An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-147

Filed: 18 September 2018

Pender County, No. 17 CVS 440

MELISSA APPERSON and her husband, JUSTIN COX, Plaintiffs

v.

INTRACOASTAL REALTY CORPORATION, MELISSA GALLISON, individually and as broker in charge of Intracoastal Realty Corporation, KEITH BEATTY, individually and as an Agent and/or Employee of Intracoastal Realty Corporation, and ED COULBURN, Individually and as an Agent and/or Employee of Intracoastal Realty Corporation, KENDALL FOWLER, and his wife, TABITHA FOWLER, Defendants

Appeal by plaintiffs from order entered 6 October 2017 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 20 August 2018.

The Law Group, by Michael P. Kepley, for plaintiff-appellants.

Shipman & Wright, L.L.P., by Gary K. Shipman, for defendant-appellees.

CALABRIA, Judge.

Where plaintiffs failed to demonstrate that defendants breached a professional duty to plaintiffs, the trial court did not err in granting summary judgment in favor of defendants on the claim of professional malpractice. Where plaintiffs failed to

demonstrate that they justifiably or actually relied upon misinformation from defendants to their detriment, the trial court did not err in granting summary judgment in favor of defendants on the claims of negligent misrepresentation, fraud, and unfair trade practices. We affirm the order of the trial court.

I. Factual and Procedural Background

Kendall and Tabitha Fowler ("the Fowlers") owned a tract of real property in Pender County ("the property"). Sometime prior to 28 November 2016, Intracoastal Realty Corporation ("Intracoastal"), via its employees Melissa Gallison ("Gallison"), Keith Beatty ("Beatty"), and Ed Coulburn ("Coulburn"), began marketing the property for sale on the Fowlers' behalf. Intracoastal marketed the property as being fully compliant with, *inter alia*, any and all federal, state, and county laws, rules, regulations, and ordinances. At the same time, Melissa Apperson and her husband, Justin Cox ("plaintiffs") had employed a real estate agent for the purchase of real property, and became aware of Intracoastal's listing. Plaintiffs expressed interest in the property, and Intracoastal provided a disclosure statement, which stated that there were no issues with the drainage, grading, or soil stability of the property, and that a new septic system had been installed in 2014. In reliance on this, plaintiffs, through their real estate agent, entered into a contract to purchase the property on 15 October 2016, and closed on the property on 28 November 2016. Subsequently, plaintiffs discovered that the septic system did not work, and would need to be

replaced; that the new septic system would have to be drained into a nearby creek; that this drainage would require permission from the State of North Carolina; and that without the permission and drainage, the septic system would be inoperable.

On 3 May 2017, plaintiffs filed the instant complaint against Intracoastal, Gallison, Beatty, and Coulburn (collectively, "the Intracoastal defendants"), as well as the Fowlers, (collectively, "defendants"). Plaintiffs alleged professional malpractice by the Intracoastal defendants in failing to communicate to plaintiffs the condition of the soil and septic system, and negligent misrepresentation, fraud, unfair trade practices, and false and misleading advertising by all defendants for the same. The complaint also alleged *respondeat superior*, creating liability in Intracoastal for the actions of its employees. Lastly, plaintiffs' complaint sought punitive damages against defendants.

On 26 July 2017, defendants filed a motion to dismiss plaintiffs' complaint pursuant to Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging failure by plaintiffs to state a claim. On 31 July 2017, defendants filed a motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, alleging that plaintiffs were aware of septic issues in advance of closing, and that the complaint failed to mention this fact and was "interposed for an improper purpose." On 11 August 2017, plaintiffs filed a response to defendants' motion to dismiss.

On 22 September 2017, defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 6 October 2017, the trial court entered an order on defendants' motion for summary judgment, granting summary judgment in favor of defendants and dismissing plaintiffs' complaint.

Plaintiffs appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Summary Judgment

In their sole argument on appeal, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendants and dismissing plaintiffs' complaint. We disagree.

A. Professional Malpractice

With respect to professional malpractice, plaintiffs alleged that the Intracoastal defendants were "engaged in the business and profession of real estate agents and/or real estate brokers[;]" that they "had a duty and an obligation to provide

true and accurate information to Plaintiffs[;]" that they "failed to exercise reasonable care and/or competence in obtaining and communicating" vital information about the property to plaintiffs; that plaintiffs "justifiably relied" on the information provided by defendants; and that plaintiffs suffered damages as a result.

> In order to assert a professional malpractice claim, plaintiff must establish (1) the nature of defendant's profession, (2) defendant's duty to conform to a certain standard of conduct, and (3) that breach of the duty proximately caused injury to her. Profession is defined as:
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> > A vocation, calling, occupation or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual.
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> *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 308, 175 N.Y.S.2d 1, 5, 151 N.E.2d 170, 173 (1958) (quoting Black's Law Dictionary 1375 (4th ed. 1951)). Malpractice is defined as "any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct." *Watts v. Cumberland County Hosp. System*, 75 N.C. App. 1, 10, 330 S.E.2d 242, 249 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986) (quoting Black's Law Dictionary 864 (rev. 5th ed. 1979)). One who undertakes to render services in the practice of a profession owes a duty to exercise that degree of skill, care, and diligence exercised by members of that same profession. *See* Restatement (Second) of Torts § 299A (1965).

Reich v. Price, 110 N.C. App. 255, 258-59, 429 S.E.2d 372, 374-75 (1993). Plaintiffs allege that defendants, as real estate agents and thus members of a "profession," are subject to professional malpractice. Even assuming *arguendo* that this is so, however,

the burden is on plaintiffs to demonstrate that defendants breached a duty to plaintiffs, and that said breach proximately caused plaintiffs' damages.

Plaintiffs contend that defendants owed plaintiffs a duty to accurately and completely represent the facts of the property, and that even negligent omissions or mistakes in compiling information constituted a breach of that duty. We note, however, that a "defendant could not, of course, be liable for concealing a fact of which it was unaware." *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190, 374 S.E.2d 135, 137 (1988). Moreover,

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C.R. Civ. P. 56(e). The burden was thus on plaintiffs not only to merely allege that defendants knew of these defects, but to present some affidavits or evidence establishing defendants' knowledge.

The information provided by defendants to plaintiffs shows that the property was serviced by a septic system, that there were no known soil problems, and that a new septic system had been installed in 2014 by previous owners. Notwithstanding plaintiffs' contentions that defendants knew of problems and failed to inform plaintiffs, there is no evidence that these statements were false.

The record also shows that plaintiffs had the home inspected on 26 October 2016. The inspection report specifically noted that "septic systems often fail when a new family moves in[,]" and "[a] home buyer will have to make special arrangements to have the system inspected[.]" A septic services report further noted that the septic tank was "in working order at this time[,]" but that the distribution box and drain lines were "not draining at this time." Both reports were provided to plaintiffs. Plaintiffs further received copies of all permits and receipts concerning work performed on the septic system. Additionally, plaintiffs engaged in an extended negotiation, at the end of which plaintiffs asserted that they would prefer to handle septic repairs themselves rather than let defendants facilitate them.

Plaintiffs have not established that defendants knew, or reasonably should have known, of the defect in the septic system, and that defendants misrepresented or omitted that fact. Nor is plaintiffs' mere conjecture that defendants knew, absent more, sufficient to support this element. Rather, the record demonstrates that defendants provided everything they could to give plaintiffs complete information. Even assuming *arguendo* that the tort of professional malpractice can be applied by a buyer to a seller's agent, we hold that plaintiffs have failed to demonstrate that defendants misrepresented or omitted any facts of which they were aware. We therefore hold that plaintiffs have failed to show a breach of a professional duty, and

that the trial court did not err in granting summary judgment in favor of defendants on the claim of professional malpractice.

B. Negligent Misrepresentation and Fraud

In their claims for negligent misrepresentation and fraud, plaintiffs contend that defendants knowingly made material misrepresentations or, in the case of negligent misrepresentation, material omissions, and that but for these misrepresentations plaintiffs would not have purchased the property.

"Justifiable reliance is an essential element of both fraud and negligent misrepresentation." *Helms v. Holland*, 124 N.C. App. 629, 635, 478 S.E.2d 513, 517 (1996). In *Helms*, the plaintiffs purchased a piece of real property, and subsequently discovered that its septic system had malfunctioned, rendering it unusable for the plaintiffs' intended purchase. The plaintiffs brought claims against the seller's agents alleging fraud, negligent misrepresentation, and unfair trade practices. The trial court granted the defendants' motion for summary judgment. On appeal, however, we noted that the contract placed the burden of inspection on the plaintiffs, that the plaintiffs failed to inspect the septic system themselves, and that "[h]ad plaintiffs complied with the state inspection provision which *they* added to the Offer to Purchase and Contract, the septic system deficiencies would have been revealed." *Id.* at 636, 478 S.E.2d at 517. We therefore concluded that the plaintiffs would not

have been justified relying on the assertions of the seller's agents, and held that the trial court did not err in granting the defendants' motion for summary judgment.

Moreover, "[a] party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014). "Reliance is not reasonable if a plaintiff fails to make any independent investigation, or if plaintiff is informed of the true condition of the property." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002) (citations omitted). Similarly, "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations." *RD & J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (citation and quotation marks omitted).

In the instant case, plaintiffs received a disclosure statement from defendants which stated, on its first page, that "[p]urchasers are strongly encouraged to obtain their own inspections from a licensed home inspector or other professional." Moreover, plaintiffs were not only afforded the opportunity to inspect the property, they actually did so. It is clear that defendants' representations, or lack thereof, in

no way impeded plaintiffs' willingness or ability to inspect the property for themselves. It is therefore apparent that plaintiffs failed to show either justifiable or actual reliance on defendants' statements. We therefore hold that the trial court did not err in granting summary judgment in favor of defendants with respect to the claims of negligent misrepresentation and fraud.

C. Unfair Trade Practices

"Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show actual reliance on the alleged misrepresentation in order to establish that the alleged misrepresentation proximately caused the injury of which plaintiff complains." *Tucker v. Blvd. At Piper Glen, LLC*, 150 N.C. App. 150, 154, 564 S.E.2d 248, 251 (2002) (citation and quotation marks omitted).

As previously stated, plaintiffs failed to demonstrate actual reliance upon any statements by defendants. Even taking plaintiffs' allegation that defendants offered misleading statements as true, plaintiffs took advantage of the opportunity to conduct their own independent inspections, and negotiated a financial arrangement that would permit plaintiffs to address the septic system themselves. It is therefore clear that plaintiffs did not rely upon any purportedly misleading statements by defendants to their detriment. We hold that the trial court did not err in granting

summary judgment in favor of defendants with respect to the claim of unfair trade practices.

IV. Conclusion

Plaintiffs failed to show, to the satisfaction of either the trial court or this Court, that defendants misrepresented or omitted facts of which they were aware in violation of a professional duty. Plaintiffs similarly failed to show that they actually or justifiably relied upon such misrepresentation to their detriment. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of defendants, and in dismissing plaintiffs' complaint.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

Report per Rule 30(e).