

**Page 1**

**THOMAS L. JACOBS and FRANCINE JACOBS, Plaintiffs-Appellants,**

**v.**

**THE CITY OF IOWA CITY, A Municipal Corporation, ALBERT R. ANDERSEN III, LINDA A. ANDERSEN, and KIM RYAN, Defendants-Appellees.**

**No. 3-927/02-1849**

**Court of Appeals of Iowa.**

**Filed March 10, 2004**

Appeal from the Iowa District Court for Johnson County, L. Verne Robinson (summary judgment) and Cynthia H. Danielson (trial), Judges.

Plaintiffs appeal the rulings for defendants on their claims against prior homeowners and their real estate agent for failing to make certain disclosures in the sale of a home and against the City of Iowa City for issuing a building permit to the prior owners. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellants.

Susan Dulek, Assistant City Attorney, Iowa City, for appellee City of Iowa City.

Alison Werner Smith and John Hayek of Hayek, Hayek, Brown & Moreland, L.L.P., Iowa City, for appellees Andersens.

C. Joseph Holland of Holland & Anderson, L.L.P., Iowa City, for appellee Ryan.

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

PER CURIAM.

**I. Background Facts & Proceedings**

The Andersens are the former owners of a residence located on Lot 42, Pepperwood Addition, Part II to Iowa City. In order to accommodate the drainage of storm water in that subdivision, Braverman, Inc., the original developer, entered into the following agreement with the City of Iowa City:

The subdivider further agrees as a covenant running with the land that no building permits

will be issued within the storm water storage basins . . . unless and until the owner of such lots or his authorized agent shall have submitted to the City a site plan showing the location of all proposed improvements on such lots including elevations for all improvements, as well as proposed method of disposing of all excavated material. The City shall not be required to issue building permits where such additional site work information required herein discloses proposed filling or excavation within the storm water storage basin as designed by the subdivider, approved by the City, and shown on the final plat of the subdivision.

An addendum to this agreement states:

The subdivision has constructed several storm water areas and structures pursuant to the requirements of the City of Iowa City, Iowa under its storm water management ordinance. As constructed; said storm water storage areas are located on parts of Lots 5 through 10, 14 through 23, 25 through 47, and 79 through 85.

No construction, excavation or grading shall be permitted in said storm water storage areas as shown on the final plat of Pepperwood Part II, without the express written consent of the city of Iowa City. It shall, however, be the primary responsibility of each of the owners of said Lots whether said Lots be improved or unimproved, to keep such Lots free from weeds and debris and to keep said Lots mowed and to maintain the entire Lot so as to minimize erosion in and around said stormwater storage areas.

The back one-half of Lot 42 is located within the boundaries of a referenced storm water storage basin.

In 1993 the Andersens obtained a building permit from the City to construct an addition to their home located on Lot 42. As built, the addition encroached on the portion of Lot 42 designated as a storm water storage basin.

In 1999 the Andersens listed their home with Kimberly Ryan, a local real estate agent. As required by Iowa Code section 558A.1 et seq. (1999), the Andersens completed a disclosure form concerning the condition of their home. That disclosure form included the following references:

1. BASEMENT/FOUNDATION: Any known past or present water or other problems? No.

...

5. SEWER SYSTEM: Any known present problems? No.

...

17. FLOODING, DRAINING, GRADING: Any known flooding, drainage or grading problems? Yes. June '98 heavy thunderstorms—city lost power—sump pump could not run.

On September 1, 1999, the Andersens sold their home to Thomas and Francine Jacobs for \$142,000. The purchase agreement acknowledged the foregoing section 558A.1 disclosure statement and also contained an express warranty concerning the home's plumbing system.

The Jacobs subsequently sued the Andersens, Ryan, and the City of Iowa City after they experienced surface water invasions to their home and pooling of surface water in their backyard. The Jacobs claimed they were third-party beneficiaries of the contract between the City and Braverman, and the City had breached the contract. They also claimed the City was negligent by issuing a building permit which allowed the construction of the addition in the storm water storage area. The suit raised claims against the Andersens and Ryan for breach of contract, based on the warranty of the home's

plumbing system. In addition, the Jacobs brought claims of fraudulent misrepresentation, negligent misrepresentation, and claims based on chapter 558A, due to the alleged failure to disclose all of the water problems with the home prior to the sale.

The City moved for summary judgment. The trial court concluded the contract with Braverman did not contain any obligation on the City to prohibit construction in the storm water storage area. The court concluded, "As a matter of law, the subdivider's agreement does not bind the City to withhold building permits when requested by a homeowner. There is no contract benefit to which the Jacobs can claim to be beneficiaries." The court also found the contract did not create a duty of due care, and thus, the Jacobs had no basis for their negligence claim against the City. Furthermore, the court noted the City was immune under section 670.4(9) from any tort claim based on an act by a City employee in granting a building permit. The Jacobs' contract and tort claims against the City were accordingly dismissed.

The case proceeded to trial against the Andersens and Ryan. The district court granted a directed verdict to defendants on the issue of breach of contract. The court found the warranty of the plumbing system did not include the storm water storage system, and that the Andersens had no control or ownership over that system. The court also granted a directed verdict to the Andersens on the issue of negligent misrepresentation, finding there was no evidence the Andersens were in the business or profession of supplying information for the guidance of others. The court granted a directed verdict for Ryan on the issue of negligent misrepresentation as well, based on the plaintiffs' failure to provide evidence Ryan did not exercise the reasonable care or skill of a person in the same business or profession.

The issues of fraudulent misrepresentation and failure to make disclosures as required by chapter 558A were submitted to the jury. The district court overruled the Jacobs' objections to the instructions on these issues. The jury

returned verdicts for the Andersens and Ryan. The court ordered that the Jacobs' petition was dismissed. The Jacobs appeal.

## II. Summary Judgment to the City

The Jacobs claim the district court erred by granting summary judgment to the City. We review a district court's ruling on a motion for summary judgment for correction of errors of law. *Financial Mktg. Servs., Inc. v. Hawkeye Bank & Trust*, 588 N.W.2d 450, 455 (Iowa 1999). Summary judgment will be upheld when the moving party shows there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. See Iowa R. Civ. P. 1.981(3). In reviewing a motion for summary judgment, we consider the evidence in a light most favorable to the party opposing the motion. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000).

### A.

The Jacobs claim the contract between the City and Braverman prohibited the City from issuing building permits within the storm water storage area. We generally review the construction and interpretation of a contract as a matter of law. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). When the district court interprets the words of a contract, it determines the meaning of the words in the contract. *American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Fund Bd.*, 586 N.W.2d 325, 329 (Iowa 1998). When the court construes a contract, it decides the legal effect of such words. *Id.*

A cardinal rule of contract construction or interpretation is the intent of the parties must control. *Whalen v. Connelly*, 545 N.W.2d 284, 291 (Iowa 1996). We give effect to the language of the entire contract according to its commonly accepted and ordinary meaning. *Hartig Drug*, 602 N.W.2d at 797. Particular words and phrases are not interpreted in isolation. *Id.* at 798.

The language of the contract between the City and Braverman does not impose an ongoing

duty on the City to prohibit building within the storm water storage area. The contract provides only that the City "shall not be required to issue building permits" in the storm water storage area. We note the City did not sign a later addendum creating restrictive covenants.<sup>1</sup> The district court examined the contract, and concluded, "[a]s a matter of law, the subdivider's agreement does not bind the City to withhold building permits when requested by a homeowner. There is no contract benefit to which the Jacobs can claim to be beneficiaries." We find no error in the district court's construction of the contract.

### B.

The Jacobs contend the district court erred by granting summary judgment to the City on their tort claim. They claim the City had a duty to maintain the storm water storage area, and that by permitting construction of the Andersens' addition in the area, the City breached its duty. They claim the issuance of the building permit was negligent.

The district court determined "the City is immunized from any tort claim based on an act by a City employee in granting a building permit." Section 670.4(9) provides immunity from:

Any claim based upon an act or omission by an officer or employee of the municipality or the municipality's governing body, in the granting, suspension, or revocation of the license or permit, where the damage was caused by the person to whom the license or permit was issued, unless the act of the officer or the employee constitutes actual malice or a criminal offense.

This section grants immunity to a municipality in the "granting, suspension, or revocation of a license or permit," such as the granting of a building permit. See *Fettkether v. City of Readlyn*, 595 N.W.2d 807, 814 (Iowa Ct. App. 1999). The alleged damage in this case was caused by the Andersens, who obtained the building permit, and the Jacobs introduced no evidence of actual malice or a criminal offense.

For these reasons, the court properly concluded the City was immune from liability under section 670.4(9). See *id.*

### III. Directed Verdicts

The Jacobs claim the district court improperly granted directed verdicts to the Andersens on the breach of contract claim, and to the Andersens and Ryan on the negligent misrepresentation claim. Our standard of review concerning appeal from the grant of a motion for directed verdict is for correction of errors at law. *Mensink v. American Grain*, 564 N.W.2d 376, 379 (Iowa 1997). The court should review the evidence presented in the light most favorable to the non-moving party to determine whether a fact issue was generated. *Detman v. Kruckenberg*, 613 N.W.2d 238, 250-51 (Iowa 2000). Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion. *Olson v. Nieman's Ltd.*, 579 N.W.2d 299, 313 (Iowa 1998). Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings. *Id.*

#### A.

The Jacobs assert their breach of contract claim against the Andersens should have been submitted to the jury. They point out that the purchase agreement provided that the home's plumbing system was in good working order. They argue that the term "plumbing system" includes the storm water storage system.

In *Ales v. Merritt*, 486 N.W.2d 592, 595 (Iowa Ct. App. 1992), we determined the term "plumbing system," as used in a purchase agreement, included a sewage or septic system. In *Ales*, the property included a private septic system. *Ales*, 486 N.W.2d at 593. The district court determined *Ales* was distinguishable because in this case the storm water storage system was in the control of the City. There is no evidence the storm water storage system was in the private hands of the Andersens, as was the case in *Ales*. See *id.* The court found the evidence showed the system was operating as designed, and that the Andersens had no

ownership or control over the system. We conclude the district court did not err in its conclusions on this issue.

#### B.

The Jacobs claim the district court should not have granted a directed verdict to the Andersens on the issue of negligent misrepresentation. The tort of negligent misrepresentation is based on Restatement (Second) of Torts section 552(1) (1977), which provides:

One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary business, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Freeman v. Ernst & Young*, 516 N.W.2d 835, 837 (Iowa 1994).

In Iowa, liability for negligent misrepresentation arises only when the information is provided by persons in the business or profession of supplying information to others. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 492 (Iowa 2000). This is because a person in the profession of supplying information for the guidance of others is acting in an advisory capacity and is manifestly aware of how the information will be used, and intends to supply it for that purpose. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 124-25 (Iowa 2001). There was no evidence the Andersens were in the business or profession of supplying information to others. For this reason, the district court correctly granted a directed verdict to the Andersens on the issue of negligent misrepresentation.

#### C.

The Jacobs contend the district court improperly granted a directed verdict to Ryan on

the issue of negligent misrepresentation. The district court determined:

No evidence has been presented in this case as to the professional standards of care applicable to Miss Ryan's business or profession, nor did any licensed person in the real estate field render any opinion that Miss Ryan failed to exercise the reasonable care or skill of a person in her profession.

We note that in *Menzel v. Morse*, 362 N.W.2d 465, 471 (Iowa 1985), the supreme court determined that in a tort action against a real estate agent, a plaintiff was required "to show the standards of conduct and practices, or bench marks, that establish the requisite skill and knowledge of members of good standing in the defendant's trade or profession." Standards of conduct and practice may be evidenced by expert testimony. *Menzel*, 362 N.W.2d at 471; see also *In re Estate of Dankbar*, 430 N.W.2d 124, 129 (Iowa 1988) ("Where breach of an established standard of conduct is not so clear that it lies 'within the ken of laymen,' expert testimony is allowable to prove the violation." (citation omitted)). Standards of conduct may also be shown by published ethical standards and practices of real estate brokers. *Menzel*, 362 N.W.2d at 172; see also *Crutchley v. First Trust & Sav. Bank*, 450 N.W.2d 877, 880 (Iowa 1990) (noting breach of the realtors' code of ethics may be considered on the issue of negligence).

The Jacobs failed to present expert testimony to show Ryan did not exercise the normal standard of care possessed by persons within her profession, and a directed verdict was appropriate.

#### IV. Jury Instructions

The Jacobs claim the district court improperly instructed the jury on their claims arising from chapter 558A. They assert chapter 558A creates a separate cause of action when the statute is violated, and the court erred by consolidating portions of the statute into a fraudulent misrepresentation instruction, while ignoring parts of section 558A.6. In particular, they claim the court erred by requiring them to

show that the Andersens and Ryan had an intent to deceive and to prove their claims by clear and convincing evidence.

Review of jury instructions is for correction of errors at law. *Hoskinson v. City of Iowa City*, 621 N.W.2d 425, 426 (Iowa 2001). Jury instructions are reviewed on appeal to decide if they are a correct statement of the law and are substantially supported by the evidence. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Error in giving or refusing to give a particular instruction does not warrant reversal unless the error is prejudicial to the party. *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994).

Iowa Code chapter 558A requires a seller of real estate to complete a disclosure form which informs the purchaser of "the condition and important characteristics of the property and structures located on the property, including significant defects in the structural integrity of the structure . . . ." Iowa Code § 558A.4(1). Section 558A.3(1) provides that all information required by the chapter should be disclosed in good faith. A person who violates chapter 558A is not liable unless "that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information." Iowa Code § 558A.6(1).

In determining the elements of a claim under chapter 558A, the district court relied upon *Arthur v. Brick*, 565 N.W.2d 623, 626 (Iowa Ct. App. 1997), which provides, "for a buyer to prevail upon a claim based on misrepresentation, not only must the seven elements of fraudulent misrepresentation be met, but they are measured in conjunction with the standards for disclosure as required by [chapter] 558A." To establish a claim of fraudulent misrepresentation, a plaintiff must prove: (1) representation; (2) falsity, (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 391 (Iowa 2001).

Clearly, under *Arthur*, an intent to deceive is an element of fraudulent misrepresentation,

and it was properly included as an element in the jury instructions regarding chapter 558A. An intent to deceive may be shown by evidence that the defendant had actual knowledge of the falsity of the representation or he made a representation with reckless disregard of whether it was true or false. *Rosen v. Board of Med. Exam'rs*, 539 N.W.2d 345, 500 (Iowa 1995).

In reference to the chapter 558A claim, the Jacobs objected to the jury instructions alleging that their burden of proof should be by a preponderance of the evidence, rather than by clear and convincing evidence. While generally to prove fraudulent misrepresentation, a plaintiff must establish the elements by a preponderance of clear, satisfactory, and convincing evidence, the Jacobs did not raise this specific objection. See *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1996). A similar issue was raised in *Lockard v. Carson*, 287 N.W.2d 871, 873-74 (Iowa 1980), and the supreme court determined the plaintiffs had failed to sufficiently alert the court to the proper burden of proof. The court noted, "The trial court was not apprised of the objection that its instruction should include both 'preponderance' and 'clear, satisfactory, and convincing' language." *Lockard*, 287 N.W.2d at 874.

#### V. Summary

We affirm the decision of the district court on all issues raised in this appeal.

AFFIRMED.

-----

#### Notes:

1. The restrictive covenant provided, "No construction, excavation, or grading shall be permitted in said storm water storage area . . . without the express written consent of the City of Iowa City."

-----