IN THE COURT OF APPEALS OF IOWA

No. 0-477 / 99-1342
Filed November 8, 2000

SHIRLEY A. ASHENBERG and WAYNE ASHENBERG,
Plaintiffs-Appellees,

vs.

CYNTHIA K. O'ROURKE and JEFFREY O'ROURKE,
Defendants,-Appellants,

and

KAY KENT and RUHL & RUHL REALTORS, INC.,
Defendants.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for [illegible] County, Edward B. deSilva, Jr.

Defendants appeal from a district court judgment entered on a jury verdict in plaintiffs' favor on their fraudulent misrepresentation claim. **REVERSED.**

Patrick L. Woodward and Patricia Rhodes Cepican of McDonald, Stonebraker & Cepican, P.C., Davenport, for appellants.

Martha L. Shaff and Jean Dickson Feeney of Betty, Neuman & McMahon, L.L.P., for appellees.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Jeffrey and Cynthia O'Rourke appeal from the district court judgment entered on a jury verdict in favor of Wayne and Shirley Ashenberg on their fraudulent misrepresentation claim. The O'Rourkes argue the trial court erred in refusing to grant their motions for directed verdict and judgment notwithstanding the verdict. The O'Rourkes also assert the damage award is not supported by sufficient evidence and the trial court erred in failing to submit two jury instructions requested by the O'Rourkes. Finding the first argument dispositive, we reverse.

The Ashenbergs' action arises out of their 1996 purchase of the O'Rourkes' home and lot in Bettendorf, Iowa. The O'Rourkes had purchased the house in 1993 from the builder for $342,000, with a significant additional investment in landscaping and improvements to the house and yard. As originally platted, the O'Rourkes' lot (Lot 13) was pie-shaped and contained 34,600 square feet. The front of the lot bordered the street, Lundy Lane. The north lot line ran from the street back to the western edge adjoining the golf course. The northwest corner was identified by a concrete marker which is approximately twelve to sixteen inches high. The northeast corner is marked by the end of the sidewalk and utility boxes.

The lot was made slightly more irregular just prior to the O'Rourkes' purchase. It was determined that the driveway of the property to the south, Lot 12, encroached on Lot 13. As a result, a 3,000-square foot rectangular portion of Lot 13 was conveyed to Lot 12 by the developer. This transfer and lot line

adjustment were recorded in 1992. However, the ultimate price paid by the O'Rourkes was not adjusted. The final size of their lot was 31,605 square feet.

When the O'Rourkes moved in, they had the lot sodded and landscaped. There was some extra sod left over, so Jeff O'Rourke had it laid to the north of the actual lot line into an undeveloped lot. The extra sod formed a triangular area which encroached on the vacant lot a few feet at the rear of the O'Rourke house and twenty-five to thirty-three feet at the back of the O'Rourke lot. To keep the sod alive, Jeff placed three sprinkler heads in the area where the extra sod had been laid. The O'Rourkes also did some landscaping of the yard, including around a tree located in the area of extra sod.

After only a few years, the O'Rourkes decided to sell the Lundy Lane home and move into a new subdivision being developed by the same builder who had built their home. For approximately thirty days, the O'Rourkes tried to sell the property on their own. Then, in early May of 1996, they listed the home with Kay Kent, the realtor who had sold it to them. At the time of the listing, the O'Rourkes completed a standardized sellers' disclosure form which asked about features shared in common with adjoining landowners, such as "walls, fences, roads, and driveways whose use or maintenance responsibility may have an effect on the property." They marked "no."

The Ashenbergs first looked at the property in September of 1996. They had the assistance of their own realtor, Carol Doyle. During the initial visit, the Ashenbergs were impressed with the home. They did not tour the yard. A short time later, the Ashenbergs took a second look at the property, walking through the house and into the back yard. They did not notice the monument marking the

northwest corner of the property. They knew the property was not rectangular because the street on which the property bordered was circular. The Ashenbergs visited the home a third time, without Doyle. That same month, they extended an offer to purchase the property for $429,000. The O'Rourkes accepted. One condition of the offer was the removal of dead trees on the property. The O'Rourkes agreed to remove one tree on the lot but declined to remove another, informing Doyle through Kent that the tree in question was not on the O'Rourke property. This tree was north of the lot line in the disputed area.

Some time before closing, Wayne Ashenberg raised a question about the location of the north lot line to Doyle. She contacted Kent and asked where the line was located. Kent replied she had been told there was a marker out in the trees. Doyle passed this information on to the Ashenbergs, however, they did not take the opportunity to look for the monument. Wayne testified if he had walked the lot and seen the marker, as he had with a prior home, he would have questioned the O'Rourkes. The Ashenbergs also retained an attorney to do a title opinion. The opinion advised them of the legal boundaries and the lot's square footage. A plat map was also attached showing the proper north boundary line. Wayne testified he did not really examine the title opinion. The recorded document which showed the change in the south boundary (the driveway of Lot 12) was not mentioned in the title opinion.

The purchase was eventually completed with no problems. However, when construction began on the vacant lot to the north, the Ashenbergs discovered their north lot line did not follow the sod, as they claimed they thought it did. They also claimed they thought the south line ran straight back from the

street, rather than jutting out behind the house on Lot 12 to the south. The Ashenbergs claimed they would not have purchased the property if they had known the true location of the boundary lines.

The Ashenbergs initiated this lawsuit against the O'Rourkes and their realtor, Kay Kent, seeking rescission of the contract based on mistake or misrepresentation and making a tort claim of fraudulent misrepresentation. The Ashenbergs alleged they suffered a decrease in value of the property because of the true location of the north and south lot lines. The case came to trial in front of a jury in June of 1999. The O'Rourkes moved for a directed verdict on the fraudulent misrepresentation claim. The district court denied the motion. The case was submitted to the jury on theories of fraudulent misrepresentation as to the O'Rourkes and negligent and fraudulent misrepresentation as to Kent and her realty agency. The jury was instructed that the measure of damages was diminution in value to the real estate. On July 1, 1999, the jury returned a verdict for the Ashenbergs against the O'Rourkes in the amount of $80,000. The jury concluded Kent and her realty agency were liable under the negligent and fraudulent misrepresentation claims but their acts were not the proximate cause of any damage to the Ashenbergs.

The O'Rourkes filed post-trial motions for judgment notwithstanding the verdict, new trial, and remittitur. On August 10, 1999, the district court entered a cursory order denying all of the motions. The O'Rourkes appealed. Originally, the Ashenbergs had filed a cross-appeal but subsequently dismissed it. The O'Rourkes contend primarily that the trial court erred in denying their motions for directed verdict and JNOV. They maintain the Ashenbergs failed to present

sufficient evidence to establish fraudulent misrepresentation. Finding this argument dispositive, we do not address the O'Rourkes' remaining claims on appeal.[1]

I. Scope of Review. We review the denial of a motion for directed verdict or JNOV for correction of errors of law. *Top of Iowa Coop. v. Sime Farms, Inc.*, 608 N.W.2d 454, 466 (Iowa 2000) (directed verdict); *Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999) (JNOV). When reviewing a ruling on either motion, the issue before us is simply whether there was "sufficient evidence to generate a jury question." *See Top of Iowa Coop.*, 608 N.W.2d at 466 (quoting *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992)). We first decide whether the nonmoving party has presented substantial evidence on each element of the claim. *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 640 (Iowa 2000) (citation omitted). Evidence is substantial if a jury could reasonably infer a fact from the evidence. *Id.* (citation omitted). In deciding this issue, we view the evidence in the light most favorable to the nonmoving party. *Top of Iowa Coop.*, 608 N.W.2d at 466. If reasonable minds could differ on resolution of the issue, it should be submitted to the jury. *Id.* If the evidence is not substantial on any element of the claim, a directed verdict is appropriate. *Balmer*, 604 N.W.2d at 641; *see also Pierce v. Staley*, 587 N.W.2d 484, 485 (Iowa 1998).

II. Fraudulent Misrepresentation. To establish their fraudulent misrepresentation claim, the Ashenbergs had to prove the following elements by

[1] The O'Rourkes also made a motion for limited remand. They expressed their intention to seek a new trial based on the fact the Ashenbergs recently sold the property for $6,000 more than they paid for it and $86,000 more than the value found by the jury. In light of our ruling here, the motion for limited remand is moot and we do not address it.

a preponderance of clear, satisfactory, and convincing evidence: (1) the O'Rourkes made a representation regarding the lot lines; (2) the representation was false; (3) the representation was material; (4) the O'Rourkes knew the representation was false; (5) the O'Rourkes intended to deceive the Ashenbergs; (6) the Ashenbergs acted in reliance on the truth of the representation and were justified in relying on the representation; (7) the representation was a proximate cause of the Ashenbergs' damages; and (8) the amount of damage. *Midwest Home Distributor, Inc. v. Domco Industries Ltd.*, 585 N.W.2d 735, 738 (Iowa 1998).

In both their motion for directed verdict and JNOV, the O'Rourkes asserted that the Ashenbergs failed to introduce sufficient evidence on all elements of the claim of fraudulent misrepresentation. The Ashenbergs claimed the O'Rourkes violated a legal duty to tell them the edge of the sod was not the lot line and the sod line itself was a false representation which caused the Ashenbergs to equate the boundary with the edge of the sod. We conclude the trial court erred in denying the O'Rourkes' motions for directed verdict and judgment notwithstanding the verdict. The Ashenbergs failed to produce substantial evidence on several elements of their fraudulent misrepresentation claim against the O'Rourkes.

A. False Representation. First, the evidence fails to establish a false 'representation.' At no time prior to closing did the O'Rourkes themselves have any type of communication with the Ashenbergs or their realtor. All contact was through both parties' respective realty agents. The Ashenbergs do not allege the O'Rourkes or Kent affirmatively stated the sod line was the north boundary line.

Thus the only possible 'representation' that can serve as a basis for a claim was a failure to disclose, on the part of the O'Rourkes, that the sod line exceeded the north[2] lot line.

A representation need not be an affirmative misstatement; the concealment of a material fact can constitute fraud. *Clark v. McDaniel,* 546 N.W.2d 590, 592 (Iowa 1996) (citations omitted). However, for concealment to be actionable, the representation must relate to a material matter which is the party's *legal duty* to communicate to the other contracting party. *Id.* (emphasis added). Such a duty may arise from a relation of trust or confidence, inequality of condition and knowledge, or other attendant circumstances. *Id.* Concealment may also consist of withholding information asked for or contriving to prevent inquiry. *See Wilden Clinic, Inc. v. City of Des Moines,* 229 N.W.2d 286, 293 (Iowa 1975) (citation omitted). However, mere silence is not a 'misrepresentation' constituting fraud. *Id.* Where there is no obligation to speak, silence cannot be termed concealment and, therefore, is not fraud. *Id.*

There was no duty to disclose here. First, there was no inequality of knowledge. The Ashenbergs had equally available to them information regarding the location of the actual north lot line. They received a title opinion with a plat map containing an accurate depiction of the north line. At Wayne Ashenberg's request, their realtor, Doyle, inquired about the location of the north line. No information was withheld. Doyle was informed of the marker in the trees indicating the northwest corner of the lot. Through Kent, the O'Rourkes also

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[2] Although there appears to have been some argument about the south lot line at the trial level, it does not appear on appeal that the Ashenbergs have any complaint about the south boundary line.

supplied truthful information about one of the dead trees located north of the lot line—they declined to remove it because it was not on their property.

Furthermore, the Ashenbergs were not inexperienced people. Jeffrey was an executive who had previously bought and sold real estate. The Ashenbergs had a realtor and an attorney assisting them with the purchase. The O'Rourkes had no reason to believe the Ashenbergs were relying on them for information. There is no indication the O'Rourkes even knew the Ashenbergs had a misconception about the boundary lines. It could not reasonably be concluded the O'Rourkes had superior information. There is an absence of substantial evidence on this element.

This case is distinguishable from *Loghry v. Capel,* 257 Iowa 285, 132 N.W.2d 417 (1965), cited by the Ashenbergs in support of their claim. In *Loghry,* the Iowa Supreme Court held that a seller of real estate who knows of a hidden defect was required to disclose such defect or risk being liable for fraud. *Loghry,* 257 Iowa at 289, 132 N.W.2d at 419. However, the defect in that case, the use of poor quality landfill under the home, was not discoverable without soil testing. The duty to disclose, recognized in *Loghry*, arises only where there are material facts known to the seller which are not readily observable upon reasonable inspection by the buyer. *See Smith v. Peterson,* 282 N.W.2d 761, 765 (Iowa App. 1979). Here, the lot line was readily observable upon inspection of the lot and information available to the Ashenbergs.

B. Intent to Deceive. Even viewing the evidence in a light most favorable to the Ashenbergs, there is not substantial evidence the O'Rourkes placed the sod with the intent to deceive the Ashenbergs about the true location

of the north lot line.

The intent element involves intent that a misrepresentation shall be made to a particular person, convey a certain meaning, be believed, and be acted upon in a certain way. *See Hall v. Wright,* 261 Iowa 758, 773, 156 N.W.2d 661, 670 (1968) (citation omitted). The alleged misrepresentation was not directed at anyone in particular—there was no plan to sell at the time the O'Rourkes laid the sod. The O'Rourkes had the sod put down, as a matter of aesthetics, shortly after they purchased the property in 1993. They did not decide to sell until some time in 1996. There was also no evidence the O'Rourkes knew the Ashenbergs thought the north lot line was where the sod lay. Kent testified she regularly sees properties where owners have sodded over their lot lines. Furthermore, when questioned, the O'Rourkes always provided truthful information to the Ashenbergs. When asked about the north lot line, the O'Rourkes, through Kent, provided truthful information about the existence and location of the marker. The evidence did not reveal the O'Rourkes tampered with the marker—it was there when they purchased it and they did not move or conceal it. The O'Rourkes also accurately informed the Ashenbergs, again through the realtor, that they would not remove one of the dead trees because it was not on their lot. In order to avoid a defendant's motion for judgment notwithstanding the verdict, a plaintiff must present more than a "mere scintilla of evidence." *Vogan v. Hayes Appraisal Associates, Inc.,* 588 N.W.2d 420, 423 (Iowa 1999). Here, there was no evidence which would even permit an inference of the intent to deceive. The jury could not reasonably have concluded or inferred that the sod was laid three years prior to sale in order to deceive the Ashenbergs about the size of the lot.

The temporal aspect of this case is like that in *Phoenix v. Stevens,* 256 Iowa 432, 127 N.W.2d 640 (1964). There, Stevens, a homeowner, plastered his basement walls in 1957. To make straight edges and avoid smearing plaster on the sills, he nailed pieces of wood to the sill or plate. He sold the property to the plaintiff, Phoenix, in 1961. Shortly after taking possession, an inspection revealed significant termite damage under these boards. Phoenix sued, alleging fraud. The trial court concluded the evidence did not establish the boards were placed with the intent to conceal damage and our supreme court affirmed. A similar situation exists here. The O'Rourkes laid the sod several years before the Ashenbergs planned to purchase the property and they did not know the Ashenbergs relied on the location of the sod to determine the boundary line. It was not possible to infer intent from these circumstances.

C. Justifiable Reliance. We also find no substantial evidence the Ashenbergs were justified in relying on the sod line as the north lot line. The test for determining whether a party to a transaction has a right to rely on representations of the other is not whether a reasonably prudent person would be justified in relying on such representations but rather, whether the complaining party, in view of his or her own information and intelligence, had a right to rely on the representations. *Lockard v. Carson,* 287 N.W.2d 871, 878 (Iowa 1980). *Id.* Some misrepresentations may not be the subject of *justifiable* reliance. *Id.* (emphasis added). For example, when a plaintiff has equal information or knowledge as the defendant has, there is no right to rely upon the defendant's statements. *Id.* (citation omitted). Moreover, recipients of a fraudulent representation are required to use their senses, and cannot recover by blindly

relying on a misrepresentation the falsity of which would be patent to them if they had utilized the opportunity to make a cursory examination or investigation. *Id.* (citations omitted).

As discussed above, the Ashenbergs had essentially equal information about the north lot line. They are educated people who have bought and sold real estate before. They were aided by an attorney and a realtor. They asked about the location of the line and were informed of the marker. They visited the property several times yet chose not to walk the property lines, as they had in the past. We conclude there was insufficient evidence to submit the fraudulent misrepresentation claim to the jury. The trial court erred in denying the O'Rourkes' motions for directed verdict and JNOV. We reverse.

REVERSED.