

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1488**

Streambend Properties II, LLC, et al.,
Appellants,

vs.

Ivy Tower Minneapolis LLC, et al.
Respondents,

Wischermann Holdings, LLC, et al.,
Respondents,

Commonwealth Land Title Insurance Company, LLC,
Respondent.

**Filed June 3, 2019
Affirmed; motion denied
Schellhas, Judge**

Hennepin County District Court
File No. 27-CV-17-18938

Rachel K. Nelson, Law Offices of Rachel K. Nelson, PLLC, St. Paul, Minnesota (for appellants)

Kerry A. Trapp, Borgelt, Powell, Peterson & Frauen, S.C., Oakdale, Minnesota (for respondent Commonwealth Land Title Insurance Company)

Thomas W. Pahl, Jamae A. Pennings, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondents Ivy Tower Minneapolis, LLC, et al.)

D. Charles MacDonald, Faegre Baker Daniels, LLP, Minneapolis, Minnesota (for respondents Wischermann Holdings, LLC, et al.)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellants challenge the rule 12.02(e) dismissal of their claims related to their condominium purchase agreements, and move to strike portions of respondents' briefs. We affirm and deny the motion to strike.

FACTS

This appeal arises out of the Ivy Tower condominium development in Minneapolis. On October 23, 2004, on behalf of appellant Streambend Properties II, LLC (Streambend II), appellant Jerald Hammann¹ entered into a purchase agreement with respondent Ivy Tower Minneapolis, LLC (Ivy Tower), for a to-be-constructed condominium unit in Ivy Tower. On October 24, on behalf of appellant Streambend Properties VIII, LLC, (Streambend VIII), Hammann's sister entered into a similar purchase agreement with Ivy Tower for a to-be-constructed Ivy Tower condominium. But Hammann did not file articles of organization for Streambend II until October 29, 2004, and he did not file articles of organization for Streambend VIII until November 2, 2004. (Hammann, Streambend II, and Streambend VIII are collectively referred to as "appellants.") Appellants paid earnest money on each purchase agreement for deposit in a trust account maintained by respondent

¹ Hammann is a frequent litigator in Minnesota state and federal courts. A Minnesota district court has previously determined Hammann to be a "frivolous litigant." *Hammann v. Donald Deyo*, No. A08-2185, 2010 WL 154212, at *8 (Minn. App. Jan. 19, 2010), *review denied* (Minn. Mar. 30, 2010).

Commonwealth Land Title Insurance Company, LLC (Commonwealth) to cover construction costs. In November 2007, through amended purchase agreements and the payment of additional earnest money, appellants requested construction upgrades.

As alleged in their complaint in paragraphs 199, 201, 203, by letters on March 13, April 6, and April 16, 2009, appellants requested return of their earnest money.² In response, Ivy Tower cancelled appellants' purchase agreements on April 23, 2009, by service of two separate notices of declaratory cancellation under Minn. Stat. § 559.217, subd. 4 (cancellation notices). Ivy Tower stated in the cancellation notices that appellants defaulted under the terms of specific provisions in the purchase agreements, including, but not limited to, the following defaults: (1) "Buyer[s] never intended to reside at the property" in violation of paragraph 17; (2) "During Year 2007, Buyer signed several upgrade addendums . . . intentionally causing Seller damages" in violation of paragraph 5; and (3) "Buyer[s] never applied for financing" in violation of paragraph 4. The cancellation notices provided that unless appellants, within the 15-day notice period, secured a court order suspending cancellation, cancellation of the purchase agreements would be final at the end of the notice period. The cancellation notices also warned appellants that upon final cancellation, under Minn. Stat. § 559.217, they would "lose all earnest money . . . paid on the purchase agreement" and "may lose [their] right to assert any claims for defenses that [they] might have."

² None of these letters is included in an attachment to appellants' complaint.

During their 15-day notice period, appellants neither sought nor obtained a court order suspending cancellation of their purchase agreements. Instead, in October 2010, appellants sued various parties in federal district court, including many of the respondents in this action. In the 11-count complaint, appellants sought the return of earnest money, claimed damages under the Interstate Land Sales Full Disclosure Act (ILSA) and the Minnesota Common Interest Ownership Act (MCIOA), and asserted claims for fraud, declaratory judgment, wrongful cancellation, breach of contract, unjust enrichment, conversion of trust-account funds, negligent misrepresentation, and breach of fiduciary duty. The federal court dismissed appellants' ILSA claims for failing to plead the requirements of an ILSA claim, declined to exercise supplemental jurisdiction over appellants' state law claims, and dismissed the remaining state-law claims without prejudice. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, Civ. No. 10-4257 (JNE/AJB), 2011 WL 1447579, at *1–2 (D. Minn. Apr. 14, 2011). The Eighth Circuit Court of Appeals reversed the dismissal of appellants' ILSA claims and remanded for “further proceedings.” *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 451 Fed. App'x 627, 627–28 (8th Cir. 2012).

On remand, appellants filed a first and second amended complaint. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, Civ. No. 10-4257 (JNE/AJB), 2013 WL 3465277, at *1 (D. Minn. July 10, 2013). The second amended complaint alleged the same claims, including violations of ILSA and MCIOA, as well as claims for wrongful cancellation, breach of contract, unjust enrichment, conversion, breach of fiduciary duty, and negligent misrepresentation. *Id.* Appellants later sought to add respondents

Wischermann Partners, Inc. and Paul Wischermann as defendants under the same theories. *Streambend Props. II, LLC v. Ivy Tower Minneapolis*, 781 F.3d 1003, 1009 (8th Cir. 2015). The federal district court concluded that this amendment was “futile” because appellants had “not adequately pleaded any theory under which Wischermann Partners, Inc. or Paul Wischermann could be liable merely by their association with respondent Wischermann Holdings, LLC.”³ *Id.* at 1015. The court also struck the ILSA claims with prejudice for failure to plead fraud with the required particularity, and the court dismissed the state-law claims without prejudice, declining to exercise jurisdiction over them. *Id.* at 1009–10. The court affirmed a magistrate’s denial of appellants’ motions for leave to file a third and fourth amended complaint. *Id.* at 1009.

On March 30, 2015, the Eighth Circuit Court of Appeals affirmed the dismissal of appellants’ ILSA claims and the federal district court’s denial of appellants’ motion for leave to add Wischermann as parties. *Id.* at 1017. In the meantime, the Eighth Circuit Court of Appeals summarily affirmed, in an unpublished order, a federal district court’s denial of Hammann’s motion to join or take the place of the Streambend II as plaintiff. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 701 Fed. App’x 544, 544 (8th Cir. 2017). The Eighth Circuit Court of Appeals also affirmed the denial of subsequent motions by Hammann for substitution of parties and relief from judgment. *Id.* at 545. And appellants filed three petitions for a writ of certiorari, which were denied in 2015, 2016, and 2018, respectively. *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 136 S. Ct. 287

³ Wischermann Partners, Inc. and Paul Wischermann will hereinafter be collectively referred to as “Wischermann.”

(2015); *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 137 S. Ct 262 (2016); *Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 139 S. Ct. 126 (2018).

In December 2017, appellants filed in state court, a ten-count, 68-page complaint, plus 100 pages of attached exhibits, against Ivy Tower, respondents Ivy Tower Development, LLC; Moody Group, LLC; Goblen Enterprises, LP; Jeffrey Laux; Gary Benson, Wischermann, and Commonwealth, seeking return of their earnest money and alleging damages under the MCIOA. Appellants also sought damages for wrongful cancellation, breach of contract, unjust enrichment, a declaratory judgment, conversion, violation of Minn. Stat. § 82.75, negligent misrepresentation, and breach of fiduciary duty. Respondents moved to dismiss all counts of appellants' complaint under Minn. R. Civ. P. 12.02(e). The district court concluded that all counts of appellants' complaint "are either barred by claim and issue preclusion, time barred, or fail to state a claim upon which relief can be granted," and that appellants failed to plead their claim of negligent misrepresentation with particularity under Minn. R. Civ. P. 9.02. The court granted respondents' motions, dismissed all of appellants' claims with prejudice, and denied appellants leave to file a motion for reconsideration.

This appeal follows.

D E C I S I O N

I. Appellants' motion to strike

Shortly before oral arguments, appellants filed a motion to strike "portions" of Ivy Tower's and Wischermann's briefs under rule Minn. R. Civ. App. P. 128.02, subd. 1(c), which provides that the statement of the case and the facts contained in the formal brief

“must be stated fairly, with complete candor, and as concisely as possible.” In their motion, appellants dispute the “fairness” and “candor” of respondents’ characterization of the letters sent by appellants in March and April 2009, which appellants now claim in their motion to strike cancelled the purchase agreements. But the rules of appellate procedure provide that “[n]o further briefs may be filed except with leave of the appellate court.” Minn. R. Civ. App. P. 128.02, subd. 5. As asserted in the response by Wischermann, “[a]ppellants’ motion is argument masquerading as a motion to strike.” Because appellants’ motion is essentially additional briefing without leave of this court, we deny the motion to strike.

II. Dismissal of appellants’ claims under Minn. R. Civ. P. 12.02(e)

Appellants challenge the district court’s dismissal of all of their claims under Minn. R. Civ. P. 12.02(e) against (A) “Developers,” and (B) Commonwealth.⁴ A district court may dismiss a complaint when a plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). On appeal from such a dismissal, this court reviews de novo whether the complaint sets forth a sufficient claim for relief. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014). We accept the facts alleged in the complaint as true and draw inferences in favor of the nonmoving party. *Id.* And “a court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment.” *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004) (emphasis omitted).

⁴ Appellants’ complaint refers to all of the respondents, except Commonwealth, as “Developers,” and we do also.

A. *Claims against Developers*

Appellants asserted claims against some or all of the Developers for (1) violation of the MCIOA; (2) wrongful cancellation; (3) breach of contract; (4) unjust enrichment; (5) declaratory judgment; (6) conversion; and (7) negligent misrepresentation. These claims against Developers stem from the purchase agreements that were entered into between Streambend II and VIII and Ivy Tower “on behalf of” the other Developers. But Minnesota law does not recognize the de facto corporation doctrine. *See Stone v. Jetmar Props., LLC*, 733 N.W.2d 480, 485 (Minn. App. 2007) (recognizing that the de facto corporation doctrine is not “viable in the context of business corporations”). The district court therefore determined that “[b]ecause the Streambend entities were not yet formed at the time the purchase agreements were signed, the agreements are void and unenforceable and any claims for damages flowing from those agreements are without merit.”

Appellants argue that the district court’s decision is erroneous because, after their formation, Streambend II and VIII adopted the purchase agreements through various amendments to the purchase agreements, including upgrade options and payment of additional earnest money. Indeed, “a voidable contract can be ratified or confirmed.” *Logan v. Panuska*, 293 N.W.2d 359, 362 (Minn. 1980). But here, assuming, without deciding, that Streambend II and VIII ratified the purchase agreements through their amendments, the record clearly shows that Ivy Tower later cancelled the purchase agreements under Minn. Stat. § 559.217, subd. 4.

Minnesota Statute section 559.217, subdivision 4 (2018), provides:

(a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of the purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either the purchaser or the seller may confirm the cancellation by serving upon the other party to the purchase agreement and any third party that is holding earnest money under the purchase agreement a notice:

(1) specifying the residential real property that is the subject of the purchase agreement, including the legal description;

(2) specifying the purchase agreement by date and the names of parties, and the unfulfilled condition; and

(3) stating that the purchase agreement has been cancelled.

....

(c) The cancellation of the purchase agreement is complete, unless within 15 days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.

Subdivision 7(a) of section 559.217 provides that:

After a cancellation under . . . subdivision 4, the purchase agreement is void and of no further force or effect, and, except as provided in subdivision 2, any earnest money held under the purchase agreement must be distributed to, and become the sole property of, the party completing the cancellation of the purchase agreement.

Minn. Stat. § 559.217, subd. 7(a) (2018).

Our supreme court has long recognized the finality of statutory cancellation. *See Olson v. N. Pac. Ry. Co.*, 148 N.W. 67, 68 (Minn. 1914) (holding that contract vendee

attempting to sue for damages caused by vendor's misrepresentations "has no contract upon which to predicate damages" after cancellation of the contract for deed has occurred). Once statutory notice has been served and cancellation effected, all rights under a contract for deed are terminated. *In re Butler*, 552 N.W.2d 226, 230 (Minn. 1996); *West v. Walker*, 231 N.W. 826, 827 (Minn. 1930); *Olson*, 148 N.W. at 68. This rule, known as the *Olson* rule, "applies to cancelled purchase agreements." 25 Eileen M. Roberts, *Minnesota Practice*, § 6.21 (2018-2019 ed. 2018); see *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 122–23 (Minn. 1981) (holding that finality of statutory cancellation applies to purchase agreements except where purchase agreement was not finally binding on both parties in all its essential terms; agreement was nullified pursuant to its own terms because parties failed to reach agreement on security for note upon which completion of contract was contingent). But the *Olson* rule is not applicable to claims against a party who is not a party to a purchase agreement. See *Doerr v. Clayson*, 375 N.W.2d 488, 491 (Minn. 1985) (noting that "the cancellation of the contract for deed had no effect on the real estate agents because they were not parties to the contract").

Here, Commonwealth was not a party to the purchase agreements with appellants, and appellants have not asserted anything to the contrary. As such, the *Olson* rule is not applicable to Commonwealth. But appellants have asserted in their complaint that Ivy Tower entered into the purchase agreements "on behalf of" the other Developers. Consequently, appellants' complaint treats the Developers as parties to the purchase agreements and, for purposes of our rule 12.02(e) analysis, we are required to accept the allegations in appellants' complaint as true. See *Bodah v. Lakeville Motors Express, Inc.*,

663 N.W.2d 550, 553 (Minn. 2003) (stating that in reviewing a rule 12.02 motion to dismiss, the reviewing court accepts the facts alleged in the complaint as true). Because, in their complaint, appellants treat the Developers as parties to the purchase agreement, and because we are required to accept the allegations in appellants' complaint as true, we apply the *Olson* rule to the Developers, which is defined in footnote 4 of the complaint to exclude Commonwealth. *But see Doerr*, 375 N.W.2d at 491 (noting that "the cancellation of the contract for deed had no effect on the real estate agents because they were not parties to the contract").

As noted above, "[o]n behalf of" Developers, Ivy Tower served appellants with notices of cancellation of their purchase agreements under Minn. Stat. § 559.217, subd. 4. Appellants failed to seek an order within the 15-day notice period to suspend cancellation, consequently, the purchase agreements were deemed cancelled by law at the end of the notice period. The earnest monies therefore became the "sole property" of Developers under Minn. Stat. § 559.217, subd. 7(a), as "the party completing the cancellation of the purchase agreement." Because the purchase agreements were cancelled, appellants' claims arising from the purchase agreements were extinguished. *See Olson*, 148 N.W. at 69 (holding that statutory termination precluded any recovery in an action arising out of the contract because statutory termination terminates the contract itself). This included appellants' claim against Developers for negligent misrepresentation. *See West*, 231 N.W.2d at 827 (stating that after cancellation of a contract for deed, the vendee cannot bring an action for fraudulent misrepresentation on the contract against the vendor).

Characterizing their letters of March 13, April 6 and 16, 2009, as statutory notices of cancellation, appellants argue that the district court erred by dismissing their claims because the court failed to “consider Streambend II’s and VIII’s statutory Notices of Cancellation.” In other words, appellants contend that their letters requesting the return of their earnest money constituted notices of cancellation to Ivy Tower under Minn. Stat. § 559.217, subd. 2. But appellants did not specifically make this argument to the district court, and the court did not treat appellants’ letters as statutory notices of cancellation. Appellants’ argument that their letters constitute statutory notices of cancellation therefore is not properly before us.⁵ See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally do not consider issues that were not presented to and decided by the district court). Moreover, even if the subject letters statutorily cancelled the purchase agreements, appellants’ claims against Developers are precluded by the *Olson* rule. See *Olson*, 148 N.W. at 69 (holding that statutory termination precluded any recovery in action arising out of contract because statutory termination terminates contract).

We acknowledge that the statutory cancellation process is “one of the harshest forfeitures known to American law,” but it is “enforced routinely in Minnesota.” 25 Eileen M. Roberts, *Minnesota Practice* § 6:16 (2018-2019 ed. 2018). And although *Olson*

⁵ We note that appellants raised this issue in their request for reconsideration under Minn. R. Gen. Prac. 115.11. But the comment to rule 115.11 states that “[m]otions for reconsideration will not be allowed to expand or supplement the record on appeal.” Minn. R. Gen. Prac. 115.11 1997 comm. cmt. (internal quotation marks omitted). Therefore, raising the issue in the request for reconsideration does not preserve the argument for appeal.

suggested that a cancelled purchaser *may* maintain a fraud action for “money had and received,” for rescission, 148 N.W. at 69, Minnesota courts have “[w]ith one exception, . . . managed to avoid finding a situation that justifies application of the exception,” 25 *Minnesota Practice* § 6:21. The only decision allowing postcancellation rescission based upon fraud involved a “widow with no business training or experience and unfamiliar with real estate values,” who had traded her home to a real-estate broker as a down payment. *Gable v. Niles Holding Co.*, 296 N.W. 525, 526 (Minn. 1941). The supreme court determined that the case was “not like” *Olson*, and allowed the case to proceed as an unjust-enrichment claim. *Id.* at 527–28.

As *Minnesota Practice* recognized, *Gable* “cried for equity, not law, and the [supreme] court responded.” 25 *Minnesota Practice* § 6:21. In contrast, this case does not cry out for equity. Unlike the widow in *Gable*, Hammann admits that he is a licensed real-estate broker who has extensive business training and experience and is clearly very familiar with real-estate value. The unjust-enrichment exception to the *Olson* rule discussed in *Gable* is therefore not applicable here, and all of appellants’ claims against Developers are precluded by the *Olson* rule. See *Nowicki v. Benson Props.*, 402 N.W.2d 205, 206–08 (Minn. App. 1987) (holding that district court properly granted summary judgment, dismissing plaintiff’s claims for breach-of-contract, fraudulent misrepresentation, and rescission, following cancellation of a purchase agreement, because all of plaintiff’s claims depend “on the existence of a contract” and “[i]t is longstanding law in Minnesota that once statutory notice has been served and cancellation effected, all rights under a contract for deed are terminated”).

Moreover, we conclude that even if appellants' unjust-enrichment claim against Developers was not precluded by the *Olson* rule, the complaint fails to state a claim for unjust enrichment upon which relief can be granted. To establish an unjust-enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant "in equity and good conscience" should pay. *Klass v. Twin City Fed. Sav. & Loan Ass'n*, 190 N.W.2d 493, 494–95 (Minn. 1971). "Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully." *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (quotation omitted). "It is well settled in Minnesota that one may not seek a remedy in equity when there is an adequate remedy at law." *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992); see *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981) (stating that if equitable relief were granted, statutory restrictions would be circumvented).

Appellants argue that the district court erred by dismissing their unjust-enrichment claim because Developers' use of the escrow money was both "unlawful and immoral." We disagree. The court aptly found that appellants "had an adequate remedy at law: seek a 15-day suspension of the declaratory cancellation under Minn. Stat. § 559.217, subd. 4(c)." Because appellants had an adequate remedy available at law, which they failed to pursue, appellants' unjust-enrichment claim fails. We conclude that the court did not err by dismissing appellants' claims against Developers under rule 12.02(e).

Finally, although our above analysis demonstrates that the district court properly dismissed appellants' claims against all Developers under rule 12.02(e), we also note that the court properly dismissed appellants' claims against Wischermann as barred by res judicata. The doctrine of res judicata seeks to avoid wasteful litigation so "that a party may not be twice vexed for the same cause." *Breaker v. Bemidji State Univ.*, 899 N.W.2d 515, 518–19 (Minn. App. 2017) (quotation omitted). Res judicata bars a subsequent claim if: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011). Res judicata applies to claims actually litigated and to claims that could have been litigated in the prior action. *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 220 (Minn. 2007). Res judicata should not be rigidly applied. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004). Instead, the court should consider whether applying the doctrine against a party would work an injustice. *Id.*

Here, the district court determined that appellants' claims against Wischermann were barred by res judicata because the Eighth Circuit Court of Appeals affirmed the decision of the federal district court that denied as "futile" appellants' request to add the Wischermann respondents as defendants. *See Streambend Props.*, 781 F.3d at 1015 (affirming federal district court's denial to add Wischermann as defendants because appellants "have not adequately pleaded any theory under which [the Wischermann respondents] could be liable" (quotation omitted)). We agree that all of the elements of res judicata are satisfied. Both claims clearly involve the same set of facts and circumstances,

and both cases involve the same parties. Moreover, judgment on the matter was final, as the Eighth Circuit affirmed the federal district court's denial of the request to add Wischermann as defendants. And appellants clearly have had full and fair opportunity to litigate the matter. Under these circumstances, we conclude that the court properly determined that appellants' claims against Wischermann are barred by res judicata. See *Breaker*, 899 N.W.2d at 518–19 (stating that doctrine of res judicata seeks to avoid wasteful litigation so “that a party may not be twice vexed for the same cause”).

B. Claims against Commonwealth

Appellants also brought several claims against Commonwealth, including for (1) violation of the MCIOA; (2) declaratory judgment; (3) conversion; (4) violation of Minn. Stat. § 82.75; (5) negligent misrepresentation; and (6) breach of fiduciary duty. Appellants contend that the district court erred by dismissing these claims under rule 12.02(e). We disagree.

1. MCIOA claims

MCIOA “is based upon the Uniform Common Interest Ownership Act (UCIOA) (1982) and codifies the rights of a homeowners’ association in a common interest community to bring causes of action against the declarant for engineering and construction defects.” *650 N. Main Ass’n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 486–87 (Minn. App. 2016), *review denied* (Minn. Nov. 23, 2016). In dismissing appellants’ MCIOA claims against Commonwealth, the district court determined that Commonwealth had “no duty to [appellants] under the MCIOA” because Commonwealth “is not an affiliate of the declarant” and there “was no contract between Commonwealth and [appellants].”

Appellants argue that the district court's determination is erroneous because, as a title agent, Commonwealth owed a duty to appellants under Minn. Stat. § 515B.4-109. But that statute provides:

All earnest money paid or deposits made in connection with the purchase or reservation of units from or with a declarant shall be deposited in an escrow account controlled jointly by the declarant and the purchaser, or controlled by a licensed title insurer or agent thereof, . . . [and] held in the escrow account until . . . delivered for payment of construction costs pursuant to a written agreement between the declarant and the purchaser.

Minn. Stat. § 515B.4-109 (2018). As Commonwealth points out, the only duty of the title agent under that statute “is to comply with the terms of a written agreement.”

Here, the written agreement between appellants and the declarant, Ivy Tower, which was attached as Exhibit C to appellants' complaint, specifically states:

In consideration of Seller's Agreement on this day to sell a certain Unit in Ivy Residence to Buyer, together with a Parking Easement in the parking ramp to be constructed beneath the Condominium building, in order to lower Seller's costs of financing the construction of the project, and as permitted by Minnesota Statutes § 515B.4-109, Buyer agrees that, upon request by Seller, all earnest money previously paid shall be released to Seller and used for the payment of construction costs.

The plain language of Exhibit C specifically allows Commonwealth to release escrow money for construction costs upon the Seller's request. There is no additional step requiring appellants to agree to release the funds. If appellants wanted such an additional step, they should have included it in the written agreement. And the written agreement between appellants and Ivy Tower that allows escrow money to be released for construction

costs upon Ivy Tower's request is consistent with Minn. Stat. § 515B.4-109, which allows a seller to use funds for construction costs as long as there is a written agreement between the parties.

Appellants argue that the language in Exhibit C is “reasonably susceptible to more than one interpretation,” and that its “more natural interpretation” is that “upon request by Seller to Buyer,” all earnest money previously paid shall be released to Seller for construction costs. But we will not read such a requirement into a contract when the language, on its face, does not contain such an obligation. *See Telex Corp. v. Data Prods. Corp.*, 135 N.W.2d 681, 686–87 (Minn. 1965) (stating that “where the written language of an instrument applied to the subject is clear, whether it be a statute, constitution, or contract, it is neither necessary nor proper in construing it to go beyond the wording of the instrument itself”). Appellants’ argument here reads into the contract language that does not appear on the face of Exhibit C. Moreover, such a requirement that Sellers obtain permission from the Buyers to use earnest monies for construction costs is unnecessary based on the plain language of the instrument itself. Exhibit C specifically states that “[i]n consideration of Seller’s agreement . . . Buyer agrees.” To add another step that Seller first request from Buyer to use earnest monies for construction costs ignores the plain language of the agreement that Buyer has already agreed to the use of earnest monies for construction costs. Thus, appellants’ argument that Exhibit C is ambiguous is without merit.

Appellants further contend that Commonwealth violated the MCIOA because Commonwealth had a duty to act in good faith, which included notifying appellants that monies would be removed and later that they had been removed from the escrow account.

To support their claim, appellants cite Minn. Stat. § 515B.1-113 (2018), which provides that “[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.” But as the district court found, Minn. Stat. § 515B.1-113 does not apply because there was no contract between appellants and Commonwealth. Moreover, based upon Exhibit C, the only duty imposed upon Commonwealth was to release the escrow monies for construction costs upon the request of Ivy Tower. The court therefore properly dismissed appellants’ MCIOA claims against Commonwealth.

2. Declaratory-judgment claim

Appellants sought an unspecified declaratory judgment against Commonwealth under Minnesota Statutes chapter 555, which permits “[a]ny person . . . whose rights, status, or other legal relations are affected by a statute” to “have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” Minn. Stat. § 555.02 (2018). But a court does not have jurisdiction over a declaratory-judgment claim unless there is a justiciable controversy, which exists if the claim “(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.” *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617–18 (Minn. 2007).

Here, the district court determined that “a party seeking a declaratory judgment must have an independent, underlying cause of action based on a common law or statutory right,” but that “[b]ecause the court has dismissed with prejudice all of [appellant]s’ claims

in this case, no such underlying cause of action exists, and [appellant]s’ claim for declaratory judgment is dismissed as well.” Because the court properly dismissed appellants’ underlying causes of action, it did not err by dismissing appellants’ declaratory-judgment claim.

3. Conversion claim

Appellants also challenge the dismissal of their conversion claim. Conversion is “an act of willful interference with the personal property of another, done, without lawful justification, by which any person entitled thereto is deprived of use and possession.” *Christensen v. Milbank Ins. Co.*, 658 N.W.2d 580, 585 (Minn. 2003) (quotation marks omitted). Recently, this court provided a thorough analysis about whether money, in its intangible form, constitutes property for conversion purposes. *TCI Bus. Capital Inc. v. Five Star Am. Die Casting, LLC*, 890 N.W.2d 423, 428–30 (Minn. App. 2017). This court reasoned that “the premise that money in an intangible form is property . . . is without precedent in Minnesota law.” *Id.* at 428. A conversion claim “is viable with respect to money only if the money is in a tangible form (such as a particular roll of coins or a particular stack of bills) and is kept separate from other money.” *Id.* at 429.

Here, appellants’ complaint alleges that their earnest money and upgrade deposits were intermingled in the Commonwealth trust account with earnest money and upgrade deposits for “various parties pursuant to purchase agreements for units” in the Ivy Hotel and Tower Development. Because this case involves only money in an intangible form, appellants’ claim fails as a matter of law under *TCI*. The district court therefore did not err by dismissing appellants’ conversion claim.

4. Claim under Minn. Stat. § 82.75 (2018)

In Count VII of their complaint, appellants allege violations of Minn. Stat. § 82.75, but the statute does not create a private cause of action. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 532 (Minn. 1992). Although the legislature was aware of the method by which it could create a private right of action, section 82.75 only grants enforcement powers to the commissioner of commerce. *Id.* Moreover, the penalty provision of the statute makes a violation a gross misdemeanor but contains no reference to civil liability. Minn. Stat. § 82.83 (2018). Instead, any civil actions contemplated by the statute are limited to claims made by licensed brokers seeking compensation and unpaid commissions. Minn. Stat. § 82.85 (2018). The district court dismissed appellants' claim under Minn. Stat. § 82.75 because the statute does not create a private cause of action and because appellants' complaint does not assert claims under Minn. Stat. § 82.85. Appellants present no argument explaining how or why the court's decision is erroneous. Accordingly, we conclude that the court did not err by dismissing appellants' claim under Minn. Stat. § 82.75.

5. Negligent-misrepresentation claim

Appellants also challenge the district court's dismissal of their negligent-misrepresentation claim against Commonwealth. To establish negligent misrepresentation, a plaintiff must demonstrate that a duty of care existed, the defendant supplied false information to the plaintiff, the plaintiff justifiably relied on the information, and the defendant failed to exercise reasonable care in communicating the information. *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012).

Here, as the district court determined, appellants are unable to establish a duty owed to them by Commonwealth. As discussed above, MCIOA does not apply to Commonwealth because Commonwealth and appellants had no contract. And, as discussed above, Minn. Stat. § 82.75 is not available to support a private cause of action. Finally, appellants fail to establish a common-law duty owed to them by Commonwealth. The district court therefore did not err by dismissing appellants' negligent-misrepresentation claim against Commonwealth. *See M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288–89 (Minn. 1992) (stating that omission is actionable as negligent misrepresentation, but such a claim is actionable only if a duty to disclose exists); *see also Smith v. Woodward Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App. 2000) (stating that “[a]n essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information”).

6. Breach-of-fiduciary-duty claim

Appellants also challenge the dismissal of their breach-of-fiduciary-duty claim against Commonwealth. To prevail on such a claim, appellants must prove four elements: duty, breach, causation, and damages. *TCI Bus. Capital, Inc.*, 890 N.W.2d at 434. But, as we concluded above, Commonwealth owed no duty to appellants, and they cite no published Minnesota caselaw supporting a contrary conclusion. Accordingly, appellants are unable to establish that the district court erred by dismissing their breach-of-fiduciary-duty claim against Commonwealth.

III. Constitutional right to a jury trial

“The right of trial by jury shall remain inviolate, and shall extend to all cases without regard to the amount in controversy.” Minn. Const. art. 1, § 4. The right to a trial by jury is accommodated by the rules of civil procedure, which provide, “[i]n actions for the recovery of money only, or of specific real property or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived” Minn. R. Civ. P. 38.01. “This rule defines the scope of the right to a jury trial in Minnesota, but it does not enlarge or diminish the historical right to a jury trial guaranteed by the Minnesota Constitution.” *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 153 (Minn. 2001).

Appellants argue that by granting respondents’ motions to dismiss, the district court denied them their constitutional right to have a jury decide the case on the merits. To support their claim, appellants argue at length that jury trials are the foundation of this nation’s constitution, and they cite statistics showing that jury trials in civil cases are sparse. But none of appellants’ assertions demonstrates that the district court improperly denied them their right to a jury trial. To the contrary, by dismissing appellants’ claims under rule 12.02(e), the court did not violate appellants’ right to a jury trial because appellants’ no longer had pending claims on which a jury could make findings. *See Onvoy, Inc.*, 736 N.W.2d at 617 (stating that constitutional jury-trial right in civil suit protects jury’s findings—and right to make findings—on all facts material to legal claim).

IV. Alleged violations of due process and equal protection

Appellants argue that the district court denied them their constitutional right to due process and equal protection. But appellants fail to establish how the court denied their due-process or equal-protection rights. Moreover, the court did not consider these issues, and appellate courts generally do not consider issues that were not presented to and decided by the district court. *Thiele*, 425 N.W.2d at 582. Appellants' due-process and equal-protection claims therefore are not properly before this court.

Affirmed; motion denied.