

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY J. MARIANO, JR., AND  
BEVERLY MARIANO, HUSBAND AND  
WIFE,  
Appellants,  
vs.  
JUDI PORTER AND MORGAN S.  
PORTER, HUSBAND AND WIFE; AND  
MARK BONELLO, A SINGLE MALE,  
Respondents.

No. 42278

**FILED**

SEP 08 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 entered after a bench trial in an action alleging misrepresentation and breach of contract. Seventh Judicial District Court, Eureka County; Steve L. Dobrescu, Judge.

FACTS AND PROCEDURAL HISTORY

Appellants Anthony and Beverly Mariano sold 320 acres of Eureka County farm property to respondents, Judi Porter, Morgan Porter and Mark Bonello. The sales contract provided that respondents bore the duty and cost of inspecting the irrigation system. However, due to unforeseen circumstances, the scheduled inspection did not occur as planned. The respondents allege that they agreed to close escrow despite the lack of inspection based upon Anthony Mariano's representations that the well and irrigation system located on the property worked properly. After discovering the system's deficient output, respondents dismantled the well and discovered an obstruction.

Subsequent to this discovery, respondents sought rescission and/or damages based on misrepresentation, civil conspiracy, negligence,

breach of contract, and tortious interference with economic advantage. Notably, the misrepresentation claim alleged both intentional and negligent misrepresentation. The district court granted appellants' motion for summary judgment with respect to the civil conspiracy, negligence and tortious interference claims; and the remaining claims proceeded to a two-day bench trial.

Testimony at trial established that the well is a total loss. However, the parties presented conflicting evidence on whether Mr. Mariano fraudulently represented the working condition of the irrigation system or lacked a sufficient basis for making such representations. The district court ultimately found that Mr. Mariano intentionally and negligently misrepresented the condition of the system. In accord with that ruling, the court granted rescission of the contract and ordered restoration to the respondents of their down payment and related costs, which approximated \$25,000. In this, the district court denied respondents' claim for reimbursement for alleged improvements to the property. Finally, the court declined to offset the respondents' award by the fair rental value of the property because neither party presented evidence establishing rental value. This appeal followed.

### DISCUSSION

Appellants assert that the district court erred in finding intentional and negligent misrepresentation. Alternatively, appellants assert that the district court erred by failing to offset the award by the fair rental value of the property.

### Intentional misrepresentation

A plaintiff asserting intentional misrepresentation must prove the following elements by clear and convincing evidence: (1) the defendant made a false representation; (2) the defendant knew or believed that the representation was false, or had an insufficient basis for making the representation; (3) the defendant intended to induce the plaintiff to act or refrain from acting in reliance upon the misrepresentation; (4) the plaintiff actually and justifiably relied upon the misrepresentation; and (5) the plaintiff suffered damages resulting from such reliance.<sup>1</sup> The question of whether “a party has met the elements of intentional misrepresentation is generally a question of fact.”<sup>2</sup> Thus, this court defers to the trial court’s 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>3</sup> Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion.”<sup>4</sup>

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<sup>1</sup>Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110-11, 825 P.2d 588, 592 (1992).

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

<sup>3</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>4</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)).

Appellants argue that substantial evidence does not support the district court's finding of intentional misrepresentation. In particular, appellants cite Bulbman, Inc. v. Nevada Bell<sup>5</sup> and Clark Sanitation v. Sun Valley Disposal,<sup>6</sup> asserting that the district court erred by not treating Mr. Mariano's statements regarding the operability of the irrigation system as opinions or estimates based on past experience, which are not actionable in fraud. We disagree. First, both Bulbman and Clark Sanitation involve commercial transactions in which the representing parties had adequate knowledge upon which to base their assertions.<sup>7</sup> Second, as we noted in Banta v. Savage, upon which Bulbman and Clark Sanitation rest, "[w]here a representation is made, going to the essence of a contract, the party making it should be careful to state it as an opinion, and not as a fact of which he has knowledge, or he may be liable thereon."<sup>8</sup> With these two particulars in mind, we conclude that substantial evidence in the record supports the conclusion that Mr. Mariano misrepresented the then current condition of the irrigation system, and that these representations were presented as matters of fact, actionable in fraud. Further, we conclude

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<sup>5</sup>108 Nev. at 111, 825 P.2d at 592.

<sup>6</sup>87 Nev. 338, 341-42, 487 P.2d 337, 341-42 (1971).

<sup>7</sup>See Bulbman, 108 Nev. at 111, 825 P.2d at 592 (Nevada Bell hired to install a phone system which they had prior experience with); Clark Sanitation, 87 Nev. at 342, 487 P.2d at 339 (noting that Clark's formal bid was accompanied by a comprehensive list of equipment).

<sup>8</sup>Banta v. Savage, 12 Nev. 151, 157 (1877); see also Clark Sanitation, 87 Nev. at 342, 487 P.2d at 342 (noting that "[t]here are, of course, exceptions" to the recognition stated in Banta that opinions are distinguishable from representations of fact).

that substantial evidence supports the district court's determination that he intentionally made the statements with an insufficient basis for making them. Thus, we conclude that substantial evidence supports the district court's finding of intentional misrepresentation and affirm the court's rescission of the sales contract.<sup>9</sup>

Offset of rental value

A buyer rescinding a land-sale contract based on the seller's misrepresentation is generally entitled to recover the purchase money paid less the reasonable rental value of the land while it was in the buyer's possession.<sup>10</sup> In the instant matter, the district court recognized this rule, but declined to award an offset after noting that neither party presented evidence regarding rental value.

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<sup>9</sup>See Pacific Maxon, Inc. v. Wilson, 96 Nev. 867, 870, 619 P.2d 816, 817 (1980) ("A suit in equity for rescission of a contract . . . does not necessarily fail because the party seeking rescission was unreasonable in relying upon the misrepresentation made by the other party."); see also In re M & L Business Mach. Co., Inc., 84 F.3d 1330, 1342 (10th Cir. 1996) (citing Pacific Maxon for the proposition that an action for rescission does not necessarily fail because the party seeking rescission unreasonably relied upon the representation, and noting that other courts have allowed "a party fraudulently induced to enter into a contract to recover the full amounts paid even when the defrauded party acted negligently and had inquiry notice of the fraud"). We further reject appellants' assertion of unclean hands. See NRAP 28(c); Phillips v. Mercer, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978).

<sup>10</sup>See Lyerla v. Watts, 87 Nev. 58, 62, 482 P.2d 318, 321 (1971); see also McCoy v. West, 138 Cal. Rptr. 660, 664 (Ct. App. 1977).

Citing Stanley v. Limberys,<sup>11</sup> appellants assert that the district court erred by failing to offset the judgment by the fair rental value of the property, which the respondents occupied for two years. We conclude that Stanley does not control this particular situation. First, Stanley addressed the restoration obligation in the context of a rescinded business transaction that undeniably produced actual profits for the rescinding party. Second, we determined that a prima facie case for restoration had been made, and that the amount of the actual profit received before rescission must be restored, despite the parties' failure to properly litigate the issue.<sup>12</sup> Aside from the questionable remaining validity of Stanley, which is counterintuitive to a claimant's burden of proof, it is undisputed in the instant case that the land in question produced no actual rental income or profits. Under the circumstances, we conclude that it was incumbent upon appellants to prove what, if any, rental value the property possessed. In a circumstance such as this, the "risk of any difficulty in proof [does] not inure to the benefit of the party responsible for the failure of the contract."<sup>13</sup>

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<sup>11</sup>74 Nev. 109, 323 P.2d 925 (1958).

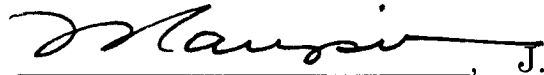
<sup>12</sup>Id. at 113-14, 323 P.2d at 927-28.

<sup>13</sup>Grill v. Hunt, 7 Cal. Rptr.2d 768, 772 (Ct. App. 1992) (also noting that "the burden of proof should be placed on the party best able to satisfy it"). Id.

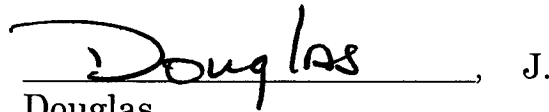
CONCLUSION

We conclude that substantial evidence supports the district court's finding of intentional misrepresentation. Further, due to a failure of proof, the district court did not err in declining to offset the judgment by the fair rental value of the property. Accordingly, we

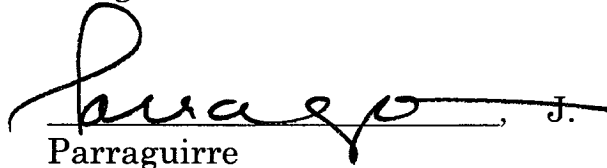
ORDER the judgment of the district court AFFIRMED.



Maupin



Douglas



Parraguirre

cc: Hon. Steve L. Dobrescu, District Judge  
A. Grant Gerber & Associates  
Mark Bonello  
Etta L. Walker  
Eureka County Clerk