This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1110

Teresa Thompson,
Appellant,

vs.

Les Riess, et al.,
Respondents.

Filed February 11, 2019
Affirmed
Ross, Judge

Carlton County District Court
File No. 90-CV-17-1323

James V. F. Dickey, Malcolm P. Terry, Bernick Lifson, P.A., Minneapolis, Minnesota (for appellant)

Scott A. Witty, Jocelyn E. Bremer, Hanft Fride, P.A., Duluth, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Appellant Teresa Thompson moved into a house she bought from Respondents Les and Sue Riess and discovered structural damage requiring demolition and repair. Thompson sued, alleging negligent misrepresentation, fraud, and failure to disclose, among other claims. The district court dismissed the suit by summary judgment, holding that the

Riesses owed no duty of care and that Thompson presented no admissible evidence that she relied on the Riesses' alleged misrepresentations or that the Riesses had known about the defective conditions. Because Thompson has presented no genuine issue of material fact and the Riesses are entitled to judgment as a matter of law, we affirm.

FACTS

Les and Sue Riess built a house in Cloquet in 1980 and owned it until 2015 when they opted to sell it to build a smaller home on adjacent property. They completed their seller's disclosure statement in March 2015, indicating only minor issues about the home's condition. They moved out of the home two months later. Teresa Thompson twice viewed the home and executed a purchase agreement contingent on an inspection. She contracted Northern Lights Inspection and Thermography to perform the inspection, which occurred and revealed no significant issues. The parties closed on the purchase the next month, in December 2015.

After Thompson moved in, she encountered problems. She found that the home had mice, and a bat was in the living room. She believed that insufficient heat flowed to the upstairs bedrooms, and ice dams formed on the eaves. Water leaked into an addition described as a Colorado room. Thompson hired contractors to fix the heating and water issues, and during their work she discovered significant structural issues.

Removing interior walls revealed extensive frame damage in various parts of the home. The Colorado room's studs were rotted. Improperly installed flashing around the windows and walls had caused water infiltration. The garage's studs were similarly rotted. Colonies of carpenter ants had damaged the kitchen and Colorado room walls. Thompson

directed her contractors to reconstruct the damaged portions of the home, requiring partial demolition. During demolition, Thompson says that her contractors found an undamaged two-by-four structural segment that appeared to be obviously and significantly newer than the studs around it.

The Riesses, whose new home was built close by, noticed the construction work being done on the Thompson home. The Riesses visited Thompson, and she showed them the repairs in progress. Les Riess wrote Thompson a check for $10,000, saying he felt badly for Thompson's situation. Thompson never cashed it.

After Thompson completed the rehabilitation project, she hired William Dalin of North Shore Superior Pest Management to offer an opinion about the pest infestation. Dalin viewed photographs that Thompson had taken during the project. From some of the images, Dalin opined that it was "highly unlikely" that the Riesses had been unaware of the ant infestation. From other images of bat droppings, a dead field mouse, and a squirrel's nest, Dalin did not determine whether the pests were present before the Riesses moved from the home.

Thompson sued the Riesses, real estate agency SIL Corporation doing business as ReMax Cloquet, and real estate agent Roger Maki. Her suit rested on six grounds: failure to disclose, fraudulent inducement to contract, fraud, negligent misrepresentation, breach of contract, and breach of fiduciary duty. The defendants moved for summary judgment. Thompson settled her claims against ReMax and Maki. The district court ordered spoliation sanctions against Thompson for failing to allow inspection or to retain physical evidence

of any of the alleged structural damage, and it granted the Riesses' motion for summary judgment. This appeal follows.

D E C I S I O N

Thompson raises three issues on appeal. First, she argues that the district court abused its discretion in ordering spoliation sanctions. Second, she contends that the district court erred in finding no genuine issues of material fact. Third, she argues that the district court misapplied the law to her claims in granting summary judgment for the Riesses. Her arguments fail.

I

We first address Thompson's argument that the district court abused its discretion by excluding evidence of the allegedly new, undamaged, two-by-four board as a spoliation sanction for her failure to retain the evidence or allow for its inspection before disposing of it. We review a district court's decision to impose spoliation sanctions for an abuse of discretion. *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011). "One challenging the trial court's choice of a sanction has the difficult burden of convincing an appellate court that the trial court abused its discretion—a burden which is met only when it is clear that no reasonable person would agree with the trial court's assessment of what sanctions are appropriate." *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (quotation omitted).

Spoliation occurs when a person fails to preserve property as evidence in pending or future litigation. *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990). This includes the affirmative destruction of evidence, even

destruction done in good faith. *Miller*, 801 N.W.2d at 127. The duty to preserve evidence begins when litigation is foreseeable. *Id.* at 127–28.

Thompson argues that she needed to repair her home, requiring the rehabilitation project during which all of the faulty structure was destroyed. Although some circumstances may justify a custodial party's disposing of evidence before trial, she must first give the noncustodial party notice and the opportunity to inspect the evidence. *Id.* at 129. Thompson maintains that she gave sufficient notice to allow the Riesses to inspect the discarded material, citing *Miller*. Thompson does not satisfy the notice requirement discussed in *Miller*, where the notice was sufficient to avoid a spoliation sanction. In that case, the homeowner plaintiff had shown the eventual defendants the damage and met with them to disclose his potential lawsuit against them. *Id.* at 124. His attorney sent them a letter inviting them to inspect the property. *Id.* The attorney sent additional letters informing them of the need to remediate the home and advising them of the date that construction would commence, warning that they needed to contact him immediately if they wished to inspect the home further. *Id.* By contrast here, Thompson began demolition without any notice, never informed the Riesses of any potential claim, and never invited the Riesses to thoroughly inspect the old structure. We hold that Thompson failed to meet her obligation to notify the Riesses sufficiently, leaving them with no opportunity to meaningfully inspect the home before Thompson's contractor removed or destroyed all physical evidence of the damaged structure.

The district court did not abuse its discretion by concluding that Thompson's spoliation of evidence prejudiced the Riesses by preventing them from defending against

Thompson's legal claims. By the time Thompson sued, the home's rehabilitation was complete and all physical evidence of its pre-rehabilitation condition was gone. This prevented the Riesses from securing any expert assessment of the timing and extent of the ant infestation or water damage as it might bear on their knowledge of its existence. The spoliation therefore deprived the Riesses of their opportunity to defend against the allegation that the damage was such that it could not have escaped their knowledge. The spoliation similarly impaired their opportunity to develop an informed position as to any damages Thompson may be entitled to. The spoliation left the Riesses essentially defenseless against Thompson's claims.

The district court's order is imprecise as to the extent of the spoliation sanction, but we affirm it even if it intends to exclude only Thompson's photograph of the seemingly new two-by-four. Thompson reasonably implies that even a lay juror would likely infer from the photographs that the obviously new, pristine two-by-four must have been placed long after the erection of the comparatively dark, rotting, surrounding woodwork in the wall structure. But the photograph does not reveal all the relevant information that an inspection may have revealed. For example, the photographs do not show whether the newer wood contains markings from which an investigator might identify its vender or its approximate date of purchase. These are details that might bear on whether one of Thompson's contractors, rather than the Riesses, purchased and installed the two-by-four.

On these facts, we cannot conclude that the district court abused its discretion in deciding that spoliation occurred, that the spoliation prejudiced the Riesses, or that excluding the evidence is the appropriate remedy.

II

Thompson challenges the district court's summary judgment for the Riesses. On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact. *Citizens State Bank Norwood Young Am. v. Brown*, 849 N.W.2d 55, 61 (Minn. 2014). We view the evidence in the light most favorable to the party against whom the district court granted summary judgment. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). And we will affirm the grant of summary judgment if the undisputed facts and the disputed facts construed favorably to the nonmoving party establish that the moving party is entitled to judgment as a matter of law. *See* Minn. R. Civ. P. 56.01 (2017).

Thompson argues that the district court inappropriately construed disputed facts in the Riesses' favor by ignoring the Dalin report in concluding that no evidence shows that the Riesses knew about the ant infestation when they completed their seller's disclosure statement, which did not disclose the infestation. We are not persuaded.

The Dalin report does not constitute evidence that the Riesses knew about the ant infestation when they made the disclosures or any time before they sold the home. The evidence establishes that Dalin is a pest-control expert. As such, he can reasonably opine, as he did, about the types of pests present or previously present in the home, the kind of noises those pests might make, the activities of those pests, and the visible indicators of their presence. He therefore reasonably opined that carpenter ants typically emerge in the spring to forage for food, that when the ants expand their nests in wood a crackling sound might be heard from within the walls, and that ants deposit what is called "frass"—a sawdust-like material—in the interior of the home. But his report does not lead to the

reasonable inference that the Riesses actually heard any noises he described or that, on hearing them, they had the experience or expertise to conclude or even suppose that the noise evidenced ants within the wall. His conclusory opinion about what the Riesses likely knew exceeds his stated expertise and the scope of his underlying investigation of examining several photographs. Construed in the light most favorable to Thompson's claims, the report establishes the infestation of ants hidden within the walls—an infestation that can be inferred by someone knowledgeable enough about the species to interpret the occasional "frass," the occasional ants wandering on the floor, and certain noises within the walls. Nothing in the report or Thompson's argument supports the notion that homeowners in general or the Riesses in particular would reach the infestation conclusion that Dalin's report deems "likely." The Dalin report does not create a genuine issue of material fact.

Thompson also maintains that, because the pergola had been improperly installed by the Riesses' contractor during a previous remodeling project as it was attached only to the fascia plate, the district court should have noticed a genuine issue of material fact. But Thompson offered no evidence from which a fact-finder could reasonably infer that the Riesses had the expertise to know that the pergola was installed improperly. Even Thompson's own pre-purchase inspector—presumably a home-construction expert—failed to notice the defect. And Thompson became aware of it only when her contractors removed the siding and brought it to her attention. The existence of this defect, without more, does not create a fact question as to whether the Riesses knew of it when they sold the home to Thompson.

Thompson likewise maintains that genuine issues of fact exist as to the Riesses' knowledge of water intrusion in the Colorado room because the Riesses built it as an addition and had replaced the carpet five times. But the Riesses did disclose water intrusion in the home. Their disclosure statement reported that, when the snow melted the previous winter, they found water in the Colorado room. They reported the steps they took to remediate the water intrusion, stating that they dried out the room and diverted the water away from the house to the edge of the lot using a plastic pipe. There is no genuine issue of fact about whether the Riesses knew about water intrusion in the Colorado room—they undisputedly did.

Thompson argues that, because the Riesses replaced the carpet five times, a jury could infer that they must have known that damage from the water intrusion was extensive. We think the step from the evidence to the necessary finding would be speculative. That the Riesses replaced the carpet five times over the 25-year life of the room does not reasonably establish either that they replaced the carpet because of water intrusion or, more relevant here, that the water intrusion resulted in structural damage to the home.

Thompson argues last that the district court ignored evidence that the Riesses knew that ice dams had formed on the house but failed to disclose extensive water damage resulting from them. That the roof accumulated ice dams occasionally (or even frequently) when the Riesses owned the home does not establish that the Riesses knew that the structure of the home had been compromised by water seepage. Long-time Minnesota homeowners are presumably aware of both the potential for ice dams and the various remedies that are commonly employed to prevent them from causing water seepage. In any

event, nothing in the record suggests that knowledge of the mere existence of ice dams implies knowledge that the ice dams have caused structural damage.

III

Thompson argues that the district court erred in applying the law to each of her claims. The argument is not convincing.

To establish fraud, Thompson must prove that the Riesses made a false representation of a past or existing material fact, that the Riesses knew that the representation was false or did not know whether it was true or false, that the Riesses intended to induce Thompson to act in reliance on the false representation, that the representation caused Thompson to rely on it, and that Thompson suffered pecuniary damages as a result of the reliance. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). District courts evaluate reliance in fraud cases "in the context of the aggrieved party's intelligence, experience, and opportunity to investigate the facts at issue." *Id.* at 369. The district court entered summary judgment because Thompson failed to establish that she relied on the Riesses' alleged misrepresentations in that she had the opportunity to inspect the home and hired an inspector to do so before purchasing it.

Thompson argues that the district court applied an incorrect standard to the reliance element. The district court relied on the supreme court's holding in *Valspar* that, "[w]hen a party conducts an independent factual investigation before it enters into a commercial transaction, that party cannot later claim that it reasonably relied on the alleged misrepresentation." *Id.* Thompson asserts that the district court applied a commercial-transaction standard, rather than the rule in *Berryman v. Riegert* that an independent

investigation may suggest but does not establish nonreliance. 175 N.W.2d 438, 443 (Minn. 1970).

Caselaw does not support Thompson's restrictive characterization of the *Valspar* holding. We have characterized the holding in *Berryman* as an exception to the rule that a purchaser cannot undergo an independent investigation, rely on it, and later assert she was misled. *Taylor v. Sheehan*, 435 N.W.2d 575, 577 (Minn. App. 1989), *review denied* (Minn. Apr. 24, 1989). This is consistent with Minnesota cases holding that reliance on a misrepresentation is justified when the relying party has not adequately investigated the falsity of the representation. *See, e.g.*, *Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37, 39 (Minn. 1967). The *Berryman* exception applies when a plaintiff makes only a partial or cursory investigation before the purchase. *Id.* (citing *Berryman*, 175 N.W.2d at 443; *City of Coon Rapids v. Suburban Eng'g, Inc.*, 167 N.W.2d 493, 496 (1969)). Thompson hired Northern Lights to inspect the home for any defects. She also visited the home twice herself. She made more than a partial or cursory investigation, precluding the district court from applying the exception. Thompson failed to establish that she reasonably relied on the Riesses' alleged misrepresentations.

To establish negligent misrepresentation, a plaintiff must demonstrate that a duty of care existed, the defendant supplied false information to the plaintiff, the plaintiff justifiably relied on the information, and the defendant failed to exercise reasonable care in communicating the information. *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012). The district court concluded that the Riesses did not owe Thompson a duty of care because they were engaged in an arm's-length transaction. *See Smith v. Woodwind Homes, Inc.*,

605 N.W.2d 418, 424 (Minn. App. 2000) (recognizing that when there is an arm's-length transaction, no duty is owed for the purpose of a negligent-misrepresentation claim). Thompson argues that the parties were not engaged in an arm's-length transaction because they had a dual-agency relationship with the real estate agent.

Thompson relies on the supreme court's decision in *PMH Properties v. Nichols*, which addressed whether a real estate agent owed a fiduciary duty to a company when he competed with it. 263 N.W.2d 799, 801 (Minn. 1978). The *PMH Properties* court reasoned that, if the real estate agent had an agency relationship with PMH, the relationship would not constitute an arm's-length relationship and the agent would owe the company fiduciary duties. *Id.* But the reasoning does not apply here; our issue is whether the sellers owed the buyer a duty, not whether the real estate agent owed the buyer a duty. The agent here disclosed his dual agency, and there is nothing to suggest that the Riesses and Thompson engaged in anything beyond an arm's-length transaction. The district court did not err by concluding that the Riesses did not owe Thompson a duty bearing on Thompson's negligent-misrepresentation claim.

Thompson also argues that the district court misapplied the law on her failure-to-disclose claim. But she bases her argument on the undisputed findings of fact discussed above and does not present a challenge to the district court's application of the law to the facts. We do not address the argument further.

Affirmed.