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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0514**

Keith Baker,  
Appellant,

vs.

Sunbelt Business Brokers,  
Respondent,

Dogs Howling, Inc.,  
Respondent.

**Filed March 11, 2008  
Affirmed in part, reversed in part, and remanded;  
motion to strike granted; motions for attorney fees denied  
Wright, Judge**

Hennepin County District Court  
File No. 27-CV-06-15730

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Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Wright, Judge.

## UNPUBLISHED OPINION

**WRIGHT**, Judge

In this action arising from the attempt to purchase a business, appellant challenges the dismissal of his lawsuit under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief could be granted and moves to strike portions of respondents' appellate brief. All parties seek attorney fees related to the motion. We affirm in part, reverse in part, and remand. We also grant appellant's motion to strike portions of respondents' brief and deny each party's motion for attorney fees.

### FACTS

Appellant Keith Baker attempted to purchase a bar and restaurant business from respondent Dogs Howling, Inc. (Dogs Howling). Respondent Sunbelt Business Brokers (Sunbelt) was the real estate broker for the transaction.

Because of the procedural posture of the case, the facts alleged in Baker's complaint are assumed to be true.<sup>1</sup> According to the complaint, in May 2004, Baker and Sunbelt signed a nondisclosure agreement, which identified two businesses for Baker's consideration. One of the businesses was owned by Dogs Howling. The nondisclosure agreement required Baker to keep all information about the businesses confidential. It also prohibited Baker from "circumvent[ing] Sunbelt in any transaction or contact with the seller(s)" or "contact[ing] the seller(s), or agents, customers, vendors or employees of

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<sup>1</sup> See *Minn. Ass'n of Prof'l Employees v. Anderson*, 736 N.W.2d 699, 701 (Minn. App. 2007) ("When reviewing a district court's dismissal for failure to state a claim upon which relief can be granted, . . . [w]e count as true the facts alleged in the complaint . . . ." (Citation omitted.)).

the Business(es) directly or indirectly.” Baker agreed to conduct “all negotiations, inquiries, investigations, offers to purchase, and/or letters of intent” through Sunbelt. In the nondisclosure agreement, Baker also “acknowledges” being

advised that Sunbelt is an agent for the seller(s) in this transaction. I agree that should I buy, lease or come into possession of the Business(es) during the listing term or within one year from the date below, I will not interfere with Sunbelt’s right to fee under Sunbelt’s agreement with the seller(s).

During negotiations to purchase the bar and restaurant business from Dogs Howling, Sunbelt’s employee, Matt Schroder, represented to Baker that Sunbelt would represent Baker’s interests in connection with the purchase of the bar and restaurant business. On June 4, 2004, Sunbelt and Baker signed a Broker Services Acknowledgement, which stated that Sunbelt does not perform due diligence and advised Baker to obtain legal and accounting advice. The Broker Services Acknowledgement also stated: “Upon the introduction of a Business or purchase of the Business, both parties agree that [Sunbelt, its agents, and employees have] fulfilled [their] Brokerage Services concerning the sale/purchase of the Business.”

That same day, Baker and Dogs Howling signed a purchase agreement (June purchase agreement) in which Baker agreed to buy the business for \$500,000. The June purchase agreement required a total down payment of \$150,000 and the balance to be paid pursuant to a secured promissory note. Under the June purchase agreement, “[b]oth [Baker] and [Dogs Howling] agree that any information provided by [Sunbelt] has not been verified by [Sunbelt] and both parties shall rely solely on their own due diligence

and hold [Sunbelt] harmless from all claims regarding this transaction.” The June purchase agreement also advised: “This is a legally binding document. Read it carefully. If you do not understand it, consult an attorney.” Baker and Dogs Howling agreed “to execute all documents necessary to consummate this transaction.”

After signing the June purchase agreement, Baker deposited \$10,000 in earnest money with Sunbelt. Under its terms, unless the June purchase agreement was amended in writing, if Baker failed or refused to complete the transaction within 14 days after the closing date of July 13, 2004, any funds on deposit with Sunbelt would “be forfeited without notice, and, at [Sunbelt’s] option, shall be split 50% to [Dogs Howling], and 50% to [Sunbelt].”

On June 10, Baker and Dogs Howling signed an addendum to the June purchase agreement (purchase-agreement addendum), which added several contingencies, including: Baker’s review and approval of all financials and records, Baker’s review and approval of lease terms and conditions, and an agreement between Baker and Dogs Howling as to a training and transition period. The contingencies were set to expire on June 30, 2004.

Sunbelt subsequently induced Baker to execute two contingency-removal forms during the month of July. The first contingency-removal form, which was executed in early July, provided that two of the contingencies listed in the purchase-agreement addendum had been satisfied and consequently removed them; it also extended the contingency expiration date to mid-July. The second contingency-removal form, which was executed after the expiration date of the first contingency-removal form, removed all

contingencies and provided that Baker was “allowing [the] deposit of \$10,000 currently held in the Sunbelt Business Brokers trust account to become nonrefundable.”

Two days later, Baker and Dogs Howling signed an Agreement Regarding Preparation of Closing Documents (the closing-documents agreement), which delegated to Sunbelt the responsibility to “coordinate with an attorney to close the Transaction.” This attorney was to draft closing documents that were “not drafted for the exclusive benefit of either party.” The particular documents to be drafted would be those “which, in the attorney’s sole opinion, are customary to close the Transaction.” Among the enumerated documents, the closing-documents agreement designated “Security Agreement (if applicable).”

Baker alleges that the documents drafted by the attorney selected by Sunbelt favored Dogs Howling’s legal interests and set forth terms and conditions that materially altered the essence of the transaction. Specifically, Baker and Dogs Howling differed on the provisions of the security agreement.

The transaction did not close on the rescheduled July date. In August, Sunbelt advised Baker that an additional deposit of \$30,000 in earnest money would break the deadlock between Baker and Dogs Howling. In reliance on this representation, Baker deposited \$30,000 in Sunbelt’s trust account.

In December, Sunbelt, purportedly on behalf of Dogs Howling, met with Baker’s counsel to negotiate the terms of a new purchase agreement (proposed December purchase agreement) that would include the security agreement, which had not been part of the June purchase agreement. Dogs Howling subsequently rejected the proposed

December purchase agreement and security agreement, asserting that Sunbelt was not acting as its agent.

On May 16, 2005, Sunbelt notified Baker that if the transaction did not close by May 19, Sunbelt would deem the \$40,000 in earnest money forfeited and distribute it to Dogs Howling and Sunbelt. The transaction did not close, and the funds were distributed.

Baker brought a lawsuit, alleging claims against Sunbelt for breach of fiduciary duty, negligence, and violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44, subd. 1(5), (7), (13) (2006). The complaint also alleged claims against Sunbelt and Dogs Howling for conversion and breach of contract. Baker attached as exhibits to the complaint the Broker Services Acknowledgement, the June purchase agreement, the purchase-agreement addendum, the closing-documents agreement, and the proposed December purchase agreement that was repudiated by Dogs Howling.

Sunbelt and Dogs Howling moved to dismiss each claim for failure to state a claim on which relief could be granted. Minn. R. Civ. P. 12.02(e). In support of their motion, they submitted the nondisclosure agreement and the two contingency-removal forms. Baker's response to the motion included two affidavits, along with emails from Sunbelt's employees purporting to support his allegations that Sunbelt promised to represent his interests.

In its January 9, 2007 order, the district court dismissed each claim alleged in the complaint. In the accompanying memorandum, the district court indicated that, in accordance with Minn. R. Civ. P. 12, its consideration was limited to the complaint and

its referenced documents. Finding that the relationship between Sunbelt and Baker was reduced to writing, the district court concluded that oral representations about the nature of the relationship between the parties could not be considered. Therefore, Baker's claims under the Deceptive Trade Practices Act and his breach-of-fiduciary-duty claims failed. The district court also concluded that, because Baker did not close the transaction, relief could not be granted on his breach-of-contract and conversion claims. Concluding that Baker was improperly attempting to convert a breach-of-contract action to a tort action, the district court also dismissed the negligence claim.

This appeal followed. Baker also moved to strike portions of Sunbelt and Dogs Howling's joint brief and for an award of attorney fees incurred in bringing the motion to strike. Sunbelt and Dogs Howling opposed the motion and moved for attorney fees.

## **D E C I S I O N**

### **I.**

Baker argues that the district court improperly considered matters outside the pleadings in granting the motion of Sunbelt and Dogs Howling to dismiss for failure to state a claim. On a motion to dismiss under rule 12.02(e), the district court may consider only the complaint and the documents referenced therein. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 n.7 (Minn. 2000). The facts as alleged in the complaint must be accepted as true, and all reasonable inferences must be construed in favor of the nonmoving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

When considering a motion to dismiss for failure to state a claim on which relief can be granted, the district court must “review the complaint as a whole, including the documents upon which [plaintiffs] rely, to determine whether as a matter of law a claim has been stated.” *Martens*, 616 N.W.2d at 740. “[W]hen the complaint refers to a contract and the contract is central to the claims alleged,” the district court may consider the entire written contract. *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995) (permitting consideration of contract provisions other than those cited in complaint). If matters outside the pleadings are considered by the district court, the motion is treated as one for summary judgment. Minn. R. Civ. P. 12.02.

Baker first argues that the district court’s decision is based on information outside the four corners of the complaint and its attachments. As an initial matter, we observe that, despite its statement that its review was limited to the complaint and its attachments, the district court made a finding of fact based on information included only in supplemental affidavits. In doing so, the district court found that this was Baker’s “first attempt to purchase a business.” Indeed, this fact was not included in the pleadings. Rather, it is based on Baker’s testimony in a supplemental affidavit submitted in response to the motion to dismiss. This finding, however, is immaterial to the district court’s ultimate conclusion. Accordingly, the inclusion of this fact obtained from Baker’s affidavit constitutes harmless error. *See* Minn. R. Civ. P. 61 (requiring harmless error to be disregarded).

Of greater import is Baker’s contention that the district court improperly considered the three documents attached to the motion to dismiss submitted by Sunbelt and Dogs Howling—the nondisclosure agreement and the two contingency-removal forms. The contingency-removal forms, which are referred to in the complaint, were properly considered by the district court. But the nondisclosure agreement is neither attached to nor referenced in the complaint. It also is not a document on which Baker relies to support his allegations, *see Martens*, 616 N.W.2d at 740 (permitting review of brochures alleged in complaint to have created unilateral offer), nor is it part of the June purchase agreement, *see Recycling Bond Litig.*, 540 N.W.2d at 497 (permitting consideration of additional provisions of contract). Rather, the nondisclosure agreement predates and is independent of the June purchase agreement. Because the nondisclosure agreement is wholly separate from the complaint and its attachments, the district court erred by considering it in deciding a motion under rule 12.02(e).

When a district court considers matters outside the pleadings on a rule 12.02(e) motion, “the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by rule 56.” Minn. R. Civ. P. 12.02; *see also N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004) (applying summary-judgment standard on review after concluding that district court erred by failing to analyze rule 12.02(e) motion as motion for summary judgment when it considered affidavits from both parties). Here, the district court considered the nondisclosure agreement submitted by Sunbelt and Dogs Howling but declined to

consider responsive affidavits and other documents beyond the complaint submitted by Baker. Because the district court excluded Baker's supplemental material from its consideration, these circumstances are different from those in which a district court considers all of the evidence presented but mischaracterizes its review as that required for dismissal on the pleadings rather than for summary judgment. As such, our review of this appeal as one granting summary judgment would be improper because the parties were not afforded the opportunity to present all pertinent material. Accordingly, we review only the pleadings and the documents referenced therein to determine whether the district court erred by granting the motion to dismiss for failure to state a claim on which relief can be granted.

## II.

We review de novo the district court's decision to dismiss under Minn. R. Civ. P. 12.02(e) to determine whether the complaint sets forth a legally sufficient claim for relief. *Bodah*, 663 N.W.2d at 553. Because dismissal under rule 12.02(e) generally is disfavored, we will reverse "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Radke v. County of Freeborn*, 694 N.W.2d 788, 793 (Minn. 2005) (quotation omitted). In reviewing such a dismissal, we consider only the facts alleged in the complaint, accepting those facts as true and construing all reasonable inferences in favor of the nonmoving party. *Bodah*, 663 N.W.2d at 553. Whether the plaintiff can prove the facts alleged is immaterial. *Martens*, 616 N.W.2d at 739.

## A.

Baker alleges that Sunbelt violated the Minnesota Deceptive Trade Practices Act (the Act), Minn. Stat. § 325D.44, subd. 1(5), (7), (13) (2006), when Schroder told him Sunbelt would represent his interests but proceeded to do otherwise. The Minnesota legislature passed the Act and related consumer-fraud statutes to “make it easier to sue for consumer fraud than it had been to sue for fraud at common law.” *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993). The Act offers consumers broad protection from deceptive practices involving all manner of “goods or services.” Minn. Stat. § 325D.44 (2006); *see also Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 474-75 (Minn. App. 1999) (holding that the Act applies to educational services); *Krueger v. State Farm Fire & Cas. Co.*, 510 N.W.2d 204, 211 (Minn. App. 1993) (analyzing insurance case under the Act).

Minnesota courts have not specifically addressed whether broker services are included within the protection of the Act. Among the states that also have adopted the Uniform Deceptive Trade Practices Act on which the Act is based, several permit claims for deceptive practices involving real-estate services. *See, e.g., Stefani v. Baird & Warner, Inc.*, 510 N.E.2d 65, 70-71 (Ill. App. Ct. 1987) (stating that Uniform Deceptive Trade Practices Act applies to real-estate brokers and concluding that district court erred by dismissing for failure to state cause of action when real-estate broker who represented plaintiff and another purchaser competing for same property concealed that representation from plaintiff). But because real-estate brokers are extensively regulated by other state statutes, the Maine Supreme Court has concluded that deceptive activity

committed by real-estate brokers does not fall within the scope of Maine's Deceptive Trade Practices Act. *First of Me. Commodities v. Dube*, 534 A.2d 1298, 1302 (Me. 1987). In light of the broad protection that Minnesota consumer law offers<sup>2</sup> and the Act's application to both goods and services, we decline to exclude broker services from the Act absent express legislative intent to do so.

To establish a claim under subdivision 1(5), Baker must allege, in pertinent part, that Sunbelt represented that its "services have . . . characteristics . . . [or] benefits . . . that they do not have." Minn. Stat. § 325D.44, subd. 1(5). Subdivision 1(7) requires an allegation that Sunbelt falsely represented that its "services are of a particular standard, quality, or grade." *Id.*, subd. 1(7). And subdivision 1(13) requires an allegation that Sunbelt "engage[d] in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." "Representations" supporting claims under the Act may be made orally. *See, e.g., Imperial Developers, Inc. v. Seaboard Sur. Co.*, 518 N.W.2d 623, 625-28 (Minn. App. 1994) (concluding that district court erred by granting summary judgment on deceptive-trade-practices claim when appellant alleged that respondent made false or misleading oral statement), *review denied* (Minn. Aug. 24, 1994).

When dismissing Baker's claim under the Act, the district court reasoned that, "because [Baker] and Sunbelt reduced their agreement regarding Sunbelt's role to writing, any previous utterances made by Sunbelt shall not be considered." In doing so, the district court relied on the principle that a contract's meaning should be ascertained

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<sup>2</sup> *See Liabo v. Wayzata Nissan, LLC*, 707 N.W.2d 715, 724 (Minn. App. 2006) (stating that consumer-protection statutes are "liberally construed in favor of protecting consumers"), *review denied* (Minn. Mar. 28, 2006).

from the written instrument alone, *Carl Bolander & Sons Co. v. United Stockyards Corp.*, 298 Minn. 428, 433, 215 N.W.2d 473, 476 (1974), without looking to previous or contemporary utterances or writings, *Karger v. Wangerin*, 230 Minn. 110, 114, 40 N.W.2d 846, 849-50 (1950). The district court found that descriptions of the relationship between Baker and Sunbelt in the nondisclosure agreement and other documents preclude consideration of Sunbelt's earlier representations. This analytical approach is unavailing for two reasons.

First, although the parol-evidence rule generally excludes evidence outside a written document if it contradicts the plain terms of the document, this rule does not apply when the allegation is that a party was induced to enter into the contract by fraudulent oral representations. *Aronovitch v. Levy*, 238 Minn. 237, 246, 56 N.W.2d 570, 576 (1953); *Nave v. Dovolos*, 395 N.W.2d 393, 396 (Minn. App. 1986). Indeed, without such evidence, a claim of fraud seldom could be proved. *Nave*, 395 N.W.2d at 396; *see also, e.g., Honeywell, Inc. v. Imperial Condo. Ass'n*, 716 S.W.2d 75, 78 (Tex. App. 1986) ("To apply the parol evidence rule in [Deceptive Trade Practices Act] cases would frustrate the legislature's purpose in passing the statute without furthering the objectives of the parol evidence rule."). Thus, the parol-evidence rule does not bar consideration of Sunbelt's allegedly fraudulent representations to Baker.

Second, the documents relied on by the district court do not expressly delineate the parameters of the relationship between Baker and Sunbelt. As discussed above, the district court erroneously relied on the nondisclosure statement. But even if the district court were permitted to consider the nondisclosure agreement, it does not preclude a

relationship between Sunbelt and Baker. It merely states that Sunbelt represents Dogs Howling, which does not contradict Baker's allegation or preclude dual agency.

Sunbelt and Dogs Howling also argue that the statements in the June purchase agreement and the Broker Services Acknowledgment advising Baker to obtain independent legal advice and disclaiming any responsibility for due diligence establish that Sunbelt did not represent Baker. But these statements—made to both Baker and Dogs Howling—do not establish that Baker was not deceived when Sunbelt allegedly promised to represent his interests and required him to conduct all contacts through Sunbelt.

When taken as true, Baker's allegation that Schroder falsely stated that Sunbelt would represent his interests sets forth a legally sufficient claim that Sunbelt represented that its services had a characteristic or benefit that they did not have, in violation of subdivision 1(5), and that Sunbelt engaged in conduct likely to cause confusion or misunderstanding, in violation of subdivision 1(13).<sup>3</sup> But we agree with the district court's determination that the allegations do not address the particular "standard, quality, or grade" of the services offered by Sunbelt as subdivision 1(7) requires. Therefore, the

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<sup>3</sup> The district court cited *In re Simitar Entm't, Inc.* for the proposition that "it is clear that 'confusion' within the statute's ambit is the mistaking of the identity of a product, or one of a product's essential aspects, for that of another product." 275 B.R. 331, 349 (Bankr. D. Minn. 2002). Based on this, the district court concluded that Baker's alleged confusion "is not the type of confusion protected by [the Act]." But the Act applies to both goods and services, Minn. Stat. § 325D.44, subd. 1, and Sunbelt's alleged promise to represent Baker's interests involves an "essential aspect" of the services that Sunbelt provided. Thus, Baker's allegations set forth a legally sufficient claim under subdivision 1(13).

district court erred by dismissing Baker's claims under subdivision 1(5) and 1(13), but properly dismissed his claim under subdivision 1(7).

## **B.**

Baker next challenges the district court's dismissal of his breach-of-contract claim, arguing that, if a contract exists, Sunbelt and Dogs Howling breached it by declaring the earnest money forfeited despite his willingness to close. The district court found that a valid contract existed but dismissed the breach-of-contract claim because Sunbelt and Dogs Howling were entitled to the earnest money under that contract.

The interpretation of a contract presents a question of law, which we review *de novo*. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). But whether a contract exists and whether parties have modified a preexisting contract are questions of fact, which for the purposes of a rule 12.02(e) motion are viewed in the light most favorable to the plaintiff. *See Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992) (existence of contract); *Hentges v. Schuttler*, 247 Minn. 380, 383, 77 N.W.2d 743, 746 (1956) (modification of contract).

The district court found that, by its terms, the June purchase agreement was no longer in effect after July 27, 2004. Rather, a "new unsigned contract was formed by performance in December 2004, when [Baker] deposited an additional \$30,000, thereby accepting the offer to keep the condition going" under the terms of the proposed December purchase agreement.

In reaching this conclusion, the district court failed to accept as true the facts alleged by Baker and to construe all reasonable inferences in his favor. *Bodah*, 663

N.W.2d at 553. Baker alleged that Dogs Howling repudiated the proposed December purchase agreement, which is contrary to the district court’s determination that Baker and Dogs Howling entered a “new” purchase agreement that entitled Sunbelt and Dogs Howling to receive the earnest money. Moreover, Baker deposited the additional \$30,000 in August 2004, four months before the negotiation of the proposed December purchase agreement. As alleged in Baker’s complaint, Sunbelt represented that the \$30,000 deposit was “essential to breaking the deadlock” and “consummating the contemplated transaction.” Thus, the district court’s *factual* determination that a contract was created under the terms of the proposed December purchase agreement indicates that the district court resolved disputed material facts, which is contrary to the applicable legal standard under rule 12.02(e).

Baker alleged that, under the terms of the June purchase agreement, forfeiture occurs only if Baker “should fail or refuse” to close. He further alleges that he was ready and willing to close the transaction but that Dogs Howling refused to accept the terms negotiated by Baker and Sunbelt. Taking these allegations as true, as we must, Baker has pleaded a legally sufficient breach-of-contract claim based on the distribution of the earnest money to Sunbelt and Dogs Howling. *See Radke*, 694 N.W.2d at 793 (stating that dismissal will be reversed “if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded” (quotation omitted)).

Accordingly, the district court erred by dismissing Baker’s contract claim.

### C.

Baker also contends that the district court erred by dismissing his conversion claim against Sunbelt and Dogs Howling. To state a claim for conversion, Baker must allege that Sunbelt and Dogs Howling unlawfully deprived him of his property interest. *Olson v. Moorhead Country Club*, 568 N.W.2d 871, 872 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). If possession of the earnest money by Sunbelt and Dogs Howling is lawful “as a matter of contract right,” Baker’s conversion claim must fail. *Erickson v. Midland Nat’l Bank & Trust Co. of Minneapolis*, 205 Minn. 224, 226, 285 N.W. 611, 612 (1939).

Because the district court found that Sunbelt and Dogs Howling were entitled to the funds when the transaction did not close, it dismissed Baker’s conversion claim. But dismissal of this claim is erroneous for the same reasons that dismissal of the breach-of-contract claim is erroneous. When taken as true, the allegations do not establish that, under either the June purchase agreement or the proposed December purchase agreement, Sunbelt and Dogs Howling were entitled to the earnest money “as a matter of contract right.”

Thus, the district court’s dismissal of the conversion claim under rule 12.02(e) was erroneous.

### D.

Baker also challenges the district court’s dismissal of his breach-of-fiduciary-duty claim against Sunbelt under rule 12.02(e). Baker alleges that, by promising to act on his behalf, improperly inducing him to deposit an additional \$30,000 into Sunbelt’s trust

account, and by distributing the contents of that trust to itself and Dogs Howling, Sunbelt breached its fiduciary duty to Baker.

The existence of a fiduciary duty is a question of fact. *Burgmeier v. Farm Credit Bank of St. Paul*, 499 N.W.2d 43, 51 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). A fiduciary relationship exists

when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal. . . . Disparity of business experience and invited confidence could be a legally sufficient basis for finding a fiduciary relationship.

*Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (quotations and citations omitted).

Special circumstances must exist in a relationship between parties in order to establish a fiduciary relationship. *St. Paul Fire & Marine Ins. Co. v. A.P.I., Inc.*, 738 N.W.2d 401, 406 (Minn. App. 2007), *review denied* (Minn. Dec. 12, 2007). Relationships that involve competing interests and “often generate litigation” are “not compatible with the concept of a fiduciary.” *See Cherne Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 343 (Minn. App. 1997) (concluding that no fiduciary relationship existed between insurer and insured), *review denied* (Minn. Feb. 19, 1998). The arm’s-length negotiation of a contract does not give rise to a fiduciary relationship. *Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953). “Ordinary business relationships may involve reliance on a professional, a degree of trust, and a duty of good faith, and yet not fall within the class of fiduciary relationships.” *A.P.I.*, 738

N.W.2d at 406. But when a broker represents both buyer and seller as a dual agent, the broker owes a duty to both parties. Minn. Stat. § 82.17, subd. 5 (2006) (defining “dual agency”).

Based on its conclusion that Baker “was informed via the Non-Disclosure Agreement and Broker Services Acknowledgment . . . that Sunbelt represented the seller, Dogs Howling, not [Baker],” the district court found that Sunbelt was representing adverse interests and, therefore, did not owe Baker a fiduciary duty.

But as discussed above, the nondisclosure agreement, which cannot be properly considered for purposes of the rule 12.02(e) motion, does not preclude Sunbelt’s dual agency. And the Broker Services Acknowledgement does not state that Sunbelt represented the seller. Accordingly, these documents do not establish an adequate basis to conclude that the breach-of-fiduciary-duty claim must be dismissed. Baker’s allegations, namely, that Sunbelt fraudulently stated that it would represent Baker’s interests, would establish that this was not an arm’s-length transaction and that Sunbelt “invited confidence,” thereby creating a fiduciary relationship. *Toombs*, 361 N.W.2d at 809.

Baker also alleges that Sunbelt had a fiduciary duty to Baker based on its acceptance of his earnest money in the trust account. Generally, the receipt of earnest-money funds by a real-estate broker creates statutory duties that give rise to fiduciary obligations to the buyer and the seller. *See* Minn. Stat. § 82.50, subd. 5(d) (2006) (requiring broker to maintain funds received in trust account “until disbursement is made in accordance with the terms of the applicable agreements”); *see also Richard T. Kiko*

*Agency, Inc. v. Ohio Dep't of Commerce, Div. of Real Estate*, 549 N.E.2d 509, 512 (Ohio 1990) (stating that seller's broker who accepted buyer's deposit had fiduciary relationship with both parties); *Edmonds v. John L. Scott Real Estate, Inc.*, 942 P.2d 1072, 1081 (Wash. Ct. App. 1997) (concluding that distribution of earnest money by broker was inconsistent with fiduciary duty owed to seller).<sup>4</sup> Accordingly, the district court's decision to dismiss Baker's breach-of-fiduciary claim as legally insufficient was erroneous. *See Radke*, 694 N.W.2d at 793 (stating that dismissal on the pleadings will be reversed "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded" (quotation omitted)).

#### E.

Baker also argues that the district court erroneously dismissed his negligence claim against Sunbelt. The district court concluded that, because Minnesota law does not recognize an independent tort for breach of contract, Baker had not stated a claim on which relief could be granted. The district court is correct in observing that a breach of contract, even if intentional, malicious, or in bad faith, cannot convert a contract claim into a tort claim. *Wild v. Rarig*, 302 Minn. 419, 442, 234 N.W.2d 775, 790 (1975). But

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<sup>4</sup> Sunbelt and Dogs Howling argue that chapter 82 does not apply to the sale of a business. But a "real-estate broker" is defined to include anyone who "for another . . . directly or indirectly lists, sells, exchanges, buys, rents, manages, offers or attempts to negotiate a sale, option, exchange, purchase or rental of *any business opportunity or business*, or its good will, inventory, or fixtures, or any interest therein." Minn. Stat. § 82.17, subd. 18(d) (2006) (emphasis added).

the pleadings do not identify breach of contract as the alleged negligence. Rather, Baker's claim alleges negligent misrepresentation.<sup>5</sup>

The negligence allegedly arose from Sunbelt's representation to Baker that the June purchase agreement was complete and enforceable. Baker alleges that Sunbelt "had a duty to exercise such care, skill and diligence as a reasonable person would exercise under like circumstances" and that it breached the duty by "failing to draft a purchase agreement that addressed all material terms and conditions of the contemplated sale." This failure allegedly caused Baker to deposit \$40,000 in reliance on an unenforceable contract.

The tort of negligent misrepresentation is defined as

[o]ne who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 420 (Minn. App. 2003) (quoting Restatement (Second) of Torts § 552(1) (1977)). This cause of action does not extend to sophisticated parties who are negotiating a commercial transaction at arm's length, without reliance on the guidance of the other. *Safeco Ins. Co. of Am. v. Dain Bosworth Inc.*, 531 N.W.2d 867, 872 (Minn. App. 1995), *review denied* (Minn. July 20, 1995). Under such circumstances, "the aggrieved party is limited to suit in contract or in fraud." *Id.* at 873; *see also Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 424 (Minn. App.

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<sup>5</sup> At oral argument, Baker stated that this claim does not include professional negligence.

2000) (stating that “essential element” of negligent misrepresentation claim is tortfeasor’s owing “a duty of care to the person to whom [the tortfeasor is] providing information,” and such duty is absent from commercial transactions in which parties with adverse interests negotiate at arm’s length).

Based on the allegations in the complaint, Sunbelt provided guidance to Baker and, in doing so, represented that Sunbelt would look out for Baker’s interests. When these allegations are taken as true, Baker has pleaded facts that are legally sufficient to support this element of negligent misrepresentation.

Moreover, Baker alleged that Sunbelt supplied false information that he reasonably relied on. According to Baker’s theory of the case, Sunbelt represented that the June purchase agreement was complete and enforceable and stated that depositing additional earnest money would break the deadlock with Dogs Howling. Baker asserts that he relied on these representations when he deposited with Sunbelt the additional \$30,000 as requested by Sunbelt. Because we cannot conclude as a matter of law that the allegations are insufficient to establish a negligent-misrepresentation claim, the district court erred by dismissing this claim under rule 12.02(e).

### **III.**

Baker moves to strike portions of the joint brief filed by Sunbelt and Dogs Howling that misrepresent the record, and he seeks attorney fees incurred in preparation of the motion. Sunbelt and Dogs Howling oppose the motion and seek attorney fees incurred in responding to the motion.

“The papers filed in the trial court, the exhibits, and the transcript of the proceedings” comprise the record on appeal. Minn. R. Civ. App. P. 110.01. We may not base our decision on matters outside the record on appeal, nor may we consider matters that were not produced and received in evidence in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Litigants on appeal are required to state the record fairly and with candor to the appellate court. Minn. R. Civ. App. P. 128.02, subd. 1(c). “If anything material to either party is omitted from the record by error or accident or is misstated in it, . . . the appellate court . . . may direct that the omission or misstatement be corrected . . . .” Minn. R. Civ. App. P. 110.05.

Baker has identified multiple statements in the joint brief that do not accurately reflect the record. For example, Sunbelt and Dogs Howling assert that a “careful review of [Baker’s] brief reveals that [he] has made no allegations anywhere that [Sunbelt] expressly agreed to represent appellant.” But Baker’s brief and, more importantly, his pleadings are replete with such assertions. Sunbelt and Dogs Howling also assert that Baker had the assistance of counsel when executing the agreement governing the earnest money. But the district court’s findings, which Sunbelt and Dogs Howling do not challenge as erroneous, reflect that Baker was not represented by counsel until after the June purchase agreement was executed. Finally, Sunbelt and Dogs Howling also mischaracterize the district court’s holding by asserting that the district court found “a valid and enforceable contract existed, containing all the essential terms, which was signed by all the parties to the transactions.” But the district court found that a contract

was created by performance, not that such a contract was signed or included all essential terms.<sup>6</sup>

In response to Baker's motion, Sunbelt and Dogs Howling do not address the accuracy of the statements identified by Baker. Rather, they argue that, because they previously submitted these statements to the district court, the statements are properly part of the record. To the contrary, the presentation of inaccurate representations of the record before two tribunals does not make them accurate or properly submitted.

On appeal, the record must be stated fairly and with candor to this court. Minn. R. Civ. App. P. 128.02, subd. 1(c). The failure of Sunbelt and Dogs Howling to present the record candidly elsewhere does not grant them license to continue to do so based on the waiver theory that Sunbelt and Dogs Howling advance. Accordingly, we grant Baker's motion to strike those portions of Sunbelt and Dogs Howling's brief that misstate the record.

In our discretion, we may award reasonable attorney fees when a party acts in bad faith by asserting frivolous or unfounded claims solely to harass or to delay proceedings. Minn. Stat. § 549.211 (2006); *see Allstate Ins. Co. v. Allen*, 590 N.W.2d 820, 823 (Minn. App. 1999) (stating that whether to award attorney fees on appeal under section 549.211 is discretionary decision with appellate court). We also may sanction a party for

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<sup>6</sup> Baker also disputes the argument advanced by Sunbelt and Dogs Howling that the sale of a business is not a conveyance of real estate. But because this is a challenge to the validity of their legal argument and not a challenge to the accuracy of their facts, we decline to address that challenge here.

violating the requirement to present factual contentions or denials that are supported by the record. Minn. Stat. § 549.211, subs. 2(3), (4), 3.

In light of the early stage of this litigation, we deny all motions for attorney fees. But we reiterate the parties' obligation of candor to *every* tribunal in which a written or oral submission is made.

**Affirmed in part, reversed in part, and remanded; motion to strike granted; motions for attorney fees denied.**