IN THE COURT OF APPEALS OF IOWA

No. 1-862 / 11-0367
Filed December 21, 2011

MICHAEL A. HILLMAN and PATRICIA J. ROZINEK,
Plaintiffs-Appellants,

vs.

SCOTT CANNON, LORI CANNON, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Fayette County, John Bauercamper, Judge.

The plaintiffs appeal a district court ruling in a personal injury action that found no partnership existed between the defendants and alleged tortfeasor. **AFFIRMED.**

Carter Stevens, Waterloo, and Harlan Holm and H. Daniel Holm Jr. of Ball, Kirk & Holm, P.C., Waterloo, for appellants.

Douglas Henry, Dubuque, and Karla J. Shea of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for appellees.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

The issue presented by this case is whether Scott and Lori Cannon and their son-in-law, Christopher Lundgren, formed a partnership under Iowa Code section 486A.202 (2009) in their operation of a dairy farm. We agree with the district court that no partnership was formed and affirm its judgment so holding.

I. Background Facts and Proceedings.

Scott and Lori Cannon own a farm in northeast Iowa. In addition to growing crops, the Cannons run a dairy operation, as well as a custom chopping and baling business on their farm. They also have a beef operation on a neighboring farm.

In May 2007, Christopher Lundgren, who was engaged to the Cannons' daughter, Kimberly, expressed an interest in becoming involved in the dairy operation. Scott was around fifty years old at the time and was "looking to slow down." He and Lundgren discussed forming a partnership but ultimately decided not to. Instead, they agreed Lundgren would purchase a group of cows to bring into the Cannons' already-existing herd, and they would then own the entire herd jointly. Lundgren also purchased an interest in several pieces of machinery used by the Cannons in the dairy operation. Lundgren secured a loan to finance the purchase of the cows and machinery, which the Cannons co-signed.

Lundgren and Scott each participated in the milking of the cows, with the assistance of several employees. They took turns paying the employees, with Lundgren paying them one week and the Cannons the next. Lundgren did not withhold taxes from the employees' checks, while the Cannons did. Lundgren and the Cannons split other expenses of the dairy operation as well, including

veterinary bills, feed for the cows, and routine maintenance of equipment used in the operation. Almost all of the companies that did business with Lundgren and Scott divided their bills in half and billed them separately. They also received separate checks for the milk produced by their herd.

On October 6, 2008, Lundgren was driving to the Cannons' farm for the evening milking when he was involved in an accident with a motorcycle driven by Michael Hillman. Hillman and his passenger, Patricia Rozinek, were both injured. They sued Lundgren, claiming he was at fault for the accident. The petition was later amended to allege the Cannons were vicariously liable for Lundgren's negligence because they were his partners in the dairy operation on their farm.

The Cannons filed two motions for summary judgment, both of which were denied by the district court. The parties subsequently entered into a stipulation in which they agreed that Lundgren's insurance company would pay $150,000 each to Hillman and Rozinek in exchange for a full release of Lundgren's liability for the accident. Lundgren was then dismissed from the suit. The parties further agreed that if the Cannons were found to be vicariously liable to the plaintiffs by virtue of a partnership with Lundgren, their insurance company would pay $250,000 each to Hillman and Rozinek.

Thus, the sole issues presented to the district court at the bench trial in February 2011 were whether Lundgren was in a partnership with the Cannons and whether he was acting within the scope of that partnership at the time of the accident. The court found the parties had not formed a partnership under Iowa Code section 486A.202, reasoning:

> There was no holding out to their lender, to the public, to the purchasers of their products, or to suppliers, that they were partners. In fact, they went out of their way to represent themselves as separate business entities and ask to be dealt with separately. None of the traditional indicia of partnership control of assets is present, such as using a firm or business name, keeping separate books for the business, accounting for the capital accounts of the partners, and filing partnership income tax returns.
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> The evidence shows that the defendants Cannon consistently treated the dairy herd as property jointly owned by two distinct sole proprietorships, each operated by Scott Cannon and Christopher Lundgren, respectively.
>
> . . . The evidence is clear that the enterprise has never made a traditional calculation of profit and loss by the method of: income less expenses equals profit or loss. The respective shares of gross sales and gross expenses have all been accounted for in the parties' own tax returns, along with other expenses, unique to each and uncommon to the other, to determine their respective profit and loss.

The court accordingly dismissed the plaintiffs' claims against the Cannons. The plaintiffs appeal.

II. Scope and Standards of Review.

When reviewing the judgment of a district court after a bench trial, our review is for the correction of errors at law. *See Hansen v. Seabee Corp.*, 688 N.W.2d 234, 237 (Iowa 2004). The trial court's findings have the force of a jury verdict and are binding on the reviewing court if based upon substantial evidence. *Id*. We are not bound by the trial court's determinations of law, however, nor precluded from examining whether the court applied erroneous rules of law that materially affected its decision. *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 782 (Iowa 1985).

III. Discussion.

In order to establish that the Cannons and Lundgren created a partnership in their operation of the dairy farm, the plaintiffs were required to show: (1) an intent by the parties to associate as partners; (2) a business; (3) earning of profits; and (4) co-ownership of profits, property, and control. *Id.* at 785; *Thorp Credit, Inc. v. Wuchter*, 412 N.W.2d 641, 647 (Iowa Ct. App. 1987). The second and third elements are uncontested. We will accordingly focus on the remaining two.

A. Intent to Associate.

The district court found the Cannons and Lundgren did not intend to associate as partners because "[t]here was no holding out to their lender, to the public, to the purchasers of their products or to suppliers, that they were partners. In fact, they went out of their way to represent themselves as separate business entities." The plaintiffs argue this finding was in error because it "is in direct conflict with the plain language of § 486A.202(1)," which states that a partnership is formed when "two or more persons . . . carry on as co-owners of a business for profit . . . *whether or not the persons intend to form a partnership*." We disagree.

Iowa adopted the Revised Uniform Partnership Act, codified at Iowa Code chapter 486A, during its 1998 legislative session. The revised act added the phrase, "whether or not the persons intend to form a partnership," to the previous definition of a partnership. However, the drafters of the revised uniform law explained no substantive change in the definition of a partnership was intended by that addition:

> The addition of the phrase, "whether or not the persons intend to form a partnership," merely codifies the universal judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be "partners." Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The new language alerts readers to this possibility.

Uniform Partnership Act § 202, cmt. 1 (1997). Thus, contrary to the plaintiffs' arguments otherwise, Iowa caselaw on partnership formation predating the 1998 IUPA is still good law. *See* Matthew G. Dore, *Partnership Law & Practice Under the New Iowa Uniform Partnership Act*, 47 Drake L. Rev. 497, 502 (1999) (emphasizing "the new statute preserves many long-standing principles of the law of partnership," including rules governing formation of partnerships, which "are basically the same in both IUPA (1998) and IUPA (1971)").

Under this caselaw, an intent to associate is the crucial test of partnership. *Chariton Feed & Grain*, 369 N.W.2d at 785; *see also Ziegler v. Dahl*, 691 N.W.2d 271, 275 (N.D. 2005) ("One of the most important tests of whether a partnership exists between two persons is the intent of the parties."). A showing of an intent to associate is not at odds with the language in section 486A.202(1), which recognizes that a partnership may be formed inadvertently. The focus "is not on whether individuals subjectively intended to form a partnership, but on whether the individuals intended to jointly carry on a business for profit." *Ziegler*, 691 N.W.2d at 275; *see also In re KeyTronics*, 744 N.W.2d 425, 439 (Neb. 2008) ("[T]he intent necessary to form an association does not refer to the intent to form a partnership per se. There is no requirement that the parties have a 'specific agreement' in order to form a partnership. . . . But, if the parties' voluntary actions

form a relationship in which they carry on as co-owners of a business for profit, then 'they may inadvertently create a partnership despite their expressed subjective intention not to do so.'" (footnotes omitted)).

The requisite intent may be gleaned from the conduct of the parties and the circumstances surrounding the transactions. *Thorp Credit*, 412 N.W.2d at 647. Some courts have held that in "considering the parties' intent to form an association, it is generally considered relevant how the parties characterize their relationship or how they have previously referred to one another." *KeyTronics*, 744 N.W.2d at 440. We have held the same. *Compare Farmers Grain Co. v. Irving*, 401 N.W.2d 596, 600 (Iowa Ct. App. 1986) (finding no partnership was formed where parties did not represent themselves to others as partners) *with Beck v. Rounds*, 332 N.W.2d 109, 110 (Iowa Ct. App. 1982) (finding partnership was formed where parties called themselves a partnership on an insurance application).

We accordingly reject the plaintiffs' argument that the district court erred in examining the manner in which the parties conducted business with others in determining the parties' intent to associate. And we find substantial evidence in the record supports the court's holding that the Cannons and Lundgren went out of their way to represent themselves as separate business entities.

Both Scott Cannon and Lundgren testified that although they split expenses for the dairy operation, they asked all of their creditors to bill them separately. Almost all of the companies they dealt with did so. They were billed separately for feed for the cows, veterinary services, and equipment repairs. Neither was responsible for the other's portion of the bills. The Cannons and

Lundgren also received separate milk checks, which they deposited into their own bank accounts. A representative from the bank that handled the parties' financial transactions testified that the bank treated them as separate entities:

> [T]hey operated with separate accounts.
> . . . .
> . . . [T]hey did separate financial statements. They came in at separate times. All of our notes were made separately to one or the other. But as you saw, Scott or Lori co-signed on the notes. But, yes, the[re] were separate annual reviews. All of that stuff was all separate.

We believe this evidence supports the district court's finding that the Cannons and Lundgren did not intend to associate with one another as partners.

B. Co-Ownership of Profits, Property, and Control.

1. Sharing of profits. The plaintiffs next argue the district court "reasoned incorrectly that the Cannons and Lundgren only shared gross returns and not profits." We disagree.

Section 486A.202(3), which sets forth rules for determining whether a partnership has been formed, distinguishes between a share of "gross returns" and a share of the profits of a business. The statute provides that the "sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived," whereas a "person who receives a share of the profits of a business is presumed to be a partner in the business" unless certain exceptions not applicable here exist. Iowa Code § 486A.202(3)(b), (c). The distinction between "a contemplated sharing of gross receipts and a sharing of profits is commonly drawn and recognized as valid." *Chariton Feed & Grain*, 369 N.W.2d at 787.

The district court acknowledged this common distinction in concluding

> the enterprise has never made a traditional calculation of profit and loss by the method of: income less expenses equals profit or loss. The respective shares of gross sales and gross expenses have all been accounted for in the parties' own tax returns, along with other expenses, unique to each and uncommon to the other, to determine their respective profit and loss.

We find no error in this conclusion.

"The ordinary meaning of 'profits' is '[t]he excess of revenues over expenditures in a business transaction.'" *Ingram v. Deere*, 288 S.W.3d 886, 899 (Tex. 2009) (quoting Black's Law Dictionary 1246 (8th ed. 2004)); *see also Ziegler*, 691 N.W.2d at 278 ("A profit is the amount remaining after the expenses of the partnership are paid."). Stated another way, the "sharing of excess receipts over disbursements, without proof of separate individual operating expenses attributable to either partner, in effect constitutes a sharing of profits." 59A Am. Jur. 2d *Partnership* § 152 (2003).

Although the Cannons and Lundgren split the proceeds they received from the milking of their cows, they did so without subtracting any outstanding expenses of the dairy. The expenses of the dairy were instead handled separately and generally split equally between the two. However, the Cannons' operating expenses were higher than Lundgren's, as the Cannons owned the land and barn that housed the cows. The Cannons also owned some of the large pieces of equipment used by the dairy, such as the bulk tank that held the milk. Lundgren did not reimburse the Cannons for those expenses. Substantial evidence thus supports the district court's finding that the Cannons

> incurred many farm expenses not attributable to Lundgren, such as real estate taxes on farm loan, mortgage loan interest, and

> expenses related solely to his non-dairy operations. [Their] bottom line "profit" or "loss" was quite different from that realized by Lundgren.

That finding is further evidenced by the fact that the Cannons earned a profit from their farming operations in 2007 and 2008, while Lundgren experienced a loss in both years, which led to his decision to end his involvement with the dairy operation in August 2009.

This case is accordingly similar to *Chariton Feed & Grain* in which our supreme court found no partnership had been formed due, in part, to the fact the parties shared gross receipts, rather than profits. 369 N.W.2d at 785. In that case, the parties "individually assum[ed] certain expenses, which resulted in each showing a different level of profit or loss generated out of the farm operation." *Id.*; *see also Farmers Grain Co.*, 401 N.W.2d at 599 (rejecting plaintiff's argument that because the defendant "undoubtedly received some portion of the gross income from the milk receipts, there was prima facie evidence of a partnership").

For the foregoing reasons, we reject the plaintiffs' argument that the profit-sharing presumption in section 486A.202(3)(c) should apply here, as it is apparent the parties shared only gross returns of the business, which does not, in and of itself, establish a partnership. *See* Iowa Code § 486A.202(3)(b); *Farmers Grain Co.*, 401 N.W.2d at 599; *Chariton Feed & Grain*, 369 N.W.2d at 785.

2. Co-ownership of property. The plaintiffs argue this factor weighs in favor of finding the Cannons and Lundgren formed a partnership. While it is true the parties jointly owned certain property, such as the cows and certain

equipment used in the dairy operation, section 486A.202(3)(a) provides: "Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property." *See KeyTronics*, 744 N.W.2d at 441 ("Being 'co-owners' of a business for profit does not refer to the co-ownership of property, but to the co-ownership of the business intended to garner profits." (footnote omitted)). Furthermore, and as mentioned above, the Cannons alone owned the land and barn housing the jointly owned cows. They also owned the bulk tank used to store the milk produced by the cows and the crops used to feed the animals. *See Chariton Feed & Grain*, 369 N.W.2d at 788 (noting that although the parties owned some property together, the major assets utilized in the association—the real estate and the machinery—were the separate assets of the parties); *accord Farmers Grain Co.*, 401 N.W.2d at 599.

3. Joint control. Finally, the plaintiffs assert the Cannons and Lundgren formed a partnership because each exercised control in the management of the dairy operation. "Co-ownership of control, or a community of interest in the administration of the business, is a key element in determining the existence of a partnership." *Chariton Feed & Grain*, 369 N.W.2d at 786. Although the Cannons and Lundgren consulted with one another about the routine decisions affecting the dairy, such as nutrition for the cows, necessary veterinary services, and the culling of jointly owned cows, there is no other objective evidence of joint control of the business. Such evidence "usually focuses on acts such as holding licenses, assuming a firm name, keeping books that show a capital account for

each party, or filing federal partnership tax returns." *Id.* at 788; *accord Farmers Grain Co.*, 401 N.W.2d at 600; *Thorp Credit*, 412 N.W.2d at 648.

The parties operated the dairy under their own separate names rather than a formal business name. *Cf. KeyTronics*, 744 N.W.2d at 440 ("The joint use of a business name is evidence of an association."). The jointly owned cows were registered to "Scott Cannon and Christopher Lundgren." The Cannons and Lundgren maintained separate bank accounts, with no joint bank account for the dairy. Neither knew how the other handled their separate financial transactions. They used different accountants and maintained separate records. They each filed their own personal tax returns, with no partnership income reported. And although the Cannons and Lundgren took turns paying their employees, they paid them differently. Finally, while Scott Cannon consulted with Lundgren regarding the design of a new barn for the cows, the Cannons paid for the barn themselves. It is accordingly clear "a community of interest in the administration of the business" was lacking in this case.

IV. Conclusion.

We conclude substantial evidence supports the district court's determination that no partnership was formed between the Cannons and Lundgren. We therefore affirm the district court's dismissal of the plaintiffs' claims against the Cannons.

AFFIRMED.