that opinion goes to its weight, not its admissibility." *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984) (citation omitted). But here, ARF did not present any evidence of its out-of-pocket-loss damages in the court trial by its owner or otherwise. *See Lobe Enters.*, 360 N.W.2d at 373 (adopting the out-of-pocket-loss rule as the proper measure of damages in a misrepresentation claim). During rebuttal cross-examination, ARF's co-owner admitted that he did not know the fair market value of the unit he purchased, and had not conducted an analysis to determine the fair market value of the units. Appellants' counsel clarified, "You did not come here today prepared to testify about the fair market value of the Creekside units ARF owns?" The co-owner replied, "I did not." The record does not contain any other testimony or documentary evidence regarding the fair market value of the building units.

Absent evidence of fair-market-value damages, ARF failed to establish a required element of its intentional-misrepresentation claim. Dismissal of a misrepresentation claim

is appropriate where the buyer fails to meet its burden of proving loss arising as a result of the seller's purported misrepresentation. *See Lobe Enters.*, 360 N.W.2d at 372-73 (affirming dismissal of fraud claim brought by plaintiff-purchaser where plaintiff failed to introduce any evidence of damages arising from installation of new roof on apartment building); *see also Driscoll v. Standard Hardware, Inc.*, 785 N.W.2d 805, 812 (Minn. App. 2010) (affirming summary judgment in defendant's favor on plaintiff's fraud claim where plaintiff "presented no evidence" of damages), *review denied* (Minn. Sept. 29, 2010).

ARF argues that the plain language of rule 59.01(g) permits the district court to order a new trial on damages when it needs additional evidence or to "fill in gaps," where necessary. We do not agree. The rules permit the district court on its own initiative to order a new trial, provided it specifies in the order the grounds for the new trial. Minn. R. Civ. P. 59.05. The district court did not comply with this requirement. And as the *Ginsberg* court recognized, the district court has no power to grant a new trial for a cause not specified in the rules. 135 N.W.2d at 221. Because the district court erred as a matter of law by sua sponte granting a new trial on damages, we reverse.

II. Appellants are entitled to relief on their remaining arguments.

Appellants assert additional arguments on appeal, which we address briefly in turn. Appellants argue that the district court erred by granting ARF's posttrial motion to amend its complaint to add a claim for punitive damages. We agree. Generally, "outside a defamation context, punitive damages are permitted only when actual or compensatory damages are also present." *Kohler v. Fletcher*, 442 N.W.2d 169, 173 (Minn. App. 1989), *review denied* (Minn. Aug. 25, 1989). Because ARF failed to present evidence of actual

or compensatory damages in the first trial, as discussed above, the district court erred by granting ARF leave to assert a punitive-damages claim.

Appellants also contend that the district court erred by determining that Senn breached an express warranty to ARF. Again, we agree. ARF did not assert this cause of action against Senn in its complaint, and it was not litigated by consent. There is no basis to grant relief on this claim. *See Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 317 (Minn. App. 2011) (stating that a party is bound by its pleadings), *review denied* (Minn. Mar. 29, 2011). Accordingly, the district court erred by concluding that Senn breached an express warranty to ARF.

Reversed.