IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RICKY A. BARR and LYNNE M. BARR, Plaintiff, vs. RIDGE VIEW ESTATES, L.L.C., and L. PAUL COMEAU, Defendants/Third-Party Plaintiffs, HGM ASSOCIATES, INC., TERRACON CONSULTANTS, INC., and WARREN FAHRENKROG & CO., INC., Third-Party Defendants.	**No. 1:06-cv-00011-JEG** **O R D E R**

This matter is before the Court on the Motion for Summary Judgment by Defendants/ Third-Party Plaintiffs Ridge View Estates, L.L.C., and L. Paul Comeau, which the Plaintiffs have resisted. Hearing was held on the motion on September 10, 2007. Defendants/Third-Party Plaintiffs Ridge View Estates, L.L.C. and L. Paul Comeau were represented by attorney Julie Martin. Plaintiffs Ricky and Lynne Barr were represented by attorney John Thomas. The matter is now fully submitted for review. For the reasons discussed below, the Motion for Summary Judgment is granted in part and denied in part.

RELEVANT PARTIES

Plaintiffs Ricky A. Barr and Lynne M. Barr ("Plaintiffs") are residents and citizens of Council Bluffs, Iowa. Defendant/Third-Party Plaintiff Ridge View Estates, L.L.C. ("Ridge View Estates") is an Iowa corporation that was formed for the purpose of developing a residential subdivision in Council Bluffs, Iowa, to be named Ridge View Estates. Defendant/Third-Party

Plaintiff L. Paul Comeau ("Comeau") is currently the only member of Ridge View Estates.[1] Third-Party Defendant HGM Associates, Inc. ("HGM Associates"), is an Iowa corporation that was retained by Ridge View Estates to act as the general contractor for development of the Ridge View Estates subdivision [hereinafter "the Subdivision"]. Third-Party Defendant Terracon Consultants, Inc. ("Terracon"), is a consulting group consisting of engineers and scientists. HGM Associates retained Terracon to perform field testing and inspection of the Subdivision and to provide information and opinions as to the degree of compaction and material moisture condition of the property. Plaintiffs hired Terracon in 2005 to conduct an examination into the soil conditions on Plaintiffs property. HGM Associates hired Third-Party Defendant Warren Fahrenkrog & Co., Inc. ("Fahrenkrog & Co.") to provide all labor, material, and equipment for the clearing, excavating, grading, and removal of refuse from the property as the property was being developed.

SUMMARY OF MATERIAL FACTS

In the light most favorable to Plaintiffs, the evidence is as follows. Ridge View Estates was formed on or about August 2, 2000, for the purpose of developing a residential subdivision in Council Bluffs, Iowa. On or about November 11, 2000, HGM Associates was retained by Ridge View Estates to act as the contractor for all aspects of the development of the Subdivision, including surveying, designing, and construction administration.

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[1] During the time period in question, along with Comeau, Mark McKeever and Craig Knickrehm were members of Ridge View Estates, L.L.C. However, by the time this litigation was commenced, the record reflects Comeau was the only member. As the citizenship of a limited liability company is that of its members at the time the litigation is commenced, see, e.g., OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007), jurisdiction of this Court lies under 28 U.S.C. § 1332(a).

On April 11, 2001, HGM Associates employee Stanley Hrupek spoke with Craig Knickrehm of Ridge View Estates. In a conversation record prepared contemporaneously with the time the conversation took place, Hrupek wrote,

> I informed Craig that the city and I had concerns over settlement of the roadway and possible damages to sewer and water lines in the lower portion of Eagle Ridge Drive. In consulting with Terracon, it was determined to be in the best interest of all parties involved that boring be taken to determine how much settlement may oc [sic] with 30' of fill being placed. Terracon estimated $2,000 using a cone penetrometer. This information was relayed to Craig and he concurred in the dollar amount.

Pls.' App. 8. Hrupek sent Mark McKeever a fax dated April 23, 2001, which states, "With this trash situation, testing and clearing and grubbing questions I've had, should we give them another day to bid?" Pls.' App. 31.

On May 14, 2001, Ridge View Estates entered into an Agreement with Fahrenkrog & Co. wherein Fahrenkrog & Co. agreed to perform certain grading, erosion control, and fill work on the Subdivision in exchange for payment in the amount of $249,365.12. Terracon was hired by HGM Associates to perform field testing and inspection of the soil and the work being performed thereon and to provide information and opinions as to the degree of compaction and the material moisture condition of the soil.

Over the next four months, Terracon submitted to HGM Associates the results from multiple soil density testings that were done on the Subdivision's soil. Soil testing performed on June 20, June 21, June 26, July 27, August 21, August 28, August 31, and September 21, 2001, failed to meet the Subdivision's project specifications regarding the percentage of moisture content and dry weight compaction. HGM Associates' records reveal that on September 10, 2001, Comeau picked up a copy of a periodic cost estimate from HGM Associates to deliver to Knickrehm. This estimate showed that as of September 10, $104,301 in excavation and fill work

had been performed on the Subdivision, with the excavation and fill work listed as being 90 percent complete.

Plaintiffs purchased 2503 Eagle Ridge Drive, Lot 18, in the Subdivision, on June 27, 2002, from Ridge View Estates. Plaintiffs contend the lot was advertised by Ridge View Estates as a "Premier building lot." Heartland Properties real estate agent John H. Jerkovich of Council Bluffs signed the contract for the sale of the lot as "Paul Comeau by John H. Jerkovich per conversation." Defs.' App. Ex. 3, p. 4. The contract contained the following provision:

> SELLERS and BUYERS acknowledge that the SELLERS of real property have a legal duty to disclose MATERIAL DEFECTS of which the SELLERS have actual knowledge and which a reasonable inspection by the BUYERS would not reveal.

Defs.' App. Ex. 3, p. 3 ¶ 10B. Comeau stated in his sworn affidavit he had no knowledge before the filing of this lawsuit of the amount of fill dirt or of buried debris or concrete on Lot 18. Comeau further stated he did not make any representations to Plaintiffs to the contrary. Mr. Barr testified in his deposition Defendants[2] never mentioned that fill dirt had been added to Lot 18. Mr. Barr served as the general contractor for the building of his residence on Lot 18 and, with the assistance of some friends, poured the foundation of the house. Mr. Barr did not notice anything wrong with the soil or the lot at the time he was building his house. Plaintiffs moved into the completed house in June 2003.

In the spring or summer of 2004, Plaintiffs first started to notice problems with their house. In the northwest corner of Plaintiffs' basement, a crack had developed on the wall. Mr. Barr testified this crack concerned him because the crack started out a little bit larger than the

[2] "Defendants" as used in this order refers collectively to Ridge View Estates and L. Paul Comeau.

typical hairline crack one might find. Mr. Barr had the crack professionally repaired, but other cracks began to appear on a frequent basis. In time, the upstairs doors on the house could not be shut because they were "racked out of shape." Mr. Barr started to notice cracks throughout the north side of the house and eventually cracking in the garage.

Mr. Barr testified that in September or October 2005, the Thrasher Company came to the house to fix the structural problems. Mr. Barr stated that cracks were fixed, walls were repainted, and doors were pulled out and rehung. Repainting was also done on the outside of the home, and in addition some landscaping problems, such as torn-up sprinklers, sod, and rock, were repaired.

Mr. Barr testified that while Thrasher's workers conducted the repair work, he noticed the workers appeared to push through the soil with relative ease, prompting him to inquire of the workers their opinion of the dirt on the lot.[3] Mr. Barr then had Terracon come to the property to take soil samples. Terracon examined the subsurface conditions of the lot, which included taking three soil borings extending to depths of about fifteen to thirty-eight feet. Terracon summarized its findings from the subsurface examination in a Geotechnical Engineering Report dated December 5, 2005. With regard to fill depths, the report stated,

> We estimate existing fill depths up to about 30 feet in the front of the lot through the filled-in drainage valley, about 15 feet of fill below basement level near the northwest building corner, and about 4 feet of fill below basement level near the southwest building corner. We estimate about 12 feet of existing fill below the garage floor level near the southeast building corner.

Pls.' App. 39. With regard to the composition of the fill, the report stated,

> The fill soils were described with varying quantities of wood, asphalt, and concrete pieces. The drillers described significant quantities of debris;

[3] Mr. Barr did not indicate the workers' response.

> including pieces of plastic, glass, concrete, metal, styrofoam, and fabric from about 25 to 33 feet (elevation 1076 feet to 1068 feet) in Boring 101. Pieces of brick, glass, asphalt, wire, and chain-link fence were encountered in Boring 102 from about 13 to 18 feet (elevation 1076.5 to 1071.5). The debris was encountered within about the same range of elevation within the two borings completed near the northeast and northwest corners of the house. Debris, including asphalt shingles, glass, and chain-link fence is also exposed at the ground surface at the crest of the fill slope behind the house.
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> . . .
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> In our opinion, the house distress movement and settlement has been caused by consolidation settlement of the existing loosely to moderately compacted fill soils and settlement of this fill is likely to continue at a generally declining rate. At this time, the building settlement appears to be occurring where the fill depth is the greatest.

Pls.' App. 42. Thus, it was Terracon's opinion the amount and consistency of the fill dirt on the property caused the home's shifting and the resultant structural defects. Once Mr. Barr received the results from Terracon, he contacted Comeau and indicated there was a problem with the lot, and the fill dirt was not good. Comeau directed Mr. Barr to contact Comeau's lawyer, Rick Crowl. Crowl told Mr. Barr he had bought a piece of dirt from Comeau, and Comeau owed him nothing.

By early 2006, all of the repair work on Plaintiffs' home had been completed. Mr. Barr testified that by the spring of 2006, he started to notice structural problems with the home developing yet again. The wood floor to the entryway of the residence was starting to pull away, and the front door of the residence was starting to stick. The front stoop on the outside of the house was starting to separate from the siding of the house in different places. Mr. Barr testified that if he had known Lot 18 contained thirty feet of fill dirt, he would never have built a home on the property out of a concern for safety.

On April 21, 2006, Plaintiffs filed the present lawsuit, alleging breach of contract, fraud, negligent misrepresentation, and alter ego liability against Defendants. On May 16, 2006, Defendants filed an Answer to the Complaint, generally denying the allegations of the Complaint and asserting as affirmative defenses that the Court lacks subject matter jurisdiction over Plaintiffs' claims; the sole proximate cause of Plaintiffs' damages, if any, was the conduct of a third-party or a condition not under the control of Defendants; Plaintiffs assumed the risk; Plaintiffs failed to mitigate their damages; and Plaintiffs themselves were negligent. On November 22, 2006, Defendants filed a Third-Party Complaint, seeking contribution or indemnification from Third-Party Defendant HGM Associates in the event Plaintiffs should recover from Defendants. On December 19, 2006, HGM Associates filed an Answer to the Third-Party Complaint, generally denying the allegations set forth in the Third-Party Complaint and setting forth various affirmative defenses.

On July 5, 2007, Defendants filed an Amended Third-Party Complaint, adding Third-Party Defendants Terracon and Fahrenkrog & Co. Defendants asserted in the Amended Third-Party Complaint that to the extent Lot 18 had any defects or was in any manner improperly prepared for construction, such defects and/or conditions were the responsibility and/or created by the actions or negligence of HGM Associates, Terracon, and Fahrenkrog & Co. HGM Associates and Terracon have answered the Amended Third-Party Complaint and generally deny the allegations set forth against them. Third-Party Defendant Fahrenkrog & Co. has not yet appeared in this action.[4]

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[4] There is brief commentary from counsel during the deposition of Ricky Barr that indicates Mr. Warren Fahrenkrog may in fact be deceased. Defs.' App. Ex. 5, 36:16-21.

On April 16, 2007, Defendants filed a Motion for Summary Judgment, claiming they are entitled to judgment as a matter of law because there are no genuine issues of material fact. Plaintiffs have resisted the Motion for Summary Judgment, arguing genuine issues of fact exist that preclude the entry of summary judgment.

APPLICABLE LAW AND DISCUSSION

I. Summary Judgment Standard

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." Swierkiewicz v. Soreman, 534 U.S. 506, 514 (2002). Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it "must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006) (quotation omitted). However, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," judgment should be rendered. Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." Heisler v. Metro. Council, 339 F.3d 622, 631 (8th Cir. 2003) (quoting Celotex, 477 U.S. at 323). "If the moving party has carried its burden, the non-moving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial." Winthrop Resources Corp. v. Eaton Hydraulics, Inc., 361 F.3d 465, 468 (8th Cir. 2004). The court gives the nonmoving party the benefit of all reasonable inferences and views the facts

in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000).

"Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Shelton v. ContiGroup Co., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991). In light of these standards, the Court considers the present motion.

II. Breach of Contract Claims

A. Breach of Contract

Plaintiffs contend Defendants failed to convey the property free of material defects, failed to disclose information they had concerning the material defects in the property, concealed knowledge they possessed concerning the defective condition of the property, and failed to develop and construct the property in a good and workmanlike manner suitable for the construction of a residence, all in violation of the real estate contract signed by the parties.

In diversity cases, substantive state law applies. Schwan's Sales Enters., Inc. v. SIG Pack, Inc., 476 F.3d 594, 595 (8th Cir. 2007). The parties do not dispute that Iowa law applies to this lawsuit.

> In a breach of contract claim, the claimant must prove (1) the existence of a contract, (2) the terms and conditions of the contract, (3) [they have] performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) damages as a result of the breach.

Voigt v. Hiawatha Bank & Trust, No. 05-0702, 2006 WL 229011, at *2 (Iowa Ct. App. 2006) (citing Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998)).

Defendants concede Plaintiffs have satisfied the first three elements of the breach of contract claim but argue there is no proof they breached the contract. Defendants admitted at hearing there is no dispute there is fill dirt consisting of debris located on Plaintiffs' property, although Defendants argue there is no evidence the fill dirt represented a material defect to the lot. Defendants assert they hired HGM Associates for the purpose of developing and constructing the property and did not participate in the day-to-day construction responsibilities but relied upon HGM Associates for this responsibility due to its experience and expertise in the development of similar subdivisions. Defendants also assert that Comeau stated in his affidavit he had no knowledge or information regarding the amount of fill or alleged debris buried on Lot 18 prior to the lawsuit being filed.

Defendants argue Plaintiffs cannot point to any representations made to the Plaintiffs regarding the lot. Defendants further point out Mr. Barr denied having any conversations with anyone at Ridge View Estates about the lot when he was building his home. Defendants argue there is no evidence they failed to disclose or concealed the knowledge of any defective condition; rather, the evidence shows Defendants had no knowledge of any defective condition and therefore could not reasonably have disclosed the same. Plaintiffs argue Defendants breached section 10B of the contract of sale, which pertained to Ridge View Estates' obligation to disclose material defects in the property.

> [O]ne who sells real estate knowing of a soil defect, patent to him, latent to the purchaser, is required to disclose such defect. It is evident such defect is material to the sale and will substantially affect the structure on the land or to be constructed on the land. The doctrine is sound and we adopt it.

Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965) (where the seller of a duplex constructed on a defectively filled lot failed to disclose the defective subsoil condition, the court concluded the subsoil defect was material).

Plaintiffs assert that prior to the fill dirt being placed on the lot, the lot had ravines and gullies, which certainly would have been visible to Defendants when they acquired the property for development. Defendants attempt to argue they had no knowledge of the fill dirt on the land and argued at hearing that approximately ten to fifteen feet of fill dirt was brought in after HGM Associates finished the grading work, and there is no evidence Defendants placed this fill dirt on the property. The Terracon report indicates the existing ground surface elevations at the northeast and northwest building corners are about nine feet and fifteen feet, respectively, higher than the proposed contours shown on the 2001 Erosion Control Plan. This does not automatically lead to the conclusion that nine to fifteen feet of fill dirt were placed on the lot without Defendants' knowledge. This information merely suggests the contours of the 2001 Erosion Control Plan were not adhered to.

There is evidence the subcontractors doing the actual grading and excavation work on the land provided Defendants with invoices, and those invoices evidenced a significant amount of funds to "Excavation & Fill." HGM Associates employee Stan Hrupek created a conversation record dated April 11, 2001, which memorialized a conversation he had with Craig Knickrehm, who at the time was a joint member in Ridge View Estates. This conversation record states in relevant part, "In consulting with Terracon, it was determined to be in the best interest of all parties involved that borings be taken to determine how much settlement may oc [sic] with 30' of fill being placed." Pls.' App. 8. The entirety of this conversation record signals Knickrehm and Hrupek discussed the settlement of fill dirt and the concern regarding how thirty feet of fill

dirt would settle. This evidence suggests Ridge View Estates was aware of the presence of fill dirt on the property at levels of up to thirty feet. The April 23, 2001, fax cover letter from Hrupek to McKeever referencing "this trash situation" leads to the inference McKeever had knowledge of the "trash situation" to which Hrupek referred. The evidence suggests Defendants had knowledge of the presence of fill dirt being placed on the land, and the April 11, 2001, conversation record shows Knickrehm was aware some of this fill was placed in one particular location creating a depth of up to thirty feet. Plaintiffs have generated an issue of fact for the jury regarding whether the failure to disclose the presence of the fill dirt on Lot 18 constituted a breach of the express contractual obligation to disclose to Plaintiffs any material defects that existed on the property.

Defendants argue there is no evidence the debris in the fill dirt is what caused the structural problems in Plaintiffs' home and allege the house was simply not constructed properly. The record shows Plaintiffs have incurred expenses for extensive repair work, done over the course of two years, to both the interior and exterior of their home, and the Terracon report opines the structural damage was caused by the settlement and shifting of the debris in the fill dirt. Plaintiffs have set forth sufficient evidence to generate a genuine issue of material fact regarding whether the damages they allege they have suffered were caused by the settlement of the fill dirt.

The Court concludes Plaintiffs have set forth sufficient evidence on their breach of contract claim to generate an issue of fact for a jury, and therefore summary judgment is not appropriate with respect to the breach of contract claim. Defendants' Motion for Summary Judgment is denied as it pertains to the breach of contract claim.

B. Breach of Implied Warranty

Plaintiffs next argue Defendants breached an implied warranty by having the land modified and by having fill added, which made the land unsuitable for building a home. Defendants contend there is no case law to support a claim for breach of express or implied warranty for real estate for a parcel of undeveloped land. Plaintiffs acknowledge the Iowa Supreme Court has not yet specifically decided whether an implied warranty exists in the sale of an undeveloped piece of land, thus this Court is required to predict how the Iowa Supreme Court would rule on the issue. Midwest Oilseeds, Inc. v. Limagrain Genetics Corp., 387 F.3d 705, 715 (8th Cir. 2004) ("As the Iowa Supreme Court has not directly answered the question, we must predict how that Court would decide this unresolved issue of state law, using decisions from other jurisdictions as aids.").

While arguing the issue, Plaintiffs have not specifically pleaded a claim for breach of implied warranty and have not moved to amend their Complaint to include such a claim. There are no allegations in the Complaint to put the Defendants on notice Plaintiffs were seeking recovery under a theory of breach of implied warranty. At this stage of the litigation, where the case does not hinge on a claim of breach of implied warranty, and the Complaint has not been amended to include such a claim, the Court finds this claim is not properly at issue and deems it premature to go through an analysis regarding whether the Iowa Supreme Court would adopt a theory of breach of implied warranty in the sale of a parcel of real estate.

III. Fraud

In order to succeed on a claim of fraud, Plaintiffs must show "(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury

and damage." Robinson v. Perpetual Servs. Corp., 412 N.W.2d 562, 565 (Iowa 1987) (citing Cornell v. Wunschel, 408 N.W.2d 369, 374 (Iowa 1987)).

Defendants contend there is no evidence of any representations made to the Plaintiffs, and if no material misrepresentations with intent to deceive were made to Plaintiffs, Plaintiffs cannot prove their fraud claim. Defendants further assert they did not have any knowledge of the amount of fill dirt being brought into the property or that there was any debris or trash buried underneath this particular lot, and thus without the requisite knowledge, there can be no scienter on the part of the Defendants nor an intent to deceive.

The record shows Defendants represented Lot 18 as sound and suitable for building a residence. There is no dispute Defendant Ridge View Estates never informed Plaintiffs the lot contained fill dirt. Thus, Plaintiffs have established Defendant Ridge View Estates made a representation the lot was suitable for the construction of a residence. After boring the property and obtaining soil samples, Terracon provided a professional engineering and scientific opinion that the amount and quality of the fill dirt was what caused the significant settlement to occur, with such settlement being the cause of the home's movement and distress. For summary judgment purposes, Plaintiffs have produced sufficient evidence to establish Defendant Ridge View Estates falsely represented Lot 18 as being suitable for building. As noted above, subsoil defects are material in the sale of real estate. "[P]rior knowledge of the defective soil condition is evidence of scienter and intent to deceive." Loghry, 132 N.W.2d at 419. As the Court concluded above, Plaintiffs have provided sufficient evidence to generate a genuine issue of material fact regarding whether Defendants had prior knowledge of the fill dirt. Building their home on the lot creates a strong inference Plaintiffs relied upon the representation of Defendant Ridge View Estates that the lot was suitable for building. For the same reasons set forth on the

contract claim, Plaintiffs have set forth sufficient evidence to generate a genuine issue of material fact regarding whether the alleged damages were caused by the settlement of the fill dirt. Defendants' Motion for Summary Judgment, as it pertains to the fraud claim, must therefore be denied.

IV. Negligent Misrepresentation

Plaintiffs contend Defendants falsely and negligently represented to them that Lot 18 was suitable for the construction of a residence. Defendants argue the sale of the lot was through a real estate agent and thus an arm's-length adversarial transaction. Defendants assert Plaintiffs had no personal contact with the Defendants at the time the lot was purchased, and no representations were made to Plaintiffs at the time the lot was purchased.

> The elements for the tort of negligent misrepresentation are: (1) One 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. (2) ... [T]he liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Barske v. Rockwell Int'l Corp., 514 N.W.2d 917, 924 (Iowa 1994); see also Beeck v. Kapalis, 302 N.W.2d 90, 96-97 (Iowa 1981). "In Iowa liability for negligent misrepresentation arises only when the information is provided by persons in the business or profession of supplying information to others." Boone County Cmty. Credit Union v. Masel, No. 02-0822, 2003 WL 1050344, at *2 (Iowa Ct. App. 2003). "Absent a special relationship giving rise to a duty of

care, a [claimant] cannot establish negligent misrepresentation." Jensen v. Sattler, 696 N.W.2d 582, 588 (Iowa 2005).

> This is because a person in the profession of supplying information for the guidance of others is acting in an advisory capacity and is manifestly aware of how the information will be used, and intends to supply it for that purpose. Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 124-25 (Iowa 2001).

Boone County Cmty. Credit Union, 2003 WL 1050344, at *2. "Thus, when deciding whether the tort of negligent misrepresentation imposes a duty of care in a particular case, we distinguish between those transactions where a defendant is in the business or profession of supplying information to others from those transactions that are arm's length and adversarial." Sain, 626 N.W.2d at 124. The requisite duty of care is found when the supplier is in the profession of supplying information in an advisory nature in a nonadversarial manner, the supplier of the information knows the recipient of the information intends to rely on the information, and the information is not provided incidental to some other transaction being provided. Id. at 126 (finding a high school guidance counselor is a person in the profession of supplying information to others and thus has a duty of care); Fry v. Mount, 554 N.W.2d 263, 266 (Iowa 1996) (noting the duty of care has been applied to accountants and investment brokers); Ryan v. Kanne, 170 N.W.2d 395, 402-403 (Iowa 1969) (accountants owe a duty of care). Whether a duty of care exists is an issue of law for resolution by the Court. McLeodUSA Telecomm. Servs., Inc. v. Qwest Corp., 469 F. Supp. 2d 677, 694 (N.D. Iowa 2007) (finding the court determines as a matter of law whether a party was in the business of supplying information); Fry, 554 N.W.2d at 265 (holding whether a duty of care exists is always a question of law for the court to decide). Defendants contend that unlike an accountant or financial advisor, they are not in the business of supplying information.

The Iowa Supreme Court has previously found the seller in a real estate transaction is not in the business or profession of supplying information to the buyer of the property. Jensen, 696 N.W.2d at 588. In Jensen, plaintiff Jensen brought suit against Sattler for failing to disclose defects, such as water leakage and defective wiring, in the home Jensen purchased from Sattler. Id. at 584. In affirming the trial court's dismissal of Jensen's negligent misrepresentation claim, the Iowa Supreme Court concluded the sale of the house was an arm's-length and adversarial transaction, and absent a "special relationship giving rise to a duty of care, a plaintiff cannot establish negligent misrepresentation." Id. at 588.

Plaintiffs argue Jensen is distinguishable from the present case because here the Defendants, in connection with their role as developers of the Subdivision, reviewed and approved the plans for Plaintiffs' house. Plaintiffs contend this distinction should create a jury question regarding whether the review and approval of the plans created the type of special relationship that can support a negligent misrepresentation claim. Defendants point out this approval of the plans was merely in the context of a covenants meeting for the Subdivision.

In Jensen, the evidence showed defendant James Sattler owned Jim Sattler Construction Company, Inc., the company that built the house at issue, and the Jensens were aware Sattler's company was the builder of the home and that Sattler had been the job-site supervisor. Id. at 583. As the builder of the home at issue in Jensen, therefore, Sattler would have most likely reviewed and approved the plans for the home. In the present case, review and approval of Plaintiffs' plans for the lot was done in the course of Defendants' business of developing real estate, which is not a business akin to one in which the primary purpose of the business is providing information to others in an advisory, nonadversarial manner. The record on this motion does not provide an adequate basis upon which to determine Defendants occupied some

heightened relationship with the Plaintiffs that would support a special duty. Thus, the Court disagrees that the Jensen case is distinguishable.

Plaintiffs contend that because Comeau is an attorney, the requisite duty of care exists. There is no evidence in the record to suggest any representations Comeau may have made were made in his capacity as an attorney. A person in the business or profession of providing information is only exposed to the tort of negligent misrepresentation for information provided as they are functioning in that professional capacity.

The record shows the sale of Lot 18 to Plaintiffs was a typical arm's-length, adversarial real estate transaction. Defendants are not in the business or profession of providing information but instead are in the business or profession of selling and developing real estate. The Court concludes the requisite duty of care does not exist, and thus Plaintiffs' claim of negligent misrepresentation must fail as a matter of law.

In addition, Plaintiffs are not alleging the information Defendants supplied harmed a transaction with a third party but instead harmed their transaction with Defendants. "[T]he tort does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant." Sain, 626 N.W.2d at 126 (citing Fry, 554 N.W.2d at 265-266); see also Madren v. Super Valu, Inc., 183 F. Supp. 2d 1138, 1144 (S.D. Iowa 2002). Even if the Court were to find the requisite duty of care existed, Plaintiffs are not alleging that Defendants' alleged misrepresentation affected Plaintiffs' transaction with a third party, but rather the alleged misrepresentation affected the transaction with Defendants themselves; therefore, the tort would not apply. For these reasons, Defendants' Motion for Summary Judgment with respect to Plaintiffs' claim of negligent misrepresentation must be granted.

V. Alter Ego Liability Against All Defendants

Plaintiffs contend there is a unity of interest and ownership such that the separate personalities of Ridge View Estates and Comeau no longer existed, and Ridge View Estates' corporate veil should be pierced to hold Comeau personally liable for the actions of Ridge View Estates.

> Veil piercing is appropriate where the corporation is a mere shell, serves no legitimate business purpose, and is used primarily as an intermediary to perpetuate fraud or promote injustice. Briggs Transp. Co. v. Starr Sale Co., 262 N.W.2d 805, 810 (Iowa 1978). The burden to prove exceptional circumstances is on the party seeking to pierce the corporate veil. In re Marriage of Ballstaedt, 606 N.W.2d 345, 349 (Iowa 2000).

Moyle v. Elliott Aviation, Inc., No. 05-0406, 2006 WL 468764, *3 (Iowa Ct. App. 2006).

Defendants contend Ridge View Estates was formed and established to develop land and sell lots for a residential subdivision and that Plaintiffs bought Lot 18 from the corporation. Defendants assert the corporation is not used to promote fraud or illegality and is not merely a sham. Defendants further argue the corporation is not undercapitalized, and Plaintiffs cannot prove otherwise. Defendants state Ridge View Estates maintains its own separate books and financial records, Comeau did not intermingle any of his personal assets with the company and did not pay for any of his personal obligations out of company finances, and Plaintiffs have no evidence to the contrary. Defendants contend corporate formalities were followed by the corporation and Comeau. Defendants argue none of the factors necessary to pierce the corporate veil have been established, and Plaintiffs cannot prove any of the factors necessary to allow Comeau to be sued personally, and therefore Plaintiffs' claim as to alter-ego liability should fail as a matter of law. Plaintiffs resist summary judgment, arguing Defendants have merely offered

conclusory assertions in support of their argument that no genuine issues of material fact exist with respect to the alter ego liability claim.

The basis of Plaintiffs' argument that Defendants' Motion for Summary Judgment must fail with respect to the alter ego liability claim is ironic given Plaintiffs' own failure to support their allegations with anything more than conclusory allegations. "A plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor." Davidson & Assocs. v. Jung, 422 F.3d 630, 638 (8th Cir. 2005). Other than Plaintiffs' self-serving allegations, there is absolutely no evidence in the record to substantiate Plaintiffs' claims that Ridge View Estates was a mere shell or a sham without adequate capital and/or adequate assets, Ridge View Estates failed to follow the formalities required by law, Comeau used the corporation as a device to avoid individual liability, Ridge View Estates was the alter ego of Comeau, or there otherwise was a unity of interest and ownership such that the separate personalities of Comeau and Ridge View Estates no longer exist. Plaintiffs have failed to generate a genuine issue of material fact regarding the alter ego liability claim; therefore, Defendants are entitled to judgment as a matter of law with regard to Plaintiffs' alter ego liability claim. Because Comeau cannot be held personally liable for any alleged breach of contract or fraud due to the actions of Ridge View Estates, Defendant/Third-Party Plaintiff L. Paul Comeau shall be dismissed from the case.

CONCLUSION

Genuine issues of material fact exist that preclude the grant of Defendants' Motion for Summary Judgment on Plaintiffs' claims of breach of contract and fraud. The motion is granted on the remaining bases. As a matter of law, Plaintiffs' claim of negligent misrepresentation must be dismissed due to the lack of the requisite duty of care and the inapplicability of the tort given

the circumstances presented in this case. Additionally, Plaintiffs have failed to offer anything more than unsupported conclusory allegations to establish their claim of alter ego liability; therefore, the Motion for Summary Judgment on the alter ego liability claim is granted, and the claims against Defendant/Third-Party Plaintiff L. Paul Comeau are **dismissed**.

Defendant's Motion for Summary Judgment (Clerk's No. 51) is **granted in part and denied in part.**

IT IS SO ORDERED.

Dated this 19th day of September, 2007.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT