**IN THE COURT OF APPEALS OF IOWA**

No. 9-112 / 08-1018
Filed May 6, 2009

**TAPESTRY VILLAGE PLACE INDEPENDENT LIVING, L.L.C.,**
Plaintiff-Appellant/Cross-Appellee,

**vs.**

**VILLAGE PLACE AT MARION, L.P., DEVELOPMENT GROUP, L.L.C., THOMAS E. MILLER, CRAIG R. MILLER, and DOUGLAS V. MILLER,**
Defendants-Appellees/Cross-Appellants.

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Appeal from the Iowa District Court for Linn County, Patrick R. Grady and James H. Carter, Judges.

Buyer appeals and sellers cross-appeal from district court rulings in an action arising from the sale of an independent living facility. **AFFIRMED ON BOTH APPEALS.**

Tiernan T. Siems and Matthew V. Rusch of Erickson & Sederstrom, P.C., Omaha, Nebraska, for appellant.

Paul D. Burns of Bradley & Riley, P.C., Iowa City, and Michael C. Flom and Prairie A. Bly of Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota, for appellees.

Considered by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

**DOYLE, J.**

Tapestry Village Place Independent Living, L.L.C. (Tapestry) appeals and Village Place at Marion, L.P. (Village Place), Development Group, L.L.C., Thomas Miller, Craig Miller, and Douglas Miller cross-appeal from district court rulings in an action arising from the sale of an independent living facility. We affirm the judgment of the district court.

***I. Background Facts and Proceedings.***

In 1988 Village Place and its general partner, Development Group, began construction on an eighty-unit independent living facility for senior citizens. Thomas Miller was the president of Village Place and Development Group, and his brothers, Craig and Douglas Miller, were the companies' vice presidents. Construction on the building was completed in 1990.

Soon thereafter, problems arose with the quality of the workmanship performed by the general contractor and its subcontractors. After the building's "first winter season," the siding "became all wavy and . . . wrinkled" because it was improperly applied. The windows on the "front façade of the building over the entryway . . . . crack[ed] for no apparent reason." All of the siding on the building had to be replaced as did the foyer widows and framing.

Beginning in 1994 or 1995, the residents of the facility began complaining about problems with the bay windows in their rooms. Some of the windows were difficult to close and let water, air, and insects inside. Maintenance personnel routinely fixed those problems by manually closing the windows from the outside, replacing window "cranks," and filling gaps in the windows with insulation or caulk. Residents would also place towels on the counters around the windows

"trying to keep the breeze down." Cindy Cason, the executive director of the facility, learned about the ongoing problems with the bay windows shortly after she began her employment in 2001. She regularly reported those problems to Steve Yurick, the corporate property manager for the Millers. Craig Miller also heard about some of the maintenance issues with the bay windows during his annual inspections of the facility.

Tapestry became interested in purchasing the facility in November or December 2004 after learning it was on a list of "troubled properties." Ryan Durant, a project coordinator for a property management company affiliated with Tapestry, visited the property on five or six occasions. Yurick told Cason to show Durant the facility and answer his questions truthfully. Cason, however, understood she was not to do anything that would jeopardize the sale. She therefore refrained from volunteering any information about problems with the bay windows.

After several months of negotiation, Tapestry agreed to purchase the property from Village Place and Development Group for $3,142,250. The parties entered into a purchase agreement, which was signed by Thomas Miller on behalf of Village Place and Development Group, on May 6, 2005. The agreement provided Tapestry was purchasing the property without "relying on any representation, warranty or promise by or on behalf of Seller" and in its "'as is' and 'where is' condition, and 'with all faults.'" Despite that provision, the agreement further provided that "[t]o Seller's knowledge . . . the Improvements located on the Real Property . . . are in good condition and repair, considering their age, ordinary wear and tear excepted, and are fit for their intended use in

the ordinary course of business." The agreement afforded Tapestry the opportunity prior to closing "to perform all such tests, investigations and analyses concerning the purchased assets, including, without limitation, the real property and the fixed assets, and the independent living facility as it deems necessary or desirable."

During Tapestry's due diligence investigation, Durant discovered problems with the roof, and the purchase price was reduced to $3,092,250. He did not, however, discover any problems with the bay windows in his inspections of the facility, nor was he informed of any by the sellers or their representatives. He also did not learn about the problems encountered by the defendants when they constructed the building.

Tapestry began renovating the facility soon after it took possession of the property. Its renovations revealed significant water damage near the bay windows throughout much of the facility. Removal of siding around the windows exposed deteriorated and rotten sheathing, framing, and insulation. Durant was informed by the contractor in charge of the renovations that all of the bay windows in the facility needed to be replaced, which he estimated would cost approximately $466,232.

Tapestry sued the defendants in June 2006 for fraudulent misrepresentation and concealment, negligent misrepresentation, negligence, and breach of contract. The defendants filed a motion for summary judgment, which was granted in part by the district court. The court determined that Tapestry's negligence claims were barred by the economic loss doctrine and dismissed those claims. It denied the remainder of the defendants' motion,

finding genuine issues of material fact existed as to Tapestry's claims for fraud and breach of contract.

The case proceeded to trial before the district court without a jury. After hearing the parties' evidence, the court dismissed all of the claims against the Millers individually. It also dismissed the fraud claims against Village Place and Development Group, but found in favor of Tapestry on its breach of contract claim against those entities. It determined that "the improvements on the real property were not as warranted" in the parties' purchase agreement due to the condition of the bay windows throughout the facility and that Tapestry was accordingly entitled to damages in the amount of $175,000 plus interest.

Tapestry appeals. It claims the district court erred in (1) dismissing its fraudulent misrepresentation and negligence claims against the defendants, (2) determining it was not entitled to punitive damages, (3) finding the Millers were not personally liable under the purchase agreement, and (4) calculating its damages. The defendants cross-appeal, claiming the damage award was not supported by substantial evidence.

***II. Scope and Standards of Review.***

We review the district court's summary judgment ruling on Tapestry's negligent misrepresentation claim for the correction of errors at law. Iowa R. App. P. 6.4; *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); *Faeth*, 707 N.W.2d at 331.

We likewise review the court's ruling on Tapestry's fraud and breach of contract claims in this law action for the correction of errors at law. Iowa R. App. P. 6.4; *Flom v. Stahly*, 569 N.W.2d 135, 139 (Iowa 1997). Because those claims were tried to the district court without a jury, the "court's findings of fact have the effect of a special verdict and are binding if supported by substantial evidence." *Equity Control Assoc., Ltd. v. Root*, 638 N.W.2d 664, 670 (Iowa 2001). We view the evidence in a light most favorable to the court's ruling and construe its findings broadly and liberally in favor of the judgment. *Id.* We are not, however, bound by the court's legal conclusions. *Id.*

***III. Discussion.***

***A. Fraudulent Misrepresentation.***

Tapestry first claims the district court erred in dismissing its fraud claims based on defendants' failure to inform Tapestry about the defects in the bay windows. We reject this claim.

In order to establish fraudulent misrepresentation, Tapestry was required to prove the following by a preponderance of clear, convincing, and satisfactory evidence: "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury." *Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005). "Concealment of or failure to disclose a material fact can constitute fraud in Iowa." *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987). However, in order for silence to be an actionable fraud, it

> must relate to a material matter *known* to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, from inequality of condition and knowledge, or other attendant circumstances.

*Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 293 (Iowa 1975) (emphasis added).

Here, the district court found

> [t]he cause of the defective windows on which [Tapestry's fraud] claims are based was insufficient structural support to hold the windows in place. This condition was concealed by the siding and was only discovered when siding was removed for a remodeling project that occurred after the sale. The evidence does not support a finding that the sellers (Village Place and Development Group) were aware of the insufficient support or the concealed deterioration underlying the windows at the time of the sale. Nor were the other named Defendants aware of those conditions. The Miller Brothers . . . had been made aware of the visible manifestations of the concealed deterioration, i.e., sagging windows that would not close and the resulting entry of rain and cold air. But they could have reasonably believed that these visible deficiencies had been adequately repaired and the facility was fit for its intended use. The Court finds that their representations were not knowingly false or made with an intent to deceive.

We conclude the court's findings are supported by substantial evidence and its application of law correct.

The expert witness retained by Tapestry, architect David Brost, testified that the deterioration of the bay window structures was apparent only after he performed his "destructive testing," which involved removal of siding. Other contractors employed by Tapestry to repair the bay windows testified similarly, with one stating, "The more we tore into it . . . the more [we discovered] it's going to be worse than what we think." The defendants' expert witness, David Unzeitig, confirmed that "the only way we knew there was any damage happening in the bay window area . . . was because the architect, Dave Brost, hired a contractor to take all the siding off."

In *Burnett v. Hensley*, our supreme court stated,

> If there be a latent defect, not ascertainable on inspection, *of which the seller had knowledge*, common honesty requires that he tell the purchaser of the defect. But if knowledge of this defect be open to the purchaser, no fraud is perpetrated by the seller in remaining silent. Should he, however, make statements regarding the condition of the thing sold with the intent to divert the eye or obscure the observation of the purchaser, he will be guilty of fraud, and the law will relieve the purchaser. Even in such cases, in an action at law for damages, *it must be shown that defendant knew of the defect*, and that he made the statements or concealed the defects with intent to defraud the purchaser.

118 Iowa 575, 578-79, 92 N.W. 678, 679 (1902) (emphasis added) (citations omitted).

As the district court found, there is no evidence the defendants knew about the deterioration of the structural support of the bay windows even though their employees did know residents experienced problems with the windows. Nor is there any evidence the defendants purposely concealed the defects with the intent to defraud Tapestry, especially in light of Tapestry's ability under the parties' purchase agreement to inspect the property in whatever manner it chose. *See Christy v. Heil*, 255 Iowa 602, 607, 123 N.W.2d 408, 411 (1963) ("Whether the purchaser should be precluded from recovery because of his investigation or opportunity to investigate is ordinarily for the trier of fact.").

We therefore affirm the district court's dismissal of Tapestry's fraud claims against Village Place and Development Group. In so doing, we also affirm its dismissal of Tapestry's request for punitive damages, which was based on the defendants' supposed fraudulent misrepresentations and concealment of the defects in the bay windows. *See Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005) ("Punitive damages are only appropriate when a tort is committed with 'either actual or legal malice.'" (citation omitted)); *see also Berryhill v. Hatt*, 428 N.W.2d

647, 656 (Iowa 1988) (stating punitive damages, which are "always discretionary," cannot be based on breach of contract alone; rather, "the breach must also constitute an intentional tort, or other wrongful act, committed with legal malice, that is with willful or reckless disregard for another's rights"). This brings us to Tapestry's next assignment of error: whether the district court erred in dismissing its negligent misrepresentation claim on summary judgment.

***B. Negligent Misrepresentation.***

The district court determined the economic loss doctrine as articulated in *Determan v. Johnson*, 613 N.W.2d 259 (Iowa 2000), applied to bar Tapestry's negligent misrepresentation claim, which sought recovery for the cost to repair the damage caused by the defective bay windows in the facility it purchased from the defendants. We agree.

The economic loss doctrine is a "generally recognized principle of law that plaintiffs cannot recover in tort when they have suffered only economic harm." *Richards v. Midland Brick Sales Co.*, 551 N.W.2d 649, 650 (Iowa Ct. App. 1996); *see also Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 128 (Iowa 1984) (adopting rule that a plaintiff "cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence"). Our supreme court most recently addressed the doctrine in *Determan*, in which a purchaser of a home sued the sellers "under several different negligence theories" after discovering significant structural problems in the home. *Determan*, 613 N.W.2d at 260-61. In finding the plaintiff could not recover under tort law, the court stated that where the loss relates to a consumer's "disappointed expectations due to deterioration, internal breakdown or non-

accidental cause, the remedy lies in contract." *Id.* at 262. This is so because "contract law protects a purchaser's expectation interest that the product received will be fit for its intended use." *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995); *see also Richards*, 551 N.W.2d at 651 ("Purely economic losses usually result from the breach of a contract and should ordinarily be compensable in contract actions, not tort actions.").

We believe the district court correctly determined that *Determan* controls the result here. Tapestry's negligent misrepresentation claim is clearly based on its disappointed expectations under the parties' purchase agreement due to the deterioration of the bay windows discovered during its remodel of the facility. *See Determan*, 613 N.W.2d at 262. The damages sought by Tapestry to repair the bay windows do not "extend beyond the product itself." *Id.* (stating at a minimum "the damage for which recovery is sought must extend beyond the product itself" in order to be compensable in tort); *see also Flom*, 569 N.W.2d at 141 (finding plaintiff's claim was contractual in nature because "the harm alleged was to the object of the contract (the house) and not to their persons or other property"). In addition, Tapestry does not seriously contest the district court's application of the economic loss doctrine on appeal. Instead, it simply asserts that it established the elements of a negligent misrepresentation claim at trial. We therefore deny this claim and affirm the district court's dismissal of Tapestry's cause of action for negligent misrepresentation.

***C. Personal Liability of Millers.***

Tapestry next claims the district court erred in determining Thomas, Craig, and Douglas Miller were not exposed to personal liability under the purchase agreement and dismissing its claims against them. We conclude otherwise.

The purchase agreement was entered into by Village Place and Development Group as the sellers and Tapestry as the purchaser. Although Thomas Miller signed the agreement as the president of both Village Place and Development Group, none of the Millers signed the agreement in their individual capacities. Tapestry accordingly seeks to impose liability on the Millers by arguing they engaged in tortious activity by making fraudulent misrepresentations about the condition of the building.[1]

A member or manager of a limited liability company is not personally liable for acts or debts of the company *solely* by reason of being a member of manager. *See* Iowa Code § 490A.603 (2005); *Estate of Countryman v. Farmers Coop. Ass'n*, 679 N.W.2d 598, 603 (Iowa 2004). The same is true for limited partners in a limited partnership. *See* Iowa Code § 488.303. However, "under general agency principles, corporate officers and directors can be liable for their

[1] We reject Tapestry's alternative argument that the purchase agreement between the Millers' corporate entities and Tapestry "reflects additional contractual relationships created with the Miller Brothers, individually." Tapestry's argument is founded on the following provision in the agreement:

> the term 'knowledge' and 'aware' . . . when used with respect to Seller or Partner, means the actual knowledge of Thomas E. Miller, Craig R. Miller, and Douglas V. Miller, after discussion with Todd Witcraft, Chief Financial Officer of Apprize, Inc., Steve Yurick, Director, Apprize Property Management, Inc., and the on-site manager of the Independent Living Facility.

There is no merit to Tapestry's assertion that this provision represents a separate contract between Tapestry and the Millers individually. *See generally Horsfield Const. Inc. v. Dubuque County*, 653 N.W.2d 563, 570-71 (Iowa 2002) (discussing factors bearing on existence of contract).

torts even when committed in their capacity as an officer." *Estate of Countryman*, 679 N.W.2d at 603 (applying same principle to members or managers of a limited liability company).

There is no evidence in the record to support Tapestry's assertion that any of the Millers participated in tortious conduct, as we indicated in our earlier discussion denying Tapestry's fraudulent misrepresentation claim against Village Place and Development Group. The district court's dismissal of Tapestry's claims against the Millers individually is thus affirmed.

***D. Damages.***

We come now to the heart of the parties' disagreement on appeal: whether the district court erred in its award of damages to Tapestry. In awarding Tapestry damages, the court determined:

> [D]amages for a breach of express warranty in the sale of physical assets may, in proper cases, be measured by the cost of correcting the deficiencies. But this is only true to the extent that such corrections enhance the value of the property to the value that was warranted. The Defendants correctly argue that the restorative costs proposed by [Tapestry] as "benefit of the bargain" damages would enhance the value of the facility far beyond its warranted condition. This does not mean, however, that [Tapestry] should not recover some damages . . . . Clearly, the window problems have rendered the assets that were purchased of less value than they would have had if the windows had been in good condition. Based on the evidence presented, damages must be approximated by the trier-of-fact. The Court's best judgment in this regard is that the condition of the windows reduced the value of the property by no less than $175,000 below what it would have been had the windows been in acceptable condition.

Tapestry claims the court erred in failing to award it damages based on the cost to repair the bay windows, which it asserted at trial would be $466,232. We do not agree.

Ordinarily, in a breach of express warranty action such as this, the appropriate measure of damages is "the difference between value of the goods as they were and value as they would have been had they answered to the warranty." *Dailey v. Holiday Distrib. Corp.*, 260 Iowa 859, 876, 151 N.W.2d 477, 489 (1967); *see also* Iowa Code § 554.2714(2). But, "[t]he 'ultimate purpose' behind the allowance of damages is to place the injured party in the position he or she would have occupied if the contract had been performed." *Macal v. Stinson*, 468 N.W.2d 34, 36 (Iowa 1991). Thus,

> [w]hen the loss in value to the injured party cannot be proved with sufficient certainty, a breach resulting in defective construction may entitle the injured party to recover damages based on "the reasonable cost of . . . remedying the defects if that cost is not clearly disproportionate to the probable loss in value . . . ."

*Flom*, 569 N.W.2d at 142 (quoting Restatement (Second) of Contracts § 348(2)(b) (1979)). Tapestry relies on *Flom* in support of its claim that the proper measure of damages was the cost to repair the bay windows.

*Flom*, however, involved a newly constructed house with significant structural defects. Here, Tapestry purchased a sixteen-year-old building and sought damages based on the cost of replacing the old windows in that building with new windows. We thus agree with the district court that "the restorative costs proposed by [Tapestry] as 'benefit of the bargain' damages would enhance the value of the facility far beyond its warranted condition." *See Flom*, 569 N.W.2d at 142 (stating a party may recover the reasonable cost of remedying the defects "if that cost is not clearly disproportionate to the probable loss in value"); *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (noting a party is "not entitled to be placed in a better position than he

would have been in if the contract had not been broken"). This is especially so in light of the fact that Tapestry purchased the facility for much less than its appraised value as of 2004, which was $3,665,000.

Moreover, "[i]n defective construction cases, damages may include diminution in value, cost of construction, and completion in accordance with the contract, or loss of rentals." *R.E.T. Corp. v. Frank Paxton Co.*, 329 N.W.2d 416, 421 (Iowa 1983). Hence, in *Hansen v. Andersen*, 246 Iowa 1310, 1315, 71 N.W.2d 921, 924 (1955), the court determined that cost-of-repair damages in a defective construction case were not appropriate where "there would have to be substantial changes to comply with [the] claimed contract." It concluded the "proper measure of damage would be the difference between the value of the building as it is and the value as it would have been if made under the provisions of the claimed agreement." *Hansen*, 246 Iowa at 1316, 71 N.W.2d at 924 ("[W]here the defective material has become an inherent part of the building so that the defect cannot be remedied except by taking down and doing over some substantial portion of the work . . . the amount allowable . . . is the amount which the building, by reason of the defect, is worth less than it would have been if constructed in entire conformity to the contract.").

The bid Tapestry received to repair the defective bay windows included installation of new siding on the entire building, drywall, paint, framing, shingling, and new gutters. The cost of labor and material in making these changes and others is substantial. We thus do not believe the district court erred in denying Tapestry's claimed cost-of-repair damages and instead awarding it $175,000

plus interest, which represented its "best judgment" as to the diminution in value caused by the faulty bay windows.

This leads us to the defendants' claim on cross-appeal: whether Tapestry presented sufficient evidence of its damages. The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996). However, "[t]here is a distinction between proof that a party has suffered damages and proof regarding the amount of those damages." *Id.* "If the record is uncertain and speculative whether a party has sustained damages, the fact finder must deny recovery." *Id.* "But if the uncertainty is only in the *amount* of damages, a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Id.* (emphasis added).

The defendants do not claim the record is uncertain as to whether Tapestry sustained damages. Rather, they assert Tapestry did not present any evidence as to the diminution in value to the facility caused by the defects in the bay windows. We conclude, however, that there is a reasonable basis in the evidence from which the district court could infer or approximate the damages as it did given the 2004 appraisal value, the amount Tapestry paid for the building, and its claimed restorative costs. The court's award of $175,000 was within the range of that evidence. *See Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 917-18 (Iowa Ct. App. 1995) (stating the determination of damages in a bench trial "ordinarily lies within the sound discretion of the trial court" and an "award of damages within the range of the evidence will not be disturbed on appeal").

***IV. Conclusion.***

We conclude the district court did not err in dismissing Tapestry's fraud claims against Village Place and Development Group and denying its request for punitive damages. We further conclude the court correctly determined the economic loss doctrine barred Tapestry's negligent misrepresentation claim. The court was also correct in finding the Millers were not subject to personal liability and dismissing Tapestry's claims against them. Finally, we conclude the court did not apply an incorrect measure of damages in this case and its award of damages was supported by substantial evidence. The judgment of the district court is therefore affirmed.

***V. Postscript.***

Appellees point to a few violations of the rules of appellate procedure made by Tapestry Village in its brief. The observations may be true, but "whose house is of glass, must not throw stones at another."[2] Appellees' brief also violates the applicable rules of appellate procedure. Iowa Rule of Appellate Procedure 6.16(1) provides that a brief's typed matter be "6 by not less than 8 1/8 inches nor more than 9 1/4 inches." The lines of typewritten text in appellees' fifty-page brief measure six and one-half inches. Exceeding the maximum width by one-half inch may seem a small matter, but appellees have in effect filed an over-length brief without permission.

**AFFIRMED ON BOTH APPEALS.**

[2] G. Herbert, *Jacula Prudentum*, No. 196 (1651).