IN THE COURT OF APPEALS OF IOWA

No. 7-379 / 07-0016
Filed June 27, 2007

KEVIN S. WETZEL, JOELLYEN M. WETZEL, ROWDY FLAMM and MONICA FLAMM,
Plaintiffs-Appellees,

vs.

HAROLD D. ROEMERMAN and WANETTA ROEMERMAN,
Defendants-Appellants.

Appeal from the Iowa District Court for Davis County, Annette J. Scieszinski, Judge.

Defendants appeal from directed verdict. **AFFIRMED.**

Patrick O'Bryan, Des Moines, for appellant.

Kevin Maughan, Albia, and Shannon Woods of Harrison, Moreland & Webber, P.C., Ottumwa, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Harold and Wanetta Roemerman claim the district court erred in granting Kevin and Joellyen Wetzel's motion for directed verdict in this dispute regarding the sale of forty acres of farmland. They request this court find the real estate contract did not merge with the warranty deed. They contend the district court erred in awarding the Wetzels attorney fees. We affirm.

I. Background and Facts

Harold and Wanetta Roemerman and Kevin and Joellyen Wetzel entered into a real estate contract in February 2003, whereby the Roemermans sold approximately forty acres of farmland to the Wetzels. The contract provided for payments every three months over twenty years, but allowed the Wetzels to prepay all or any part of the principal without penalty. The contract further provided the Wetzels would not sell or assign the property without the Roemermans' consent. The contract also included a provision that the Roemermans would "have the use of the land so long as [they] are able to operate and/or manage the real estate."

When the Roemermans' attorney, Rick L. Lynch, prepared the contract, he also prepared a warranty deed which did not contain the provision allowing the Roemermans use of the land. Lynch had the Roemermans execute the warranty deed at the same time as the real estate contract and placed the deed in his safe to be held in escrow. After the closing, the Roemermans continued to farm the land and Wetzel began to make improvements on it.

In January 2006, Wetzel met with Lynch and advised him he wanted to pay off the contract. Lynch called Wanetta Roemerman, who asked about the

provision in the real estate contract allowing the Roemermans to continue to use the land. Lynch testified that he told Wanetta the deed would merge, and that the provision would no longer be valid. He further testified that Wanetta told him to "just go ahead and do it . . . go ahead and give the deed to Kevin Wetzel. Don't put anything in there about that."[1] Lynch delivered the warranty deed to Wetzel upon payment of the balance of the contract price. The next day, Harold Roemerman went to Lynch's office and told him he wanted to be able to continue to use the property. It was too late to recover the deed because Wetzel had recorded it the previous day. On May 31, 2006, Wetzel sold the property.

In August 2006, the Roemermans served a notice of forfeiture of real estate contract based on (1) the Wetzels taking possession of the land without fulfilling the contract provisions and (2) the Wetzels selling the land to another party without the Roemermans' written consent and without including the provision regarding their right to use the land. In September 2006, the Wetzels filed a declaratory judgment action and application for injunction. At a December 21, 2006 trial, the district court directed a verdict in the Wetzels' favor at the conclusion of their case. The district court found that

> [b]ecause the legal effect of the recorded deed drives the status of the real estate title, the Roemermans' subsequent Notice of Forfeiture of the merged contract, is null and void. The plaintiffs are entitled to declaratory relief as to the effect of the deed, and they also should be protected from further process on the Roemermans' forfeiture attempt.

[1] In an unusual move, the district court granted the Wetzels' motion for directed verdict before the Roemermans presented their case. Wanetta was therefore precluded from testifying to rebut the statements Lynch attributed to her.

The district court also awarded the Wetzels $3246.90 for reasonable attorney fees and expenses. The Roemermans appeal.

II. Merits

A. Directed Verdict

We review the district court's grant of the motion for directed verdict for correction of errors at law. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002). We view the evidence in the light most favorable to the nonmoving party. *Rife v. D.T. Corner, Inc.,* 641 N.W.2d 761, 766 (Iowa 2002). If reasonable minds could differ on resolution of the issue, the grant of directed verdict is inappropriate. *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 566 (Iowa 1997).

The district court directed a verdict in the Wetzels' favor at the conclusion of their case.[2] The trial judge acknowledged that, as plaintiffs, the Wetzels' motion for directed verdict "at this stage of the proceedings is kind of a unique procedural posture for this case." The judge found, however, it was undisputed the deed was delivered and recorded, which "has the legal effect of merging the contract terms into the terms of that warranty deed." Counsel for the Roemermans resisted the motion, stating there were genuine issues of fact, "it's

[2] Because this matter was tried to the court without a jury, the Wetzels should have designated their motion as a motion to dismiss rather than as a motion for directed verdict. *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 438 (Iowa 1996). "The misnomer is not material, however, because a motion to dismiss during trial is equivalent to a motion for directed verdict." *Id.*

up to the court to decide who's telling the truth . . . and we haven't presented our case yet."

The motion for directed verdict should not have been granted because the Roemermans had not yet presented their case. *See Thordson v. Kruse*, 173 Iowa 268, 274-75, 155 N.W. 334, 336 (1915) (noting the acceptance of a deed as performance of a collateral stipulation in a contract to convey land depends on the intention of the parties; to ascertain the parties' intent, written or oral extrinsic evidence may have to be considered); *see also Johnson v. Van Werden*, 255 Iowa 1285, 1291, 125 N.W.2d 782, 785 (1964) (disapproving of trial procedure whereby a party is deprived of the opportunity to present rebuttal evidence because a motion for directed verdict is sustained); *Horridge v. Nichols*, 194 Iowa 295, 297, 189 N.W. 763, 764 (1922) (noting it is not appropriate that a party present a motion for a directed verdict before the other party has rested).

Had they requested a remand for a new trial because the motion for directed verdict should not have been granted, we would have granted a new trial. In their brief to this court, however, the Roemermans "pray that the district court's ruling be reversed *with a finding that the real estate contract in question did not merge with the warranty deed*." (Emphasis added). An appellant's brief must "state the precise relief sought." Iowa R. App. P. 6.14(1)(*g*). "[O]ur review is confined to those propositions relied upon by the appellant for reversal on appeal." *Hyler v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) (citing *Richardson v. Neppl*, 182 N.W.2d 384, 390 (Iowa 1970)).

The evidence is unopposed and compels us to agree with the district court that the real estate contract merged with the deed. *See Phelan v. Peeters*, 260

Iowa 1359, 1362, 152 N.W.2d 601, 602 (1967) (noting the general rule that a contract to convey land presumptively merges into the deed, but the rule has many qualifications, including that collateral agreements or conditions survive for the purpose of enforcement). Therefore, we are unable to grant the Roemermans the precise relief they have sought.

A. Attorney Fees

The Roemermans contend there was no contractual basis to award attorney fees to the Wetzels because the award was "inconsistent with the court's prior ruling that the real estate contract in question was null and void, and had merged with the warranty deed." We review the district court's award of attorney fees for an abuse of discretion. *Great Am. Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration*, 691 N.W.2d 730, 732 (Iowa 2005). Reversal is warranted when the court rests its discretionary ruling on unreasonable or untenable grounds. *Id.*

The Wetzel brief fails to respond to the attorney fee issue. "[S]uch unprofessional failure can lead to summary disposition of an appeal." *Inghram v. Dairyland Mut. Ins. Co.,* 215 N.W.2d 239, 239 (Iowa 1974); *see* Iowa R. App. P. 6.14(1)(*c*), (*f*) and 6.14(2) (appellees are required to make their arguments in their brief); *see also Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002) ("We are not bound to consider a party's position when the brief fails to comply with our rules of appellate procedure."). A party's failure to argue an issue is not automatically deemed a waiver, however, where the party's position on the issue "clearly has merit and its failure to cite authority or argue the issue has not hindered our review or consideration of the issue." *State*

v. Crone, 545 N.W.2d 267, 271 n.1 (Iowa 1996). If the failure does not require us to undertake the party's research and advocacy, we may decide the issue raised on appeal. *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999). We accordingly limit our review to issues that were raised and ruled on below that do not require us to assume a partisan role.

In the absence of statutory or contractual authority, attorney fees are ordinarily not recoverable or allowable as court costs. *Lickteig v. Iowa Dep't of Transp.*, 356 N.W.2d 205, 212 (Iowa 1984). Under Iowa Code section 625.22 (2005), "[w]hen judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court."

The parties' real estate contract provided that "[i]n any action or proceeding relating to this contract, the successful party shall be entitled to receive reasonable attorney's fees and costs as permitted by law." The Roemermans contend an award of attorney fees is inconsistent with the court's ruling that the real estate contract was null and void and had merged with the warranty deed." The district court did not find the contract was null and void but the Roemermans' notice of forfeiture of the merged contract was null and void. Because section 625.22 allows attorney fees in cases such as this, we are not required to assume a partisan role in reviewing this issue. Therefore, notwithstanding the Wetzels' failure to argue this issue, we affirm the district court's award of attorney fees.

III. Conclusion

Because the evidence was unopposed, we are unable to grant the Roemermans a reversal with a finding that the real estate contract did not merge with the warranty deed. We affirm the award of attorney fees.

AFFIRMED.