**IN THE COURT OF APPEALS OF IOWA**

No. 6-619 / 05-1609
Filed November 16, 2006

NATIONWIDE ADVANTAGE MORTGAGE COMPANY, f/k/a ALLIED GROUP MORTGAGE COMPANY,
Plaintiff,

vs.

NORMA C. ECHEVERRIA, LUIS ECHEVERRIA, wife and husband, MERITAGE MORTGAGE CORPORATION, UNKNOWN PARTIES IN POSSESSION, MARIAN HALABIS, IRINA HALABIS and HRS CHECK SECURITY SEVICE,
Defendants.

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**NORMA C. ECHEVERRIA and LUIS ECHEVERRIA,**
Cross-Claim Plaintiffs-Appellees,

**vs.**

**MERITAGE MORTGAGE CORPORATION,**
Cross-Claim Defendant-Appellant.

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MERITAGE MORTGAGE CORPORATION,
Third-Party Plaintiff,

vs.

LENDER'S MANAGEMENT CORPORATION and DAVID WINTERFELD,
Third-Party Defendant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson, Judge.

Lender appeals from a district court ruling that enjoined it from taking any action to collect upon a mortgage loan. **AFFIRMED**.

William B. Serangeli and Joseph M. Borg of Smith, Schneider, Stiles & Serangeli, P.C., Des Moines, for appellant.

Carrie L. O'Connor of Iowa Legal Aid, Des Moines, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MILLER, J.**

Meritage Mortgage Corporation (Meritage) appeals from a district court ruling that enjoined Meritage from taking any action to collect upon a mortgage loan made to Norma and Luis Echeverria. We affirm the district court.

**I. Background Facts and Proceedings.**

The Echeverrias were looking for a home for Norma's father, Nelson Peralta. Norma and Nelson entered into a real estate contract with the Wolford Corporation (Wolford) for the purchase of a home located at 2320 S.E. 17th Street, Des Moines, Iowa. The contract required Norma and Nelson to make total payment of $124,900: a $3,000 down payment, monthly principal and interest payments, and a balloon payment in one year on the outstanding balance. However, Wolford assured Norma and Nelson that they did not need to worry about the balloon payment, as the company would arrange for a mortgage within the one year period.

Approximately eight months after entering into the contract, Wolford contacted Norma and informed her that someone would get in touch with her regarding a loan application. Because Norma and Luis had a higher credit rating than Nelson, the couple decided they would take out the mortgage in their names. The Echeverrias' loan application was taken by an employee of Metropolitan Mortgage Corporation (Metropolitan), a mortgage broker. Metropolitan placed the Echeverrias' loan with Meritage, which issued two notes:

one in the amount of $99,900, and one in the amount of $25,000.[1] Lenders Management Company (Lenders) acted as the closing agent.

On March 3, 2003, the Echeverrias met with Leslie Van Roekel, an employee of Lenders, and closed the transaction. Meritage had provided Lenders detailed closing instructions. The instructions directed Lenders to obtain title insurance, pay closing fees, and disburse $121,900 directly to Wolford. The instructions also referenced a February 21, 2003 title opinion prepared by attorney Brent Zimmerman and provided to Wolford.[2]

In relevant part, Zimmerman's opinion noted the titleholder to the property was the 2320 S.E. 17th Street Trust, Rachel M. Nelson as Trustee, and that there was no record conveyance of title from the trust to Wolford. It also noted the property was subject to an $81,000 mortgage taken out by Marian and Irina Halabis and held by Allied Group Mortgage Company, now known as Nationwide Advantage Mortgage Company (Nationwide), as well as two small claims judgments and a special assessment. The opinion stated clear title required (1) proof of a title transfer from the trust to Wolford, (2) release of the Nationwide mortgage, and (3) satisfaction and release of the judgments and assessment.

As evidenced by the HUD-1A statement, Lenders paid closing fees, disbursed funds to satisfy the judgments and assessment, and disbursed the

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[1] This matter initially named Mortgage Electronic Registration Systems, Inc. "MERS," as nominee for Meritage Mortgage Corporation, as the cross-claim defendant. However, Meritage was substituted as the cross-claim defendant prior to trial. For ease of reference we will use Meritage to refer to both entities.

[2] The closing instructions directed Lenders, in regard to its obligation to obtain title insurance, to "ISSUE SAID FORM OF POLICY FREE FROM ENCUMBRANCES EXCEPT ITEM(S) 4-5 OF PRELIMINARY REPORT DATED 02/21/03." Paragraphs four and five of Zimmerman's February 21, 2003 title opinion list the easements, restrictions, and plat for the subject property.

remaining $116,305.58 to Wolford. It did not satisfy the Nationwide mortgage or obtain title insurance.

Approximately two weeks after closing Wolford provided a letter to Lenders that stated, in regards to the subject property:

> We have received your payment in full of $115,148.58 to pay off all the liens and mortgages on the property at 2317 [sic] SE 17th. We have proceeded on paying off the loan that is against our seller in the amount of $70,473.22 to Nationwide. This is your receipt that it is being handled in this manner.

Wolford did not, however, satisfy the Nationwide mortgage; it simply retained all funds it received from Lenders.

In April 2004 Nationwide filed a petition for foreclosure of the subject property, asserting the note taken out by the Halabises was in default. The Echeverrias filed a cross-claim against Meritage, asserting Meritage was "liable to the [Echeverrias] to protect them from harm caused by their agents and to pay any amount lost by them as a result of their wrong doing." The Echeverrias requested that Meritage be responsible for the Nationwide mortgage and hold the Echeverrias harmless for all losses caused by Meritage's negligence, and any other equitable relief. After Nationwide was granted summary judgment on its petition for foreclosure, Meritage filed a third-party petition against Lenders.

The Echeverrias' cross-claim against Meritage came before the district court in July 2005. At the close of evidence the Echeverrias restated their cross-claim as a request for a determination that they should not be subject to, or responsible for, the indebtedness to Meritage. The court granted the cross-claim

to the extent it sought to enjoin Meritage from taking any action to collect upon the mortgage loan for the subject property.[3]

The court concluded Meritage had not acted in a reasonable manner in the loan transaction, and moreover that Meritage was charged with the knowledge of its agent, Lenders. The court further concluded Meritage's

> failure to ensure that the Nationwide mortgage was paid as part of the disbursement process, to take any action when a record satisfaction of the Nationwide mortgage was not obtained after closing, to take any action when no title insurance was obtained and in misleading the Echeverrias by telling them that title insurance had been procured all mandate a result that [Meritage] and not the Echeverrias now bear the loss resulting from the misappropriation of funds by the Wolford Corporation.

Meritage filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which asserted, in relevant part, that the Echeverrias had not demonstrated Meritage breached any standard of care, that there was insufficient support for the conclusion Lenders was acting as Meritage's agent, and that the court failed to address Meritage's affirmative defenses of sole proximate and intervening/superseding cause. Other than clarifying a factual matter not pertinent to resolving the issues in this appeal, the court denied the motion.

Meritage appeals. It asserts (1) the Echeverrias failed to establish the standard of care required of a normal mortgage lender or that Meritage deviated from any such standard, (2) Lenders was not an agent of Meritage, (3) even if Lenders was an agent of Meritage, Lenders did not act negligently in this matter, (4) the Echeverrias' fiduciary relationship with Wolford precludes judgment in the their favor, and (5) Wolford's fraudulent misappropriation of the loan proceeds

[3] It is unclear whether or how the claims in Meritage's third-party's petition against Lenders were resolved. However, the record indicates that by the time of trial Lenders was no longer in operation, and that its principal owner had filed for bankruptcy.

and failure to satisfy the Nationwide mortgage was a superseding or intervening cause of the Echeverrias' loss.

**II. Scope and Standard of Review.**

This matter was filed and tried in equity. Accordingly, we conduct a de novo review. Iowa R. App. P. 6.4. We give weight to the court's fact findings and credibility assessments, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

**III. Discussion.**

Meritage first asserts that it is entitled to enforce its mortgage unless the Echeverrias can establish "some breach of a higher duty," such as a fiduciary duty or a professional standard of care for mortgage lenders and closing companies. It points out there is no evidence it was in a fiduciary relationship with the Echeverrias, particularly as the Echeverrias never had any direct contact with Meritage, and suggests expert testimony is required to establish a professional standard of care. However, it cites nothing in support of the proposition that a mortgage lender can be found liable only upon a showing of a breach of a fiduciary duty or some other "higher" standard of care.[4]

We accordingly consider the three factors that normally govern our analysis of whether one party owes a legal duty to another:

> (1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations. We use these factors under a balancing approach and not as three distinct and necessary elements. In the

[4] Meritage does cite to the case of *Kurth v. Van Horn*, 380 N.W.2d 693, 695-98 (Iowa 1986). However, *Kurth* held only that (1) a fiduciary relationship does not arise solely from the existence of a bank-borrower relationship but must be judged on the facts and circumstances of an individual case, (2) no fiduciary relationship existed in that particular case, and (3) the district court's cancellation of a real estate mortgage, which had been based upon the jury's conclusion the bank obtained the mortgage through a breach of the nonexistent fiduciary duty, must be set aside. *Kurth*, 380 N.W.2d at 695-98.

> end, whether a duty exists is a policy decision based upon all relevant considerations that guide us to conclude a particular person is entitled to be protected from a particular type of harm.

*Kolbe v. State*, 625 N.W.2d 721, 728 (Iowa 2001) (citations omitted). We conclude all three factors indicate that Meritage had a duty to take reasonable steps in the closing of this transaction to protect the Echeverrias from the lien of the pre-existing mortgage against the subject property.

In issuing a loan to the Echeverrias, Meritage reserved to itself control of the disbursal of the loan proceeds. Despite knowledge there was a preexisting $81,000 mortgage on the subject property—a secured debt which was owed by someone other than the trust as record titleholder or Wolford as purported seller—and without any indication the borrowers were aware of the encumbrance, Meritage directed that the proceeds be disbursed directly to Wolford. By taking this course of action, Meritage deprived the Echeverrias of their ability to protect themselves against the prior mortgage lien. It was accordingly obligated to act in a manner that did not imperil its borrowers. Instead, it ordered the proceeds disbursed to Wolford without requiring proof or even assurances that the encumbrance had been or would be satisfied. To the extent the directions regarding title insurance were meant to serve as such assurances, Meritage knew upon receipt of the HUD-1A statement not only that the encumbrance remained unsatisfied but also that title insurance had not been obtained. Yet, it took no further action. We conclude the facts establish a duty owed by Meritage to the Echeverrias and a breach of that duty.

Meritage complains that breach cannot be shown without relying on the acts and knowledge of Lenders, and that Lenders's acts and knowledge cannot

be imputed to it because Lenders's was not its agent. We first note this assertion ignores evidence of Meritage's own knowledge, as demonstrated by the closing instructions and the HUD-1A statement. However, we agree with the district court's determination that Lenders's actions and knowledge can be and should be imputed to Meritage.

To establish that an agency relationship exists between Meritage and Lenders, the Echeverrias were required to show both (1) a manifestation of intent by Meritage that Lenders will act on its behalf and subject to its control, and (2) consent by Lenders that it will so act. *See Benson v. Webster*, 539 N.W.2d 126, 130 (Iowa 1999). The key to determining whether such a relationship exists is Meritage's right of control. *Id*.

Although it is not entirely clear, it does appear that Lenders was first contacted by Metropolitan in regard to this specific loan. Lenders's principal owner, David Winterfield, testified that Lenders would be contacted by the mortgage broker, which would in turn "sell this loan to Meritage" and "get us in contact with an individual at Meritage to prepare documents." What is clear is that Lenders had a preexisting relationship with Meritage, having acted as the closing agent on at least twenty prior transactions involving Meritage. It is also clear that Lenders understood it was "closing in [Meritage's] name," and that its actions when closing the transaction were governed by the closing instructions provided by Meritage.

Meritage asserts that, pursuant to *Gardin v. Long Beach Mortgage Co.*, 661 N.W.2d 193 (Iowa 2003), the Echeverrias cannot establish an agency relationship between Meritage and Lenders. In that case, the borrowers, the

Gardins, sued their lender, Long Beach Mortgage Company (Long Beach), alleging Long Beach had collected various settlement charges, including a $250 closing fee, in violation of the Iowa Code. *Gardin*, 661 N.W.2d at 195-96. In support of their argument that Long Beach had illegally "collected" the $250 fee paid to the closing company, Rock Island County Abstract & Title Guarantee Company (RICA), the Gardins asserted RICA was acting as Long Beach's agent, and thus Long Beach should be vicariously liable for RICA's illegal charges. *Id*. at 196, 199. The district court found as a matter of law that RICA was not Long Beach's agent because (1) it was undisputed that RICA was hired by the brokerage company, and not Long Beach, (2) it was undisputed that there was no ongoing or established business relationship between RICA and Long Beach, and (3) the fact that Long Beach sent RICA closing instructions did not create any material fact issue on the question of agency because the act at issue was limited to RICA's collection of fees on its own behalf for services that it had performed. *Id*. at 199-200.

We conclude *Gardin* is distinguishable. Here, it is not clear from the record whether Metropolitan purported to hire Lenders on its own behalf, or purported to simply retain Lenders's closing services on behalf of Meritage. More importantly, however, there was an ongoing or established relationship between Lenders and Meritage, and the relevance of the closing instructions at issue here is not limited to Lenders's collection of its own fee.

Under the facts and circumstances of this case, in particular Lenders's understanding that it was closing the loan on Meritage's behalf and was required to follow Meritage's closing instructions, the Echeverrias have established that

Lenders was acting as Meritage's agent. Evidence of the combined acts and knowledge of Meritage and Lenders is sufficient to establish that Meritage breached a duty of care it owed to the Echeverrias.

We therefore turn to Meritage's claim that Wolford's retention of all loan proceeds and its failure to satisfy the Nationwide mortgage is a superseding or intervening cause of the Echeverrias' damage. A superseding or intervening cause is one that relieves a defendant from liability for an earlier negligent event because it "breaks the chain of causal events between the [defendant's] negligence and the plaintiff's injury." *Rieger v. Jacque*, 584 N.W.2d 247, 251 (Iowa 1998). This is true even where the defendant's negligence is a substantial factor in bringing about the plaintiff's injury. *Id*. However, an intervening force is not a superseding or intervening cause if it is simply "a normal consequence of a situation created by the actor's negligent conduct . . . ." *Id*. Rather,

> "To relieve an individual from liability, the intervening act or force must not have been a normal consequence of his or her acts or have been reasonably foreseeable." Put another way, an intervening force which falls squarely within the scope of the original risk will not supersede the defendant's responsibility.

*Id*. at 251-252 (citation omitted).

Meritage asserts Wolford's conduct was a superseding or intervening cause because it was simply not foreseeable that Wolford would misappropriate the loan funds and fail to pay off the Nationwide mortgage. We cannot agree. If a lender decides to control disbursement of the loan funds, with knowledge of an existing encumbrance for a loan owed by someone other than the borrower, purported seller, or title holder, and without evidence that the borrower has knowledge of the encumbrance, yet orders disbursement be made to the

purported seller without ensuring satisfaction of the encumbrance or even the issuance of title insurance, the purported seller's failure to satisfy the encumbrance was a reasonably foreseeable consequence of the lender's actions. Stated another way, Wolford's failure to satisfy the Nationwide mortgage is an act "which in ordinary human experience is reasonably to be anticipated under the particular circumstances . . . ." *Weyerhaeuser Co. v. Thermogas Co*., 620 N.W.2d 819, 830 (Iowa 2000). Hence, Meritage is not relieved of responsibility for its own negligent acts. *Id*.

**IV. Conclusion.**

We have considered all of Meritage's contentions, whether or not specifically discussed. As noted above, we conclude that Lenders was acting as Meritage's agent while closing the transaction, that Meritage has breached its duty of care to the Echeverrias, and that Meritage has not established Wolford's acts were the sole proximate or intervening cause of the Echeverrias' damage. As we find Meritage's remaining contentions to be without merit, we affirm the district court's ruling in favor of the Echeverrias.

**AFFIRMED.**