This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0489

Anshuman Bhatia, et al.,
Appellants,

vs.

Joseph Anderson, et al.,
Respondents.

Filed February 10, 2025
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CV-22-15189

Carl E. Christensen, Christopher J. Wilcox, Robert Kouba, Christensen Sampsel PLLC, Minneapolis, Minnesota (for appellants)

Karl J. Yeager, Louise A. Behrendt, Meagher + Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Smith, Tracy M., Presiding Judge; Schmidt, Judge; and Reilly, Judge.*

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellants Anshuman Bhatia and Jayati Saha challenge the district court's summary judgment dismissing their claims for damages and rescission based on alleged fraudulent

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

misrepresentation, negligent misrepresentation, and violation of the seller's disclosure statute, Minnesota Statutes sections 513.52-.61 (2024), in connection with their purchase of a home from respondents Joseph and Molly Anderson. We conclude that summary judgment on appellants' damages claims is proper because damages for misrepresentation or nondisclosure in the sale of property cannot be proved by repair costs alone and, by submitting evidence of only repair costs, appellants failed to present evidence sufficient to prove damages. We also conclude that summary judgment is proper on appellant's claim for rescission because, based on the undisputed facts, the claim was untimely as a matter of law. We therefore affirm.

FACTS

In June 2021, appellants entered into an agreement to purchase a home from respondents for $710,000. As part of the purchase agreement, appellants waived a home inspection. Appellants assert that their offer and waiver of inspection were based on respondents' disclosure statement, which purported to describe the property's condition and any existing issues known to respondents and stated that respondents were not in possession of any past seller's disclosure statements. The appellants closed on the property in July 2021.

The appellants moved into the property in early August 2021. Appellants assert that they began experiencing issues with the property immediately after moving in, starting with water intrusion and leakage. Appellants state that these issues were omitted from respondents' seller's disclosure statement. Appellants assert that, about one month after moving in, they were provided a copy of the prior seller's disclosure statement—which respondents had received when they moved into the home about 16 months prior to the sale to appellants—and that the prior seller's disclosure statement disclosed many of the issues that appellants were experiencing with the home.

In September 2021, appellants had an inspection of the property and a comprehensive moisture inspection completed. According to a declaration filed by Bhatia, reports from both inspections "determined the presence of major and continuous issues with the Property." Bhatia stated that, after receiving results from the initial inspections, appellants continued to have inspections completed and sought bids and quotes to install, replace, or repair various items in the house.

According to a declaration filed by appellants' attorney, appellants sent a demand letter to respondents toward the end of February 2022. Though the letter is not attached to the declaration, the attorney averred that the letter "outlin[ed] the issues with the Property and inform[ed] [respondents] that if the issues [were] not resolved, [appellants] would seek, among other things, rescission of the Purchase agreement." The record does not show that respondents replied to or otherwise acted in response to the letter.

In October 2022, appellants filed a complaint against respondents alleging claims for fraud/intentional misrepresentation, negligent misrepresentation, and failure to disclose under the seller's disclosure statute. They sought both damages and rescission. In their complaint, appellants alleged that it would cost them $216,961.10 "to fix the issues misrepresented and omitted by [respondents]."

At the close of discovery, the parties filed cross-motions for summary judgment. Appellants sought partial summary judgment on liability for all counts in the complaint.

They also asserted that they were entitled to the equitable relief of rescission as a matter of law, but they asked that the issue of damages be determined at trial. With their motion, appellants submitted a declaration from Bhatia detailing the inspections that appellants had had completed and their estimate of the total cost to repair the issues based on the bids and quotes they received, which was $221,576.16.

Respondents sought summary judgment on all of appellants' claims. Respondents argued, in relevant part, that (1) appellants had failed to produce evidence of recoverable damages for the claims of fraudulent misrepresentation, negligent misrepresentation, and statutory nondisclosure because the evidence they submitted showed only repair costs and not the diminished value of the property and (2) appellants' claim for rescission should be dismissed as untimely because appellants waited over a year after noticing issues with the property in August 2021 before initiating their action for rescission in October 2022.

In their reply memorandum in support of their motion for partial summary judgment on liability and rescission, appellants maintained that damages were a fact issue for the jury. With their reply memorandum, appellants also filed a supplemental declaration from Bhatia, which states, "I believe the value of the Property is worth less as a result of the issues not disclosed to us. I believe the value of the Property is the cost we paid for it minus the cost necessary to repair it."

In an amended order, the district court denied appellants' motion for partial summary judgment and granted respondents' motion for summary judgment, dismissing all of appellants' claims. As for appellants' claims for damages for fraudulent misrepresentation, negligent misrepresentation, and statutory nondisclosure, the district court ruled that all three causes of action required proof of damages as calculated under the out-of-pocket-loss rule and that appellants, by submitting only repair costs and not evidence of diminution in value of their property, "failed to provide evidence of recoverable damages." As for appellants' claim for rescission based on those same causes of action, the district court determined that appellants' claim was untimely because appellants commenced their suit more than a year after discovering a significant portion of the alleged misrepresentations and omissions and the undisputed evidence did not support a determination that the delay was reasonable.

This appeal follows.[1]

DECISION

Summary judgment is appropriate when "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. Appellate courts review a grant of summary judgment "de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). In doing so, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). To create a genuine issue of material fact, a nonmoving party must submit evidence that is "sufficiently

[1] In their complaint, appellants asserted claims in addition to those described in this opinion, but they do not challenge the district court's summary judgment against them on those other claims.

probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Appellants contend that (1) because they submitted sufficient evidence of damages to survive summary judgment, the district court erred by dismissing their damages claims for fraudulent misrepresentation, negligent misrepresentation, and statutory nondisclosure and (2) because they did not unreasonably delay in seeking rescission, the district court erred by dismissing as untimely their claim for rescission based on those same causes of action. We address each argument in turn.[2]

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[2] As a preliminary matter, we note that, while the district court dismissed appellants' negligent-misrepresentation claim for damages and for rescission for the reasons described above, it also dismissed the negligent-misrepresentation claim for a separate and independent reason. Specifically, the district court concluded that, as a matter of law, appellants' negligent-misrepresentation claim failed because respondents did not owe appellants a duty since appellants were represented in the transaction by their own real-estate agent. Respondents argue that appellants forfeited any challenge to the lack-of-duty reason for dismissing the negligent-misrepresentation claim because appellants did not argue the issue in their principal appellate brief. In their reply brief, appellants respond that they preserved the argument because, in their principal brief, they stated the five elements of a misrepresentation claim as outlined in *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009), and those elements do not include the element of duty.

Appellants' argument is unconvincing. The elements that appellants listed in their principal brief are the elements of a fraud claim as outlined in *Valspar*, not the elements of a negligent-misrepresentation claim, which are also outlined in that case. *Valspar*, 764 N.W.2d at 368-69. And, significantly, the *Valspar* court referenced the issue of whether a negligent-misrepresentation claim is actionable if the defendant did not owe a duty of care to the other party to the transaction, although it determined that, in the circumstances of that case, it did not need to decide the issue. *Id.* at 369-70 & n.7. Despite this reference in *Valspar* to the question of duty, appellants did not address the district court's ruling regarding lack of duty in their principal brief. Merely stating the elements of a claim is not the same as arguing that the district court's determination about those elements was erroneous. Appellants therefore forfeited the argument that the district court erred by

I. Summary judgment is proper because appellants failed to submit sufficient evidence of recoverable damages to survive summary judgment.

Appellants argue that they submitted sufficient evidence of damages to survive summary judgment. They make three arguments to support that claim. First, they contend that repair costs may suffice to establish recoverable damages for fraud or misrepresentation in the context of a residential real-estate transaction and thus their evidence of repair costs is sufficient to survive summary judgment. Second, they argue that the opinion of Bhatia—that the value of the home is the purchase price less the repair costs—suffices to establish recoverable damages. Third, they assert that a claim for damages under the seller's disclosure statute is not subject to the same measure of damages as a fraud or misrepresentation claim. None of the arguments are persuasive.

A. Appellants' evidence of repair costs is insufficient to survive summary judgment under the out-of-pocket-loss rule for damages.

Appellants argue that evidence of repair costs may establish recoverable damages for claims based on fraud or misrepresentation in the sale of residential real estate and that they therefore submitted sufficient evidence to survive summary judgment.

When evaluating damages resulting from a contract for the purchase of real property induced by fraud or misrepresentation, Minnesota courts apply the out-of-pocket-loss

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determining that their negligent-misrepresentation claim fails for lack of duty. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived); *Ward v. El Rancho Manana, Inc.*, 945 N.W.2d 439, 449 (Minn. App. 2020) (declining to address an argument that "appellants failed to argue . . . in their principal brief"), *rev. denied* (Minn. Sept. 29, 2020). As a result, even if we were to conclude that the district court erred in its rulings about damages or rescission, the district court's dismissal of appellants' negligent-misrepresentation claim would stand.

measure of damages. *Marion v. Miller*, 55 N.W.2d 52, 55 (Minn. 1952). Out-of-pocket loss "is the difference between the actual value of the property received and the price paid for it." *Yost v. Millhouse*, 373 N.W.2d 826, 830-31 (Minn. App. 1985) (quoting *Lowrey v. Dingmann*, 86 N.W.2d 499, 501-02 (Minn. 1957)). In cases of alleged misrepresentation in a real-estate transaction, "the measure of damages is the amount paid less the fair market value of the property." *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1977). When there is no difference between the actual value of the property and the price paid, the defrauded party "has suffered no damage and therefore cannot recover." *Berg v. Xerxes-Southdale Off. Bldg. Co.*, 290 N.W.2d 612, 615 (Minn. 1980) (quotation omitted).

Here, the district court relied on, and the parties discuss, two cases in which this court explained that repair costs alone are insufficient to show a diminution in value in a real-estate transaction under the out-of-pocket-loss rule.

In *Lobe Enterprises v. Dotsen*, the buyer of a commercial building sued to recover the cost of a new roof, claiming that the seller had misrepresented the state of the roof. 360 N.W.2d 371, 372 (Minn. App. 1985). The district court found against the buyer. *Id.* On appeal, the buyer asserted that the district court had erred by applying the out-of-pocket-loss rule. *Id.* We affirmed, holding that "the 'out-of-pocket-loss rule' rather than the costs of repair" was the proper measure of damages and that the buyer "did not fulfill their burden of proving damages under the 'out-of-pocket-loss' rule by subtracting the cost of repairs from the purchase price of the property." *Id.* at 371. We explained that the cost of a new roof does not establish the market value of the building, observing that "[t]he installation price of a new roof includes cost factors which have no effect upon the market value of the building." *Id.* at 373. We stated that "the actual value of the property in the condition received" is "essential to prove loss." *Id.*

In *Bryan v. Kissoon*, a home buyer sued the seller, claiming that the seller's failure to disclose that the house had suffered a fire caused her to incur damages because, had she known about the fire, she would have had a water-intrusion inspection performed and would have discovered unrelated structural defects that cost $400,000 to remedy. 767 N.W.2d 491, 493-94 (Minn. App. 2009). The district court excluded the buyer's evidence of repair costs because the alleged misrepresentation had not proximately caused the damages. *Id.* at 494. Without evidence of damages, the district court then granted the sellers' motion for judgment as a matter of law. *Id.* We affirmed. *Id.* at 497. In so doing, we reiterated the holding in *Lobe* that, under the out-of-pocket-loss rule, "repair costs alone are not sufficient to show damages for fraudulent misrepresentation in a real-estate transaction." *Id.* at 496 (citing *Lobe*, 360 N.W.2d at 373).

Appellants challenge the application of *Lobe* and *Bryan* here for several reasons. They contend that *Lobe* does not apply because it dealt with a commercial, not residential, buyer of real estate. But, while the appellant in *Lobe* was a commercial buyer, there is no indication in the opinion that the holding should be limited to commercial buyers. *See Lobe*, 360 N.W.2d 371. And in *Bryan*, we rejected the argument that *Lobe* does not apply to a residential-real-estate purchase, noting that "*Lobe* did not limit its holding to buildings that are commercial in nature." 767 N.W.2d at 496 n.2.

Appellants also assert that *Lobe* does not establish a bright-line rule that repair costs may never reflect diminution in value because *Lobe* states, "*Under these circumstances*, repair costs do not accurately reflect appellants' loss proximately arising from the misrepresentation." 360 N.W.2d at 373 (emphasis added). But, even if that phrase implies that, in some cases, repair costs alone are sufficient, appellants have not distinguished the circumstances of their case from those in *Lobe*. Appellants' repair costs, like the repair costs asserted in *Lobe*, include other costs that do not affect the market value of the building, such as the cost of installing new fixtures in the home. As a result, as in *Lobe*, the repair costs asserted by appellants are insufficient to show the diminished value of the building under the out-of-pocket-loss rule.

As for *Bryan*, appellants assert that our statement that repair costs are insufficient to prove recoverable damages is dicta. It is true that our decision in *Bryan* turned on whether the asserted repair costs were proximately caused by the alleged fraud, not whether repair costs can be evidence of damages. 767 N.W.2d at 496. But, even if we were to consider the *Bryan* court's discussion of the out-of-pocket-loss rule to be dicta, it is still persuasive authority, especially when, as is the case here, the dicta discuss the law at issue on appeal. *See In re Est. of Bush*, 224 N.W.2d 489, 501 (Minn. 1974) ("Even dictum, if it contains an expression of the opinion of the court, is entitled to considerable weight."); *see also Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267, 277 n.9 (Minn. 2017) (relying on dictum as "persuasive" where the analysis focused on the same statutes at issue on appeal).

Appellants further argue that *Lobe* and *Bryan* "went before the factfinder" and therefore cannot be relied on to establish that repair costs are insufficient as a matter of law and that doing so would result in "a conflation of the admissibility of evidence with its weight." But, as stated above, *Lobe* establishes that the actual value of the property cannot be determined by repair costs that include other cost factors that do not affect market value. 360 N.W.2d at 373. Accordingly, without evidence that the actual value of the property diminished as a result of the alleged problems, appellants, as a matter of law, did not establish a genuine issue of material fact as to the element of damages under the out-of-pocket-loss rule.

B. Bhatia's declaration provides insufficient evidence to survive summary judgment.

Appellants also argue that they submitted sufficient evidence to survive summary judgment because Bhatia, as the homeowner, submitted a supplemental declaration stating that he "believe[d] the value of the Property is the cost [appellants] paid for it minus the cost necessary to repair it." They argue that to hold otherwise would require homeowners to obtain expert testimony to show a diminution in value, which would contradict the rule that an "owner of property either real or personal is presumptively acquainted with its value and may testify as to its value." *Lehman v. Hansord Pontiac Co.*, 74 N.W.2d 305, 309 (Minn. 1955). We disagree. Caselaw states that, under the out-of-pocket-loss rule, "the measure of damages is the amount paid less the fair market value of the property." *Peterson*, 254 N.W.2d at 362. A homeowner could submit testimony about the value of their own property so long as the testimony addresses the market value of the home and is based on evidence separate from or in addition to repair costs. Because Bhatia's supplemental declaration testimony does not address actual value but, instead, merely reiterates the repair costs identified in his initial declaration, it does not create a genuine issue of material fact regarding damages.

C. The out-of-pocket-loss rule applies to claims for statutory nondisclosure.

Finally, appellants argue that the out-of-pocket-loss rule is not the proper measure of damages for their claim of failure to disclose under Minnesota Statutes section 513.55.

Although *Lobe* and *Bryant* address claims of common-law fraud and misrepresentation, we read the language of the seller's disclosure statute to use the same measure of damages as those common-law claims. The seller's disclosure statute creates a separate cause of action from common-law fraud and misrepresentation and requires a seller to make written disclosures to the prospective buyer regarding material facts that the seller knows may affect the buyer's use or intended use and enjoyment of the property. Minn. Stat. § 513.55, subd. 1. A person injured by a seller's nondisclosure may "recover damages and receive other equitable relief as determined by the court." Minn. Stat. § 513.57, subd. 2. The statute does not "preclude[] liability for an action based on fraud, negligent misrepresentation, or other actions allowed by law." *Id.*, subd. 3.

Appellants assert that the statute should not be limited to out-of-pocket loss because section 513.55 mandates disclosures that impact the buyer's "use and enjoyment of the property" and because section 513.57 provides that a buyer may "recover damages and receive other equitable relief." But section 513.55 describes the disclosures that are required, not the remedies available. And, while section 513.57 provides that an individual injured by a failure to disclose can seek damages in addition to equitable relief, the statute does not indicate that the legislature intended "damages" to be defined differently from common-law-fraud damages in real-estate cases. "[S]tatutes are presumed to be consistent with the common law and will not be construed to modify or alter the common law unless they expressly so provide." *Minn. Equal Access Network Servs. v. Burlington N. & Santa Fe R.R. Co.*, 646 N.W.2d 911, 914 (Minn. App. 2002), *rev. denied* (Minn. Oct. 15, 2002). Accordingly, we conclude that the measure of common-law-fraud damages in property cases, which is the out-of-pocket-loss rule, is the proper measure for damages under the seller's disclosure statute. *See Peterson*, 254 N.W.2d at 362 (measuring common-law damages using the out-of-pocket-loss rule); *see also Lawrence v. Forthun*, No. A09-0543, 2009 WL 4796754, at *8 (Minn. App. Dec. 15, 2009) ("It is most logical to use the same measure of damages in a real-estate transaction where injury is caused by the seller's failure to disclose, as required by the seller's disclosure statute, as in an action arising out of a real-estate transaction where the injury is caused by the seller's fraud or misrepresentation.").[3]

In conclusion, because appellants failed to provide sufficient evidence of diminution of value to create a genuine issue of material fact regarding damages, the district court did not err when it granted respondents' motion for summary judgment and dismissed appellants' claims for damages based on fraud, negligent misrepresentation, and statutory nondisclosure.

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[3] We cite this nonprecedential opinion as persuasive authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

II. The district court did not err in determining that appellants' rescission claim was untimely.

"Rescission is an equitable remedy," *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011), "which not only terminates the contract but abrogates it and undoes it from the beginning," *Johnny's, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn. App. 1990). The remedy of rescission "may be lost where the buyer . . . fails to disaffirm the transaction within a reasonable time after discovery of the fraud." *Hemming v. Ald, Inc.*, 155 N.W.2d 384, 386 (Minn. 1967).

Appellants argue that the district court erred by rejecting rescission as untimely as a matter of law for two reasons: first, because the district court erred when it determined that appellants did not disaffirm the transaction until filing suit in October 2022 and, second, because the district court did not apply the relevant factors for determining whether a party's delay was unreasonable.[4]

Regarding their first argument, appellants assert that the record establishes that they disaffirmed the transaction long before they filed suit in October 2022. Specifically, they assert that they disaffirmed the transaction in February 2022 when their lawyer sent a

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[4] Appellants possibly assert a third reason why the district court erred when they state that the district court "ignored that rescission is a remedy provided for by statute." While it is true that the seller's disclosure statute permits an injured party to seek equitable remedies, Minn. Stat. § 513.57, subd. 2, and those remedies presumably include rescission, appellants do not explain how the district court ignored that remedy. Nor do appellants argue that the statute alters how a court must analyze a claim for rescission. To the extent that appellants are making such an argument here, it is for the first time since they did not assert that argument before the district court. We therefore decline to consider the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)).

"demand letter" to respondents. That letter, according to their lawyer, outlined the issues with the property and informed appellants that "if the issues [were] not resolved, the Bhatias would seek, among other things, rescission of the Purchase agreement." Appellants argue that the February letter disaffirmed the transaction and the district court erred by determining that they did not seek rescission until October 2022.

We disagree that the February 2022 letter provides the endpoint for measuring whether appellants timely sought rescission. In *Holcomb & Hoke Manufacturing Co. v. Osterberg*, the buyer knew within a month of purchasing a machine from the seller that there was an issue that could not be overcome. 233 N.W. 302, 302-03 (Minn. 1930). Three months after purchasing the machine, the buyer sent a letter threatening to stop payments unless the seller fixed the machine. *Id.* at 303. The seller did not fix the machine, but the buyer waited another nine months before bringing a suit against the seller for rescission. *Id.* The supreme court viewed the delay between the letter and the start of the lawsuit as the buyer "deliberately abandon[ing] his efforts at rescission" and determined that the delay from the time the issue was known until when the lawsuit was commenced—about 11 months—was unreasonable and rescission was no longer an appropriate remedy. *Id.* at 304.

Similarly, here, while appellants' February 2022 letter referenced a possible action for rescission, there is no evidence in the record suggesting that respondents responded to the letter or repaired the property, and yet appellants waited an additional eight months before commencing suit against respondents. Thus, even if we consider the February letter as asserting a claim for rescission, the district court properly used the date of suit to measure the delay because appellants, by waiting eight months between the demand letter and bringing the suit, abandoned their efforts to rescind. *See id.* at 303-04.

Regarding appellants' second argument, contrary to appellants' assertion, the district court properly considered the applicable factors for determining whether a party seeking rescission acted within a reasonable time—including the relative knowledge of the parties, the potential prejudice to the seller from the delay and fluctuations in the market, and whether the seller induced the delay. *See Hemming*, 155 N.W.2d at 386-87 (setting forth factors to determine a reasonable time to rescind). As noted in the district court's order, appellants admitted that they discovered key aspects of the alleged fraud by September 2021, appellants had previously bought a house and knew of the importance of an inspection, nothing in the record suggested that respondents acted in a way that would dissuade or delay appellants from seeking rescission, and the parties did not dispute that there had been fluctuations in the residential retail market that would impact rescission. Under the applicable legal factors and based on the undisputed facts, a reasonable fact-finder could not find that appellants' delay of nearly 13 months between the time of the inspections until the time of the lawsuit was reasonable. *See id.* Accordingly, the district court did not err by determining that appellants' delay was unreasonable as a matter of law.

Affirmed.