IN THE COURT OF APPEALS OF IOWA

No. 9-005 / 97-1498
Filed April 30, 1999

THOMAS F. IRVINE, an Individual, and ELIZABETH IRVINE, an Individual,
Plaintiffs-Appellants,

vs.

MIDAMERICA SAVINGS BANK n/k/a HOMELAND SAVINGS BANK,
Defendant-Appellee.

MIDAMERICA SAVINGS BANK n/k/a HOMELAND SAVINGS BANK,
Third-Party Plaintiff,

vs.

DAVID E. TALLANT, an Individual; CERTIFIED APPRAISAL ASSOCIATES INC. n/k/a CAA APPRAISAL SERVICES, INC., a Corporation,
Third-Party Defendants.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Plaintiffs appeal from the district court's ruling granting defendant summary judgment in a tort and contract action. **AFFIRMED.**

John R. Hearn, Des Moines, for appellants.

Steven L. Serck and Wade Hauser of Ahlers, Cooney, Dorweiller, Haynie, Smith & Allbee, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Thomas and Elizabeth Irvine appeal from the district court's ruling granting MidAmerica Savings Bank a summary judgment in a tort and contract action. We affirm.

Thomas Irvine is CEO of Prime Alliance, Inc., located in Des Moines. Prime Alliance is a distributor of plastic raw materials with approximate sales of $60 million annually. Thomas had bought three homes prior to the purchase in question. The first was in Des Moines and the other two in Minneapolis. Thomas utilized the services of a home inspector for the two purchases in Minneapolis, since it was required. Elizabeth Irvine attended three years of college and had previously owned and operated a retail store. She was previously involved in the purchase of one other home. The Irvines were aware the loan application process would involve an appraisal of the property.

In November 1993, the Irvines agreed to purchase an acreage located in Urbandale for the sum of $315,000,[1] subject to financing. The terms of sale called for $3000 down, $232,000 at closing, with the balance of $80,000 carried back by the seller as a second mortgage. The Irvines then filed a loan application with MidAmerica Savings Bank on January 24, 1994.[2] The Irvines requested a loan in the sum of $210,000. This loan application contained a provision reading:

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[1] The listing price was $350,000.

[2] There was no previous business connection between the parties.

> (9) The Lender, its agents, successors and assigns, make no representations or warranties, express or implied, to the Borrower(s) regarding the property, the condition of the property or the value of the property.

The Irvines paid a loan application fee which included the cost of an appraisal. On January 27, 1994, MidAmerica retained Certified Appraisal Associates to perform the appraisal. David Tallant,[3] an employee of CAA, completed his appraisal report on or about March 1, 1994. The Irvines were named as "purchasers/borrowers" on the Appraisal Order and the Uniform Residential Appraisal Report; MidAmerica was named as "the client." The report stated the price the Irvines had offered to pay for the property. The report showed Tallant had arrived at a cost approach value for property of $315,543. The Irvines were informed of the appraisal results during a telephone conversation with an employee of the bank in early March 1994.[4] The bank decided to make the $210,000 loan on the basis of the appraisal report.

On March 22, 1994, the Irvines signed a document entitled, "MidAmerica Savings Bank Property Declaration." This declaration, which was part of the closing documentation, states as follows:

> THE UNDERSIGNED DECLARE THAT THE PROPERTY REFERENCED ABOVE IS ACCEPTABLE TO US IN ITS EXISTING CONDITION. WE UNDERSTAND AND ACKNOWLEDGE THAT ANY DEFICIENCIES IN CONNECTION WITH THIS PROPERTY ARE MATTERS SOLELY BETWEEN

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[3] Certified Appraisal Associates and David Tallant also performed appraisals for Iowa Mortgage, Hawkeye Bank, and the Principal.

[4] Testimony indicates, for the bank's purposes, the property had to appraise at $262,500 for the 80% loan-to-value maximum to be reached.

> THE AGENT(S), BUYER(S), SELLER(S), AND/OR BUILDER(S). *WE UNDERSTAND AND ACKNOWLEDGE THAT ANY APPRAISAL AND/OR INSPECTIONS MADE BY MIDAMERICA SAVINGS BANK ARE MADE BY THE BANK FOR ITS OWN PURPOSES, IN ITS OWN BEHALF AND NOT IN OUR BEHALF.* ANY REQUIREMENTS MADE BY THE BANK IN REGARD TO THE CONDITION OR STATUS OF THE PROPERTY ARE MADE FOR LOAN COLLATERAL PURPOSES ONLY, AND NO REPRESENTATION OR WARRANTIES ARE MADE. THE BANK DOES NOT REPRESENT OR GUARANTEE THAT THE PROPERTY IS FREE OF STRUCTURAL OR ANY OTHER DEFECTS, NOR MAKE ANY WARRANTIES OR REPRESENTATIONS CONCERNING THE PRESENCE, SUITABILITY, OR TYPE OF INSULATION MATERIALS IN THE PROPERTY. NO WARRANTIES OR REPRESENTATIONS REGARDING THE PRESENCE OF UREA FORMALDEHYDE FOAM INSULATION ARE MADE BY THE BANK. SUCH MATTERS ARE STRICTLY BETWEEN THE AGENT(S), BUYER(S), SELLER(S) AND/OR BUILDER(S).
>
> THE UNDERSIGNED AGREE TO HOLD THE BANK HARMLESS IN ANY DISPUTE ARISING CONCERNING THE PROPERTY REFERENCED ABOVE. (Emphasis added.)

There is no dispute that Thomas read this declaration. There is also no dispute that neither Thomas nor Elizabeth objected to the language of the declaration.

The Irvines moved into the house in June 1994. By December 1994, the Irvines had decided to sell the property. After approximately $18,000 of remodeling, the house finally sold for $237,000 in January 1996.

In 1995, the Irvines filed this lawsuit against Tallant and CAA because of the substantial variance between the purchase price of $315,000 and the resale price of $237,000. MidAmerica was added as a defendant in September 1996. The allegations against MidAmerica included general negligence claims, negligent misrepresentation, breach of contract, and fraud.

On June 10, 1997, the bank filed for summary judgment. A hearing was held on July 15, 1997.[5] The Irvines resisted the motion and their expert witness testified Tallant should have appraised the house at $205,000. The district court granted the bank's motion for summary judgment. The Irvines appealed.

I. STANDARD OF REVIEW. The district court's grant of summary judgment is reviewed for errors at law. *Hayward v. P.D.A., Inc.*, 573 N.W.2d 29, 31 (Iowa 1997); Iowa R. App. P. 4. We will uphold the grant of summary judgment when the moving party has shown there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). We review the record in the light most favorable to the party opposing the motion for summary judgment. *Id.*

II. NEGLIGENT MISREPRESENTATION. The Restatement (Second) of Torts section 552 (1977) suggests guidelines for defining those persons who may recover against someone who negligently supplies information for the guidance of others. Those guidelines are set out as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

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[5] On July 8, 1997, Tallant and CAA were dismissed from the lawsuit without prejudice by the Irvines. On July 15, 1997, the district court granted MidAmerica's motion to return Tallant and CAA to the lawsuit as third-party defendants.

> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Barske v. Rockwell Intern. Corp., 514 N.W.2d 917, 924 (Iowa 1994); *Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281, 287 (Iowa 1981); Restatement (Second) of Torts § 552.

In other words, to prevail on this claim,. the Irvines must prove: (1) MidAmerica, in the course of business, supplied information; (2) MidAmerica did not exercise reasonable care in obtaining the information; (3) the Irvines justifiably relied upon that information; and (4) that reliance caused a pecuniary loss.

Actionable negligence cannot exist without the prerequisite showing of a duty of care. *Greatbatch v. Metropolitan Fed. Bank*, 534 N.W.2d 115, 116 (Iowa App. 1995); *Peters v. Burlington Northern R.R. Co.*, 492 N.W.2d 399, 401 (Iowa 1992). Courts look to legislative enactments, judicial decisions, and legal principles for the existence of a duty. "In the end, the existence of a duty becomes a policy decision derived from all relevant considerations which guide the law to conclude that a particular person is entitled to be protected from a particular type of harm." *Greatbatch*, 534 N.W.2d at 116.

It is certainly recognized, as a general rule, persons who supply information in the course of their business for the guidance of others have a duty to use reasonable care in either obtaining or communicating such information. *Id.* A breach of this duty is called negligent misrepresentation. "The duty has been applied with mixed results in Iowa to a variety of businesses, including lending institutions." *Id.* The task is always to determine if the duty applies to the particular circumstances of the case at bar. *Id.* Banks have been determined to fall somewhere in the middle of businesses where the duty may apply. *Rankow v. First Chicago Corp.*, 870 F.2d 356, 363 (7th Cir. 1989). Thus, a case-specific determination is needed. *Id.* In other words, the question of whether a bank can be held responsible under a theory of negligent misrepresentation depends almost entirely on the nature of the particular transaction which took place. *Id.* at 364.

A. In the Course of Business, Supplied Information. This issue was addressed in *Larsen*, where our supreme court found the bank owed a duty of care to the Larsens. *See Larsen*, 300 N.W.2d at 287.

The case at bar and *Larsen* are factually similar in that the bank/appraiser knew of the offered purchase price and that the purchase was subject to financing; the borrowers paid the appraisal fee; the borrowers had previous experience purchasing homes and knew of the appraisal requirement; upon request, the bank customarily tells borrowers the results of the appraisal; and, the borrowers' names appear on the reports.

The case at bar and *Larsen* differ factually in that the Larsens were listed as "client/borrower" on the report. However, the report in *Larsen* specified only the client could use the report. In the case at bar, MidAmerica is listed as "the client" but the borrowers' names appear on the report and this report states the client may share results with the borrower. Thus, in either case, the borrower is expected to have access to the report, whether designated as "the client" or not. Another factual difference is that in *Larsen* the appraisal was done by a bank employee; in the case at bar the appraisal was performed by an independent contractor selected by MidAmerica.

Our supreme court noted in *Larsen*:

> Nor is it necessary, under the *Ryan* [*v. Kanne*, 170 N.W.2d 395 (Iowa 1969)] analysis, that the party suing for negligence be the only party for whom the information was provided. It is enough that he or she be a third party whom the negligent provider of the information knew would utilize it. Even though the appraisal might be made primarily for the benefit of the lending institution, the appraiser should also reasonably expect the home purchaser, who pays for the appraisal and to whom the results are reported (and who has access to the written report on request), will rely on the appraisal to reaffirm his or her belief the home is worth the price he or she offered for it. The purchaser of the home should be among those entitled to rely on the accuracy of the report and therefore should be entitled to sue for damages resulting from a negligent appraisal.
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> This is especially true when we "take into consideration the end and aim of the transaction," *Ryan*, 170 N.W.2d at 403, which in this case is a loan transaction that will enable the Larsens to purchase a home. If the home had been found to be worth less than the $45,000 offer, we can safely assume the association would not have accepted the mortgage, nor would the Larsens have wished to pay that amount for the home. It is undisputed that had the appraisal reflected the real market value of the home the loan would have been refused and

> Larsens could have canceled or renegotiated their contract. Thus, taking the "aim" of the transaction into account, both the lending institution and the buyers should be foreseen as users of the appraisal report as an important factor in their respective decisions to lend money and to borrow money to purchase the home.

Larsen, 300 N.W.2d at 287.

We conclude MidAmerica was in the business of supplying information under the facts of this case. This case is factually different from *Larsen* in that an independent contractor performed the appraisal. However, we do not read *Larsen* to apply only to the cases where a lending institution uses its own employees to perform the appraisal. Such a reading would allow banks to avoid the duty imposed by simply hiring an independent contractor to complete the appraisal. This would allow banks to enjoy financial security without any chance of liability. Banks would be fully protected and yet be allowed to expose the buyers to potentially huge financial losses. *See Barry v. Raskov*, 283 Cal.Rptr. 463, 466-467 (Ct. App. 1991) (mortgage loan broker is liable to lender for fraud or negligence of independent property appraiser hired by broker to appraise securing property); *Loosle v. First Fed. Sav. & Loan Ass'n of Logan*, 858 P.2d 999, 1000-01 (Utah 1993) (plaintiffs' negligent misrepresentation claims against bank fail because the appraisal was not disclosed to the borrower, no evidence the appraisal was negligently performed, and no evidence of reliance, which suggests the bank, under other circumstances, could have been liable for the appraisal report by the independent contractor).

B. Reasonable Care in Obtaining Information. The Irvines must be able to prove MidAmerica did not exercise reasonable care in obtaining the appraisal information. In addition, they must be able to prove MidAmerica knew or should have known the appraisal was faulty. *See Marvin v. Adams*, 274 Cal.Rptr. 308, 312 (Ct.App. 1990) (granting of motion for nonsuit appropriate where there was no evidence defendant had any reason to believe the appraisal was inaccurate nor any evidence which would put a reasonable person on inquiry regarding its accuracy).

We have carefully reviewed the facts of this case and conclude MidAmerica did exercise reasonable care in obtaining the appraisal. First, there was no evidence of past problems with the appraiser. Second, MidAmerica was also relying on the appraisal results and indicated an appraisal of $262,500 was needed in order to approve the loan. Third, there were no readily observable problems with the residence, as was the case in *Larsen*. Finally, we note the Irvines signed a Property Declaration absolving the bank of liability.[6] Mr. Irvine read the declaration and did not object.

We conclude, as a matter of law, the Irvines have failed to prove MidAmerica did not exercise reasonable care or competence in obtaining or communicating the appraisal information. The evidence does not establish MidAmerica knew or should have known the appraisal was faulty, if in fact it was.

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[6] We do not address the issue of whether a "property declaration" can absolve the bank of liability in all cases.

C. Justifiable Reliance and Pecuniary Loss. We need not address these issues based upon the discussion above.

D. Summary. We conclude, as did the district court, that summary judgment is appropriate on the issue of negligent misrepresentation.

III. ALL OTHER CLAIMS OF THE IRVINES. The negligence claims were dismissed based upon the economic loss doctrine. This doctrine provides that no recovery in tort may be had for injuries which are purely economic in nature. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 106-07 (Iowa 1995); *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 650-51 (Iowa App. 1996).

The district court dismissed the contract claims and determined, from a contractual standpoint, MidAmerica was not obligated to obtain an appraisal on the Irvines' behalf.

The fraud claim was dismissed because the district court found there was nothing even close to clear and convincing evidence of intentional or reckless misrepresentation by MidAmerica.

After review of the record, we find the district court correctly disposed of these other claims. We adopt the district court's reasoning as to these claims and will not repeat it here.

For these reasons, we affirm.

AFFIRMED.

No. 97-1498. [9-005] IRVINE v. MIDAMERICA SAVINGS BANK

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.
AFFIRMED. Heard by Vogel, P.J., and Mahan and Zimmer, JJ. Opinion by Mahan, J.
(11 pages $4.40)

Thomas and Elizabeth Irvine appeal the district court's ruling granting MidAmerica Savings Bank a summary judgment in a tort and contract action. This action arose out of a loan transaction between the parties to finance the Irvines' purchase of a home. The loan application fee included the cost of an appraisal, which MidAmerica arranged. The Irvines were notified the appraiser valued the property at $315,543. On the day of closing, the Irvines signed a "property declaration" absolving the bank of liability. The Irvines moved into the house in June 1994. By December 1994, the Irvines had decided to sell the property. After approximately $18,000 of remodeling, the house finally sold for $237,000 in January 1996. The Irvines' allegations against MidAmerica included general negligence claims, negligent misrepresentation, breach of contract, and fraud. **OPINION HOLDS: I.** ***Negligent Misrepresentation.*** The Restatement (Second) of Torts section 552 (1977) suggests guidelines for defining those persons who may recover against someone who negligently supplies information for the guidance of others. As a general rule, persons who supply information in the course of their business for the guidance of others have a duty to use

No. 97-1498. [9-005] IRVINE v. MIDAMERICA SAVINGS BANK(continued)
reasonable care in either obtaining or communicating such information. Banks have been determined to fall somewhere in the middle of businesses where the duty may apply, thus, a case-specific determination is needed. **A.** ***In the Course of Business, Supplied Information.*** This issue was addressed in *Larsen v. United Fed. Sav. & Loan Ass'n*, 300 N.W.2d 281 (Iowa 1981), where our supreme court found the bank owed a duty of care to the Larsens. We conclude MidAmerica was in the business of supplying information under the facts of this case. While this case is factually different from *Larsen* in that an independent contractor performed the appraisal, we do not read *Larsen* to apply only to the cases where a lending institution uses its own employees to perform the appraisal. Such a reading would allow banks to avoid the duty imposed simply by hiring an independent contractor to complete the appraisal. **B.** ***Reasonable Care in Obtaining Information.*** We have carefully reviewed the facts of this case and conclude MidAmerica did exercise reasonable care in obtaining the appraisal: there was no evidence of past problems with the appraiser; MidAmerica was also relying on the appraisal results and indicated an appraisal of $262,500 was needed; and, there were no readily observable problems with the property. Finally, we note the Irvines signed the "property declaration" absolving the bank of liability; Mr. Irvine read the declaration and did not object. We need not address the issues of justifiable reliance and pecuniary loss. **III.** ***All Other Claims of the Irvines.*** The negligence claims were dismissed upon the economic loss doctrine. The contract claims were dismissed because MidAmerica was not contractually obligated to obtain an appraisal on the Irvines' behalf. The fraud claim was dismissed because the district court found there was nothing even close to clear and convincing evidence of intentional or reckless misrepresentation by MidAmerica. After review of the record, we find the district court correctly disposed of these other claims.