

IN THE SUPREME COURT OF THE STATE OF NEVADA

DON A. DIFEO AND DEBBIE L.  
DIFEO,  
Appellants,  
vs.  
STANLEY F. SCHMIDT,  
Respondent.

No. 41488

**FILED**

SEP 07 2005

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment against appellants entered pursuant to NRCP 41(b). Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. We affirm.

FACTS AND PROCEDURAL HISTORY

This appeal involves appellants' seller-financed purchase of residential real estate from respondent in August 2000. After months of attempting to deal with substantial problems with the property, appellants filed suit against respondent for damages, alleging intentional misrepresentation/fraud; breach of contract; breach of the implied covenant of good faith and fair dealing; and concealment of material defects under NRS Chapter 113.<sup>1</sup> In addition to the issues joined in the pleadings, the parties also litigated rescission issues based upon the claims of fraud and concealment, and based upon non-pleaded claims of unilateral and mutual mistake.

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<sup>1</sup>Respondent counterclaimed, seeking recovery under the purchase money note, and for restitution. The district court dismissed the counterclaim in light of respondent's decision to pursue his remedies by way of foreclosure proceedings against deeds of trust that the appellants posted as collateral for the sale.

The matter was tried to the bench. Following the presentation of appellants' case, the district court granted respondent's NRCP 41(b) motion for involuntary dismissal. On appeal, appellants assert that the district court misapplied NRCP 41(b), substantively erred in dismissing their claims of concealment brought under NRS 113.150, substantively erred in failing to grant rescission, and erred in failing to consider relief based upon a theory of negligent misrepresentation.

### DISCUSSION

#### NRCP 41(b)

Appellants argue that the trial judge disregarded every legal standard applicable to NRCP 41(b) motions by improperly weighing the credibility of witnesses, failing to draw every inference in their favor, and improperly considering conflicting defense evidence presented during their case-in-chief.

Under NRCP 41(b), a party may move for "involuntary dismissal of a claim after the close of the plaintiff's case 'on the ground that upon the facts and the law the plaintiff has failed to prove a sufficient case for the court or jury.'"<sup>2</sup> We have previously stated that, in ruling on a Rule 41(b) motion, the district court "must accept the plaintiff's evidence as true, draw all permissible inferences in the plaintiff's favor, and not assess the credibility of the witnesses or the weight of the evidence."<sup>3</sup> However, we have also recognized that this standard can be dispensed

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<sup>2</sup>J.A. Jones Constr. v. Lehrer McGovern Bovis, 120 Nev. 277, \_\_\_, 89 P.3d 1009, 1018 (2004) (quoting NRCP 41(b)).

<sup>3</sup>Id. at \_\_\_, 89 Nev. at 1017 (quoting Chowdhry v. NLVH, Inc., 109 Nev. 478, 482, 851 P.2d 459, 461 (1993)).

with when the case has been fully presented.<sup>4</sup> When this has occurred, the trial judge may make findings of fact based on conflicting evidence.<sup>5</sup>

While the district court below weighed the evidence in making its NRCP 41(b) ruling, we conclude that this presumptive error does not warrant reversal in this case. First, although the respondent had not testified, the respective claims of the parties had essentially been tried in full at the time the defense moved for dismissal. Second, the ruling in favor of respondent without respondent's testimony did not prejudice the appellants, especially when they could have called respondent as a witness during their case-in-chief. Third, because this matter was tried to the bench, the trial court was, in any event, the arbiter of witness credibility. In this, it is evident that the district court assessed all credibility issues in favor of the defense without hearing from the primary defense witness. However, under the circumstances, we conclude that the district court's apparent consideration of witness credibility constitutes harmless error.<sup>6</sup>

### Substantive rulings

#### Standard of review

Questions as to whether a party has met the elements of intentional/negligent misrepresentation or unilateral/mutual mistake are generally questions of fact.<sup>7</sup> Thus, this court defers to the trial court's

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<sup>4</sup>Martin v. Ross, 96 Nev. 916, 917-18, 620 P.2d 866, 867 (1980).

<sup>5</sup>See id.

<sup>6</sup>We note that former NRCP 41(b), under which this case was resolved, has been superseded, effective January 1, 2005, by NRCP 52(c).

<sup>7</sup>See Blanchard v. Blanchard, 108 Nev. 908, 911, 839 P.2d 1320, 1322 (1992).

ability to assess the credibility of witnesses and conflicting testimony, and will not set aside the trial court's findings unless clearly erroneous and unsupported by substantial evidence.<sup>8</sup> Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."<sup>9</sup>

Fraud and statutory concealment

Appellants alleged at trial that respondent fraudulently induced them into the purchase by failing to disclose latent and material defects in the property. They pressed common law and statutory claims for damages, including a claim for treble damages under NRS 113.150(4), for alleged violations of the disclosure provisions regulating real property sales, in particular, NRS 113.100, NRS 113.120, and NRS 113.130.

Appellants introduced evidence suggesting that respondent failed to disclose known but hidden structural defects in the property on statutory disclosure forms. However, the body of evidence presented, in its totality, also showed that the houses on the property in question were old; that numerous defects, including structural defects, were apparent upon the appellants' visual inspection; that the property disclosure form confirmed the presence of structural conditions that could affect the value or use of the property;<sup>10</sup> that the sales contract and other documents

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<sup>8</sup>NRCP 52(a); James Hardie Gypsum, Inc. v. Inquipco, 112 Nev. 1397, 1401, 929 P.2d 903, 906 (1996); Lubbe v. Barba, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975).

<sup>9</sup>State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting Perales v. Perales, 402 U.S. 389, 401 (1971)).

<sup>10</sup>The disclosure form contained a brief explanation that stated, "2065½ (rear house) is in rougher condition than front house, but tenants have not told me of things that they need to have done."

contained an “as-is” provision, noted appellants’ right to inspect, and expressly disclaimed reliance upon respondent’s representations concerning the property; that the condition of the property was reflected in the purchase price; and that appellants proceeded to sale without inspection notwithstanding these issues.

Based on the evidence, the district court concluded that appellants failed to prove that respondent possessed the intent to defraud, that respondent did not affirmatively violate Nevada’s statutory disclosure laws, and that appellants acted unreasonably in failing to conduct a more in-depth inspection. We conclude that the body of evidence summarized above, although contested, provides substantial support for the district court’s findings.

We also conclude that the district court’s findings concerning appellants’ failure to inspect justify rejection of appellants’ Chapter 113 concealment claim under NRS 113.140(3), which provides that “a buyer or prospective buyer [seeking statutory damages based on concealment is not relieved] of the duty to exercise reasonable care to protect himself.” Finally, the sales contract itself supports a waiver of the statutory damage claim under NRS 113.150(6):

A purchaser of residential property may waive any of his rights under this section. Any such waiver is effective only if it is made in a written document that is signed by the purchaser and notarized.

To explain, the sales contract documents in this matter contained a provision that the property was “being sold in its present condition,” and that “[b]uyer is not relying upon any representation of the seller in his decision to purchase the property.” We conclude that this clause in the

contract substantially complies with the waiver provisions of NRS 113.150(6).<sup>11</sup>

In light of the above, we can find no “clear error” mandating reversal of the fraud and statutory concealment rulings.

Negligent misrepresentation

Appellants contend that they adequately proved a claim of negligent misrepresentation, a claim not included in their complaint below. They claim that the district court should have afforded relief under NRCP 54(c), which requires the district court to “grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.” We disagree. These claims fail on procedural and substantive grounds.

First, NRCP 54(c) relates to the form of relief awarded under a cause of action actually pleaded. Second, appellants made no attempt below, even after judgment, to seek an amendment to the pleadings to conform with appellants’ proofs at trial.<sup>12</sup> Third, the total body of evidence suggests that respondent acted reasonably toward appellants by couching the transaction in terms that placed appellants on notice of the problems with the property. Fourth, the claim of negligent misrepresentation does not, of necessity, implicate whether appellants justifiably relied upon respondent’s disclosures or failure to disclose. Rather, the district court could reasonably conclude, based upon appellants’ failure to inspect, that no reliance in fact occurred.

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<sup>11</sup>The notary requirement is not pertinent because there is no dispute as to whether appellants executed the sales documents.

<sup>12</sup>See NRCP 15(b).

Negligence and actual or justifiable reliance are essential elements of a claim of negligent representation.<sup>13</sup> We see no error in the denial of relief under this theory.

### Rescission

The district court also refused to grant rescission based upon mistake because of the passage of time and the amount of post-sale work performed on the property. Although the district court's oral ruling in this regard was incomplete and somewhat cryptic, the record below supports the result reached.<sup>14</sup> First, as noted, substantial evidence supports the proposition that respondent entertained no intent to defraud the appellants into the purchase. Second, substantial evidence also supports the district court's finding of no mistake of fact. To explain, the appellants' consummated the transaction despite the fact that the property was old and in visibly poor condition, despite clear notice at the time of purchase of considerable structural and other defects in the

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<sup>13</sup>In Bill Stremmel Mtrs. v. First Nat'l Bank, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978), we adopted the Restatement (Second) of Torts § 552 (1971) definition of the tort of negligent misrepresentation:

One who, in the course of his business, profession or employment, or in any other action 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 to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

<sup>14</sup>See Rosenstein v. Steele, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) (holding that "this court will affirm the order of the district court if it reached the correct result, albeit for different reasons").

property, despite the clear advisability of a comprehensive inspection, despite the agreement that appellants “were not” relying upon respondent’s representations, and despite the fact that appellants undertook the purchase of property in “as-is” condition.<sup>15</sup> Going further, evidence in the record suggests that the condition of the property was reflected in the purchase price. Under the circumstances, we conclude that the district court did not err in refusing to rescind the contract based upon mutual or unilateral mistake.<sup>16</sup>

### CONCLUSION

The district court heard conflicting evidence on the questions of fraud, mistake and concealment under NRS Chapter 113. While the oral pronouncement of the decision was disjointed and laced at times with

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<sup>15</sup>See Mackintosh v. Jack Matthews & Co., 109 Nev. 628, 632, 855 P.2d 549, 552 (1993) (holding that that an “as-is” clause does not relieve a seller of property from his obligation to disclose a condition that substantially affects the value of habitability of property known to the seller, and unknown to the buyer, and which would not be revealed by reasonable inspection). Despite appellants’ evidence that only a very sophisticated inspection would have revealed some of the structural defects, the “as-is” provision constitutes some evidence that no mutual or unilateral mistake occurred.

<sup>16</sup>This court has adopted the Restatement (Second) of Contracts § 153 definition of unilateral mistake. See Home Savers, Inc. v. United Security Co., 103 Nev. 357, 358-59, 741 P.2d 1355, 1356-57 (1987). Under this provision, relief is appropriate if the party seeking rescission does not bear the risk of the mistake under Restatement (Second) of Contracts § 154 (1981). Under § 154(b), a party bears the risk if “he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.” See also Restatement (Second) of Contracts § 152 (defining mutual mistake and referencing § 154).



flawed or incomplete legal reasoning, we conclude that the result is supported by substantial evidence in the record. Accordingly, we find no clear error in the district court's substantive rulings.<sup>17</sup>

Additionally, determining that the procedural errors in using NRCP 41(b) as a mechanism for dismissing the case were harmless, we conclude that the district court did not commit reversible error in dismissing appellants' claims below. Therefore, we

ORDER the judgment of the district court AFFIRMED.

Becker, C.J.  
Becker

Rose, J.  
Rose

Maupin, J.  
Maupin

Gibbons, J.  
Gibbons

Douglas, J.  
Douglas

Hardesty, J.  
Hardesty

Farraguirre, J.  
Farraguirre

cc: Hon. Steven R. Kosach, District Judge  
Michael Davis Merchant  
Kreitlen & Walker  
Washoe District Court Clerk

<sup>17</sup>See Rosenstein, 103 Nev. at 575, 747 P.2d at 233.