IN THE COURT OF APPEALS OF IOWA

No. 1-022 / 10-0504
Filed February 23, 2011

JON E. JACKSON and JAX N FARMS,
Plaintiffs-Appellants,

vs.

TROY WESSELINK,
Defendant-Appellee.

Appeal from the Iowa District Court for Jasper County, John D. Lloyd, Judge.

The plaintiffs appeal from a district court order dismissing their action for replevin, conversion, and malicious prosecution. **AFFIRMED.**

Richard E. H. Phelps II of Phelps Law Office, Mingo, for appellants.

James C. Ellefson of Moore, McKibben, Goodman, Lorenz & Ellefson, L.L.P., Marshalltown, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

This case arises from a failed farming relationship between Jon Jackson, owner of Jax N Farms,[1] and his protégé, Troy Wesselink. Jackson filed a petition in replevin seeking the return of numerous items of farming equipment from Wesselink. The petition was later amended to include claims for conversion and malicious prosecution. Following a bench trial, the district court entered a ruling denying all of the claims raised by the plaintiffs. We affirm.

I. Background Facts and Proceedings.

Jon Jackson was the owner of a large farming operation, doing business as Jax N Farms, consisting of approximately 1300 acres of farmland, as well as cattle and hogs. Jackson had been farming for many years and wanted to retire from the operation. He met Wesselink in 1997 while Wesselink was working at a grain cooperative. Wesselink had just graduated from college with a degree in agriculture business and wanted to start farming. Jackson agreed to help him.

In March 2000, Wesselink entered into a lease with Jackson to cash rent twenty-five percent of Jackson's farmland. He also bought a twenty-five percent interest in Jackson's livestock operation. Jackson described his deal with Wesselink as a "25/75 arrangement" whereby Wesselink "would get 25 percent of the income and pay 25 percent of the expenses, livestock and grain." From there, the parties' account of their agreement diverges.

Wesselink did not own any equipment when he began farming with Jackson. According to Wesselink, Jackson told him that in exchange for Wesselink's "hard work and labor" on the farm, he would help Wesselink acquire

[1] For ease of reference, we will refer to both plaintiffs as Jackson.

some machinery of his own. Jackson did so by occasionally allowing Wesselink to use the trade-in value of Jackson's equipment that needed to be replaced towards Wesselink's purchase of new equipment. Wesselink would either pay cash for the remainder of the purchase price or, on some of the larger items, finance the difference. Jackson denied any such agreement ever existed, though he acknowledged the disputed equipment had been purchased and financed in Wesselink's name.

The parties' relationship soured in 2007 over a disagreement about the operation's finances during Jackson's divorce from his wife. Jackson terminated Wesselink's lease. Wesselink took the equipment he believed was his and continued farming on his own.

Jackson filed a petition for a writ of replevin in January 2009, seeking the immediate return of numerous items of equipment, tools, and machinery Jackson claimed were in Wesselink's possession. The petition was later amended to add claims for conversion and malicious prosecution.[2] Wesselink answered, admitting some of the items were in his possession but denying Jackson's claim of ownership to them. The case proceeded to a bench trial before the district court in February 2010, following which the court entered a ruling denying all of the plaintiffs' claims. The plaintiffs appeal.

[2] We recognize that a replevin action may not be joined with other claims for recovery. *See Roush v. Mahaska State Bank*, 605 N.W.2d 6, 10 (Iowa 2000); *see also* Iowa Code § 643.2 (2009). However, Wesselink did not object to the misjoined action. *See Roush*, 605 N.W.2d at 10 ("[T]he remedy for misjoinder must be made by motion."). We may accordingly proceed to hear the appeal as it has been presented to us. *See id.* ("Misjoined actions, consequently, can be considered in a single proceeding by agreement of the parties or the failure to object to the misjoinder.").

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. *Keppy v. Lilienthal*, 524 N.W.2d 436, 438 (Iowa Ct. App. 1994).

> "A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted."

Id. (quoting *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978)). "We are prohibited from weighing the evidence or the credibility of the witnesses." *Id.*

III. Discussion.

The result in this bench-tried case is dictated by our standard of review. As the district court noted, the plaintiffs' claims for replevin and conversion "are essentially credibility contests" between Jackson and Wesselink. In order to succeed on either claim, Jackson was required to prove he had an ownership interest in or superior right to possession of the property he claimed was in Wesselink's possession. *See In re Estate of Bearbower*, 426 N.W.2d 392, 394 n.1 (Iowa 1988) (stating an element of conversion is "ownership by the plaintiff or other possessory right in the plaintiff greater than that of the defendant"); *Varvaris v. Varvaris*, 255 Iowa 800, 804, 124 N.W.2d 163, 165 (1963) ("Where both parties to a replevin action claim to own the property the right of possession

depends on the fact of ownership."). The court determined Jackson failed to meet that burden, stating:

> [T]he court finds the defendant to be more credible than the plaintiff.
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> . . . .
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> It is the plaintiff's burden to prove his claims in this case. There is little if anything in this record that supports the plaintiff's testimony. There is much that supports the defendant's testimony. . . . [T]he weight of the evidence is with the defendant and the court finds that the defendant's version of the agreement between he and the plaintiff is supported by the preponderance of the evidence in this record.

In so finding, the court stated Wesselink's claim of ownership of the disputed property was consistent with the testimony of Jackson's daughter, Julie Fitzgerald. She testified that when new equipment appeared at the farm, she would ask her father who it belonged to because he had repeatedly expressed his desire to retire from farming. Fitzgerald stated her father would always reply, "It isn't mine, it's Wesselink's. Everything was always it's Wesselink's." She testified her father told her that he was helping Wesselink "[b]ecause he was a nice young man and he wanted to help him out farming and he had the capital to buy . . . where Troy couldn't have."

The court rejected Jackson's attempts to disparage Fitzgerald's testimony as vindictive because of his divorce from her mother, finding:

> Even during vigorous cross-examinations, the court was never able to see any animosity from Ms. Fitzgerald towards her father. . . . [T]he court saw a witness who was calm and thoughtful and who refused to fill in blanks or add details if she did not have the information. She was consistent in her testimony and recollections and was able to provide some details that cause the court to credit her testimony. . . . In short, Ms. Fitzgerald appeared to be credible and her testimony supports the defendant's version of events.

The court also found Wesselink's testimony more believable than Jackson's because many of the items Jackson claimed were his had been purchased in Wesselink's name and financed by him. As the court stated, "There is little reason to believe that defendant would take on such financial burdens unless he believed that he owned the equipment." The court also found the parties' tax returns were consistent with Wesselink's claims of ownership, stating:

> Equipment that defendant claimed he owned is listed on defendant's depreciation schedules as owned by him. It is not listed on plaintiff's. Defendant does not claim depreciation for items that he testified were bought by plaintiff. While plaintiff spent considerable time testifying as to his total ignorance of and lack of involvement in the financial side of his farming operation, it is hard for the court to believe that he thought he owned the equipment but walked away from the significant tax advantage of depreciating that equipment.

"'On appeal in a law action we are bound by such factual findings on the credibility of witnesses.'" *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010) (citation omitted). This is because the trial court, as the original trier of fact, is in a "markedly better position to judge the credibility" of the witnesses than our court on appeal. *Id.*; *see also In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("A trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.' In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented." (internal citations omitted)). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings,

and opinions may be detected from this "nonverbal leakage." Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the trial judge is in the best position to assess witnesses' interest in the trial, their motive, candor, bias, and prejudice.

In light of the foregoing, we find no reason to disturb the district court's specific credibility findings and resulting conclusion that Jackson did not prove his ownership of or right to possess property in Wesselink's hands. The court's findings are supported by substantial evidence, and we affirm its ruling dismissing the replevin and conversion claims.

We also affirm the court's ruling dismissing Jackson's malicious prosecution claim. That claim stemmed from Jackson's arrest for second-degree theft of an all-terrain vehicle (ATV) in September 2008. Wesselink testified he purchased the ATV in question but stored it at Jackson's for use around the farm. After the parties' falling out, Jackson sold the ATV. Jackson's daughter, while visiting with a sheriff's deputy about another matter, mentioned the ATV might not have been her father's to sell. The deputy then contacted Wesselink and asked him about the matter. Wesselink described the ATV to the deputy and gave him its VIN number, along with the purchase agreement listing him as the purchaser. He told the deputy that he owned the ATV.

Based on this evidence, the district court denied Jackson's claim, finding he had failed to show that Wesselink instigated or procured the prosecution. *See Sarvold v. Dodson*, 237 N.W.2d 447, 448 (Iowa 1976) (listing elements of a claim for malicious prosecution, which include instigation or procurement of a previous prosecution by defendant). The court stated:

> At best, the plaintiff managed to prove that the defendant gave information to a law enforcement officer that consisted of his claim of ownership of the 4-wheeler in question and a copy of a purchase order showing it was bought in his name. This information was provided only after plaintiff's daughter had mentioned the 4-wheeler to the law enforcement officer. . . . The law enforcement officer sought out Wesselink, not the reverse, and there is absolutely no evidence that Wesselink sought to have criminal charges filed. He simply provided information to the officer.

(Footnote omitted.)

Jackson attempts to combat these findings by arguing the deputy "would not have filed a felony theft charge against Jackson without the information obtained from Wesselink and the statement by Wesselink that the 4-wheeler was his." However, our supreme court has acknowledged the

> giving of the information or the making of the accusation . . . does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit.

Lukecart v. Swift & Co., 256 Iowa 1268, 1281, 130 N.W.2d 716, 724 (1964). *But see Bair v. Shoultz*, 233 Iowa 980, 983, 7 N.W.2d 904, 905 (1943) (holding in an action for malicious prosecution, it "matters not that the defendant did not sign an information and cause the arrest. It is sufficient if his voluntary participation in the prosecution starts the movement of the criminal machinery so that an arrest would probably follow").

The comments to the Restatement (Second) of Torts regarding the instigation or procurement element of malicious prosecution explain:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The

> exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement (Second) of Torts § 653 cmt. g, at 409 (1977). But, if the "information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." *Id.*

On appeal, Jackson does not claim Wesselink falsely told the deputy the ATV was his. And during the trial, Jackson testified only that he "assumed" the four-wheeler was his, even though Wesselink paid for it. As mentioned, the district court found Wesselink's testimony more credible. We defer to this finding, which we believe is supported by substantial evidence in the record.

For the foregoing reasons, we affirm the judgment of the district court dismissing the plaintiffs' claims against Wesselink.

AFFIRMED.