Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
09/16/2026 03:20 AM CDT

the necessity of posting bond." The district court found that such waiver was not permissible under § 25-1084 and that the receiver had to comply with that section. Therefore, the court decreed that if the parties could not agree on the appropriate bond by June 1, 2011, the receiver should notice the matter for hearing. The supplemental transcript in this case shows that a "receiver's bond" was issued to the receiver on July 8 in the sum of $10,000.

The intervenor's argument is that given that the receiver had in excess of $40,000 in his possession, he should have had a bond. We cannot disagree, but the intervenor, 3RP Operating, is not a party to this case and, by virtue of the summary judgment which we have affirmed, has no financial interest in the estate or what remains of this case. In short, the intervenor does not make any argument telling us how this error in the proceedings caused it prejudice, and no other party complains about the matter in this appeal. Accordingly, we find no prejudice to the intervenor or any other ground for any relief to the intervenor on this basis.

CONCLUSION

After our exhaustive review of this voluminous record, we find that we have jurisdiction of this appeal under § 25-1090 and that the district court properly granted summary judgment to the receiver, Huff, and against the intervenor corporation, 3RP Operating.

AFFIRMED.

HEATHER NELSON, APPELLANT, V. NEIL WARDYN AND SELENA WARDYN, APPELLEES.

820 N.W.2d 82

Filed May 8, 2012. No. A-11-655.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony.
2. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.

3. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court considers the evidence in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
5. ____: ____: ____. In a claim of negligent misrepresentation, one who, in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused by justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
6. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state.
7. **Actions: Fraud: Proof.** To set forth a prima facie case for misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false, or made recklessly or negligently; (4) that it was made with the intention that it should be relied upon; (5) that the party did so rely; and (6) that he or she suffered damages as a result.
8. **Negligence: Fraud.** In a claim for negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.
9. ____: ____. In a case of negligent misrepresentation, the defendant need not know that the statement is false; the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation.
10. **Real Estate: Sales: Attorney Fees.** Neb. Rev. Stat. § 76-2,120(5) (Reissue 2009) provides that a real estate disclosure statement is to be completed to the best of the seller's belief and knowledge. Section 76-2,120(12) provides that if the seller fails to comply with the requirements of the statute, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney fees.

Appeal from the District Court for Hall County, JAMES D. LIVINGSTON, Judge, on appeal thereto from the County Court for Hall County, PHILIP M. MARTIN, JR., Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Brian J. Davis, of Berreckman & Davis, P.C., for appellees.

IRWIN and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Heather Nelson appeals an order of the district court for Hall County, Nebraska, in which the district court reversed a judgment of the county court in Nelson's favor on a claim of negligent misrepresentation and affirmed the county court's denial of attorney fees. We find that the county court's factual findings concerning negligent misrepresentation were not clearly erroneous, and we reverse the district court's judgment on that issue. We find that the county court erred in finding that there was no violation of Neb. Rev. Stat. § 76-2,120 (Reissue 2009) and declining to award attorney fees. Therefore, we reverse, and remand with directions.

II. BACKGROUND

The events giving rise to this action concern Neil Wardyn and Selena Wardyn's sale of a home to Nelson in 2008. In February 2008, Nelson and the Wardyns entered into a purchase agreement for a home located in Grand Island, Nebraska. When the Wardyns listed the home for sale, they completed a "Nebraska Real Estate Commission Seller Property Condition Disclosure Statement," which they signed in November 2007. See § 76-2,120. Nelson reviewed the disclosure statement prior to entering into the purchase agreement. The disclosure statement contained a disclaimer that it was not intended to be a warranty, but that the purchaser "may rely on the information contained" within the disclosure statement "in deciding whether and on what terms to purchase the property."

The disclosure statement represented that the Wardyns had owned the property for 7 years, but the record indicates that they had actually owned the property for closer to 4½ years. Neil Wardyn testified that during the time the Wardyns lived in the home, they did experience leakage or seepage in the basement of the home. He testified that they experienced such leakage or seepage on at least two occasions in the spring of 2007.

The disclosure statement included, among other subjects, a question asking the sellers, "Has there been leakage/seepage in the basement or crawl space?" The disclosure statement

then included three boxes that the sellers could choose from in responding to this question: "yes," "no," and "do not know." Even though the Wardyns had personally experienced leakage or seepage on at least two occasions in the year prior to completing the disclosure statement, they checked the box indicating "do not know" in response to the question about leakage and seepage.

Nelson testified that she reviewed the disclosure statement prior to signing the purchase agreement. She testified that the disclosure statement did not reflect that the Wardyns had experienced any problems and that the way the form was completed "[told her] that the basement [did not] leak and that there was no problem." She testified that she elected not to have an inspection performed on the house because it was a newer construction, that "[e]verything seemed to be fine," and that "[a]ccording to the disclosure statement, nothing was wrong." She testified that she would have acted differently if the "yes" box had been checked and prior problems explained.

Neil Wardyn testified at trial that he believed the disclosure statement was asking whether there was then a current leakage or seepage problem and that because it had been several months since the Wardyns had experienced any leakage or seepage, a "yes" answer on the disclosure statement was inappropriate. He also testified that he explained the prior experiences to the Wardyns' real estate agent and confirmed with the agent that a "do not know" answer would be appropriate. He acknowledged at trial that the answer to the question should have been "yes" as opposed to "do not know."

Approximately 1 or 2 months after moving into the home, Nelson experienced problems with water entering the basement. During a period of rain, Nelson experienced a significant amount of water entering the basement; her then boyfriend testified that when he cleaned the water from the room with a Shop-Vac, he removed in excess of 36 gallons of water. Nelson continued to experience problems with water entering the basement after rainfalls.

Nelson hired a professional with 18 years of experience waterproofing and doing construction work to inspect the home and provide an estimate for fixing the leakage problem. The

professional testified that "it would have been very unlikely that [there] had not [been] previous water damage" in the home. He testified that his bid for performing the necessary work to remedy the leakage problem would be $16,100.

In July 2008, Nelson filed a complaint in county court, based on the Wardyns' failure to sufficiently disclose the prior water leakage before Nelson purchased the home. Nelson alleged three causes of action: (1) fraudulent misrepresentation, (2) negligent misrepresentation, and (3) violation of § 76-2,120. Nelson requested monetary damages.

After a bench trial, the county court entered a judgment in favor of Nelson. The court found that Nelson had demonstrated that "with respect to the [leakage/seepage] answer the [Wardyns] answered 'don't know' when clearly the correct answer would have been 'yes.' [Nelson] relied on this incorrect answer and entered into the purchase agreement." The court found that although the evidence suggested that Nelson did not closely or carefully examine the disclosure form, "even scanning a disclosure document when there is an affirmative answer in a particular problem area, that would be a red flag for any reader more so than a 'don't know' answer would be."

The county court specifically found that based upon the Wardyns' explanation at trial, they had not intentionally or fraudulently misrepresented the prior leakage or seepage problems, but that their answer given the realities of the situation was negligent misrepresentation. The court also specifically found that this misrepresentation was not a violation of § 76-2,120. The court awarded $16,000 damages.

The Wardyns appealed to the district court. On appeal, the district court reversed the county court's judgment. The district court held that the checking of the "do not know" box on the disclosure statement was not an assertion that there was not a problem and that the evidence of Nelson's reliance on the disclosure statement was insufficient to meet her burden of proof. The district court placed great emphasis on the fact that Nelson did not conduct an inspection or inquire further what was meant by the "do not know" box being checked. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Nelson has assigned two errors. First, Nelson asserts that the district court erred in reversing the county court's judgment on negligent misrepresentation. Second, Nelson asserts that the court erred in not reversing the county court's failure to award attorney fees under § 76-2,120.

IV. ANALYSIS

1. Negligent Misrepresentation

Nelson first asserts that the district court erred in reversing the county court's judgment in her favor on the issue of negligent misrepresentation. We agree that under the applicable standard of review, the county court's factual conclusions were not clearly erroneous and the district court erred in reversing the judgment.

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id.* Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.* In reviewing a judgment awarded in a bench trial of a law action, an appellate court considers the evidence in the light most favorable to the successful party and resolves conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[4,5] Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Kramer v. Eagle Eye Home Inspections*, 14 Neb. App. 691, 716 N.W.2d 749 (2006), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010). In a claim of negligent misrepresentation, one who, in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused by

justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. See *Kramer v. Eagle Eye Home Inspections, supra*, quoting *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003).

[6-9] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state. *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009). To set forth a prima facie case for misrepresentation, one must show (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false, or made recklessly or negligently; (4) that it was made with the intention that it should be relied upon; (5) that the party did so rely; and (6) that he or she suffered damages as a result. See *Eicher v. Mid America Fin. Invest. Corp., supra*; *Kramer v. Eagle Eye Home Inspections, supra*. In a claim for negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances. *Lucky 7 v. THT Realty, supra*. In a case of negligent misrepresentation, the defendant need not know that the statement is false; the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation. *Id.*

In the present case, the evidence is undisputed that the Wardyns represented on the disclosure statement that they owned the property for 7 years (although they actually had owned the property for approximately 4½ years) and that they did not know whether there had been leakage or seepage in the basement of the home. There is no dispute that this representation about leakage or seepage was false, as they had personally experienced leakage or seepage on at least two prior occasions, had attempted to remedy the problem with caulking, and explained the prior issues to their real estate agent. Thus, the first two elements of a negligent misrepresentation claim were satisfied.

The county court held that the representation was made negligently. The Wardyns attempted to explain at trial that they were unsure whether there was still a leakage or seepage

potential because they had not experienced any problems for the past several months before filling out the disclosure statement. However, the question on the disclosure statement did not ask whether there existed ongoing problems or whether there would be future problems; the question on the disclosure statement simply asked, "Has there been leakage/seepage in the basement or crawl space?" There had been, the Wardyns knew there had been, and the Wardyns elected to falsely represent that they did not know. Neil Wardyn testified at trial that the question on the disclosure statement should have been answered "yes." The county court's conclusion that the Wardyns made their false representation negligently is not clearly wrong. Thus, the third element of a negligent misrepresentation claim was satisfied.

The disclosure statement itself includes a statement, in all capital letters at the top of the page, indicating that although the disclosure statement is not intended to be a warranty, it is intended to be a disclosure of the condition of the property known by the seller on the date on which it is signed and that "the purchaser may rely on the information contained [therein] in deciding whether and on what terms to purchase the real property." In addition, the purchase agreement between Nelson and the Wardyns provided that "[i]n making the offer to purchase and determining what inspections to elect, [Nelson] relie[d] upon the condition of the property as represented by [the Wardyns] in the [Wardyns'] Property Condition Disclosure Statement . . . ." The county court's implicit conclusion that the Wardyns' statement on the disclosure statement was made with the intention that it be relied upon was not clearly wrong. Thus, the fourth element of a negligent misrepresentation claim was satisfied.

The basis for the district court's reversal of the county court's decision was largely the district court's conclusion that Nelson failed to demonstrate that she reasonably relied upon the representation. The county court made a factual determination that she did reasonably rely upon the representation. Nelson testified that she reviewed the disclosure statement prior to signing the purchase agreement and that it affected her decision to enter into the purchase agreement.

She testified that when she reviewed the disclosure statement, it did not reflect any problems, and that if it had, she would have acted differently. She testified that the fact that the Wardyns chose to answer "do not know" to the question of whether there had been any leakage or seepage problems indicated to her that there was no problem. Nelson's testimony supports the county court's conclusion that she did rely on the disclosure statement, and the court's conclusion was not clearly wrong.

The record indicates that the Wardyns had owned and resided in this home for 4½ years at the time they completed the disclosure statement. On the disclosure statement, they actually indicated that they had owned the home for 7 years. As the county court concluded, it is reasonable that a purchaser would view an answer of "do not know" to a question of whether there had been leakage or seepage in the basement, by someone who had resided in the home for several years, as meaning that the Wardyns were not aware of any such leakage or seepage and that the Wardyns had not experienced such leakage or seepage during their time in the home; they might have been unaware of whether there had been some latent issues or whether there had been issues prior to their ownership. The county court's conclusion that Nelson's reliance was reasonable was not clearly wrong. Thus, the fifth element of a negligent misrepresentation claim was satisfied.

Finally, Nelson presented evidence that she had secured the services of a professional with 18 years of experience waterproofing and doing construction work who submitted a bid of approximately $16,000 to remedy the problem. He testified that he was certified through an international company to provide waterproofing services and that he had provided services to "[p]robably 500 to 600" structures, and "[p]robably 200 of them [had] been existing" structures. The Wardyns challenge the evidence of damages by suggesting that the professional retained by Nelson to submit a bid was unqualified. It is unclear to this court why it is relevant that the professional "did not graduate high school and only received his GED." Brief for appellee at 44. Nelson presented evidence of the cost to repair the problem, and there was no contrary evidence

adduced by the Wardyns. Thus, the sixth element of a negligent misrepresentation claim was satisfied.

In this case, the district court appears to have disregarded the standard of review and substituted its own factual conclusions for those of the county court. The district court appears to have disagreed on the conclusions of whether Nelson relied upon the misrepresentation and whether such was reasonable in light of the circumstances of this case and the specific misrepresentation. The county court, however, was not clearly erroneous in reaching its conclusions, and the district court was not free to disregard those conclusions without finding that there was clear error. We reverse the district court's reversal of the county court's judgment in favor of Nelson on the negligent misrepresentation claim.

2. Attorney Fees

Nelson next challenges the county court's finding that there was no violation of § 76-2,120 and the court's failure to award attorney fees. Because, as noted above, we conclude that the county court did not err in finding sufficient evidence of a negligent misrepresentation in the disclosure statement, we conclude that the county court erred in finding that there was no violation of § 76-2,120.

[10] Section 76-2,120(5) provides that the disclosure statement is to be completed to the best of the seller's belief and knowledge. Section 76-2,120(12) provides that if the seller fails to comply with the requirements of the statute, the purchaser shall have a cause of action against the seller and may recover the actual damages, court costs, and reasonable attorney fees. Although the statute indicates that the purchaser "may" recover attorney fees, in *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006), the Nebraska Supreme Court held that attorney fees are mandatory under § 76-2,120.

In the present case, as discussed above, the county court did not err in finding that the Wardyns negligently misrepresented whether they were aware of leakage or seepage when completing the disclosure statement. This finding indicates that the Wardyns did not complete the disclosure form to the best of their belief or knowledge. This finding is inconsistent with

the county court's conclusion that there was not a violation of § 76-2,120, and the county court provided no explanation or rationale for concluding that there was both a negligent misrepresentation and no violation of the statute.

No issue has been presented regarding any failure of proof as to the attorney fees in this case, and affidavits supporting those fees are found in the record. See *Pepitone v. Winn, supra*. Because we conclude that the negligent misrepresentation by the Wardyns was a violation of § 76-2,120, we remand the matter to the district court with directions to remand the matter to the county court to enter an appropriate attorney fee award.

V. CONCLUSION

We reverse the district court's judgment reversing the county court's judgment. The county court was not clearly erroneous in its factual findings on the record in this case. We find that the county court erred in denying attorney fees under § 76-2,120. We remand the matter to the district court with directions to remand the matter to the county court to enter an appropriate attorney fee award.

REVERSED AND REMANDED WITH DIRECTIONS.

MOORE, Judge, participating on briefs.

TRISTAN BONN, APPELLANT, V. CITY OF OMAHA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

814 N.W.2d 114

Filed May 15, 2012. No. A-11-604.

1. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.