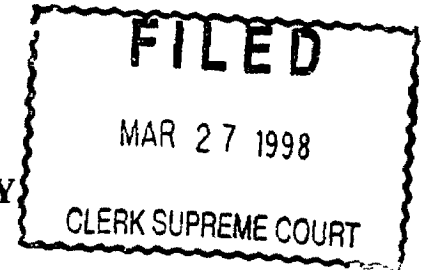


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IN THE COURT OF APPEALS OF IOWA

No. 8-091 / 97-618

LEON B. McNEALY and ELIZABETH MUKERJI-McNEALY
Appellants,



vs.

PAT E. LUSE and TERESA J. LUSE,
Appellees.

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem,
Judge.

Plaintiffs, the McNealys, appeal the dismissal of their petition alleging various
claims against the defendants, the Luses, regarding the purchase of a home.

AFFIRMED.

Douglas E. Flom and James E. Walker of Corbett, Anderson, Corbett, Poulson,
Flom & Vellinga, Sioux City, for appellants.

Steven J. Andreasen of Gildemeister, Willia & Keane, Sioux City, for
appellees.

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

VOGEL, J.

Leon McNealy and Elizabeth Mukerji-McNealy, buyers, appeal the dismissal of their petition, alleging various claims against Pat and Teresa Luse, sellers, regarding the purchase of the Luses's home. While we agree that the theory of express warranty does apply to the sale of real estate, we do not find the information given to the McNealys rose to the level of a warranty and thus affirm the dismissal of the claim.

Background facts. The McNealys responded to a newspaper ad for the sale of the Luse home. On January 29, 1992, the McNealys made an offer to purchase the home which was accepted by the Luses.

Prior to taking possession of the home, the McNealys had the home professionally inspected by Don Karrer. Karrer submitted a questionnaire to the Luses requesting specific information regarding any problems with or repairs made to home. The Luses completed the questionnaire and Karrer used the information in the questionnaire in conducting his inspection.

The McNealys took possession of the home, and within two weeks noticed (1) water flooding in the pump room and basement closets, (2) water leaking into the basement after it rained, (3) water leaking into the basement from septic backup, and (4) water leaking in from the window wells after it rained. Additionally, a note was left in the kitchen by the Luses indicating the water pipes in the master bedroom may

freeze. In November 1992, the pipes did freeze and continued to do so four or five times a year. The McNealys discovered further problems including: cracks in the walls of one of the bedrooms, the windows in the sun room were slipping out of their frames, the septic system had to be replaced, the floor of the racquetball court was weak, and the flashing in the roof above the sun room was defective.

On May 25, 1995, the McNealys filed a petition against the Luses claiming (1) breach of express warranty, (2) negligent misrepresentation, (3) breach of implied warranty, (4) intentional misrepresentation, and (5) fraudulent nondisclosure. At trial in November 1996, the McNealys testified they would not have purchased the home if its true condition had been known, and they expended \$84,000 to repair the defects after paying \$195,000 for the home.

The district court dismissed the petition. It concluded neither the newspaper advertisement nor the answers to the questionnaire constituted express warranties, there was insufficient evidence of fraud, and negligent misrepresentation did not apply.

The McNealys only appeal issues stemming from the finding no express warranty existed. They do not appeal the trial court's findings and conclusions concerning negligent misrepresentation.

Scope of review. We review cases tried at law in the district court for errors of law. Iowa R. App. P. 4; *Claus v. Whyte*, 526 N.W.2d 519, 523 (Iowa 1994). We

view the evidence in the light most favorable to the judgment, construing the findings of the district court liberally to uphold, rather than defeat, the result reached. *Claus*, 526 N.W.2d at 523. The district court's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); *Claus*, 526 N.W.2d at 523. This does not preclude inquiry into whether or not the trial court applied erroneous rules of law which materially affected its decision. We are not bound by the trial court's determinations of law. *Farmers Ins. Group v. Merryweather*, 214 N.W.2d 186, 187 (Iowa 1974).

I. Express warranties. Since the trial court ruling, our supreme court has addressed the issue of express warranties in *Flom*, which held in part, "[w]e conclude that the theory of express warranty can apply to specific representations or warranties contained in contracts for the sale of real estate." *Flom v. Stahly*, 569 N.W.2d 135, 140 (Iowa 1997). In *Flom*, a test was crafted for the application of express warranty in the sale of real estate:

Although words such as "warranty" or "guaranty" need not be used to create an express warranty, the plaintiff must show:

- 1) that the seller made some distinct assertion of quality concerning the thing to be sold as distinguished from a mere statement of opinion or of praise, and
- 2) that he intended such assertion to be believed and relied on by the purchaser as an undertaking on his part that the article is what he represents it to be, and

3) that it was so understood and believed and relied on by the purchaser.

Id. (numbering added) (quoting *Carleton D. Beh Co. v. City of Des Moines*, 228 Iowa 895, 900, 292 N.W. 69, 71 (1940) (citing *Zimmerman v. Brannon*, 103 Iowa 144, 147, 72 N.W. 439, 440 (1897))).

We examine the facts before us to determine whether the information given to the McNealys met the test as set forth in *Flom*. The McNealys argue two representations made to them, the advertisement for the sale of the house and the questionnaire about the condition of the house rise to the level of a warranty.

A. Advertisement. The advertisement which appeared in the newspaper and to which the McNealys responded stated: “Executive five to six bedroom house for the sports enthusiast, inside pool, racquetball court, tennis court, much, much more.” The description of the Luse house, which was included in the real estate agency’s ad along with many other houses, was merely a general description of what type of home was on the market. Stating a racquetball court was included did not give any warranty as to the condition of the court. Describing the home as “executive” does not constitute any warranty concerning the construction or lack of defects in the home.

B. Questionnaire. Prior to the professional inspection of the home, the Luses completed a questionnaire provided by the inspector, similar to the disclosure now required by Iowa Code chapter 558A. The McNealys cite the following questions and answers as creating express warranties:

5. ROOFING: Have you had any leaks or problems? A: No.

7. HEATING: Have you had any heating problems? A: no answer given.

15. PLUMBING: (If private sewage system) Have you had any problems or done any repairs? A: Yes, new line last year.

18. PLUMBING: Are you aware of any plumbing leaks, including shower stalls? A: No.

24. WATER PENETRATION: Have you ever had any water in the basement, crawl space, or lower level? A: No.

31. Are you aware of any other past or present conditions which may have affected the habitability or structural stability of this property? A: No.

The very difficult issue becomes—does answering questions regarding the sellers' knowledge of the condition and their history with the house rise to the level of making warranties concerning the house? The trial court found, and we agree, it does not. Each of the questions asks about the Luses' experience with and knowledge of the house. Substantial evidence in the record supports the findings of the trial court concerning each of the questions not being a warranty.

Although the sale of the Luse home occurred prior to the enactment of Iowa Code section 558A, the questionnaire the Luses used can be compared to the disclosure required by this chapter:

The disclosure statement shall include information relating to the condition and important characteristics of the property and structures located on the property, including significant defects in the structural integrity of the structure, as provided in rules which shall be adopted by

the real estate commission pursuant to section 543B.9. The disclosure statement shall also include whether the property is located in a real estate improvement district and the amount of any special assessment against the property under chapter 358C. The rules may require the disclosure to include information relating to the property's zoning classification; the condition of plumbing, heating, or electrical systems; or the presence of pests.

Iowa Code § 558A.4(1) (1997). Sellers are to put the buyers on notice of significant known defects, based on the experience the sellers have had with the house or which may be determined after reasonable effort. The disclosure statement may also encompass the plumbing, heating, and electrical systems. Section 558A does not contain any language that would construe the required representations to a warranty of the condition of the house.

Chapter 558A is similar to disclosure statutes in several other states.¹ Although the contents of the disclosure statement varies from state to state, it is clear the disclosures are not interpreted as warranties. Some states, such as Virginia and

¹ California: Cal. Civ. Code §§ 1102-1102.15, 2079-2079.10 (West 1994); Maine: Me. Rev. Stat. Ann. tit. 32, §§ 13001-13251 (West 1988 & Supp. 1993); Virginia: Va. Code. Ann. §§ 55-517 - 55-525 (Michie Supp. 1994); Wisconsin: Wis. Stat. Ann. §§ 709.01-709.08 (West Supp. 1994); Kentucky: Ky. Rev. Stat. Ann. § 324.360; New Hampshire: N.H. Rev. Stat. Ann. § 477:4-c (Supp. 1993) and N.H. Code Admin. R. Rea 701.04-701.07 (1992); Alaska: Alaska Stat. §§ 34.70.010-34.70.200 (Supp. 1993); Delaware: Del. Code Ann. tit. 6, §§ 2570-2578 (1993); Illinois: S.H.A. 765 ILCS 77-77/99 (Supp. 1994); Indiana: Ind. Code Ann. §§ 24-4.6-2 - 24-4.6-2-13 (West 1994); Maryland: M.D. Code Ann., Real Prop. § 10-702 (Supp. 1993); Michigan: Mich. Stat. Ann. § 26.1286(51)-(66) (Callaghan Supp. 1993); Mississippi: Miss. Code Ann. §§ 89-1-501 - 89-1-523 (Supp. 1993); Ohio: Ohio Rev. Code Ann. § 5302.30 (Anderson Supp. 1993); Rhode Island: R.I Gen. Laws §§ 5-20.8-1 - 5-20.8-10 (Supp. 1993); and South Dakota: S.D. Codified Laws Ann. §§ 43-4-37 - 43-4-44 (Supp. 1994).

Wisconsin, expressly provide the disclosures are not warranties.² Most provide the buyer may timely rescind a contract of sale or, following completion of the transaction, recover actual damages. None of the statutes expressly preempts any common-law action for fraud.

Since we have determined substantial evidence supports the trial court's findings the advertisement and answers on the questionnaire do not constitute warranties, we need not reach the McNealys' claims concerning reliance and proximate cause. The district court did not err in dismissing the McNealy's petition.

AFFIRMED.

² Va. Code Ann. § 55-519.1; Wisc. Stat. Ann. § 709.02.