IN THE COURT OF APPEALS OF IOWA

No. 0-180 / 09-1195
Filed May 12, 2010

WILDCAT INNS, A Kansas General Partnership,
Plaintiff-Appellant,

vs.

FIRST AMERICAN TITLE INSURANCE COMPANY, WAYNE R. MYRON, HEIDI MYRON, STEVEN G. DAVIS, TERESA L. DAVIS, GARY MYRON, and GOLDMARK SCHLOSSMAN COMMERCIAL REAL ESTATE SERVICES, INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Plaintiff appeals from district court rulings entering summary judgment in favor of defendants. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Alan E. Fredregill of Heidman Law Firm, L.L.P., Sioux City, for appellant.

Kyle S. Irvin of Corbett, Anderson, Corbett, Vellinga & Irvin, L.L.P., Sioux City, for appellees Wayne R. Myron, Heidi Myron, Steven G. Davis, Teresa L. Davis, and Gary Myron.

Francis L. Goodwin of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellee Goldmark Schlossman Commercial Real Estate Services, Inc.

Brian D. Nolan of Nolan, Olson & Stryker, P.C., L.L.O., Omaha, Nebraska, for appellee First American Title Insurance Company.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Wildcat Inns appeals from district court rulings entering summary judgment in favor of Wayne Myron, Heidi Myron, Steven Davis, Teresa Davis, and Gary Myron, the sellers of a Sioux City apartment complex, their real estate agent, Goldmark Schlossman Commercial Real Estate Services, Inc., and First American Title Insurance Company, the escrow agent that handled the sale. The lawsuit arises from a dispute regarding responsibility for real estate taxes. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts. On June 14, 2006, the sellers entered into a purchase agreement with Edison Investments, Inc. for the sale of an apartment building located in Sioux City, Iowa. Edison assigned its interest in the agreement to Wildcat Inns on August 9, 2006. That same day, Jordan Dunn, an escrow officer with First American, sent an email to the parties and their attorneys with a copy of the estimated settlement statement she had prepared for their review.

The statement listed $133,632 as a credit to Wildcat Inns and charge to the sellers for "Total Estimated 2005-2006 Taxes 07/01/05 to 06/30/06 @ $133632.00/yr," along with an additional $15,742.95 credit to Wildcat Inns and charge to the sellers for "Estimated 2006-2007 Taxes 07/01/06 to 8/13/06 @ $133632.00/yr." Dunn's email explained:

> In Iowa, real estate taxes are 12 months in arrears. Real property is assessed as of January 1, with taxes applied to the fiscal year starting July 1 of the following calendar year. Real estate taxes are payable in one payment or two equal installments, first installment

> delinquent September 30 and the second installment delinquent March 31. That is why the tax proration is showing as is.

Ronald Glaser, the sellers' real estate broker with Goldmark, called Dunn after receiving her August 9th email and attached settlement statement. He informed her that the real estate taxes were prorated incorrectly based on language in the parties' purchase agreement, which he believed required Wildcat Inns to assume responsibility for the taxes assessed in 2005. Dunn accordingly changed the settlement statement to reduce the credit to Wildcat Inns and charge to the sellers to $16,946.78 for "2005-2006 Taxes 07/01/06 to 08/17/06 @ $65804.00/semi." The new proration represented the "1st half of taxes that were due as of September 1 according to the seller's ownership from the payable date of July 1 through the date of closing."

Several days later, on August 15, the attorney for Wildcat Inns emailed Dunn stating, "I thought I had a copy of your proposed closing statement but could not find the email or the attachment. Am I mistaken in seeing that proposed document? If not, please resend it to me." Dunn replied, "Yes, I did send the settlement statement to you. I will resend, however it will be revised again sometime today or early tomorrow to include the rent prorations and other adjustments." Less than thirty minutes later, Dunn sent the revised settlement statement with the new tax proration to the attorney for Wildcat Inns. Her email did not advise the attorney about the changes she had made to the real estate tax proration. A third draft of the settlement statement was sent to all of the parties later that day with additional changes.

The closing on the purchase agreement occurred on August 17. Wildcat Inns signed the final settlement statement with the reduced credit for real estate taxes. The sellers gave a special warranty deed to Wildcat Inns, which provided:

> And said Grantor hereby covenants with said Grantee, and successors in interest, to warrant and defend the said premises against the lawful claims of all persons claiming by, through or under it, except as may be stated as follows:
>
> . . . .
>
> . . . The lien of any real estate taxes and installments of special assessments not yet due and payable.

Sometime later that year, Wildcat Inns received a notice from the county treasurer's office indicating the first installment for the 2005-2006 real estate taxes was delinquent. Counsel for Wildcat Inns wrote a letter to First American stating:

> Our client assumed that the taxes for the 2005-2006 year had been paid in full by the Seller or were being retained from the Seller's proceeds by First American Title Insurance Company as the Closing Agent since, as of June 30, 2006, they constituted a lien against the real estate.

Wildcat Inns requested that First American "either advance and pay all taxes and penalties for the year 2005-2006 and seek recovery from the Seller, or induce the Seller to forthwith pay." First American denied the claim, and this suit followed.

The petition filed by Wildcat Inns alleged: (1) the sellers breached their warranty of title to Wildcat Inns; (2) First American acted negligently in failing to disclose that the "2005/2006 real estate taxes were a lien on the property that was not being paid at closing" and breached its fiduciary duty to Wildcat Inns by failing "to disclose this lien to its principal, and fail[ing] to disclose the fact that it had been directed by Defendant Sellers not to satisfy the lien"; and (3) Goldmark

acted negligently in drafting the real estate tax proration language. All of the parties filed motions for summary judgment.

Following a hearing, the district court entered rulings denying the motion for summary judgment filed by Wildcat Inns and granting the motions filed by the sellers, First American, and Goldmark. Wildcat Inns appeals.[1]

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.907; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002).

III. Discussion.

A. The Sellers.

Wildcat Inns claims the sellers breached their warranty of title by failing to satisfy the 2005-2006 real estate tax lien based upon the following language in paragraph nine of the parties' purchase agreement: "Seller shall cause all mortgages or other liens (excepting future installments of special assessments) to be paid and satisfied and released of record prior to or at Closing." The sellers respond by asserting that argument ignores the first sentence of paragraph nine,

[1] At the outset, we reject Wildcat Inns' argument, made in support of all its claims on appeal, that the district court made "plainly erroneous factual findings about taxes." The "erroneous factual findings" cited by Wildcat Inns were actually typographical errors made by the court in quoting an exhibit submitted by one of the parties.

which states: "Seller shall convey to Buyer insurable title to the Property, subject only to the Permitted Exceptions in accordance with this agreement." Paragraph two lists the "Permitted Exceptions" referred to in paragraph nine:

> The Property is sold subject to the following (collectively the "Permitted Exceptions"):
>
> . . . .
>
> (d) The lien of any real estate taxes and installments of special assessments not yet due and payable.

The special warranty deed given by the sellers to Wildcat Inns contains an identical exception.

The sellers argue the foregoing provisions show the sale was subject to real estate tax liens, while Wildcat Inns argues the provisions are ambiguous.[2] Wildcat Inns contends the phrase "not yet due and payable" could be interpreted as modifying both the "lien of any real estate taxes" and "installments of special assessments" or modifying only "installments of special assessments." The district court rejected that argument, reasoning the phrase "not yet due and payable" could only be interpreted as modifying "installments of special assessment" because a "lien based on real estate taxes is always due and payable once it becomes a lien and . . . there is no such phenomenon as a real estate tax lien that is 'not yet due and payable.'"

The interpretation of a written contract is a question of law, unless the contract is ambiguous. *Margeson v. Artis*, 776 N.W.2d 652, 660 (Iowa 2009); *Walsh v. Nelson*, 622 N.W.2d 499, 503 (Iowa 2001) ("If the resolution of

[2] We note that neither party has addressed the doctrine of merger, which states that a "contract for conveyance of real estate, absent any showing to the contrary, is deemed to have merged in a subsequent deed." *Lovlie v. Plumb*, 250 N.W.2d 56, 63 (Iowa 1977).

ambiguous language involves extrinsic evidence, a question of interpretation arises which is reserved for the trier of fact."). A contract is ambiguous if it is reasonably susceptible to more than one interpretation. *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa Ct. App. 1987). We agree with Wildcat Inns that the provisions discussing the responsibility for real estate taxes are ambiguous when the contract is read as a whole and in light of all the circumstances. *See Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999) ("In interpreting contracts, we give effect to the language of the entire contract according to its commonly accepted and ordinary meaning.").

We believe a brief overview of Iowa's taxation structure, which includes a tax on real property, *see* Iowa Code § 427.13 (2007), will be helpful in interpreting the disputed language in the purchase agreement and deed. The taxation process begins with the county assessor, who values each item of taxable property in the county. Iowa Code §§ 441.18-.21; *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 174 (Iowa 2006). "The assessment date of January 1 is the first day of an assessment year period which constitutes a calendar year commencing January 1 and ending December 31." Iowa Code § 441.46. The property tax "assessment date is January 1 for taxes for the fiscal year which commences six months after the assessment date and which become delinquent during the fiscal year commencing eighteen months after the assessment date." *Id.* For example, a January 1, 2005 assessment date is for the 2005-2006 fiscal tax year, which starts July 1, 2005, and ends June 30, 2006.

> After the property is valued, the taxpayer has an opportunity to protest the assessment to the board of review. *Id*. §§ 441.23, .37. The department of revenue then equalizes the assessments, *id*. §

> 441.47, and taxing authorities (e.g., cities, counties, school districts, and townships) establish their budgets based on the valuations in the assessments and determine the rate of tax, based on the value of the property, needed to fund their budgets, *id*. §§ 444.1-.3. The county auditor then delivers a tax list computing the total amount due, *id*. § 443.2, to the county treasurer to collect the taxes, *id*. § 443.4.

Fennelly, 728 N.W.2d at 174.

The tax list is to be delivered to the county treasurer before June 30. Iowa Code § 443.4. "As soon as practicable" after receiving the tax list, the county "treasurer shall deliver to the titleholder . . . a statement of taxes due and payable."[3] *Id*. § 445.5. Real estate taxes for the previous fiscal year become due on the first day of the current fiscal year—July 1. *Presidential Realty Corp. v. Bridgewood Realty Investors*, 498 N.W.2d 694, 697 (Iowa 1993) (citing Iowa Code § 445.36).

> A demand for taxes is not necessary, but every person subject to taxation shall attend at the office of the county treasurer and pay the taxes either in full, or one-half of the taxes before September 1 succeeding the levy, and the remaining half before March 1 following. This subsection does not apply to special assessments, or rates or charges.

Iowa Code § 445.36(2). If paying in installments, the first installment becomes delinquent October 1, and the second on April 1. *Id*. § 445.37. In this case, the fiscal year 2005-2006 taxes, based on the 2005 assessment, became due on July 1, 2006. The taxes were payable in full before September 1, 2006, or if paid in installments, the first installment was payable before September 1, 2006 (becoming delinquent October 1), and the second was payable before March 1, 2007 (becoming delinquent April 1). "Under Iowa law taxes for one year fall due

[3] For example, a statement for the 2005-2006 fiscal year taxes would be sent to the titleholder after July 1, 2006.

the next, becoming a lien against the premises as of June 30 of the year in which levied." 1 Marlin M. Volz, *Iowa Practice: Methods of Practice* § 6:15, at 140-41 (2009) (citing Iowa Code § 445.30) [hereinafter Volz]; *see also Merv E. Hilpipre Auction Co. v. Solon State Bank*, 343 N.W.2d 452, 455 (Iowa 1984) ("No lien arises until the tax is actually levied."); *Gates v. Wirth*, 181 Iowa 19, 26, 163 N.W. 215, 218 (1917) (stating taxes become a lien on the property once the amount to be paid is fixed, and this is the first time that an obligation rests upon "anyone to discharge the tax in order to free the land from the burden").

The sale in this case closed on August 17, 2006. The taxes due July 1, 2006, which became a lien on the property June 30, 2006, *see* Iowa Code § 445.30, were for the 2005-2006 fiscal year, a period of time when the real estate was in the possession of the sellers. It is "the universal" rule in Iowa

> that the holder of the legal title in the actual occupancy and possession is duly bound to pay the taxes accruing during such possession, and, in the absence of some agreement to the contrary, he cannot shift the burden to the shoulders of another.

Clinton v. Shugart, 126 Iowa 179, 184, 101 N.W. 785, 787 (1904).[4] The sellers argue the purchase agreement provided for allocation of real estate taxes on a

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[4] Unless otherwise provided, all real estate taxes due or payable and which have become a lien are paid by the seller and all subsequent real estate taxes are paid by the purchaser. However, the parties may provide for proration of the taxes or estimated taxes between themselves as of a date normally stated in their agreement or on any other basis which they may choose.

. . . .

If a conveyance occurs sometime after June 30, there will normally be two tax payments falling due during that fiscal year, one half of the taxes payable by September 30 and the other half payable by March 31. The seller usually assumes responsibility for paying these taxes since they are a lien on the property. The taxes accruing for the year of purchase but not becoming a lien and due and payable until the

payable rather than assessed basis. The sellers point out that the language used in the purchase agreement is the same language and the same manner that the sellers had used to prorate the taxes when the sellers purchased the property. It is undisputed that such an arrangement is not traditional in Iowa real estate transactions.

In addition to the provisions mentioned above, paragraph fifteen of the purchase agreement provided:

> Real estate taxes and installments of special assessments due and payable in the year prior to the year of closing and all prior years, including any real estate taxes otherwise payable during any such year which may have been deferred, shall be paid by Seller. *Real estate taxes due and payable in the year of closing*, including any real estate taxes otherwise payable during such year which may have been deferred, *shall be prorated as of the closing date based upon the parties' respective period of ownership of the Property in the calendar year of closing*.

(Emphasis added.) Paragraph eighteen similarly stated:

> The following shall be apportioned as of midnight of the day preceding the closing:
>
> (a) *All real estate taxes due and payable in the year of closing shall be prorated as of the date of closing.* All prior year's taxes, interest and other charges, if any, due and payable in prior years, will be paid by Seller.

(Emphasis added.)

We find these provisions to be ambiguous, as did the parties. As discussed above, real estate taxes in Iowa are normally prorated as of the closing date based upon the parties' respective periods of possession for the time period in which the taxes were assessed. *See* Iowa Code § 445.30.

> following year are normally prorated to date of closing or to the date of possession.

Volz, § 6:15, at 140-41.

Paragraph 18 could be interpreted as consistent with that normal practice—"[a]ll real estate taxes due and payable in the year of closing shall be prorated as of the date of closing." Paragraph 15 could be interpreted in the same manner, although it refers to ownership in "the calendar year of closing" rather than in the fiscal year as taxes in Iowa are assessed. The parties' confusion is evident in the final settlement statement which, as Wildcat Inns observes, prorated the 2005-2006 taxes from July 1, 2006, through the date of the closing, August 17, 2006, instead of on a calendar year basis as directed in paragraph fifteen.

The circumstances surrounding the purchase agreement further supports a finding of ambiguity. Multiple drafts of the agreement were submitted by the parties as exhibits in support of the summary judgment motions. The first version of paragraph nine did not contain the provision relied upon by Wildcat Inns requiring the sellers to "cause all mortgages or other liens" to be paid and satisfied prior to or at the closing. That provision was added by counsel for Wildcat Inns. The sellers' real estate agent, Ronald Glaser, testified by deposition that he never discussed real estate tax proration with Wildcat Inns. He stated that he was involved in the acquisition of the property by the sellers, which involved the same type of real estate tax proration the sellers attempted here. According to Glaser, "because of that situation, we . . . knew . . . that if you buy it that way, you just need to sell it that way." Wildcat Inns was not aware of that fact, however, as it was never brought to their attention by the sellers.

There is also a disputed question of fact as to whether counsel for Wildcat Inns saw the initial estimated settlement statement prepared by the escrow agent for First American, Jordan Dunn. On August 9, 2006, Dunn emailed that

statement, which credited Wildcat Inns with $133,632 for the 2005-2006 real estate taxes, to Wildcat Inns' attorney, Clayton Skaggs, along with an explanation of how taxes are assessed and paid in Iowa. He emailed her a few days later, asking for another copy of that statement because he had misplaced the first one that she had sent to him. Instead of sending him the original statement, she sent him the revised settlement statement that listed the tax proration as follows: $16,946.78 "Buyer Credit" for "2005-2006 Taxes 07/01/06 to 08/17/06 @ $65804.00/semi." Skaggs testified by deposition that he never saw the contents of the initial settlement statement. In a letter written to First American after the closing, counsel for Wildcat Inns stated:

> Our client assumed that the taxes for the 2005-2006 year had been paid in full by the Seller or were being retained from the Seller's proceeds by First American . . . since, as of June 30, 2006, they constituted a lien against the real estate. . . .
>
> . . . It is totally nonsensical that the Buyer would have agreed . . . to be responsible for all taxes accruing from July 1, 2005 through June 30, 2006, when the property was owned solely by the Seller, yet the Seller would be charged for a prorated share of taxes accruing after July 1, 2006.

Based on this evidence of conflicting expectations and disputed factual issues, we are convinced the district court erred when it determined the parties' purchase agreement and special warranty deed were unambiguous as a matter of law. We accordingly reverse the portion of the court's ruling entering summary judgment in favor of the sellers on Wildcat Inns' breach of warranty of title claim, and remand for further proceedings. *See Walsh*, 622 N.W.2d at 503-04.

B. First American.

Wildcat Inns next claims the district court erred in dismissing its negligence and breach of fiduciary duty claims against the parties' escrow agent and title insurer, First American. We conclude otherwise.

"The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Van Essen v. McCormick Enterps. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). Whether such a duty arises out of the parties' relationship is always a matter of law for the court. *Id.* "Courts look to legislative enactments, prior judicial decisions, and general legal principles as a source for the existence of a duty." *Id.* Our courts have also often relied on the Restatement (Second) of Torts when determining whether a given defendant owes a duty to a plaintiff. *Id.*

We begin by observing that, on appeal, Wildcat Inns has identified no source for the duty it claims First American owed to it. In the district court proceedings, Wildcat Inns cited "general rules regarding the duty owed to principals by agents," such as the following set forth by our court in *Cruikshank v. Horn*, 386 N.W.2d 134, 137 (Iowa Ct. App. 1986): "The duty of an agent to make full disclosure to his principal of all material facts to the agency is fundamental to the fiduciary relation of principal and agent." First American responds by citing cases from other jurisdictions that have specifically discussed the duty owed by an escrow agent to the parties involved in the sale. We find these cases persuasive, as they address the fact pattern before us.

"It is generally accepted that an escrow agent is the agent and fiduciary of all parties to an escrow agreement." *American State Bank v. Adkins*, 458 N.W.2d 807, 810 (S.D. 1990); *accord Youngblut v. Wilson*, 294 N.W.2d 813, 817 (Iowa 1980). "The extent of this agency and fiduciary relationship is necessarily limited, however, due to the escrow agent's obligation to act for all parties to the escrow." *Am. State Bank*, 458 N.W.2d at 810. Courts have nevertheless recognized several fiduciary duties arising from the escrow relationship:

> The first is the escrow agent's duty of strict compliance. An escrow agent's duty to its respective principals is to act in strict accordance with the terms of the escrow agreement. Deviation from those terms without the mutual consent of the parties concerned will subject the agent to liability for damages caused by such deviation. The second duty incident to the escrow relationship is the escrow agent's duty to disclose known fraud.

Maganas v. Northroup, 663 P.2d 565, 568 (Ariz. 1983) (internal citations omitted). In general, "there is no duty to disclose information received by an escrow agent unless such a duty is required by the terms of the agreement." *Id. But see Home Loan Corp. v. Texas Am. Title Co.*, 191 S.W.3d 728, 731 (Tex. Ct. App. 2006) (noting that at least two jurisdictions have held an escrow agent owes a duty of full disclosure to parties in the transaction). As indicated above, an exception to that rule exists when the escrow agent knows that a fraud is being committed on a party to an escrow and the failure of the escrow agent to disclose the information of the fraud will assist in accomplishing the fraud. *Maganas*, 663 P.2d at 568. A third duty is the duty of an escrow agent "to act scrupulously and honestly in carrying out [the agent's] duties," which means, among other things, that the escrow agent must avoid any act of self-dealing that places [the agent's]

personal interest in conflict with [the agent's] obligations to the beneficiaries. *Am. State Bank*, 458 N.W.2d at 811.

Wildcat Inns does not argue that First American violated any of these recognized duties owed by an escrow agent to a party to the escrow. Instead, it asserts First American negligently failed to disclose and advise that the "2005/2006 real estate taxes were a lien on the property that was not being paid at closing." Wildcat Inns particularly takes issue with the fact that First American changed the first settlement statement at the request of the sellers' real estate agent without first alerting Wildcat Inns to the change and securing its agreement. We find several flaws with this claim.

First, as stated, an escrow agent has no duty to disclose information received by it unless the agent has actual knowledge of a fraud being committed on one party. *Maganas*, 663 P.2d at 568. That circumstance is not present here as First American believed it was prorating the real estate taxes consistent with the parties' purchase agreement. Second, First American did disclose the real estate tax proration to Wildcat Inns in the estimated settlement statements it provided to the parties for their review prior to the closing. Although Wildcat Inns claims First American should have pointed out the tax proration change requested by the sellers, an escrow agent owes "no duty to advise the parties on their legal rights" and has "no reason to protect the rights of any one party as against another." *McDonald v. Title Ins. Co.*, 621 P.2d 654, 657 (Or. Ct. App. 1980). Finally, Wildcat Inns approved the manner in which the real estate taxes were prorated, as evidenced by its signature on the final settlement statement. *See Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 323 (Iowa

1977) ("[A] party is usually bound by the documents he signs even though . . . it has not expressly accepted all of the contract provisions or is even aware of them."). It cannot now claim ignorance of the settlement statement's terms and conditions for the purpose of relieving itself from its obligation. *Id.*; *see also Swift v. White*, 256 Iowa 1013, 1019, 129 N.W.2d 748, 752 (1964) (denying claim brought by buyer against real estate agent regarding payment of real estate taxes where the purchase agreement "plainly state[d] the liability for the payment of the taxes" and buyer "had a full opportunity to examine the offer and did not give any directions or make any requests in this regard").

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of First American on Wildcat Inns' claims of negligence and breach of fiduciary duty. *See Am. State Bank*, 458 N.W.2d at 810 ("An escrow agent is not intended to function as an insurer for an agreement gone bad.").

C. Goldmark.

Wildcat Inns finally claims the district court erred in dismissing its claim against the sellers' real estate agent, Goldmark. We do not agree.

In its petition, Wildcat Inns alleged Goldmark negligently drafted the tax proration language in the purchase agreement. In the summary judgment proceedings, it additionally alleged Goldmark conspired with First American to defraud Wildcat Inns "of more than $133,000 in tax payments that should have been made by the Sellers." Now, on appeal, Wildcat Inns claims the "accusation is that Glaser [the real estate broker with Goldmark] misrepresented the buyer's agreement with his changes to the settlement statement." We will address each of these claims in turn.

With respect to the negligent drafting claim, we observe Wildcat Inns has again failed to identify any duty owed to it by Goldmark in its appellate brief. In the summary judgment proceedings, Wildcat Inns cited *Burke v. Roberson*, 417 N.W.2d 209 (Iowa 1987), in arguing that negligent drafting of real estate documents has been recognized as a cause of action in Iowa. However, *Burke* involved a legal malpractice claim brought by sellers against the attorney that represented them in the sale of their farmland. 417 N.W.2d at 211. That case is thus inapplicable here.

Wildcat Inns also cited *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818 (Iowa 2001). The issue in that case was "whether attorneys representing persons on opposite sides of a transaction owe each other, as opposed to the clients those attorneys represent, a duty to refrain from intentional misrepresentation throughout the course of the transaction." *Hansen*, 630 N.W.2d at 824. In holding such a duty existed, the court relied on Restatement (Third) of the Law Governing Lawyers section 98 (1998), which provides that a "lawyer communicating on behalf of a client with a nonclient may not . . . [k]nowingly make a false statement of material fact or law to the nonclient." The difficulty with Wildcat Inns' reliance on *Hansen* is that Goldmark and its employee, Ronald Glaser, acted as the sellers' real estate agent, not as their attorney. *Hansen* is thus also inapplicable. We accordingly agree with the district court's dismissal of the negligence claim.[5]

[5] We observe that Iowa Code section 543B.56 sets forth the duties owed by licensees, or real estate brokers, to all parties involved in a real estate transaction. Those duties include the duty to provide brokerage services to all parties to the transaction honestly and in good faith and disclose to each party all material adverse

We next examine Wildcat Inns' misrepresentation claim, although we question whether error was preserved on this issue as the district court did not address any such claim in its summary judgment ruling. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). In order to establish such a claim, Wildcat Inns was required to show "(1) a material misrepresentation, (2) made knowingly (scienter) (3) with intent to induce plaintiff to act or refrain from acting (4) upon which plaintiff justifiably relies (5) with damages." *Nie v. Galena State Bank & Trust Co.*, 387 N.W.2d 373, 375 (Iowa Ct. App. 1986). With respect to the first element, Wildcat Inns argued in the summary judgment proceedings that Goldmark "misrepresented the contract terms regarding payment of liens to the closing agent." The undisputed facts show otherwise.

Glaser testified by deposition that once he saw the first estimated settlement statement he called Dunn, the escrow agent for First American that prepared the statement, because "it did not follow with the language that was in the contract . . . it was prorated incorrectly based on the contract." Dunn testified that after Glaser called her she reviewed the parties' purchase agreement, focusing on paragraph fifteen, and changed the settlement statement to reflect the language in that paragraph. She then sent the revised settlement statement to the parties for their review.[6]

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facts that the licensee knows, subject to certain exceptions. Iowa Code § 543B.56(1)(a), (c). However, Wildcat Inns did not identify this statute as a source for the duty it claimed Goldmark owed to it.

[6] Wildcat Inns makes much of the fact that Dunn supposedly sent the revised settlement statement with the new real estate tax proration to Glaser for his approval before sending it to Wildcat Inns' attorney. However, the record shows that Dunn emailed Wildcat Inns' attorney that statement at 11:31 a.m. on August 15, 2006. Her email advised, "Attached is the estimated statement without the prorations and adjustments." Later that day, she emailed another revised settlement statement just to

Glaser acknowledged there were no discussions on his behalf with Wildcat Inns regarding the manner in which the taxes were prorated in the purchase agreement and subsequent amended settlement statement. However, he stated, "I always thought [Wildcat Inns] understood exactly what was in the contract," observing that their counsel participated in the drafting of the agreement. He testified, "If for some reason they decided not to opt by putting that tax language in there, then [the sellers] would have gone for a higher price" because that was how the taxes were handled when the sellers purchased the property. We cannot find any material misrepresentation on these facts, where the parties simply disagree as to how their purchase agreement should be interpreted.

Because we have concluded the district court did not err in entering summary judgment in favor of First American, Wildcat Inns' civil conspiracy claim against Goldmark also must fail. *See Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 172 (Iowa 2002) ("[C]onspiracy is merely an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert."); 16 Am. Jur. 2d *Conspiracy* § 50, at 275-76 (1998) ("[I]f the acts alleged to constitute the underlying wrong provide no cause of action, then neither is there a cause of action for the conspiracy itself."). We accordingly affirm the district court's grant of summary judgment in favor of Goldmark.

Goldmark, stating, "Once I receive your approval, I will send it to everyone." That settlement statement contained a new rent proration calculation that had not appeared on previous drafts. Dunn sent that statement to counsel for Wildcat Inns shortly thereafter.

IV. Conclusion.

We affirm the district court's grant of summary judgment in favor of First American on Wildcat Inns' claims of negligence and breach of fiduciary duty. We affirm the district court's grant of summary judgment in favor of Goldmark. We reverse that portion of the district court's ruling entering summary judgment in favor of the sellers on Wildcat Inns' breach of warranty of title claim, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Danilson, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

The basic facts here are quite simple. Plaintiff agreed to purchase Iowa real estate. Defendant American Title was the closing agent and title insurer. The sale was closed on August 17, 2006. At the time of closing, the 2005-2006 real estate taxes on the property were a lien on the property and were not paid prior to closing. Plaintiff was not aware of that fact until it received a delinquency notice, at which time it paid the taxes of $131,378.00 and a penalty and sued defendants here to recoup its loss. Defendants all filed motions for summary judgment seeking dismissal of the clams against them. The district court sustained their motions and dismissed all claims. The majority, in a well-written opinion, has sustained all rulings except the claim against the sellers, which it has reversed and remanded for further proceedings. I agree with the majority opinion in all respects except I would also reverse the summary judgment in favor of First American Title Insurance Company as I believe that plaintiff also has a viable cause of action against it.

The buyer, in contending that the district court erred in sustaining the motion for summary judgment of American, argues that:

> If ever there was a case that illustrates just how worthless title insurance is, this is it. First American knew that it was not handling this transaction correctly, but went ahead and closed it anyway, and in the process, left unpaid real estate taxes is excess of $130,000.00. First American's actions were inconsistent with Iowa law and practice and in conflict with the contract documents. The contract between the buyer and the seller . . . had a clause (paragraph 9) that stated in pertinent part:
>
> > Seller shall cause all mortgages and other liens (excepting future installments of special assessments) to

> be paid and satisfied and released of record prior to or at closing.

There is merit to this argument. The majority recognizes that in Iowa, because these taxes were accrued during the time the sellers owned the property and were a lien on the property at the time of closing, it would have been customary in Iowa that the taxes be paid by the seller prior to closing or if not paid that the buyer be given credit against the purchase price for the amount of the taxes. I too agree that the custom to do otherwise would increase the purchase price. Furthermore, because taxes are a lien, for a seller to convey clear title it is necessary they be paid prior to the transaction closing. Jordan Dunn, who closed for American, knew the taxes were not paid and realized that they were a lien on the property. First, her testimony so indicates. When questioned about what paragraph 9 meant the following exchange occurred:

> A. [B]asically what it says, that all mortgages and other liens shall be released prior to or at closing.
> Q. As of that date (of closing) were the 2005-2006 a lien? A. Yes, taxes are always a lien.
> Q. Were the 2005-2006 taxes satisfied prior to closing as the clause in paragraph 9 says? A. No, they were not.
> Q. By the terms of the revised settlement statement, was the highlighted portion of paragraph 9 of the purchase agreement being complied with? A. In my opinion probably not as far as the taxes.

Second, she understood the taxes were a lien, as her initial closing statement so reflected. However, she modified the closing statement to provide for the buyer to pay the taxes yet made no effort to call the change to the attention of the buyer and its attorney.

The purchase agreement is confusing in many respects as to the payment of taxes and appears to have been drawn and negotiated by persons unfamiliar

with the laws of assessments and payment of taxes in Iowa, which are not necessarily the same laws as those of other states.

That said I believe that American had a duty to the buyer and breached that duty. American was the closing agent for both buyer and seller and provided title insurance for the benefit of the buyer. While Jordan Dunn testified that as an escrow officer she was not to take sides between buyer and sellers, she did just that. She accepted the sellers' position when she admittedly knew she was closing a sale where the buyer did not receive the property free and clear, but received it subject to a lien in excess of $130,000 for property taxes accrued during the sellers' time of ownership. First, I believe as a result of Jordan's actions, American failed to meet its alleged duty of remaining neutral in not calling to the buyer's attention that because of the change it made, American was closing a transaction whereby the buyer was not receiving clear title. Second, I believe American, because of Jordon's action, breached the duty of trust that the buyer placed in it to close the transaction fairly. I believe that American was clearly negligent in breaching these duties. I therefore would also reverse that part of the summary judgment dismissing claims against American.

I am unable to find any laws or rules or regulations regulating those not otherwise licensed who hold themselves out as closers. I suggest we may need regulation of so called "closers" such as American here, so they do not escape liability for what I see as negligence in closing a transaction.