IN THE COURT OF APPEALS OF IOWA

No. 3-242 / 11-1437
Filed May 30, 2013

LARRY D. SCHAEFER and
ELAINE M. SCHAEFER,
Plaintiffs-Appellants,

vs.

DALE L. PUTNAM, PUTNAM
LAW OFFICE; SMP, L.L.C.; and
LIBERTY BANK, F.S.B.,
Defendants-Appellees.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Larry and Elaine Schaefer appeal district court judgments against them, their two sons, and G.R.D. Investments, L.L.C. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

William W. Graham and Aimee R. Campbell of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, and Dale L. Putnam, Decorah, for appellees, Putnam and Putnam Law Office.

Bernard L. Spaeth, Jr., Kara M. Sinnard, and Thomas H. Burke of Whitfield and Eddy, P.L.C., Des Moines, for appellee, Liberty Bank.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Against a labyrinthine backdrop of property transfers and financing deals, Larry and Elaine Schaefer appeal district court judgments against them, their two sons, and G.R.D. Investments, L.L.C. They raise nine issues on appeal; we only reach the merits of two claims.

First, Larry and Elaine contend the record contained insufficient evidence to sustain a creditor's fraudulent nondisclosure claim. Because the evidence shows the creditor was unaware only Larry and Elaine could bind G.R.D., the district court properly submitted the nondisclosure claim to the jury. Second, Larry challenges the court's award of common law attorney fees to his sons. We agree with the district court's assessment that Larry's conduct toward his sons was so oppressive or conniving that a fee award was appropriate. The district court's rulings that affect only the Schaefer sons or G.R.D. cannot be challenged by Larry and Elaine on appeal. We also decline to address several issues advanced without any supporting authority.

I. Background Facts and Proceedings

At the center of this dispute are husband and wife, Larry and Elaine Schaefer. Also involved are their sons, Ray and Dean Schaefer; the couple's former attorney, Dale Putnam; G.R.D. Investments, a limited liability company organized in the name of the sons; SMP, a limited liability company set up by Putnam; and creditor Liberty Bank, successor-by-merger to Hancock County Bank & Trust (Liberty).

Before this action, in March 1998, Land O'Lakes, Inc. gained a judgment in an Iowa district court against Larry for $127,125 stemming from a breach of four hedge-to-arrive grain contracts. In January 2001 attorney Putnam advised Larry and Elaine to form a limited liability company and transfer their nonexempt Iowa real estate to the entity to protect their assets from creditor claims—including that of Land O'Lakes. Named G.R.D., the limited liability company's articles of organization, executed by sons Ray and Dean, list Larry and Elaine as managers. Ray and Dean executed an operating agreement for G.R.D. designating them as the initial members and managers, and describing the company's purpose as "[t]he purchase, sale and rental of real estate." That same month Larry and Elaine signed deeds transferring several parcels of real estate to G.R.D., including a video store, farmland, 1108 South Shore, Pascal property, and the Heartland building. The couple retained ownership of their homestead and farm.

On July 23, 2001, Land O'Lakes filed suit in the United States District Court for the Northern District of Iowa, claiming the property transfers to G.R.D. were intended to hinder, delay, and defraud the company. Larry and Elaine settled with Land O'Lakes, agreeing to pay $85,000 to satisfy the judgment.

The couple and their sons later approached William Paulus, a commercial loan officer for Liberty, to obtain financing for G.R.D. Based on conversations among Paulus, Ray, Dean, and Larry, as well as financial statements and G.R.D. organizational documents provided, Paulus approved financing to G.R.D. Between March 2003 and May 2004, Liberty loaned G.R.D. $562,807.21 in

principal as consideration for seven promissory notes signed by Ray and Dean. The bank secured the promissory notes with mortgages on each parcel of property held by G.R.D. and by obtaining personal guarantees from Ray and Dean. Larry and Elaine used the proceeds from the G.R.D. notes to pay off prior existing indebtedness, liens, and real estate taxes of G.R.D. and their own.

On April 2, 2003, G.R.D. loaned $85,000 to Larry and Elaine in exchange for a mortgage on their homestead and forty acres of agricultural property. The couple used the proceeds to settle with Land O'Lakes in May 2003.

In October 2003, Larry and Elaine filed for Chapter 7 bankruptcy. Putnam sent a letter to Larry, Elaine, Ray, and Dean in November 2005 regarding the amount of money they would need to settle Larry and Elaine's bankruptcy obligations. He estimated it would cost $180,000 to cover their obligations and pay his attorney fees. Putnam proposed:

> "[T]here [i]s an entity that would be in a position to make the cash available as needed as set out above. The entity is an LLC known as SMP, LLC (SMP) which is comprised of my wife. Obviously, I have a connection. Also, I will be involved in obtaining the funds for SMP to make the loan . . . . SMP would be willing to enter into an initial note for the approximate amount of $180,000 depending on what you need for the unsecured creditors, secured by Open-End Mortgages up to $250,000.

On June 8, 2006, Larry and Elaine assigned the $85,000 note and mortgage on their homestead property in favor of G.R.D. to SMP. Larry, Elaine, Ray, Dean, and G.R.D. executed additional notes to SMP to repay creditors, which were secured by mortgages on the several parcels of property initially transferred to G.R.D.

Meanwhile, the bankruptcy trustee challenged the couple's real estate transfers to G.R.D. as fraudulent conveyances. On June 7, 2006, the bankruptcy court ruled the real estate transfers to G.R.D. were "void."[1] Rather than liquidating the real estate for a cash distribution to the creditors, the trustee accepted a settlement from Larry and Elaine and the court granted the couple's discharge from bankruptcy.

G.R.D. made payments on the Liberty notes from their inception, and Larry and Elaine took over payments from June 2006 until June 2008. Liberty eventually declared defaults on all seven notes.

On September 28, 2008, Larry and Elaine sued multiple parties. They claimed Putnam was negligent in advising them to form G.R.D. and transfer property to the company to stave off creditor claims. They also claimed Putnam breached his duty of loyalty, and because SMP is Putnam's "alter ego" the company should not be considered a separate entity.

The couple alleged because the mortgages between G.R.D. and Liberty were executed by Ray and Dean, rather than Larry and Elaine as managers, the instruments are invalid and accordingly all payments to Liberty should be refunded. Larry and Elaine claimed G.R.D. breached its manager employment contract and that both Liberty and Putnam are liable for acting in concert with G.R.D. In a claim against Ray and Dean, the couple alleged their sons intentionally interfered with G.R.D.'s contractual rights, and that Liberty is also

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[1] In a quiet title action, our supreme court held that G.R.D. retained all interest in the property transferred from Larry and Elaine to G.R.D. *See Schaefer v. Schaefer*, 795 N.W.2d 494, 502 (Iowa 2011).

liable for acting in concert with Ray and Dean. They also alleged neither son has rights as a member of G.R.D.

The several defendants included counterclaims and cross-claims with their answers. Liberty submitted a counterclaim for fraudulent nondisclosure, among others, seeking actual and punitive damages. Ray, Dean, and G.R.D. counterclaimed for breach of contract, conversion, and breach of fiduciary duty. SMP sought to foreclose its mortgages, and Putnam counterclaimed to recover attorney fees.

The district court bifurcated the proceedings and held a jury trial on February 8, 2011. The jury rejected all of Larry and Elaine's claims against Putnam, awarded Putnam $12,200 in unpaid legal fees, and found in favor of Liberty's counterclaim for fraudulent nondisclosure, awarding $200,000 in punitive damages. The jury found in favor of G.R.D. against Larry and Elaine for breach of contract in the amount of $715,975.50; conversion for $32,000; and breach of fiduciary duty for $200,200. The jury also awarded Ray and Dean $58,360 for their breach of fiduciary duty claim against their parents.

In its June 6, 2011 findings of fact, the court found Liberty was entitled to judgment in rem on all secured property, and judgment on its notes against G.R.D. and its guarantees against Ray and Dean—including interest, late charges, attorney fees, and costs—for a total $1,132,658.22. The court also entered a declaratory judgment finding Ray and Dean are the "members" of

G.R.D., and awarding Ray and Dean $87,868.14 in common law attorney fees against Larry Schaefer.[2]

II. Scope and Standards of Review

We determine whether sufficient evidence exists to justify submitting the claim to the jury, viewing the record in the light most favorable to the nonmoving party. *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). To submit a claim to the jury, each element of the claim must be supported by substantial evidence. *Id.* Evidence is substantial when a reasonable mind could find it sufficient to support a finding. *Id.*

Because an award for common law attorney fees is in the court's equitable powers, our review is de novo. *Hagge v. Iowa Dep't of Revenue & Fin.*, 539 N.W.2d 148, 151 (Iowa 1995).

III. Analysis

A. Can Larry and Elaine Challenge the District Court's Judgments Against their Sons and G.R.D.?

Larry and Elaine argue because the court failed to recognize Liberty loan officer Paulus's false testimony, it abused its discretion in awarding the bank attorney fees against theirs sons, Ray and Dean, and G.R.D. The couple also asserts insufficient evidence supports the court's finding that G.R.D. should be obligated to pay a $25,000 note executed between G.R.D. and Liberty, accusing

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[2] The district court also entered judgment in rem in favor of SMP for $149,596.80 on the homestead property plus $86,079.25 in attorney's fees and granted SMP's foreclosure claims on the additional mortgages totaling $476,148.39. Larry and Elaine separately appealed these grounds in *Schaeffer v. Putnam*, No. 12-0064 (Iowa Ct. App. Feb. 13, 2013) (further review granted April 25, 2013).

Ray of breaching his fiduciary duty to G.R.D. by borrowing the money to pay his personal obligations.

Liberty contends the couple cannot challenge these rulings on appeal because Larry and Elaine are not obligated to pay the judgments imposed on their sons or G.R.D. and have no authority to assert G.R.D.'s rights.

By virtue of Larry and Elaine's role as managers, they are not liable for G.R.D.'s obligations. *See* Iowa Code § 490A.601 (2007). And at the time G.R.D. executed mortgages and promissory notes to Liberty in connection with the quitclaimed estates, title opinions confirmed neither Larry nor Elaine had any interest in them. *See Schaefer v. Schaefer*, 795 N.W.2d 494, 502 (Iowa 2011) ("[T]itles . . . continue to belong to G.R.D. today."). Because the rulings at issue do not legally affect Larry and Elaine, they have no right to challenge them on appeal.[3]

Our supreme court addressed a similar situation in *Ackerman v. Lauver*, 242 N.W.2d 342 (Iowa 1976). The appellant challenged a directed verdict in favor of the plaintiff and against another party to the suit who did not appeal. *Id.* at 347. Our supreme court held the appealing party "cannot have a reversal because the court—correctly or incorrectly—decided the claim of two other litigants." *Id.* We follow *Ackerman* here.

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[3] As previously discussed, at one point Larry and Elaine were managers of G.R.D. Even if the couple retained authority to act on behalf of the company, because they are now challenging the district court's ruling in their individual capacity as parties to the litigation rather than on behalf of G.R.D.—whom they personally asserted claims against, and who asserted claims against them—the couple cannot challenge rulings adverse to G.R.D.

The district court entitled its ruling "findings of fact, conclusions of law, and order granting foreclosure and judgment against G.R.D. Investments, L.L.C., Raymond Schaefer and Dean Schaefer." Because Larry and Elaine were not prejudiced by these specific conclusions of law and have no authority to assert the defendants' rights, they may not challenge the rulings on appeal. *See Vicorp Rests., Inc. v. Bader*, 590 N.W.2d 518, 521 (Iowa 1999) ("[A] party may appeal only from an adverse judgment and not from a finding or conclusion of law not prejudicial, no matter how erroneous.").

B. Did the District Court Erroneously Submit Liberty's Fraudulent Nondisclosure Claim to the Jury?

Larry and Elaine assert Paulus knew they were the managers for G.R.D. with authority to bind the company when their sons signed for the G.R.D. loans. They argue because one cannot fraudulently conceal a fact of which the other party is fully aware, insufficient evidence existed to submit Liberty's fraudulent nondisclosure claim to the jury.

Liberty acknowledges Paulus was aware of the status of Larry and Elaine as managers, but contends no evidence at trial showed Liberty or Paulus knew only Larry and Elaine could sign on G.R.D.'s behalf.

"Fraud requires clear-and-convincing evidence of (1) materiality, (2) falsity, (3) representation, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury and damage." *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996). Because concealing or failing to disclose a material fact may also constitute fraud, the representation element can be satisfied absent an

affirmative misstatement. If the party who conceals or fails to disclose the fact had a duty to communicate it, the party is liable for fraudulent nondisclosure. *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 174 (Iowa 2002).

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material . . . .

City of Ottumwa v. Poole, 687 N.W.2d 266, 269 (Iowa 2004) (quoting Restatement (Second) of Contracts § 161 (1981)).

For Liberty to prevail on its fraudulent nondisclosure claim, the jury instructions required a showing that "Larry Schaefer knew that Raymond Schaefer and Dean Schaefer were not authorized to execute notes and mortgages on behalf of G.R.D." and that he "concealed or failed to disclose that only he and Elaine were authorized to execute notes and mortgages on behalf of G.R.D." Larry and Elaine argue because Paulus "knew Larry and Elaine Schaefer were the Managers and authorized signators for G.R.D . . . [Larry] cannot fraudulently conceal something that [Paulus] is fully aware of."

The couple correctly asserts a plaintiff's reliance on a nondisclosure must also be justified to recover for fraud. *See Wright*, 652 N.W.2d at 174. Reliance is justified if the individual, "in view of their own information and intelligence, had a right to rely on the representations." *Hammes v. JCLB Props., LLC.*, 764 N.W.2d 552, 556 (Iowa Ct. App. 2008) (recognizing test is subjective). Reliance is not justified if the individual has equal knowledge, or could have discovered falsity through a cursory examination. *Id.*

Paulus's knowledge that Larry and Elaine had authority to sign does not mean he knew *only* they could sign. Paulus testified he made loans based on G.R.D.'s "corporate authority resolution," which listed Ray and Dean as managers with full authority to bind the entity. Another "corporate authority resolution" listed the brothers as members with fully authority to bind. The operating agreement presented to him listed Ray and Dean as the initial members of G.R.D. and defined "Managers" as Ray, Dean, and another brother, Glenn Schaeffer. Nobody supplied the bank with a later amendment listing Larry and Elaine as managers.

Paulus testified he did not know only Larry and Elaine could sign on behalf of G.R.D. He testified Ray, Dean, and Larry attended the first meeting regarding the loans, and none of the three represented that Ray and Dean were without authority to bind G.R.D. Ray and Dean both testified they believed they had authority to sign the notes and mortgages on behalf of G.R.D. But Larry testified that from G.R.D.'s inception and at all times after, he, Elaine, Ray, and Dean knew that only he and Elaine could sign notes and mortgages on G.R.D.'s behalf. He admitted he never informed the bank or Paulus that Ray and Dean had no authority to sign the notes.

The record contains substantial evidence that Liberty did not have equal information regarding who could bind the company. Larry and Elaine's ability to bind the company did not communicate their exclusive ability to do so. Because the couple presented no evidence that would have signaled to Paulus the possibility that their sons did not hold authority to bind G.R.D., he justifiably relied

on the organizational documents and the representations of Ray, Dean, and Larry. According to both sons' testimony, even they believed they were authorized to sign; only Larry knew he and his wife alone could bind G.R.D. The court properly submitted Liberty's fraudulent nondisclosure claim to the jury.

C. Did the District Court Abuse its Discretion by Awarding Common Law Attorney Fees?

Larry contends his alleged deceitfulness did not fit within the narrow exception permitting the court to award common law attorney fees to his sons.

Attorney fee awards are generally not proper absent a statutory or contractual basis. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993). But a rare exception exists "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* The party seeking common law attorney fees must show: "The culpability of the defendant's conduct exceeds the willful and wanton disregard for the rights of another; such conduct must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159–60 (internal quotation marks and citation omitted).

"Oppressive" conduct "denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Id.* at 159. "Connivance" is "voluntary blindness [or] an intentional failure to discover or prevent the wrong." *Id.* The standard is beyond a mere lack of care or disregard for another's rights. *Id.*

Our supreme court found a county treasurer's fabrication of documents to defeat plaintiffs' claims and establish her counterclaims justified an award of

common law attorney fees: "it is hard to imagine behavior that would be more oppressive or conniving than a public official creating documents which benefit herself to the detriment of those she is elected to represent." *Williams v. Van Sickel*, 659 N.W.2d 572, 581 (Iowa 2003). Contrasting his actions with those of the treasurer in *Williams*, Larry argues because he "did not give false testimony on material points" and "did not fabricate exhibits," his conduct did not rise to a level justifying an award of common law attorney fees.

But the district court was appalled by Larry's actions:

> Larry Schaefer's willingness to unnecessarily subject his sons to possible financial ruin is shocking. Although Ray and Dean voluntarily agreed to become involved in the G.R.D. scheme they could never have imagined that their father would attempt to save his own financial skin at their expense. Although the jury concluded otherwise, Larry has always maintained that Ray and Dean did not have authority to sign loan documents on behalf of G.R.D. In spite of his beliefs he remained silent while Liberty Bank continued to make large loans based on the signatures of people he believed to be unauthorized. All the while Larry was aware that Ray and Dean were also signing personal guarantees for the loans.

Because Larry received substantial financial benefits from loans he believed were not properly executed, the district court determined "[t]he only logical conclusion that can be drawn . . . is that Larry knew he had an 'ace in the hole' that could be played at a later date," which would expose his sons to personal liability based on their guarantees, "notwithstanding the fact that the entire undertaking was done at his request in order to save himself financially."

In our de novo review, we agree with the district court's conclusion that Larry's conduct rises beyond a "willful and wanton disregard" for the rights of Ray and Dean. The treasurer's actions in *Williams* are not the exclusive manner in

which a defendant may risk being assessed common law attorney fees; rather they exemplify the tyrannical conduct that justifies such an award. We believe intentionally subjecting his sons to financial liability to mitigate his own loss—especially when his sons involvement appeared to be for the purposes of helping their father in the first place—typifies the connivance the *Hockenberg* court sought to punish when setting the heightened standard for common law attorney fees. Therefore, we affirm the district court's award.[4]

AFFIRMED.

[4] The brief filed on behalf of Larry and Elaine raises five additional issues without citing authority to support their arguments. Because they fail to cite authoritative support, we deem those issues waived. *See* Iowa R. App. P. 6.903(2)(g)(3); *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 507 n.12 (Iowa 2012).