

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-158

JULY TERM, 2020

Antony Sutton et al.	}	APPEALED FROM:
	}	
v.	}	Superior Court, Lamoille Unit,
	}	Civil Division
Vermont Regional Center et al.	}	
	}	DOCKET NO. 100-5-17 Lecv

In the above-entitled cause, the Clerk will enter:

Following our decision in this case, pursuant to Vermont Rule of Appellate Procedure 40, the State filed a motion for reargument urging the Court to affirm the trial court’s dismissal of plaintiffs’ claims of negligence and negligent misrepresentation against the Vermont Agency of Commerce and Community Development (ACCD). The State argued that 1) plaintiffs waived their negligent-misrepresentation claim on appeal, and 2) both the negligence claim and the negligent-misrepresentation claim arose from misrepresentations and are thus barred by sovereign immunity.

We denied the motion to reargue as to the negligence claim, and allowed the motion for reargument as to the negligent-misrepresentation claim. In particular, we requested supplemental briefing limited to the question of whether 12 V.S.A. § 5601(e)(6), which excepts from the State’s waiver of sovereign immunity claims “arising out of alleged assault, battery, abuse of process, misrepresentation, deceit, fraud, or interference with contractual rights,” applies to negligent-misrepresentation claims.

The State filed supplemental briefing expanding on its argument that the negligent-misrepresentation claim against ACCD is exempted from the State’s waiver of sovereign immunity under 12 V.S.A. § 5601(e)(6). In its supplemental briefing, the State also renewed its argument that plaintiffs’ negligence claim arises from misrepresentations and therefore is also barred by sovereign immunity.

In response, plaintiffs moved to dismiss “Count 11”—the negligent-misrepresentation claim—from their appeal. See V.R.A.P. 42(a)(2). Plaintiffs explained that: 1) they concede that 12 V.S.A. § 5601(e)(6) applies to their negligent-misrepresentation claim; 2) there is no available insurance for any such claims; 3) the negligent-misrepresentation claim is not the principal thrust of their claims; and 4) they want to proceed efficiently without unnecessary briefing.

The State supports dismissal of the negligent-misrepresentation claim (Count 11), and requests that the Court’s opinion be modified accordingly. The State also reiterates its claim that the surviving negligence claim is also a barred misrepresentation claim.

Pursuant to Rule 42(a)(2), we grant plaintiffs’ motion to dismiss their appeal as to Count 11, the negligent-misrepresentation claim. This leaves the trial court’s dismissal of that count in place. In granting this motion, we do not accept plaintiffs’ concession of error, and do not reach the question of whether 12 V.S.A. § 5601(e) applies to plaintiffs’ claim for negligent misrepresentation against ACCD. That claim is no longer before us, and any analysis of the State’s sovereign-immunity defense to that count would be an advisory opinion. We accordingly amend our decision to reflect the deletion of the negligent-misrepresentation claim against ACCD and the associated analysis.*

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

* We recognize that in its supplemental briefing on reargument, the State has continued to argue that plaintiffs’ other negligence claim, in Count 5, should also be dismissed on the basis that the undertaking that potentially gave rise to ACCD’s duty of care arose from misrepresentations. We previously denied reargument on this count, and we decline to consider this argument which was first raised in the State’s motion for reargument. See Champlain Val. Exposition, Inc. v. Village of Essex Junction, 131 Vt. 449, 457, 309 A.2d 25, 30 (1973) (declining to “re-examine an issue already fully decided using a new theory not presented in the briefs upon the original argument”); see also Wolfe v. Yudichak, 153 Vt. 235, 256, 571 A.2d 592, 604 (1989) (same).