STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0277

Regents of the University of Minnesota,
Appellant,

vs.

Doran University III, LLC,
Respondent.

Filed December 4, 2017
Affirmed
Jesson, Judge

Hennepin County District Court
File No. 27-CV-16-6805

Douglas R. Peterson, General Counsel, Timothy J. Pramas, Associate General Counsel, University of Minnesota, Minneapolis, Minnesota (for appellant)

Katherine A. McBride, Michael D. Hutchens, Elizabeth S. Poeschl, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Hooten, Judge; and Reyes, Judge.

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

JESSON, Judge

Doran University III, LLC built an apartment building next to a parking ramp owned by the Regents of the University of Minnesota. Doran provided construction plans to the university. But plans change. The university argues that Doran had a duty to disclose its

changed plans and that its failure to do so constituted fraud. The district court disagreed and granted summary judgment in Doran's favor. We affirm.

FACTS

Respondent Doran University III, LLC, is a commercial and mixed-use developer. In early 2011, Doran decided to build an apartment building on its property that is adjacent to a six-story parking ramp (Oak Street Ramp), owned and operated by appellant, Regents of the University of Minnesota. The Oak Street Ramp has six stair towers, one at each corner, one in the center of the ramp, and one combined with elevators at the west side of the ramp. The property owned by Doran is adjacent to the northwest stair tower. Because of the close proximity to the university's property, Doran requested permission to enter the university's property during construction. The university requested that Doran submit its construction plans for the university's review to ensure its parking ramp would not be damaged.

Doran submitted its first plans to the university in January 2011. Those plans included one level of below-grade parking, utilizing a permanent sheet pile foundation wall, constructed up to the property line. The university expressed concern that the plan would undermine the foundations of the Oak Street Ramp.

Doran then provided its second design to the university in early May 2011. This design included one level of below-grade parking, but pulled the garage four feet back from the property line. The foundation wall would still be made of permanent sheet pile. Doran submitted its third plan to the university at the end of that same month, May 2011. This plan was entitled "Preliminary Design Submittal" and contained many of the same features

as the second design plan submitted. It still included a foundation wall made of permanent sheet pile and made no mention of tie-back anchors. The university again voiced concern that installing sheet pile so close to the Oak Street Ramp could cause movement or damage to the ramp during construction, but it asked for no updated plans.

After submission of the third design plan, Doran began construction on the apartment building and its below-grade parking garage. But instead of installing permanent sheet pile as the foundation for the garage, as had been in the construction plans, Doran installed temporary sheet pile, stabilized by helical tie-back anchors.[1] These anchors extended underground, onto the university's property and beneath the Oak Street Ramp.

In January 2012, after the installation of the tie-back anchors, but before the university knew of their installation, the university entered into two agreements with Doran. One agreement provided Doran with a temporary license to enter "on, over and across" the university's property in order to carry out necessary construction activities. The other granted a perpetual easement to Doran for access to the Oak Street Ramp property after construction, in order to perform maintenance or repair work on the apartment building. Neither agreement made any reference to a license or easement below

[1] Doran described sheet pilings as "long metal pieces that are pushed into the ground that keep the soil in place on one side of the piling while excavation occurs on the other" and tie-back anchors as "long, narrow screws drilled from a shoring wall down into the soil beneath the university's parking ramp to anchor the shoring wall in place."

grade on the university's property, nor did either agreement reference Doran's construction design plans.[2]

The university noticed movement of the Oak Street Ramp stairwells in the fall of 2011, specifically some gaps between stair slabs. It began monitoring those stairwells in February 2012. It was not until February 28, 2012 that the university became aware that Doran had installed tie-back anchors to stabilize temporary sheet pile in the below-grade parking garage, instead of permanent sheet pile alone, as had been described in the submitted plans. The university also learned that the anchors were under the Oak Street Ramp. The university informed Doran of the damage to the stairwells and asserted that Doran should pay for the repairs in June 2014. Doran declined to do so in September 2015.

Three years after Doran installed tie-back anchors that allegedly caused damage to the university's property, the university commenced an action against Doran in November 2015, alleging: (1) breach of the license agreement; (2) breach of the easement agreement; (3) trespass; and (4) fraud. Doran moved for summary judgment on all claims. The district court granted summary judgment to Doran on the first three claims because the statutes of limitations had run. On the fraud claim, the district court determined that Doran was entitled to judgment as a matter of law because Doran did not owe an affirmative duty to disclose its change in construction plans to the university.

The university appeals.

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[2] These agreements did require Doran to "use its best efforts to minimize interference with or damage to [the university's] [p]roperty" and at its "sole cost and expense . . . restore any damage."

D E C I S I O N

The university argues the district court erred in granting summary judgment in favor of Doran on the fraud claim. It does not challenge the district court's finding on the other claims. Summary judgment allows a court to dispose of a claim on the merits if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); Minn. R. Civ. P. 56. "On appeal, we review a grant of summary judgment 'to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law.'" *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quoting *K.R. v. Sanford*, 605 N.W.2d 387, 389 (Minn. 2000)). Neither party alleges that there are material facts in dispute regarding the duty issue to be addressed in this appeal. As a result, we review de novo whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

A claim of fraud requires a false representation. *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 289 (Minn. 1992). Typically a representation involves an affirmative statement. But in this case, the university alleges the misrepresentation is Doran's failure to disclose information that it changed its construction plans. A misrepresentation may be made by failing to disclose certain facts that render the facts that are disclosed misleading. But "before nondisclosure may constitute fraud . . . there must be a suppression of facts which one party is under a *legal or equitable obligation* to communicate to the other, and which the other party is entitled to have communicated to him." *Richfield Bank & Tr. Co. v. Sjogren*, 309 Minn. 362, 365, 244 N.W.2d 648, 650 (1976) (emphasis added). The

district court determined there was no legal or equitable obligation (in short, no "duty") to disclose here, and made its summary-judgment ruling based solely on the duty issue.[3]

Minnesota courts have consistently adhered to the general rule that a "party to a transaction has no duty to disclose material facts to the other." *Hommerding v. Peterson*, 376 N.W.2d 456, 459 (Minn. App. 1985). Looking specifically at commercial entities, "[c]ourts applying Minnesota law have been reluctant to impose a duty to disclose material facts in arm's-length business transactions." *Driscoll v. Standard Hardware Inc.*, 785 N.W.2d 805, 813 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

There are three exceptions to this general rule: (1) one who speaks must say enough to prevent their words from misleading the other party; (2) one who has special knowledge of material facts to which the other party does not, may have a duty to disclose these facts to the other party; and (3) one who stands in a confidential or fiduciary relationship with another party to a transaction must disclose material facts. *Hommerding*, 376 N.W.2d at 456 (citing *Newell v. Randall*, 32 Minn. 171, 19 N.W. 972 (1884); *Marsh v. Webber*, 13 Minn. 109, 13 Gil. 99 (1868)). The university argues that the first two exceptions apply.

[3] Assuming a duty to disclose was present, the other elements of fraudulent misrepresentation are: the representation must have to do with a past or present fact; the fact must be material; it must be susceptible to knowledge; the representer knows it to be false or represents it as his own knowledge without knowing whether or not it is false; the representer must intend to induce the other party to act on the representation; that party must be enticed to act; the action must be in reliance on the representation; the party must suffer damage; and the damage must be attributable to the representation. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 117, 149 N.W.2d 37, 38-39 (1967). Because duty is the threshold issue here, we do not reach the application of these factors in our analysis. And while the university argues that the district court added an impermissible element to its fraud analysis, because we decide this case based on the issue of duty to disclose alone, we do not reach this argument.

We address these exceptions to the general rule of "no duty to disclose" below, as well as the university's overarching request to construe the exceptions to encapsulate a duty to update.

Duty Not to Mislead

"One who speaks must say enough to prevent his words from misleading the other party." *Richfield Bank*, 309 Minn. at 366, 244 N.W.2d at 650 (internal quotations omitted) (citing *Newell*, 32 Minn. at 171, 19 N.W. at 972). Even if one is under no duty to speak on a subject, if one does speak, one is "bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated." *Swedeen v. Swedeen*, 270 Minn. 491, 500, 134 N.W.2d 871, 877-78 (emphasis omitted).

While the scope of the exception based on the duty not to mislead is regularly referenced by Minnesota appellate courts, the exception is rarely applied. *See, e.g., L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (citing the exception but rejecting it in favor of consideration of a lawyer's ethical duty); *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972) (citing the exception but rejecting it and considering a duty based on the confidential and fiduciary relationship between parties). In the few cases where it has applied, a party has failed to disclose facts the party was actually aware of, at the time it disclosed other facts.

In *Newell*, the case that sets out this exception, the defendant responded to a direct question about his finances prior to a merchant agreeing to let him purchase items on credit. 32 Minn. at 172, 19 N.W. at 972. The defendant explained that he had more than $3,000

in financial resources, while failing to state that he was also more than $2,000 in debt. *Id*. The supreme court held that this was not a case of "mere passive non–disclosure" and that the half-truth communicated by the defendant was "calculated to convey a false impression." *Id*. at 172-73, 19 N.W. at 973. As a result, the court applied the exception. *Id*.

In *Caritas Family Services*, the supreme court characterized the duty as to "say enough to prevent the words from misleading the other party." 488 N.W.2d at 288 (citing *Newell*, 32 Minn. at 172–73, 19 N.W. at 973). The misrepresentation at issue in the case was an adoption agency's failure to disclose that an adopted child was a product of incest. *Id*. at 284-85. While the adoption agency knew this fact at the time of adoption—and told the adoptive parents of incest "in the family"—it failed to disclose that the child was a product of incest. *Id*. In these circumstances, the court held that an adoption agency *could* have a duty to disclose. *Id*. at 288. It proceeded, however, to hold that the nondisclosure at issue did not amount to an intentional misrepresentation. *Id*. at 289. [4]

In this case, there is no allegation that Doran had the information that the plans would change when it submitted its third design plan to the university. There is no evidence in the record that Doran attempted to convey a false impression when it disclosed that plan.

[4] The only additional case that applied this exception is *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 793-94 (Minn. App. 1998), *review denied* (Minn. Dec. 15, 1998), where this court held there was an actionable duty to disclose when an individual filled out a volunteer application with an agency, disclosing information including that she was unemployed, when she was employed by a television station that was investigating the agency. Because *Special Forces Ministries* actually considers an affirmative misrepresentation instead of a failure to disclose information, we do not consider it persuasive here.

Indeed, after Doran disclosed the third design plan, over which the university expressed concern, the university and Doran entered into license and easement agreements. The university had the opportunity to require disclosure of changes to the plan, or condition the agreements on the plan, but it did not.

The university points to language in *Caritas Family Service* to support its argument that the duty-not-to-mislead exception applies. But unlike the adoption agency in *Caritas Family Services*, there is no allegation that Doran had actual knowledge of the future change to its construction plans at the time of its interactions with the university. While the university agrees that actual knowledge is required for the application of this exception, it disagrees that such knowledge must be present at the time of disclosure. But because the caselaw addressed above does not support such an exception to the general rule of no duty to disclose, we conclude, based upon these facts, that the exception based upon a duty not to mislead does not require Doran to disclose its change in construction plans.

Duty Based on Special Knowledge

We turn to address the special-knowledge exception. "One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party." *Richfield Bank*, 309 Minn. at 366, 244 N.W.2d at 650 (citing *Marsh*, 13 Minn. at 109, 13 Gil. at 99). While there is a sparsity of caselaw addressing the special-knowledge exception, *Driscoll*, 785 N.W.2d at 813, to examine its scope we turn to caselaw where it has been applied to impose a duty to disclose.

In *Marsh*, the case that established this special-knowledge exception, a sheep farmer sold sheep to the plaintiff, representing them as "sound or free of disease," when the sheep

were, in fact, diseased. 13 Minn. at 111, 13 Gil. at 101; *see Richfield Bank*, 309 Minn. at 366, 244 N.W.2d at 650 (citing *Marsh* to support the special-knowledge exception). The seller's knowledge of the sheeps' disease at the time of sale, the Minnesota Supreme Court held, provided an adequate basis for fraud liability. *Marsh*, 13 Minn. at 114, 13 Gil. at 104.

Over a century later, the supreme court again addressed the special-knowledge exception in *Richfield Bank*, where the bank financed the plaintiffs' purchase of merchandise from a company that the bank—and the specific loan officer who interacted with the plaintiffs—knew was "irretrievably insolvent" and could not reasonably expect to deliver on the plaintiffs' purchase. *Richfield Bank*, 309 Minn. at 368, 244 N.W.2d at 651. The court found that a duty arose, based on the bank's "actual knowledge" of the company's fraudulent activities at the time it provided financing to the plaintiffs. *Id.* at 369, 244 N.W.2d at 652 (emphasis omitted).

The facts in these two seminal cases are easily distinguishable from those before us. Here, we discern neither the imbalance of bargaining positions nor the actual knowledge of fraud that permeate the facts of *Marsh* and *Richfield Bank*. Doran and the university are both sophisticated entities accustomed to real-estate negotiations and transactions. The imbalance of power between bank and borrower is not reflected here. *Richfield Bank*, 309 Minn. at 364, 368, 244 N.W.2d at 649, 651; *see also Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1065 (D. Minn. 2001) (stating that when both parties are commercial entities, imposing a duty to disclose on one party "based only on an arms-length commercial business transaction, places too heavy an onus" on that party). More critically, unlike the sheep seller in *Marsh*, and the loan officer in *Richfield Bank*, there is no evidence

that when Doran disclosed its third design plan to the university that it had actual knowledge that the plan would change. Simply put, these are the type of knowledgeable entities that are encompassed in the general rule. And that rule does not deem nondisclosure of material facts to be fraud.

Duty to Update

In its construction of these two exceptions to the general rule, the university essentially asks this court to impose a duty to update information already disclosed, as that information may change. It asks this court not only to consider a party's actual knowledge at the time of disclosure, but also its future knowledge. To support this, the university relies on dicta in *Heidbreder v. Carton*, where the supreme court states that a "duty to disclose facts may exist when . . . disclosure would be necessary to clarify information already disclosed." 645 N.W.2d 355, 367 (Minn. 2002); *see also L & H Airco, Inc.*, 446 N.W.2d at 380. But in *Heidbreder*, the court did not apply a duty based on that concept but instead considered the issue of duty arising out of a fiduciary relationship. *Id*. at 367-68. The court in *L & H Airco, Inc.* stated the same principal, but then applied a duty based on a lawyer's code of ethics. 446 N.W.2d at 380. Neither circumstance is present here.

There is no Minnesota caselaw that actually applies a duty to update. This is not to say that such a duty could never be imposed, but based on the circumstances of this case, where the parties are sophisticated, there was no actual knowledge of changed plans at the time Doran submitted its third construction plan, and the university had concerns about previous construction plans and the opportunity to address those concerns, its application is inappropriate.

When the Minnesota Supreme Court in *Richfield Bank* applied an exception to the general rule which imposes no duty to disclose, it did so because of the "unique and narrow" circumstances of the case. 309 Minn. at 369, 244 N.W.2d at 651. We discern no unique and narrow circumstances here.[5] Doran and the university are sophisticated entities in an arm's length business transaction. If this court were to apply an exception to the general rule here, that decision would be far from narrow. Rather, it could introduce allegations of fraud into a myriad of business transactions.

We decline to impose a duty on Doran to disclose its change in construction plans after submittal of its third construction plan. Because no duty exists, and a claim of fraudulent nondisclosure would require such a duty, the district court in its careful order appropriately granted summary judgment to Doran.

Affirmed.

[5] When asked during oral argument how this case is unique and narrow, the University's counsel stated "I don't know if it's unique."