

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREG ANDERSON; LYNDA KEANE-ANDERSON; AND PARADISE PROPERTY HOLDINGS, LLC,
Appellants,
vs.
RELIANT TITLE AGENCY, LLC,
Respondent.

No. 85379-COA

FILED

OCT 19 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Greg Anderson, Lynda Keane-Anderson, and Paradise Property Holdings, LLC (collectively, the Andersons), appeal from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

In February 2017, the Andersons extended an offer via a residential purchase agreement to non-party Ford Ranch, LLC (Ford Ranch) for the purchase of a residential property known as "Ford Ranch" (the property).¹ The property is made up of five separate parcels of land with appurtenant water rights and permits. Ford Ranch's first counteroffer rejected the Andersons' proposed escrow company and instead designated respondent Reliant Title Agency, LLC (Reliant) and its escrow officer, non-party Mandi Watson, to consummate the transaction as escrow holder.² The

¹After the close of escrow, Greg Anderson and Linda Keane-Anderson transferred title of the property to appellant Paradise Property Holdings, LLC.

²We do not recount the facts except as necessary to our disposition.

Andersons agreed. The parties ultimately reached an agreement as to the terms of the purchase of the property, and the entirety of the final purchase agreement consisted of the initial residential purchase agreement and several addenda and counteroffers. As relevant to this appeal, a one-page addendum incorporated by reference into the initial purchase agreement titled "ADDITIONAL TERMS OFFER ON 3910 E RUSSELL RD" included a term that states: "SELLER TO DISCLOSE TO BUYER WHAT WATER RIGHTS ARE INCLUDED WITH THE SALE OF THE PROPERTY, SELLER TO TRANSFER OWNERSHIP OF CURRENT WATER RIGHTS TO BUYER AT CLOSE OF ESCROW" (Additional Term No. 3). The initials of Scott Sibley, Ford Ranch's manager, appear next to this term, along with a handwritten line that reads, "Disclosed in email on August 7, 2016." Sibley and the Andersons signed at the bottom of this page. These water rights were held by Nevada Natural Resource Preservation FR 22, LLC (FR 22), an entity controlled by three of Ford Ranch's four principals.

In May 2017, the Andersons were left waiting for hours in Reliant's waiting room, and later in a conference room on the stipulated date of closing. The Andersons allege that the reason they were kept waiting is because Watson was scrambling to obtain the signatures of all three principals of FR 22 in order to convey the water rights at closing. Near the end of the business day, Watson presented a stack of documents to the Andersons and informed them that they needed to sign them immediately, otherwise they would be in breach of the purchase agreement and forfeit their \$50,000 earnest money deposit. Without adequate time to carefully review them, the Andersons signed the documents believing that among them was a document that provided for the transfer of the water rights.

Watson was silent on the issue and did not disclose to the Andersons that the closing packet contained no water rights documents.

The Andersons did not learn that they did not possess the water rights documents until they received the closing packet in the mail a week later. They were apparently able to obtain ownership of FR 22 that summer and the state water permits in September 2018 after they hired an attorney who procured and filed the necessary documents.

In June 2019, two years after escrow closed on the property—and nine months after securing the water permits—the Andersons filed a complaint in district court alleging negligence and breach of fiduciary duty, seeking to recover \$477,600.06 in compensatory damages related to a potential decrease in value of the property, costs related to noncompliant and contaminated wells, legal costs, and damages related to defects on the property not disclosed by Ford Ranch. The Andersons alleged that Reliant knew the water rights would not transfer at the close of escrow and conspired with Ford Ranch to defraud them into going forward with the purchase.³ The Andersons argued that had Reliant revealed that the water rights were not transferring as part of the sale, they would have declined to close escrow and would ultimately not have incurred \$477,600.06 in damages.

³The Andersons first sued Ford Ranch and its principals for problems related to the condition of the property. *See Anderson v. Ford Ranch LLC*, No. 78684-COA, 2020 WL 6955438 (Nev. App. Nov. 25, 2020) (Order Affirming in Part, Reversing in Part and Remanding).

The Andersons eventually filed a second amended complaint alleging specific instances of fraud in November 2020. Reliant moved for summary judgment on all claims in May 2022. The district court granted Reliant's motion, finding primarily that the Andersons were not able to show Reliant proximately caused their damages.

On appeal, the Andersons raise multiple issues.⁴ They argue that the district court erred (1) in determining proximate cause; (2) in finding that the water rights transferred with the deed conveying the property at the close of escrow and in confusing water rights with water permits;⁵ (3) in finding that Reliant's duties were limited to those set forth

⁴Although the Andersons enumerated ten separate issues in their opening brief, they are more effectively addressed by consolidating them into five issues.

⁵The district court concluded that, pursuant to NRS 111.167, the deed conveying the property to the Andersons transferred the appurtenant water rights as a matter of law. The Andersons argue that NRS 111.167 merely created a rebuttable presumption that water rights transfer with the property, and that they rebutted the presumption by showing that the water rights were not held by the seller of the property, but rather by a separate entity, FR 22. The Andersons also argue that there is no distinction between water rights and water permits, as the district court found. Reliant responds that there is a distinction between water rights and permits, and that the Andersons held the rights as a matter of law when they obtained the deed to the property, which they then used to transfer the permits to their name. In reply, the Andersons do not dispute that this was the manner in which they transferred the permits to their name. Instead, they argue that the fact that they were able to transfer the permits without Reliant's help is of no legal moment in determining whether Reliant was required to do so or liable for failing to do so. As discussed below, because the Andersons failed to allege any damages that were proximately caused

in the escrow instructions; (4) in finding that the economic loss doctrine bars their negligence claim; and (5) in granting summary judgment in Reliant's favor as to their fraud and breach of fiduciary duty claims. We disagree and therefore affirm.

All causes of action alleged in the Andersons' second amended complaint have a causation element, meaning that the damages must be substantially related to Reliant's alleged wrongdoing. The Andersons failed to present evidence to the district court to support the causation and damages elements of their claims. Accordingly, the district court properly found that even if the Andersons could establish all other elements for negligence, breach of fiduciary duty, and fraud, these claims necessarily fail, because the \$477,600.06 in damages the Andersons sought to recover from Reliant were not proximately caused by Reliant's conduct.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable

by Reliant's failure to transfer the water rights and permits, this court need not reach a decision on the issue of whether water rights appurtenant to a property are conveyed to a buyer with the deed even when the seller does not hold those rights and did not reserve them in the deed pursuant to NRS 111.167. See *Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 315 n.1, 774 P.2d 1047, 1048 n.1 (1989) (declining to decide an unnecessary issue).

inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

The damages alleged by the Andersons were not proximately caused by Reliant

The Andersons argue that proximate cause is a but-for test that is properly left for the jury to decide, and that it is therefore unsuitable for resolution on summary judgment. Moreover, they argue that there is an unbroken chain of foreseeability between Reliant’s duties and its false statements regarding the Andersons’ duty to close the escrow on the date set forth in the purchase agreement and the losses they incurred due to inadequate disclosures of property defects by Ford Ranch. Reliant responds that it was not foreseeable, natural, or probable that the alleged failure to transfer the water rights would result in \$477,600.06 in damages claimed against Reliant as a result of undisclosed defects on the property by the seller.

At the outset, we note that the three causes of action the Andersons alleged in their second amended complaint require a plaintiff to prove damages and causation; that is, the damages must flow from the alleged tort. *See Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009) (negligence); *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (breach of fiduciary duty); *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (fraud). “Causation consists of two components: actual cause and proximate cause. To demonstrate actual cause . . . the [plaintiff must] prove that, but for the [defendant’s tortious conduct] the [plaintiff’s damages] would not have occurred. The second component, proximate cause, is essentially a policy consideration that limits

a defendant's liability to foreseeable consequences that have a reasonably close connection with both the defendant's conduct and the harm which that conduct created.”⁶ *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 797 (2004) (citing *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998)). More particularly, proximate cause is defined as “any cause which in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.” *Id.* (quoting *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980)).

While “issues of negligence and proximate cause are usually factual issues to be determined by the trier of fact,” *Frances v. Plaza Pac. Equities, Inc.*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993), and “the question of foreseeability is generally one for the jury,” *Dakis v. Scheffer*, 111 Nev. 817, 820, 898 P.2d 116, 118 (1995) (internal quotation marks omitted), a party is entitled to summary judgment as a matter of law when there is “no genuine [dispute] of material fact,” *Wood*, 121 Nev. at 731, 121 P.3d at 1031 (discussing NRCP 56). “A genuine [dispute] of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). Nevada courts may grant summary judgment despite factual disputes where no rational trier of fact could return a verdict for the nonmoving party. *Jaramillo v. Ramos*, 136 Nev. 134, 135, 460 P.3d 460,

⁶Proximate cause is the only element of causation at issue here.

463 (2020) (“A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party.” (internal quotation marks omitted)).

The Andersons sought \$477,600.06 in damages related to noncompliant and contaminated wells, legal costs, and costs related to several undisclosed defects on the property, by Ford Ranch, such as issues with the air conditioner, water heater, water softener, irrigation system, pool pumps, and barn doors.⁷ The Andersons’ causes of action revolved entirely around Reliant’s failure to both transfer the water rights at the end of escrow and to disclose this omission to them. The Andersons did not submit evidence to support any causal link between Reliant’s allegedly negligent conduct and their alleged damages. There are no allegations—let

⁷The Andersons also sought to recover \$12,645.25 for “legal costs” “directly related to the water rights,” which appear to have been paid to the attorney they hired to file the necessary documents to transfer the water permits to their name. Although this argument was not developed below or on appeal, attorney fees incurred as foreseeable damages arising from tortious conduct are considered special damages and may be recovered in three specific instances, as described in *Sandy Valley Associates v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001). However, they “must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages.” *Id.* The Andersons failed to state their claim of attorney fees as special damages in accordance with NRCP 9(g). Therefore, they cannot recover these damages, even if they could meet one of the three special circumstances described in *Sandy Valley* and prove that their damages were the natural and proximate consequences of Reliant’s alleged conduct. *See id.*; NRCP 9(g).

alone evidence—that the delay in obtaining the water rights caused the property’s defects. There are also no allegations that Reliant’s failure to transfer the water rights to the Andersons caused the wells to become contaminated or fall out of compliance with state law or regulations.

Because damages and causation are essential elements of negligence, breach of fiduciary duty, and fraud, and the Andersons failed to articulate how their alleged damages could possibly have been proximately caused by Reliant’s alleged conduct, there were no genuine disputes of material fact, such that a reasonable jury could return a verdict for these damages. Accordingly, we conclude that the district court did not err when it granted Reliant’s motion for summary judgment on all claims.

*The economic loss doctrine precludes recovery by the Andersons as to their negligence claim*⁸

The Andersons argue that there is a direct and foreseeable injury to property insofar as they incurred \$477,600.06 in property damages, which would not have occurred absent Reliant’s negligence in handling the water rights transfer. Reliant responds that the district court correctly applied the economic loss doctrine when it barred the Andersons from recovering anything for their negligence cause of action.

The economic loss doctrine “bars unintentional tort actions when the plaintiff seeks to recover purely economic losses.” *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 73, 206 P.3d 81,

⁸The district court and the parties did not address whether the economic loss doctrine also applies to the breach of fiduciary duty claim as an unintentional tort and therefore, we need not address it.

86 (2009) (internal quotation marks omitted). Purely economic loss is defined as “the loss of the benefit of the user’s bargain . . . including . . . pecuniary damage for inadequate value, the cost of repair and replacement of [a] defective product, or consequent loss of profits, without any claim of personal injury or damage to other property.” *Id.* at 69, 206 P.3d at 83 (alterations in original) (internal quotation marks omitted).

The Andersons have not shown that Reliant caused the alleged injury to the property, and they have not argued that an exception to the doctrine applies. Therefore, we conclude that the district court properly applied the doctrine and did not err when it granted summary judgment.⁹

Reliant did not breach its fiduciary duty

The Andersons argue that failure to follow the escrow instructions may constitute a breach of fiduciary duty and, at minimum, this creates a genuine dispute of material fact for a jury. According to the Andersons, Reliant knew the water rights would not transfer at close of escrow, yet failed to disclose this information. Reliant responds that its fiduciary duties to the Andersons were limited to the duties provided in the escrow instructions,¹⁰ which it did not breach.

⁹We note also that this is an independent and separate ground for summary judgment as to the negligence claim and for affirmance as to that issue on appeal.

¹⁰The Andersons also argue that Reliant had a duty to perform the obligations placed on it under the purchase agreement, which was incorporated into the escrow instructions. Accordingly, they argue that Additional Term No. 3 created a duty on behalf of Reliant to ensure the

The “escrow instructions control the parties’ rights and define the escrow agent’s duties.” *Mark Props., Inc. v. Nat’l Title Co.*, 117 Nev. 941, 946, 34 P.3d 587, 591 (2001). The only exception to the rule that the escrow instructions define the duties of an escrow agent is the requirement that escrow agents disclose fraud to the parties to the escrow transaction. *Id.* at 945, 34 P.3d at 590. This duty attaches only if an escrow agent is “aware of facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud.” *Id.* at 946, 34 P.3d at 591 (internal quotation marks omitted). However, escrow agents do not have a duty to investigate or to discover fraud, and the facts known by the escrow agent must present substantial evidence of fraud for the exception to apply. *Id.* at 945, 34 P.3d at 590. Substantial evidence is evidence that a reasonable mind “accept[s] as adequate to support a conclusion.” *Hall v. SSF, Inc.*, 112 Nev. 1384, 1389, 930 P.2d 94, 97 (1996) (internal quotation marks omitted).

The Andersons have not provided evidence sufficient to establish a genuine dispute of material fact that Ford Ranch committed fraud, and that Reliant or its agents had knowledge of said fraud. Even if the Andersons had shown that Reliant knew that the water rights and permits would not transfer at closing, they have not provided evidence sufficient to establish the alleged breach of fiduciary duty proximately

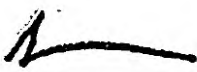
water rights would transfer at closing. Reliant responds that Additional Term No. 3 was signed only by the Andersons and Ford Ranch, therefore, it only imposed a duty on Ford Ranch to transfer the water rights. We need not reach a decision on this issue because, as discussed above, even if Reliant had a duty to transfer the water rights and breached that duty, the Andersons did not allege damages proximately caused by the breach. See *Johnson*, 105 Nev. at 315 n.1, 774 P.2d at 1048 n.1.

caused their damages. *See Stalk*, 125 Nev. at 28, 199 P.3d at 843 (stating proximate cause is an element of a claim for breach of fiduciary duty). Likewise no such evidence of damages was forthcoming to establish the separate claim for fraud. Therefore, the district court did not err when it granted summary judgment in Reliant's favor.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹¹


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Jerry A. Wiese II, Chief Judge
Eighth Judicial District Court, Dept. 29
Brian K. Berman
Koley Jessen, P.C., L.L.O./Omaha
Yan Kenyon
Eighth District Court Clerk

¹¹Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.