NOT DESIGNATED FOR PUBLICATION

No. 124,512

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SURFACE COMPANIES, INC d/b/a
SURFACE REAL ESTATE HOLDINGS,
Appellant,

v.

PISHNY REAL ESTATE SERVICES, LLC,
Appellee,

v.

MICHAEL SURFACE,
Third-party Defendant/Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed March 10, 2023. Affirmed.

Eric G. Kraft, of Eric Kraft Law, P.A., of Olathe, for appellant.

Robert J. Bjerg, of Law Office of Robert J. Bjerg, P.A., of Kansas City, Missouri, for appellees.

Before BRUNS, P.J., ATCHESON and ISHERWOOD, JJ.

PER CURIAM: This appeal follows a three-day bench trial in Johnson County District Court over the collapse of a lease for commercial property that prompted Surface Companies, Inc., the landlord, to sue Pishny Real Estate Services, LLC, the tenant, for breach of the agreement and, in turn, drew counterclaims from Pishny for fraud and various forms of misrepresentation. The district court entered judgment for Pishny and

against Surface, although for a fraction of the claimed damages. Surface has appealed. We find no reversible error in the district court's conclusions that largely rest on credibility determinations drawn from the trial evidence and, therefore, affirm the judgment.

FACTUAL AND PROCEDURAL OUTLINE

We endeavor to distill what seems to have been a convoluted and sometimes contentious landlord-tenant relationship, despite its comparative brevity, into a narrative of the circumstances essential to the issues before us on appeal. The parties, of course, are familiar with all of the twists, turns, and disagreements.

Pishny Real Estate Services specializes in restoring historic buildings and in early 2018 needed to find a larger space to accommodate its burgeoning business. Daniel Pishny, the company's president, communicated with Michael Surface, his counterpart at Surface Companies, about renting part of a warehouse in Lenexa. Michael and his wife own the warehouse, and Surface Companies manages the property. Daniel Pishny and Michael Surface met at the warehouse several times before Pishny agreed to lease part of the warehouse. The conversation between the two during one of those meetings figures prominently in the district court's decision, so we return to those specifics later.

Surface constructed a demising wall—a substantial interior wall dividing an open space into separate premises to be used by different occupants—in the warehouse, creating two units. And Pishny agreed to rent one of the units. The warehouse did not have a sprinkler system used for fire protection.

Pishny Real Estate Services signed a three-year lease for the warehouse unit in June 2018 for a monthly rent of $3,888.75 and provided a security deposit of $7,777.50. Pishny set up what has been described as a commercial woodshop and installed a paint

booth in its portion of the warehouse. Building inspectors from the City of Lenexa questioned the construction of the demising wall and the installation of the paint booth—both of which were done without building permits. They also said the warehouse required a sprinkler system because of Pishny's woodworking business and noted other code violations. Trial evidence the district court credited showed that inspectors had already admonished Surface that installation of the demising wall would call for a sprinkler system. The sprinkler system and the code violations quickly became a point of contention between Pishny and Surface. Each claimed the other was obligated to pay for the sprinkler system, and they never resolved their disagreement. They likewise fought over responsibility for correcting at least some of the code violations, although that aspect of the dispute was secondary to the sprinkler system.

Surface filed a Chapter 61 limited action against Pishny in early October 2019 to evict the company because it would not pay for the sprinkler system and, therefore, ostensibly breached the lease. In November, Pishny vacated the warehouse, prompting Surface to add a claim for delinquent rent. Pishny filed counterclaims for fraud, negligent misrepresentation, and mutual mistake with an alternative claim that Surface materially breached the lease first. Pishny asserted those counterclaims excused it from any continuing performance of the lease obligations, including occupying the premises or paying rent for the remainder of the term. Pishny also joined Michael Surface as a third-party defendant.

Based on the expanded claims, the district court converted the action to a Chapter 60 case in mid-November. We gather the pleadings were amended several times as the parties undertook discovery. In the final pretrial order, Surface identified nearly $59,000 in damages, and Pishny sought nearly $121,000 in damages largely attributable to moving expenses and higher rental costs for substitute space.

The district court conducted a three-day bench trial in January 2021, announced a ruling in early March, and filed a short journal entry later in the month. The district court ruled against Surface on its claims, found for Pishny on its counterclaim for fraud, and entered judgment against Surface Companies and Michael Surface jointly and severally for $16,379.78 in compensatory damages, reflecting moving costs and return of the security deposit less $1,200 for repairs to the roof. The district court found that the ruling effectively superseded or was duplicative of Pishny's other claims and reserved ruling on Pishny's request for punitive damages.

The district court held an evidentiary hearing on punitive damages in August. And in a final judgment entered in early October, the district court awarded Pishny $8,189.99 in punitive damages jointly and severally against Surface Companies and Michael Surface and restated the earlier award of compensatory damages. The damages, thus, totaled $24,569.77. Surface has appealed; Pishny did not file a cross-appeal.

LEGAL ANALYSIS

The district court found that Surface made fraudulent representations to Pishny when the companies, through their principals, discussed a possible lease. And the district court determined the false statements were sufficiently material to the bargain that they vitiated the lease agreement. We begin there. Fraud is a species of intentional tort with these elements:

> "(1) false statements . . . made as a statement of existing and material fact; (2) the representations were known to be false by the party making them or were recklessly made without knowledge concerning them; (3) the representations were intentionally made for the purpose of inducing another party to act upon them; (4) the other party reasonably relied and acted upon the representations made; and (5) the other party sustained damage by relying upon them." *Kelly v. VinZant*, 287 Kan. 509, 515, 197 P.3d 803 (2008).

See also PIK Civ. 4th 127.40 (2022). The elements must be proved by clear and convincing evidence. *Hernandez v. Pistotnik*, 58 Kan. App. 2d 501, 510, 472 P.3d 110 (2020).

In *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008), the Kansas Supreme Court recast clear and convincing evidence as a standard or level of proof greater than a preponderance of the evidence but less than beyond a reasonable doubt. In turn, the court described appellate review of an issue to be proved by clear and convincing evidence as asking whether "a rational fact[-]finder" could have determined the factual contention to be "highly probable." 286 Kan. at 705. On appeal, we view the evidence in a light favoring the party prevailing in the district court, here Pishny, and neither reweigh conflicting evidence generally nor upend credibility determinations in particular. 286 Kan. at 705. Those remain the governing standards. See *In re Estate of Field*, 55 Kan. App. 2d 315, 324-25, 414 P.3d 1217 (2018).

The parties joust over how the appellate standard of review should be applied to a bench-tried fraud claim. Pishny says the heightened standard enunciated in *In re B.D.-Y.* applies to both the district court's findings of fact and its ultimate legal conclusions. Conversely, in its reply brief, Surface submits that the standard governs only the findings of fact, so we should review the district court's legal conclusion without any deference consistent with the usual rule. See *Geer v. Eby*, 309 Kan. 182, 190-91, 432 P.3d 1001 (2019) (appellate court asks whether substantial evidence supports factual findings and makes unlimited review of legal conclusions based on those findings). Although the dispute has a superficial intrigue, especially since each side advances a standard that would effectively favor the other, we do not see that it drives the outcome. Assuming the facts the district court found by clear and convincing evidence show the elements of fraud were highly probable, we should uphold the legal conclusion whether we look at it anew or through a heightened standard. Either way, when the legally required facts have been

sufficiently proved, the legal conclusion necessarily follows. Based on our assessment that the trial evidence sufficiently supports the district court's finding of fraud, we would affirm under either stated standard of review.

Turning to the trial evidence, Daniel Pishny testified that during his last meeting with Michael Surface before leasing the space, he asked whether a sprinkler system would be required. He testified that Surface told him that a sprinkler system was not required because of the building's largely metal construction. According to Pishny, Surface also said that a cabinet shop had leased space there for an extended time without a sprinkler system. Surface testified he had no recollection of such a conversation and would have directed Pishny to contact the City of Lenexa about code requirements for a sprinkler system if he had asked. Pishny introduced evidence that City representatives had already told Surface that a sprinkler system would be required following the installation of the demising wall. Key here, the district court credited Pishny's account of the communications he had with Surface and the related evidence about Surface's interaction with the City's agents.

Pishny testified that he also asked about the demising wall and whether City code officers had approved it. Again, according to Pishny, Surface said the City did not require him to finish the wall until both portions of the warehouse had been leased. Surface denied having any discussion with Pishny about the demising wall. Pishny introduced evidence City representatives had cited Surface for putting in the wall without a building permit both before and after Pishny signed the lease and moved his company in. The district court credited Pishny's version of those communications.

The district court concluded that Surface had made false statements of material fact about the need for a sprinkler system and the status of the demising wall that sufficiently supported Pishny's fraud claim. The remaining components of the district court's findings on liability and punitive damages flow from those determinations.

Surface launches several attacks on the sufficiency of the evidence supporting the finding of fraud.

Surface does not separately challenge the amount of compensatory damages or the propriety of the punitive damages or their amount if the district correctly found for Pishny on the fraud claim. See K.S.A. 60-3702(c) (punitive damages permitted against party acting with "fraud or malice" among other legal bases); *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*, 308 Kan. 1040, 1044, 427 P.3d 9 (2018) (recognizing successful fraud claim supports punitive damages). We, therefore, do not concern ourselves with those aspects of the district court's judgment.

Surface disputes the sufficiency of the evidence supporting any false representation, proximate cause, and reasonable reliance as elements of the claimed fraud and focuses on communications about the sprinkler system without carving out the demising wall for separate consideration. As to the falsity of the representations, we examine Pishny's account and the supporting evidence consistent with the district court's credibility findings and the general requirement that an appellate court view the trial record in a way favoring the prevailing party. From that perspective, Michael Surface made a categorical representation to Daniel Pishny during their lease negotiations that a sprinkler system was not required because of the warehouse's metal construction. But that was plainly untrue, and City staff members had told Surface that the demising wall triggered the need for a sprinkler system. Surface was aware of the type of work Pishny intended to do and could not fairly or accurately represent that the City would not require a sprinkler system.

Whether a sprinkler system would be required entailed a material point for Pishny in deciding to lease the warehouse unit. When one party knowingly makes a material misrepresentation in contract negotiations and the parties then enter into an agreement, the wrong is known as fraud in the inducement. See *Stechschulte v. Jennings*, 297 Kan. 2,

19-20, 298 P.3d 1083 (2013); cf. *Goff v. American Savings Association*, 1 Kan. App. 2d 75, 78, 561 P.2d 897 (1977) ("Good faith is required in every business transaction and the law will not permit a business person to intentionally or recklessly make false representations."). The resulting contract is typically considered void—or at the very least voidable by the party induced to act in reliance on the fraudulent representation. See *Chism v. Protective Life Ins. Co.*, 290 Kan. 645, 662, 234 P.3d 780 (2010) (suggesting agreement voidable); *Albers v. Nelson*, 248 Kan. 575, 579-80, 809 P.2d 1194 (1991) (suggesting agreement void); see also 17A C.J.S., Contracts § 241 (jurisdictions divided on treating fraudulently induced contracts as void or as voidable by misled party). Either way, Pishny properly could walk away from the lease if the company had been fraudulently induced to enter the agreement.

Evidence supports the district court's finding of fraud on the part of Michael Surface in making representations to Daniel Pishny about the need for a sprinkler system as they discussed leasing the premises. On appeal, Surface offers an unpersuasive argument based on the differing verb tenses Daniel Pishny and another witness used in testifying about the discussion of the sprinkler system. As described in the testimony, Michael Surface was asked whether a sprinkler system had been required, would be required, or is now required. Surface now suggests that injects sufficient uncertainty to render the evidence less than clear and convincing and turns his representation either into a correct statement of past or then-existing circumstances or merely an opinion that would not be actionable. But the argument fails to take into account the undisputed substance of Michael Surface's response that a sprinkler system was not required *because* the warehouse was principally constructed of metal—a representation reasonably construed to mean no such system was or foreseeably would be necessary. Surface knew that to be incorrect based on his communications with representatives from the City. Accordingly, his statement to Pishny entailed a material misrepresentation of an existing fact or circumstance.

Next, Surface challenges the sufficiency of the evidence establishing legally proximate cause between his representations about the sprinkler system—assuming they were as Pishny asserted and the district court found—and the City's insistence a system be installed in the warehouse after Pishny converted the space into a woodshop with a paint booth. Surface contends Pishny's decision on how to use the space was the sole proximate cause triggering the need for a sprinkler system and the concomitant dispute over who should pay for it. In legal parlance, Surface characterizes Pishny's use of the warehouse as a superseding cause that cut off any legal liability Surface might have had. But the argument misapprehends the concept of proximate cause.

Proximate cause entails a question of fact, so we defer to the district court's conclusion if it has the requisite evidentiary support. See *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 793, 440 P.3d 576 (2019). Several sequential events or circumstances may combine to form the legally proximate cause of an actionable harm. Those occurring closer in time to the injury typically do not cut off legal liability for the earlier ones unless one of them alone would have been sufficient to bring about the harm—it, then, may become an independent intervening or superseding cause. See *Puckett v. Mt. Carmel Regional Medical Center*, 290 Kan. 406, 428-33, 228 P.3d 1048 (2010) (outlining principles of proximate cause and superseding causation in context of medical malpractice action). But a later event or occurrence commonly will not constitute a legally superseding cause if it is predictable or reasonably foreseeable. See *Russell v. May*, 306 Kan. 1058, 1078, 400 P.3d 647 (2017) (foreseeable intervening cause does not cut off proximate cause of earlier act); *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 623, 345 P.3d 281 (2015) ("To prove legal causation, the plaintiff must show it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of that conduct and contributing causes was foreseeable.").

Here, the use Pishny made of the space it rented in Surface's warehouse cannot be a legally superseding cause of the ultimate harm—the dispute over who had to pay for the

sprinkling system. The evidence indisputably showed Surface knew the kind of business Pishny intended to conduct if they agreed on a lease, so that occurrence was plainly foreseeable and, indeed, was a given. (It would be the unusual property owner who would lease premises to a tenant for an undisclosed purpose.) Pishny's woodshop, therefore, was not a superseding cause cutting off Surface's legal liability for the misrepresentations about the need for a sprinkler system.

Secondarily, Surface's argument fails because the two occurrences—the misrepresentations and the use of the premises—combined to bring about the legally actionable harm. But for Surface's misrepresentation, Pishny presumably would not have leased the space if it were on the hook for the cost of any required sprinkler system. In short, Surface's misrepresentation about the sprinkler system became an integral part of the proximate cause of Pishny's legal injury.

Finally, Surface disputes the sufficiency of the evidence supporting the element of reasonable reliance. Surface essentially contends Pishny could not have reasonably accepted the statement that a sprinkler system was unnecessary and why. In turn, according to Surface, Pishny had an affirmative duty to check with the City to find out about the applicable code requirements and the failure to do so scrubs out any liability otherwise attaching to the fraudulent statements. As an element of fraud, reasonable reliance presents a question of fact rather than an issue of law, so we defer to the district court's findings following the bench trial. See *Nordstrom v. Miller*, 227 Kan. 59, 65, 605 P.2d 545 (1980); *Associated Factors, Inc. v. Kansas Business Systems, Inc.*, No. 64,490, 1991 WL 12018278, at *3 (Kan. App. 1991) (unpublished opinion) ("The issue of a reasonable reliance is a question of fact.").

Again, Surface misapprehends the governing law. Although it may have been prudent for Pishny to have consulted with City officials about the code requirements applicable to the woodshop specifically and the warehouse premises generally, that

failure does not dissipate the legal impact of Surface's intentional tort in making false statements material to the lease negotiations. *Sippy v. Cristich*, 4 Kan. App. 2d 511, 515, 609 P.2d 204 (1980); *Jacobson-Campbell Excavation, Inc. v. M & I Marshall & Ilsley Bank*, No. 106,838, 2012 WL 4121126, at *5 (Kan. App. 2012) (unpublished opinion). As outlined in those cases, Kansas does not impose an affirmative duty on a party to investigate a potentially fraudulent misrepresentation to assess its accuracy. The rule conforms to the principle recognized in the Restatement (Second) of Torts § 540 (1977): "The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation." See *Sippy*, 4 Kan. App. 2d at 515 (citing Restatement); *Jacobson-Campbell Excavation*, 2012 WL 4121126, at *5 (citing Restatement). Even if Pishny could be characterized as careless for failing to inquire of the City, the lack of attention or industry does not cut off a wrongdoer's liability for an intentional tort, leaving Surface responsible for the legal consequences of its fraud. See *Sandifer Motors, Inc. v. City of Roeland Park*, 6 Kan. App. 2d 308, 317, 628 P.2d 239 (1981).

The no-investigation rule is inapplicable if the recipient of the fraudulent representation knows the information to be false or if the immediate circumstances patently demonstrate the falsity of the representation. *Jacobson-Campbell Excavation*, 2012 WL 4121126, at *5; Restatement (Second) of Torts § 541 (1977). For example, as the drafters of the Restatement suggest, a purchaser of a horse represented to be sound and made available for inspection at the time of sale cannot later complain because the animal has only one eye. Restatement (Second) of Torts § 541, Comment. Surface tries to fit within the narrow exception to liability for fraudulent misrepresentations afforded in § 541. But nothing in the trial evidence suggested Pishny either knew a sprinkler system would be required for the woodshop or that the need was patently obvious from looking at the warehouse. The argument fails.

Without belaboring our discussion, Surface has failed to show the district court erred in finding for Pishny on the fraudulent misrepresentation claim, especially given its credibility determinations based on the trial record. We, therefore, affirm that conclusion and the resulting judgment, since neither side disputes the damages on appeal.

In closing, we mention by way of completeness that Surface has included a point addressing the reciprocal breach of contract claims; it argues Pishny first breached the lease and should be liable for unpaid rent and other financial harms flowing from the breach. As Surface's argument implies, we never reach the issue if we affirm the district court's judgment for Pishny based on fraudulent misrepresentation. The fraud vitiates the contract, and, as we have already explained, Pishny cannot be bound to the lease as a result. We need not and do not consider Surface's appellate argument on breach of the lease.

Affirmed.