

EXHIBIT MM

1995 WL 497275

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Court of Appeals of Minnesota.

Willie H. KNOPFF and Georgia
Knopff, husband and wife, Appellants,

v.

Alfred C. OLSON, Defendant,
Geneva V. Olson, Respondent,
Lake Forest Realty, Inc., Respondent.

No. C7-95-601.

|

Aug. 22, 1995.

Attorneys and Law Firms

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Before [LANSING](#), P.J., and [HARTEN](#) and [THOREEN](#),
JJ. *

* Retired judge of the district court, serving as judge
of the Minnesota Court of Appeals by appointment
pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

[HARTEN](#), Judge.

*1 Appellants sued alternatively for damages or rescission and restitution after they discovered that representations made regarding the boundaries of realty they purchased from defendant differed from the actual boundaries. The trial court granted rescission, but found that the real estate agency involved in the sale was not liable for the restitution award because the agency had not committed fraudulent or negligent misrepresentation. It also found defendant's wife not liable for the award because she signed the warranty deed as an

accommodation party only. Appellants argue that both the real estate agency and defendant's wife should be liable for the restitution awarded by the trial court. They also contend that the trial court erred by failing to award them attorney fees and costs pursuant to the Minnesota Prevention of Consumer Fraud Act. We affirm.

FACTS

Appellants Willie and Georgia Knopff were looking for a residence in the Outing, Minnesota, area in the spring of 1990. They contacted Don Thuesen, a real estate broker with respondent Lake Forest Realty, Inc. (Lake Forest). Thuesen showed the Knopffs several properties, including that of defendant Alfred Olson. The Knopffs were given a listing prepared by a Lake Forest agent from an auditor's drawing of the area, which indicated that the property was 100.46 feet by 166 feet (.45 acres).

The Knopffs decided to buy the Olson property, but they were concerned about its boundaries because the front of the house was situated close to a state highway. Thuesen told them that Olson had said that a utility pole near the road was just inside the state's highway right-of-way. A title opinion prepared for the Knopffs indicated that it was impossible to determine the property's boundaries or the location of the highway easement without a survey. The Knopffs did not obtain a survey, but on the day of the closing, Olson, Thuesen, and Willie Knopff walked to the front of the property, where Olson told Knopff that the right-of-way was located near the utility pole.

The Knopffs purchased the property and made significant expenditures to improve it. Two years later, while taking steps to correct a non-conforming septic tank, the Knopffs discovered that the deed's property description was incorrect. They hired a surveyor, who found that the property description was not surveyable and that the Knopffs' house was situated across the state's right-of-way. In his trial testimony, the surveyor opined that the encroachment rendered title to the property unmarketable; a second surveyor, hired by the Knopffs' neighbor, reached similar conclusions. The Lake Forest agent who prepared the property listing admitted at trial that the auditor's drawing he used to prepare the listing showed that a significant portion of the property extended into the highway right-of-way.

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Prior to trial, both Lake Forest and respondent Geneva Olson moved for dismissal. The trial court denied the motions, but ruled that the Knopffs had elected the remedy of rescission and would be restricted to recovery under that remedy.

*2 At trial, both Alfred Olson and Geneva Olson testified that Geneva Olson did not have an ownership interest in the property and did not receive any of the sale proceeds. She testified that she signed the sale documents because she was asked to do so. Subsequent to the sale, the Olsons' marriage was dissolved.

Following the trial, the trial court granted the Knopffs rescission and restitution. Alfred Olson was found liable for negligent (but not fraudulent) misrepresentation, and the restitution award included the purchase price, interest, the cost of improvements made by the Knopffs, and other expenses, offset by the reasonable rental value of the property while the Knopffs were in possession. The trial court also ruled that Lake Forest had not fraudulently or negligently misrepresented the property and that, even if Lake Forest had been negligent, the Knopffs' own negligence was greater, precluding relief from that party.¹ Finally, the trial court ruled that Geneva Olson could not be held liable for the award because she signed the deed as an accommodation party.

¹ Upon inquiry at oral argument, counsel did not advance any reason for the trial court's introduction of comparative negligence into a rescission and restitution case.

The trial court denied the Knopffs' motion for amended and additional findings; it also denied the Knopffs' request for attorney fees under the Prevention of Consumer Fraud Act. The Knopffs appeal the trial court's finding that Lake Forest was not liable for negligent misrepresentation, its holding that Geneva Olson is not liable because she signed the deed as an accommodation party only, and its refusal to grant attorney fees.

DECISION

1. Realtor Liability. The Knopffs argue that the trial court erred by finding Lake Forest not liable for negligent misrepresentation and thereby not jointly and severally liable for the restitution awarded. We disagree.

Because the Knopffs elected and were granted the remedy of rescission, Lake Forest cannot be held liable for the restitution award.² When a rescission is granted, the underlying contract is erased: "Rescission is the unmaking of a contract, which not only terminates the contract but abrogates it and undoes it from the beginning." *Johnny's, Inc. v. Njaka*, 450 N.W.2d 166, 168 (Minn.App.1990) (citation omitted). The parties are returned to their pre-contract positions, to the extent possible. *Liebsch v. Abbott*, 265 Minn. 447, 451, 122 N.W.2d 578, 581 (1963). Lake Forest, which was not a party to the contract, cannot be held responsible for restoring the status quo. See *Restatement (Second) of Agency* § 348 cmt. g (1958) (only an agent who has received something under a contract may be held liable for rescission).³

² We deny appellants' request to strike the letter included in Olson's appendix. The record on appeal includes the papers "filed in the trial court." *Minn. R. Civ.App. P. 110.01*. Even though this document does not appear in the district court file, the copy in Olson's appendix is stamped as having been filed with the district court, and appellants do not claim that they did not file the letter with the court.

³ We express no opinion on any potential cause of action that Alfred Olson may have against Lake Forest.

Nor do the cases cited by the Knopffs, which recognize the independent tort liability of agents who commit or participate in their principals' fraudulent misrepresentations, suggest that joint and several liability for rescission (i.e., non-tort) damages may be imposed here. See, e.g., *Anders v. Dakota Land & Dev. Co.*, 289 N.W.2d 161, 163-64 (Minn.1980) (agent may be independently liable for fraud if it knew or should have known of principal's misrepresentations); *Sawyer v. Tildahl*, 275 Minn. 457, 460-61, 148 N.W.2d 131, 133 (1967) (broker who induced third party to purchase by fraudulent misrepresentations was liable for losses suffered as a result). The Knopffs elected their rescission and restitution remedy and have a judgment against Olson for the full amount of their rescission and restitution damages. Permitting Lake Forest to be held liable in tort under these circumstances would violate the rule prohibiting double recovery for the same wrong. See *Vesta State Bank v. Independent State Bank*, 518 N.W.2d 850, 855 (Minn.1994) (recovery cannot be had under

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two or more coexisting and inconsistent remedies because double recovery could then be had for a single wrong); *Anders*, 289 N.W.2d at 163 (party induced to enter into a contract by fraudulent misrepresentation may elect either to rescind the contract or to sue for damages).

*3 Given appellants' election of remedies, liability cannot be imposed upon Lake Forest under the facts of this case even if it negligently misrepresented the property. Accordingly, we do not reach the question of whether the trial court committed reversible error by finding no misrepresentations by Lake Forest.

2. Liability of Spouse. The trial court found that Geneva Olson could not be held liable for the restitution award because she signed the deed as an accommodation party only.⁴

⁴ The check given in payment for the property listed both Alfred and Geneva Olson as payees, but the record shows that only Alfred Olson received the proceeds.

The trial court relied on *McDermott v. Ralich*, 188 Minn. 501, 247 N.W. 683 (1933). That case involved rescission of a sale of land on contract for deed in which the husband owned the property but his wife signed the contract for deed. *Id.* The supreme court rejected the possibility that the wife could be held liable for returning the money paid under the rescinded contract:

There can be no recovery against Pauline Ralich. She joined with her husband in the contract for a deed. She participated in none of the negotiations. She did not receive the purchase money. She did not own and could not convey an interest in the lot. The only purpose of her signing was to bar her so-called inchoate right of dower. She did not make herself personally liable for the return of the money on rescission.

Id. at 509, 247 N.W. at 686; see also *In re Estate of Wulf*, 471 N.W.2d 850, 852 (Iowa 1991) (discussing rule presuming that a wife who joins in a conveyance of property held solely by her husband does so merely to release her inchoate rights of dower); *Wellons v. Hawkins*, 264 S.E.2d 788, 789 (N.C.Ct.App.1980) (same).

The Knopffs rely on *Gustafson v. Gervais*, 291 Minn. 60, 189 N.W.2d 186 (1971), in which the supreme court held that a seller's spouse could be found liable for amounts to be returned under the rescission of a contract for deed. *Id.* at 67, 189 N.W.2d at 191. The court ruled that Mrs. Gervais was a proper party because she signed the contract for deed as a vendor. *Id.* at 67, 189 N.W.2d at 191. The *Gervais* court relied on *Security Bank v. Holmes*, 68 Minn. 538, 71 N.W. 699 (1897). In *Security Bank*, the seller's wife had been included in the suit on the basis of warranties contained in mortgages she had signed (although she did not own the mortgaged property). *Id.* at 541, 71 N.W. at 700-01. The supreme court rejected the argument that the wife did not have an interest in the subject property and only joined the mortgage as the seller's spouse and to be estopped from claiming an interest in the property if she survived her husband. *Id.* The court stated: "That a married woman is under no disability to join in the covenants in her husband's deed, and that, if she does, she is liable thereon, was decided in *Sandwich [Mfg. Co.] v. Zellmer*, 48 Minn. 408, 51 N.W. 379 [(1892)]." *Id.* at 541, 71 N.W. at 701. The court affirmed the trial court's order striking this defense from the defendants' answer. *Id.*

*4 *McDermott* and *Gervais* conflict and suggest differing results here. We are mindful, however, that rescission is an equitable remedy. *First Trust Co. v. Union Depot Place Ltd. Partnership*, 476 N.W.2d 178, 182 (Minn.App.1991), *pet. for rev. denied* (Minn. Dec. 13, 1991). The evidence shows that Geneva Olson did not have an ownership interest in the property sold, did not participate in the misrepresentations that prompted the Knopffs' purchase, and did not receive any of the purchase money paid by the Knopffs. (It is unclear from the facts set out in *Gervais* whether Mrs. Gervais received any of the funds paid under the contract for deed in that case. See *Gervais*, 291 Minn. 60, 189 N.W. 186.) Equitable principles and the factual similarities between the present case and *McDermott* lead us to agree with the trial court that Geneva Olson is not equitably liable for the rescission and restitution awarded.

3. Attorney Fees Claim. The Knopffs argue that the trial court erred by not granting them attorney fees pursuant to Minn.Stat. §§ 325F.68-.70 (1994), Minnesota's Prevention of Consumer Fraud Act (Consumer Fraud Act). Private causes of action can be brought under the Consumer Fraud Act and the plaintiff may be awarded attorney fees. Minn.Stat. § 8.31, subd. 3a (1994); *Yost v.*

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Millhouse, 373 N.W.2d 826, 831-32 (Minn.App.1985). An award of attorney fees is committed to the trial court's discretion, and will not be reversed absent an abuse of that discretion. *State ex rel. Humphrey v. Alpine Air Prods.*, 490 N.W.2d 888, 896 (Minn.App.1992), *aff'd*, 500 N.W.2d 788 (Minn.1993).

It is unclear whether this relief is available in actions involving negligent misrepresentation. Compare *Church of the Nativity of our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 8 (Minn.1992) (declining to rule whether negligent misrepresentation establishes liability under the Act) with *In re Professional Financial Mgmt.*, 703 F.Supp. 1388, 1397 (D.Minn.1989) (holding that negligent misrepresentation is sufficient) and *Church of the Nativity*, 491 N.W.2d at 10 (Simonett, J., concurring in part and dissenting in part) (indicating negligent misrepresentation establishes a claim under the Act). The trial court found that Alfred Olson's misrepresentation was made with the "honest belief" that the right-of-way was situated as he claimed. Thus, the Knopffs' action does not redress

a wrong that threatens general consumers or alleviates problems arising from unequal bargaining powers. See *Church of the Nativity*, 491 N.W.2d at 11 (Simonett, J., concurring in part and dissenting in part) (arguing that attorney fees should be awarded only if the fraud has "the potential to deceive and ensnare members of the consumer public"); *Alpine Air Prods.*, 490 N.W.2d at 892 (one purpose of consumer protection laws is to "counteract the disproportionate bargaining power present in consumer transactions"). Even if attorney fee awards may be available in cases involving negligent misrepresentation, we conclude that the trial court did not abuse its discretion in this case by denying attorney fees under the Consumer Fraud Act.

*5 Affirmed.

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