

IN THE COURT OF APPEALS OF IOWA

No. 8-820 / 07-1861
Filed December 17, 2008

RUEFER INSULATION, INC.,
Plaintiff-Appellant,

vs.

CHERI RUEFER,
Defendant-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

The plaintiff appeals from the district court order awarding judgment in its favor. **AFFIRMED AS MODIFIED.**

David Lemanski, Dubuque, for appellant.

Cheri Ruefer, Longmont, Colorado, pro se appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Ruefer Insulation, Inc. (Ruefer), through one of its shareholders, Donald Ruefer Jr., appeals from a district court ruling awarding judgment in its favor and against Cheri Ruefer for \$36,312.92. In addition to claiming the damages were inadequate, Ruefer seeks punitive damages and attorney fees. We affirm as modified.

Donald and Cheri were married in 1988, and operated Ruefer Insulation, Inc. together as officers and shareholders. They separated in February 2003 and their marriage was dissolved in November 2003. The decree of dissolution of marriage contained a stipulation of the parties, which noted the only area of disagreement was whether Donald would pay Cheri spousal support and if so, in what amount. As to Ruefer Insulation, Inc., the stipulation contained this provision: "Husband and wife agree that this family business shall continue to be jointly owned (50/50) by them and that the current debt thereon as well as any future debt thereon be owed jointly (50/50)." Additionally, a buy-out provision was included, which the parties did not utilize, and Cheri remained a 50% shareholder. Cheri continued in her capacity essentially as office manager and accountant for the business until November 2004.

On August 31, 2006 Ruefer filed a petition against Cheri, seeking damages, punitive damages, and attorney fees for alleged breach of fiduciary duties to Ruefer.

Scope of Review. Our review is de novo. Iowa R. App. P. 6.4; *Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76, 78 (Iowa 1984).

Judgment Amount. At the outset, we, like the district court, are compelled to comment on the lack of coherent evidence in the record. Neither party requested a professional audit of Ruefer, which would have provided a clear picture of the income and expenses of the business. To complicate the spotty financials admitted into evidence, the record was supplemented post-trial, with no opportunity for the parties to challenge the enhanced record. Needless to say, many questions remain in the record on appeal. Nonetheless, it is the parties, not the court, who create the record, and if it is sketchy, the court must work with the evidence provided. In this case, the district court sifted through the exhibits and testimony, arriving at an amount which was close to what Cheri admitted she actually owed the company. In its post-trial motion and now on appeal, Ruefer challenges the district court's judgment as it lacks detail in its calculations. Although our de novo review is hampered by the lack of clear financial evidence in the record, we are able to discern clear support for the district court's ruling.

Ruefer introduced several documents purporting to demonstrate Cheri's inappropriate taking of money from Ruefer's accounts and using those monies for herself or for the benefit of her adult children from a previous marriage. We agree with Ruefer that the reasons Cheri gave for taking money from the company should not minimize her wrongdoings as a fiduciary of Ruefer. Nonetheless, we also acknowledge the district court's observations that Cheri's actions were in part a by-product of the unresolved financial issues from the dissolution of marriage. Cheri was helping herself to what she thought she was

owed from Donald, by using the company bank accounts. This was clearly the wrong method to satisfying the dissolution of marriage issues.

Because of the stipulation in Donald and Cheri's decree of dissolution of marriage, we will not consider any allegations of wrong-doing prior to November 6, 2003. From the records available, it appears Cheri withdrew \$40,523.87 from the Liberty Bank account from November 18, 2003 to November 30, 2004. The record does not disclose a complete explanation for each withdrawal, as some could have been for the business while others are clearly personal. Cheri acknowledged many of the withdrawals were for her personal benefit or for the benefit of her adult children. Those items were: \$23,490.86 (cash); \$1,600.00 (daughter Michelle's school tuition); \$3,500.00 (payments on behalf of son Robert); \$2,463.63 (daughter Michelle's attorney). In addition, Cheri acknowledged \$9,104.87 in personal charges to the company's American Express credit card. These combined withdrawals and charges total \$40,159.36. The district court entered judgment against her in the amount of \$36,312.92. On our de novo review, we modify the award to reflect judgment against Cheri in favor of Ruefer in the total amount of \$40,159.36.

Attorney Fees and Punitive Damages. Although Ruefer requested attorney fees and punitive damages, we decline to make this award. Ruefer is correct in its position that this suit was to recover assets wrongfully taken from a corporation by a shareholder, but we cannot overlook the fact that this also is the end product of a dissolution of marriage between Donald and Cheri. Sorting out the financials of the company was intertwined with the unsettled issue of alimony following the dissolution trial. Cheri, while helping herself to company assets, did

so in part to recover what she thought was due to her from the unresolved dissolution issue and judgment in the dissolution decree. In addition, she retained a fifty percent ownership as a shareholder of Ruefer, so in essence, her post-dissolution withdrawals from the business resulted in her robbing her own assets. Had she triggered the buy-out provision contained in the dissolution of marriage decree, the value of the company would have been greatly reduced by her own actions. Thus, under the facts of this case, we affirm the district court's denial of attorney fees and punitive damages. See *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158-60 (Iowa 1993) (stating that a plaintiff seeking the rare remedy of common law attorney fees "must prove that the culpability of the defendant's conduct exceeds the willful and wanton disregard for the rights of another"); *First Nat'l Bank of Counsel Bluffs v. One Craig Place, Ltd.*, 303 N.W.2d 688, 699-700 (Iowa 1981) (stating that an award of exemplary damages depends on the particular facts in a case, such as whether an award is appropriate to punish a party or discourage others from similar wrongful conduct).

AFFIRMED AS MODIFIED.