IN THE COURT OF APPEALS OF IOWA

No. 1-417 / 10-1172
Filed August 10, 2011

KRISTIN L. ROWEDDER, as Conservator of GARY KRAL,
Plaintiff-Appellee,

vs.

MICHAEL ANDERSON, RICHARD F. ROSENER, MARK HELKENN, RAYMOND HELKENN, MCCORD INSURANCE & REAL ESTATE CORP., BERNEIL PREUL, and ROGER PREUL,
Defendants-Appellants,

and

COMSTOCK BROTHERS, MERRITT DANIEL COMSTOCK, GEARY STEVEN COMSTOCK, DOUGLAS E. COMSTOCK, and D.R. FRANCK,
Defendants.

Appeal from the Iowa District Court for Crawford County, Jeffrey A. Neary, Judge.

Defendants appeal from the district court's award of sanctions against the plaintiff's attorney and its denial of their motions for judgment notwithstanding the verdict and new trial. **AFFIRMED.**

Brandon R. Tomjack of Baird Holm, L.L.P., Omaha, Nebraska, for appellant Anderson.

Michael P. Jacobs of Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, for appellant Rosener.

Earl G. Greene, III of Woodke & Gibbons, P.C., L.L.O., Omaha, Nebraska, for appellants Helkenns.

Sean A. Minahan, Patrick G. Vipond, and Gage R. Cobb of Lamson, Dugan & Murray, L.L.P., Omaha, Nebraska, for appellants McCord Insurance and Preuls.

Robert J. Laubenthal and Marvin O. Kieckhafer of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellee Rowedder.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

This second appeal arises from the district court's award of sanctions against the plaintiff's attorney and its denial of the motions for directed verdict, for judgment notwithstanding the verdict, and for new trial made by defendants-appellants McCord Insurance and Real Estate Corp. (McCord) and Berneil and Roger Preul, following a jury verdict in favor of the plaintiff in her breach-of-fiduciary-duty/professional-malpractice suit. McCord and the Preuls contend the court erred in denying their motions because the plaintiff failed to prove they had a duty, they breached a duty, or they proximately caused any damages. Defendants-appellants Anderson, Rosener, and the Helkenns contend the district court erred in limiting the sanction amount to $1000 and in ordering that it be paid to the Crawford County jury and witness fund instead of to them as the offended parties. We affirm.

I. Background.

Gary Kral was the executor of his father's estate and sole heir. From late 2003 through 2005, Kral, as executor, contacted Roger Preul about selling forty-acre tracts of land owned by his father's estate. Kral said he wanted to sell the land at $2000 per acre, the value of the land in the estate inventory, to avoid capital gains taxes. Preul facilitated the sale of four tracts of land to Anderson, the Comstock Brothers, Rosener, and Raymond Helkenn.

In August of 2005, Kral met with attorney Bradley Nelson about evicting a tenant, Mark Helkenn, Raymond's brother, from a rental house Kral owned. Nelson felt Kral was low functioning mentally and did not have the mental ability

to take care of his own financial matters. In delving further into Kral's bank records, Nelson found checks payable to individuals that appeared out of the ordinary to him and totaled over $200,000. In talking with some of Kral's acquaintances, including Roger Preul, Nelson was convinced people were taking advantage of Kral and a number of people knew this was happening. Nelson sought to have his office manager, Kris Rowedder, appointed as conservator for Kral. She was appointed in September of 2005.

In May of 2006 Rowedder, as conservator for Kral, filed suit against the buyers of the four parcels of land, Mark Helkenn, the Preuls and their realty company, and D.R. Franck, attorney for the estate of Kral's father. The petition alleged fraud against the buyers, the Preuls, and Frank. It also alleged "certain of the defendants"[1] conspired to divest Kral of his assets through the real estate purchases. It further alleged the Preuls and Franck were professionally negligent and breached a fiduciary duty to Kral in facilitating the four sales. The suit sought to void the four sales and to recover damages.

In September of 2006, when plaintiff refused Raymond Helkenn's offer to return the forty acres he purchased for the purchase price, the Helkenns filed a motion for sanctions. Discovery proceeded. Several defendants filed motions to compel, citing the plaintiff's responses to interrogatories asking for the factual basis for the fraud and conspiracy claims.[2] Following a hearing, the court

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[1] The court sustained motions to dismiss by various defendants, noting the petition was too vague, but allowed the plaintiff to recast the allegations.

[2] Plaintiff's responses to defendants' interrogatories stated, "Because discovery has not been completed, Plaintiff cannot provide specific answers . . . at this time."

ordered the plaintiff to answer all the discovery requests by January 20, 2007, or be subject to sanctions. The court noted:

> All of the defendants request that the court order the plaintiff to simply tell them why they have been sued.
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> While it appears to the court that perhaps the reason or lack of a reason for the plaintiff's claim of liability will be more clear at the close of discovery, certainly Plaintiff must have had some evidence of a conspiracy or some evidence of fraud before [she] filed this lawsuit.
>
> Defendants are requesting what evidence the plaintiff ha[s] and plaintiff [is] simply saying [she doesn't] know of any at this time. That constitutes a fishing expedition, which the Rules simply do not allow.

The plaintiff did not comply with the court's order, but just before the deadline sought an extension of time.

From November of 2006 through January of 2007, defendants Anderson, Rosener, and the Comstock brothers filed motions for summary judgment, which the plaintiff resisted. On March 1, 2007, the court issued its ruling on the motions, granting summary judgment in favor of these defendants. The court found:

> At the time they were served Interrogatories and Requests for Production of Documents many months ago, Plaintiffs apparently had no evidence to support the allegations in the petition against these defendants. Despite a Motion to Compel, the plaintiffs were still not able to produce any such evidence. After the court's order of December 21, 2006, the plaintiffs were unable to produce any such evidence. When asked directly at both the January 29 hearing and the February 23 hearing, "Where is your evidence?" neither of plaintiff's attorneys were able to provide any whatsoever.
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> . . . .
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> Plaintiffs have not only been challenged to produce evidence of such a tort by the court's rulings, but have been challenged to do so in open court, in the court's chambers, at least three times now. The court cannot help but believe if this evidence existed, the court would have seen it by now.

From April through August of 2007, defendants Franck, McCord and the Preuls, and the Helkenns filed motions for summary judgment, which the court granted. In the December 24, 2007, order granting the Helkenn's motion for summary judgment, the court noted it could not find "a scintilla of evidence" of fraud or conspiracy on the part of the Helkenns.

In January of 2008 the Helkenns requested a hearing on their earlier motion for sanctions and defendants Anderson, Rosener and the Comstock brothers filed motions for sanctions as well. On January 22 the plaintiff appealed from all the district court orders granting summary judgment. In February the court stayed all motions before it, pending the disposition of the plaintiff's appeal.

In July of 2008 all the defendants except the Helkenns moved to dismiss the plaintiff's appeal. The supreme court granted the motions of defendants Anderson, Rosener, the Comstock brothers, and Franck and transferred the remaining issues to this court.

Following oral arguments, this court affirmed the district court's grant of summary judgment in favor of the Helkenns, but reversed the grant of summary judgment as to defendants McCord and the Preuls. *Rowedder v. Anderson*, No. 08-0117 (Iowa Ct. App. May 29, 2009). The supreme court denied further review on July 28. Following the appeal, Rosener, Anderson, and the Helkenns renewed their motions for sanctions. The plaintiff resisted all the motions.

The motions for sanctions came on for hearing on March 19, 2010. In June the court issued its order for sanctions. The court briefly recited the history of the proceedings, how all the defendants except McCord and the Preuls were

successful in obtaining summary judgment and having it upheld on appeal. It noted the "file reflects that the only actionable claims that ever existed were those against the remaining Defendants, namely McCord Insurance and Real Estate and the Preuls." The court further stated:

> While it is understandable that at first blush there would appear to have been a potential cause of action against each of the originally named Defendants, it should have been clear at the outset of the case's institution after further investigation that there was no basis for a cause of action against any other Defendant but McCord Insurance and Real Estate and the Preuls. This Court concludes that legal counsel for the Plaintiff in naming as Defendants all of the identified Defendants with the exception of McCord Insurance and Real Estate and Roger and Berneil Preul was ill-advised and not objectively reasonable under the circumstances. Accordingly, counsel for the Plaintiff Robert Laubenthal is subject to the imposition of sanctions.
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> This Court does not find that Mr. Laubenthal's actions were taken in bad faith, nor were his actions vindictive or willful insofar as he acted with evil intent. Mr. Laubenthal's actions suggest he was zealously representing his client, which caused his objectivity to be clouded due to his desire to make things right for his client, Gary Kral. This was clear by his advocacy portrayed at trial.
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> The Court was not presented with any prior history of sanctions having been imposed on Mr. Laubenthal nor indications of similar behavior left unsanctioned. The Court was presented with itemizations of attorney fees incurred by the various Defendants seeking sanctions, but the Court was not presented with any evidence or argument pertinent to the issue of Mr. Laubenthal's ability to pay any sanctions that may be imposed by the Court. The Court was not presented with any indication of the parties' insurance coverage for their legal fees and was left with the impression that each party who sought sanctions personally paid their legal fees.
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> Nevertheless, given the entire picture of this case and the arguments made by all involved, sanctions should be imposed by the Court on Mr. Laubenthal as lead counsel named in the Petition filed here. The Court recognizes that the mere imposition of sanctions has in and of itself an impact of significant deterrence upon the person upon which the sanctions are imposed. Further, the Court finds that it would be inappropriate under the facts here to require the payment of the Defendants' attorneys' fees as a sanction since the mere payment of fees and costs, while certainly

> a deterrent, far exceeds that which is necessary to attain the goals of the imposition of sanctions. Here, the Court is satisfied that a court-ordered sanction of $1000 along with the stigma attached to the mere imposition of sanctions is sufficient sanction.

Defendants Anderson, Rosener, and the Helkenns appeal from this ruling.

On March 23, 2010, a jury trial commenced on the plaintiff's claims of breach of fiduciary duty and professional negligence against McCord and the Preuls. At the close of the plaintiff's case and at the close of all evidence defendants moved for a directed verdict, contending the plaintiff failed to present evidence concerning negligence, breach of fiduciary duty, professional negligence, and causation. They argued there was no evidence Kral would have sold any of the parcels of land for more than $2000 per acre. The court denied the first motion and reserved ruling on the second motion until after the jury's verdict.[3]

On April 1 the jury found the defendants did not breach any fiduciary duty to Kral concerning the sale of the four parcels of farmland. The jury found the defendants negligent in the sales to Rosener and Helkenn and awarded the plaintiff damages in the amount of $15,400 for the Rosener sale. The jury did not award damages for the Helkenn sale. The plaintiff filed a motion for new trial. The defendants filed a motion for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial concerning the jury's verdict related to the Rosener sale. In June, the court denied the plaintiff's and the defendants' motions. The defendants appeal. Plaintiff filed a notice of cross-appeal, but failed to make any

[3] It does not appear that the court ever expressly ruled on the motion.

argument in her brief in support of such an appeal; therefore, plaintiff's cross-appeal is dismissed as waived. *See* Iowa Rs. App. P. 6.903(2)(*g*)(3), 6.903(5).

II. Scope and Standards of Review.

We review a district court's ruling on a motion for directed verdict and for judgment notwithstanding the verdict for correction of errors at law. *Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). Our review of both motions is limited to the grounds raised in the motion for a directed verdict. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 845 (Iowa 2010). Our role is to decide whether there was sufficient evidence to justify submitting the case to the jury when the evidence is viewed in the light most favorable to the nonmoving party. *Van Sickle Const.*, 783 N.W.2d at 687. "Simply put, we ask, was there sufficient evidence to generate a jury question?" *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990).

Review of a ruling on a motion for new trial depends on the grounds raised in the motion. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007). If the motion was based on a legal question, like it is here, our review is for errors at law. *Id.* If a jury's verdict is not supported by sufficient evidence and fails to effectuate substantial justice, a new trial may be ordered. *Id.* at 850.

Review of a district court's decision whether to impose sanctions is for an abuse of discretion. *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009). The district court's findings of fact are binding on us if supported by substantial evidence. *Id.*

III. Merits.

A. Sanctions. Anderson, Rosener, and the Helkenns all challenge the district court's award of sanctions, claiming the court erred in the amount of the sanction imposed and in ordering that it be paid to the county jury and witness fund instead of to them to help compensate them for their attorney fees. The record shows these appellants incurred in excess of $70,000 in attorney fees defending themselves against claims that lacked any basis in fact.

1. Amount of the sanction. The district court determined a sanction of $1000 "along with the stigma attached to the mere imposition of sanctions is sufficient sanction." Appellants compare the actions of counsel in this case with those in *Barnhill*, where the district court ordered a sanction of $25,000, and *Everly*, where the district court ordered a sanction of $47,403.87, and contend counsel's actions here were more egregious and require a greater sanction.

Iowa Rule of Civil Procedure 1.413(1)[4] provides, in relevant part:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. . . . If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

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[4] The language of Iowa Code section 619.19 (2005) is identical.

The purpose of imposing monetary sanctions is to (1) deter attorneys from filing frivolous lawsuits, and (2) avoid the general cost to the judicial system in terms of wasted time and money. *Barnhill*, 765 N.W.2d at 276. In *Barnhill*, the Iowa Supreme Court instructed district courts to consider the four-factor test articulated by the Fourth Circuit in *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990). Those four factors are: "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the . . . violation." *Barnhill*, 765 N.W.2d at 277. In addition, the court in *Barnhill* encouraged the district court to consider the sixteen ABA factors as they relate to the four-factor test when determining sanctions. *Id*.; *see* ABA Section of Litigation, *Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure* (1988), *reprinted in* 121 F.R.D. 101, 125-26 (1988).

In this case the district court applied the sixteen factors from the ABA and the four from *Kunstler* when determining what sanction was appropriate. It considered the investigation done by counsel before filing suit. It also considered the fact that all the defendants who sought sanctions were successful in obtaining summary judgment and in defending it on appeal. Appellants point to factors that could support a greater monetary sanction, but the court's decision is supported by other factors such as the good faith and lack of vindictiveness of Laubenthal, his lack of any prior sanctions, and the minimum amount necessary to deter such conduct. The court also had the opportunity to observe Laubenthal at trial and see how his zealous representation and his desire to "make things

right" for Kral clouded his objectivity. Considering the "entire picture" of this case, the court determined that paying the attorney fees and costs of the defendants, "while certainly a deterrent," greatly exceeded what was necessary to accomplish the goals of a sanction.

From our review of the district court's decision, the amount of the sanction may be modest but not inappreciable. We conclude the court properly exercised its discretion in determining the amount of the sanction imposed and in not ordering Laubenthal to compensate the defendants for their attorney fees and legal costs. Interpreting a rule of federal civil procedure similar to our rule 1.413(1), the U.S. Supreme Court, held the federal rule "calls only for an appropriate sanction—attorney fees are not mandated." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 553, 111 S. Ct. 922, 934, 112 L. Ed. 2d 1140, 1160 (1991). We agree our rule is also "not a fee shifting statute" and "[a] movant . . . has no entitlement to fees or any other sanction." *Id*. We affirm on this issue.

2. Payment of the sanction to the county jury and witness fund. Appellants contend the court erred in ordering that the monetary sanction be paid to the county jury and witness fund instead of to them as the offended parties. They argue the district court did not cite any authority for its decision. Although rule 1.413(1) provides a sanction "may include" an order of payment to "the other party or parties," it does not specify or limit where else a court may or may not direct a sanctioned party to pay a monetary sanction. Our supreme court has "determined the purpose of imposing monetary sanctions is to (1) deter attorneys

from filing frivolous lawsuits, and (2) avoid the general cost to the judicial system in terms of wasted time and money." *Barnhill*, 765 N.W.2d at 273 (citations omitted). Ordering Laubenthal to pay the monetary sanction to the county jury and witness fund serves the second enumerated purpose. We affirm on this issue and affirm the district court's order concerning sanctions.

B. Denial of the motions for directed verdict, for judgment notwithstanding the verdict, and for new trial made by McCord and the Preuls.

Following our decision on the first appeal, the case against McCord and the Preuls went to trial on the plaintiff's claims of breach of fiduciary duty and professional negligence. The defendants moved for a directed verdict at the close of the plaintiff's case and the close of all evidence. The district court denied the first motion and took the second motion under advisement reserving ruling until the jury returned its verdict.

The jury found Preul did not breach his fiduciary duty in any of the sales. But the jury found Roger Preul was negligent with regard to the sales to Rosener and Raymond Helkenn. It found Preul's negligence was a proximate cause of damages to Kral only concerning the Rosener sale in the net amount of $15,400. The defendants filed a motion for judgment notwithstanding the verdict or, alternatively, for new trial. The district court denied all the post-trial motions. The defendants appeal.

On appeal, the defendants contend the court erred in not granting their motions for directed verdict and for JNOV because they had no duty to sell the

property to Rosener for more than $2000 per acre. They also contend the court erred in overruling their motions for JNOV or new trial because the plaintiff failed to produce any evidence the defendants proximately caused any damages.

1. Duty. In a professional negligence action, the plaintiff must prove a duty of care is owed to him, breach of that duty, and the breach caused the plaintiff's damages. *See Smith v. Koslow*, 757 N.W.2d 677, 680 (Iowa 2008). The existence of a duty is a question of law for the court. *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 693 (Iowa 2009). Generally, as Kral's real estate agent, Preul had a duty to use "reasonable care, diligence, and judgment in the performance of tasks undertaken on behalf of his principal." *See Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc.*, 512 N.W.2d 573, 574-75 (Iowa 1994). The requisite standard of care for one practicing a profession, such as a real estate agent, is to exercise "'the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.'" *Id.* at 575 (quoting *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101 (Iowa 1971)). A real estate agent's duty to a client includes advising the client to seek legal advice when the interest of any party to the transaction requires it. *See Menzel v. Morse*, 362 N.W.2d 465, 472-73 (Iowa 1985). In an early case involving fraud instead of professional negligence, the court stated:

> It is elementary that an agent must be loyal in transacting the business of his principal. An agent is under the legal duty to fairly and fully disclose all facts within his knowledge, germane to the subject-matter of the agency, and in the strictest good faith impart to his principal all information that would control, or have a tendency to influence, the conduct of the principal. It is his duty to secure the highest price possible. It is his duty to inform his principal as to the true value of the land and to communicate any

> offers made therefor. He occupies a position of confidence, and must bear true allegiance to his principal. The principal has a right to rely on the statements of the agent in relation to the subject-matter of the agency. The agent must make a full, fair, and prompt disclosure of all the circumstances affecting the principal's right or interests.

Githens v. Johnson, 195 Iowa 646, 649, 192 N.W.2d 270, 272 (1923).

The defendants argue the circumstances here differ from those in *Githens* in that Kral told Preul he wanted to sell the land for $2000 per acre so he wouldn't owe taxes, where as in *Githens* the agent was told "to get the best price he could but not less than $110 per acre." *Id.* at 647, 192 N.W.2d at 271. The defendants contend there was no duty to sell the land for more than what Kral told them to sell it for, even if the market value was more. They also cite an Arizona Court of Appeals case in support of their argument there was no duty to get the best price for the land. *Musselman v. Southwinds Realty, Inc.*, 704 P.2d 814, 816 (Ariz. Ct. App. 1985) (declining to hold "as a matter of law an agent-broker is obligated to obtain the highest price possible for the property being sold").

Defendants also argue there was no duty to advise Kral to contact an attorney or tax advisor concerning the tax consequences of the land sales. They point to evidence Kral had advice from the attorney for his father's estate and the lack of any evidence the advice was erroneous.

At trial the testimony and appraisals of John Seuntjens covered the value of the parcels sold and the standards of care for real estate professionals. He appraised the Rosener parcel at $2990 per acre. He testified an agent should investigate the market value of the land and advise the client of the value. If a

client insisted on selling land for less than market value, an agent should point the client to professionals who can give needed advice and should document efforts made to provide the client with the information the client needs to make the best decision concerning the land sale. Seuntjens opined the standard of care that would be typical among Roger Preul's peers was not met in the land sales. The plaintiff also presented written standards of practice of the National Association of Realtors.

Viewing the evidence in the light most favorable to the jury's verdict, we agree with the district court's determination there was sufficient evidence on this issue to submit it to the jury instead of directing a verdict for the defendants. *See Van Sickle Const.*, 783 N.W.2d at 687. If reasonable minds could differ on an issue, a directed verdict is improper. *See Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009).

2. Causation. The defendants next contend there is no evidence their actions were the cause of any damages to Kral because there is no evidence he would have sold the land for more than the $2000 per acre price he set for the Rosener sale. They note that Kral met with Rosener about selling the land and agreed on the $2000 per acre price before bringing the deal to McCord and the Preuls to handle the paperwork. Rosener testified that Kral was concerned about the tax consequences of selling the land at a profit, that Kral did not enjoy farming and told him "he'd rather have the money because he could control that a lot easier than farming," and that Rosener thought the price for the

land was "probably fair market value at the time." Roger Preul testified he explained the financial information to Kral at the closing and Kral appeared fine.

The plaintiff presented evidence the land was worth nearly fifty percent more than the $2000 per acre Rosener paid for it. Plaintiff also presented evidence that Roger Preul knew Kral was not able to keep from being taken advantage of financially in some circumstances. The fact a conservatorship was established for Kral indicates a court determined he needed assistance with his financial affairs.

Viewing the evidence in the light most favorable to the verdict, and taking into consideration all reasonable inferences that could be made by the jury, we conclude the district court did not err in denying the defendants' motions for JNOV or a new trial. *See Van Sickle Const.*, 783 N.W.2d at 687.

IV. Conclusion.

The district court carefully exercised its discretion and did not abuse its discretion or commit legal error in determining the amount of the monetary sanction imposed or in directing it be paid to the county jury and witness fund. Because substantial evidence supports the jury's verdict and award of damages against the defendants McCord and the Preuls, the court properly denied their motions for directed verdict, for judgment notwithstanding the verdict, and for new trial. We affirm the district court in all respects.

AFFIRMED.