IN THE COURT OF APPEALS OF IOWA

No. 9-144 / 08-0117
Filed May 29, 2009

KRISTIN L. ROWEDDER, as Conservator of GARY KRAL,
Plaintiff-Appellant,

vs.

MARK HELKENN, RAYMOND HELKENN, MCCORD INSURANCE & REAL ESTATE CORP., BERNEIL PREUL, and ROGER PREUL,
Defendants-Appellees.

Appeal from the Iowa District Court for Crawford County, James D. Scott, Judge (summary judgment ruling in favor of McCord Insurance and Real Estate Corp. and Berneil and Roger Preul) and Jeffrey A. Neary, Judge (summary judgment ruling in favor of Mark and Raymond Helkenn).

Plaintiff appeals the district court's rulings granting defendants' motions for summary judgment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Marvin O. Kieckhafer and R. L. Laubenthal of Smith Peterson Law Firm, L.L.P., Council Bluffs, for appellant.

Earl G. Greene, III, of Pansing, Hogan, Ernst & Bachman, L.L.P., Omaha, Nebraska, for appellees Raymond Helkenn and Mark Helkenn.

Sean A. Minahan and Patrick G. Vipond of Lamson, Dugan & Murray, L.L.P., Omaha, Nebraska, for appellees McCord Insurance & Real Estate Corp., Berneil Preul, and Roger Preul.

Heard by Sackett, C.J., and Vogel, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

SACKETT, C.J.

Gary Kral sold, in four separate transactions, farmland he owned in Crawford County. Plaintiff Kristin Rowedder, who subsequently was appointed Gary Kral's conservator, filed this action on Kral's behalf against a number of defendants.[1] The district court sustained the motions for summary judgments filed by all defendants and dismissed the case. This appeal addresses plaintiff's claims that the district court erred in dismissing defendants McCord Insurance and Real Estate Corporation (McCord), Berneil and Roger Preul, and Mark and Raymond Helkenn. We affirm in part, reverse in part, and remand.

BACKGROUND AND PROCEEDINGS. In November 2003, Gary Kral contacted defendant Roger Preul about selling a forty-acre tract of land Kral had inherited from his father. Kral was referred to Preul by defendant Mark Helkenn. Kral wanted to sell the land at $2000 per acre so as to avoid capital gains taxes.[2] Preul facilitated the sale of that tract for the asking price on November 11, 2003. On January 5, 2004, Kral discussed with Preul selling another forty-acre tract for $2000 per acre. This tract was advertised and sold for $2000 an acre with Preul again facilitating the sale. On or around May 10, 2004, Kral considered selling another forty-acre tract for $2000 per acre and gave Preul the name of a prospective buyer who ultimately purchased the property for the asking price on May 18, 2004. On February 18, 2005, Kral and Preul discussed selling a fourth

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[1] Besides the parties to this appeal, the defendants included the purchasers of the first three tracts. These suits were dismissed on summary judgment. Rowedder's appeal as to these purchasers was dismissed by the Supreme Court on November 7, 2008.

[2] Apparently the land had been inventoried in Kral's father's estate at $2000 per acre which would have been his basis in the land for federal and state income tax purposes.

forty-acre tract of land for $2000 per acre. Mark Helkenn told his brother Raymond about the listing. He also told Raymond that Gary Kral appeared to be infatuated with a lady and was spending a lot of money on her. Raymond offered to purchase the land for the asking price on February 22, 2005. At the time of this transaction, Mark Helkenn lived on other property owned by Gary Kral. As part of the conveyance to Raymond Helkenn, the parties made an agreement that Mark Helkenn would have a right of first refusal should Kral want to sell the land where Mark lived. No consideration was paid for the right of first refusal.

On August 25, 2005, an attorney, Bradley J. Nelson, met with Kral because Kral wanted to evict Mark Helkenn. Kral tried to explain that Mark Helkenn was taking money from him and not paying rent. He told Nelson that Mark Helkenn was to make repairs to the house which would be credited against the rent and he believed Mark Helkenn was not living up to his end of the bargain. Kral showed Nelson copies of his cancelled checks. There were several checks to Mark Helkenn for amounts up to $5000. Nelson believed some of the checks had been altered or written by two different people. Kral was unable to explain to Nelson the purpose for which the checks were written. Nelson felt Kral was low functioning mentally and did not have the mental ability to take care of his own financial matters. In further delving into Kral's bank records Nelson found checks payable to individuals that appeared out of the ordinary and totaled over $200,000. In talking with some of Kral's acquaintances, including Roger Preul, Nelson was convinced people were taking advantage of Kral and a number of people knew this was happening. To protect

Kral, Nelson sought to have a conservator appointed. Kral agreed and Kristin Rowedder was appointed as Kral's conservator. She then brought this action asserting, in part, that the purchasers of the property engaged in fraud and conspired to divest Kral of his assets by exploiting Kral's incompetence and incapacity. She also contended the Preuls and McCord committed professional malpractice in facilitating the real estate transactions.

PRESERVATION OF ERROR. Defendants McCord and Berneil and Roger Preul contend that we do not have jurisdiction to consider the claim against them because Rowedder has not appealed the ruling on summary judgment dismissing them from the case.

The district court entered summary judgment in favor of McCord and the Preuls on August 30, 2007. The plaintiff filed a motion to reconsider and the court overruled that motion on September 27, 2007. The motions filed by defendants Helkenn were considered later and the ruling on their motions came on December 21, 2007. This ruling sustained the Helkenn's motion for summary judgment as to all counts and dismissed the claims against them.

On January 18, 2008, a "Notice of Appeal" was served,[3] directed to defendants and their attorneys of record, including McCord and Berneil and Roger Preul. The notice advised that "Notice is hereby given that the undersigned hereby appeals to the Supreme Court of Iowa final judgment entered against the undersigned party in said cause on December 21, 2007, and from each order and ruling inhering therein." The notice was signed by Marvin O.

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[3] The notice was filed in the district court on January 22, 2008.

Kieckhafer, who was attorney of record for the plaintiff. It did not include the name of the plaintiff as the appealing party. The proof of service on the notice indicates it was sent to the attorneys of record for defendants McCord and Berneil and Roger Preul as well as attorneys for Raymond and Mark Helkenn.

Appeals generally must be taken within thirty days from the entry of the judgment or thirty days after the entry of a ruling on a motion to reconsider. Iowa R. App. P. 6.5(1).

> An appeal . . . is taken and perfected by filing a notice with the clerk of the court where the order, judgment, or decree was entered, signed by appellant or appellant's attorney. It shall specify the parties taking the appeal and the decree, judgment, order, or part thereof appealed from.

Iowa R. App. P. 6.6(1). The court entered summary judgment in favor of Mark and Raymond Helkenn on December 21, 2007, and the plaintiff did not file a motion requesting the court to reconsider this ruling. The notice of appeal was filed nearly four months after the court's final ruling on the claims against McCord and the Preuls.

The plaintiff argues appeal was timely as to McCord and the Preuls because notwithstanding the requirement to file a notice of appeal within thirty days, Iowa Rule of Appellate Procedure 6.5(3) provides:

> an order disposing of an action as to fewer than all of the parties to the suit, . . . or finally disposing of fewer than all the issues in the suit, . . . may be appealed within the time for an appeal from the order, judgment, or decree finally disposing of the action as to remaining parties or issues.

The time for filing a notice of appeal addressed to these defendants is controlled by rule 6.5(3). *See Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d

10, 16 (Iowa 1989). Under this rule, the plaintiff's notice of appeal was timely because it was filed within thirty days of the final ruling disposing of the remaining parties in the suit. Iowa R. App. P. 6.5(3).

The next questions are whether it identified the party appealing and if it specified the decree, judgment, order, or part thereof appealed from. Plaintiff was not named in the notice, but it was signed by her attorney of record as the appealing party. However, the question of whether this notice was sufficient to preserve the appeal rights of plaintiff against McCord and the Preuls is subject to the general rule that notices of appeal are to be given a liberal construction. *Iowa Dep't of Human Servs. ex rel. Greenhaw v. Stewart*, 579 N.W.2d 321, 323 (Iowa 1998).

> Notices of appeal should be liberally construed so as to preserve the right of review, and permit, if possible, a hearing on the merits; and only substantial compliance with the forms and requisites of the statutes or rules of court is required, and they should be held to have been complied with if the purpose of the statutes or rules has been accomplished. Thus, as long as the opposing party is not misled to his irreparable harm, a notice of appeal which can reasonably be construed as an attempt in good faith to appeal from an appealable decision is sufficient; and, as a rule the notice is sufficient if it reasonably shows that an appeal is intended and the judgment, order, or decree appealed from substantially states the other facts required by the statute to be shown.

Id. (citing 4 C.J.S. *Appeal & Error* § 371, at 421 (1993)).

It can be argued that the failure to specifically identify the plaintiff was not in substantial compliance with our appellate rules. However one cannot say that the defendants were misled as the notice contained the case's caption. *See State ex rel. Phipps v. Phipps*, 503 N.W.2d 391, 392 (Iowa 1993). In *State ex rel.*

Phipps v. Phipps, 503 N.W.2d at 392, the court said it was a nonfatal error where a petition stated the action was brought on behalf of the mother instead of the child. The failure to include the plaintiff's name as an appealing party is not a fatal error.

The next question is whether the notice is sufficient to alert McCord and the Preuls that the summary judgment dismissing the claims against them was also appealed. Applying Iowa's liberal rule, we believe it was. The notice was addressed to McCord and the Preuls. It indicated it appealed from the final judgment of December 21, 2007, and each order and ruling inhering therein. *See Citizens First Nat. Bank of Storm Lake v. Turin*, 431 N.W.2d 185, 188 (Iowa Ct. App. 1988) (entertaining an appeal on the merits when notice stated it was an appeal from "the final decision" and appellee had not claimed it was prejudiced or misled).

We will therefore consider the claims against McCord and the Preuls.

STANDARD OF REVIEW. We review a ruling on a motion for summary judgment for correction of errors at law. *Rock v. Warhank*, 757 N.W.2d 670, 672 (Iowa 2008); *Diemer v. Hansen*, 545 N.W.2d 573, 575 (Iowa Ct. App. 1996). The motion should be granted

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Iowa R. Civ. P. 1.981(3). An issue of fact is "genuine" if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). "A fact is material if it will affect

the outcome of the suit, given the applicable law." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). The court should view the evidence in a light most favorable to the party resisting the motion for summary judgment. *Murtha v. Cahalan*, 745 N.W.2d 711, 713-14 (Iowa 2008). "We also indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question." *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). Yet, a party moving for summary judgment may prevail by establishing that the nonmoving party's proof is too limited to succeed on its claim. *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996). "If those limits reveal that the resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." *Id.*

SUMMARY JUDGMENT GRANTED TO MCCORD INSURANCE AND THE PREULS. The plaintiff contends the district court erred in determining there were no genuine issues of material fact to preclude granting McCord and the Preuls summary judgment on the plaintiff's claim of professional negligence. The district court found summary judgment should be granted because there was no genuine issue of material fact as to whether Roger Preul breached the duty of care owed to Kral during the transactions. It stated that the plaintiff's expert opined that a realtor that sold real estate at a price directed by the client would not fall below professional standards if (1) the client was duly informed of all the advantages and disadvantages of the specific price, and (2) the client had the mental capacity to make the necessary decisions. It reasoned that breach of the

standard of duty could not be proved because there was not clear, satisfactory, and convincing evidence that Kral lacked the mental capacity to understand the nature of the transaction. On appeal, the plaintiff asserts the court erred by weighing the evidence and making its own findings of fact rather than identifying whether there was a genuine issue of fact to proceed to trial.

In a professional negligence action, the plaintiff must prove a duty of care is owed to him or her, breach of that duty, and that the breach caused the plaintiff's damages. *See Smith v. Koslow*, 757 N.W.2d 677, 680 (Iowa 2008). Generally, as Kral's real estate agent, Preul had a duty to use "reasonable care, diligence, and judgment in the performance of tasks undertaken on behalf of his principal." *Humiston Grain Co. v. Rowley InterstateTransp. Co., Inc.*, 512 N.W.2d 573, 574-75 (Iowa 1994). The requisite standard of care for one practicing a trade or profession, such as a real estate agent, is to exercise "'the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.'" *Id.* at 575 (quoting *Kastler v. Iowa Methodist Hosp.*, 193 N.W.2d 98, 101 (Iowa 1971)). Unless a professional's lack of care is obvious, the standard of care and breach will typically require proof in the form of expert testimony. *See Graeve v. Cherny*, 580 N.W.2d 800, 801 (Iowa 1998); *Humiston Grain Co.*, 512 N.W.2d at 575. Since the existence of a duty is a question of law, it can be adjudicated on a motion for summary judgment. *Hansen v. Anderson, Wilmarth, & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001).

The plaintiff's expert, John Seuntjens, testified by deposition that each parcel was sold below its market value. He reported that he believed Roger Preul did not represent fully the best interest of his client, Kral, during the transactions. He stated,

> Based on my appraisals, it was obvious to me that the farms were underpriced; therefore [Roger Preul] should have practiced a higher level of due diligence to determine their present market value when he exposed those farms to the market. And based on my research with the information that I have available, it appears that they were marketed poorly.
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> . . . .
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> I don't think he practiced due diligence to determine what the tax ramifications would be on this property. That's not fully his responsibility, but he does have a fiduciary responsibility to his client to inform them of any significant negative repercussions of selling the farm, that specifically being capital gains tax.
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> . . . .
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> I think he had a responsibility to call attention to the fact that there is potential for significant capital gains on the farm and to advise him to seek competent legal counsel to determine what that was or competent tax advice one or the other.

When asked what a real estate agent's duty is when a client states he wants the land sold for $2000 an acre, Suentjens advised,

> I think they need to quiz their potential client as to why they would sell it for less than market value. They need to go on a fact-finding venture to find out why someone would want to sell their property for less than it's worth.
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> . . . .
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> I think an experienced real estate agent should have documentation as to why that individual wanted to sell it for less than market value. Possibly an acknowledgement would be recommended whereby they acknowledge that they're selling it for less than market value, that they have been disclosed what the actual market value is. I think it's up to the real estate agent to inform their potential client or their client in the normal due diligence as to what the advantages and disadvantages are, all the aspects of the listing, all the aspects of the sale. There should be a comprehensive disclosure to their client as they enter into any agreement of sale or listing.

When pressed about whether selling property below market price at the instruction of the client would be a breach of a real estate agent's duty to the client, Suentjens responded,

> It would be my opinion that if an individual has the mental capacity to make the appropriate decision and they have been completely informed by people with whom they have entrusted their matters, then it would seem to me to be their choice as to what they were going to sell the farm for.

In a tort action against a real estate agent, a plaintiff must "show the standards of conduct and practices, or bench marks, that establish the requisite skill and knowledge of members of good standing in the defendant's trade or profession." *Menzel v. Morse*, 362 N.W.2d 465, 471 (Iowa 1985). This can be proved by expert testimony or through published ethical standards and practices of real estate agents. *Id.* at 472. In *Menzel*, we recognized that a real estate agent's duty to his or her client includes advising the client to seek legal advice when the interest of any party to the transaction requires it. *Id.* at 472-73. One early Iowa case, which addresses a claim of fraud rather than professional negligence, specifically addresses a real estate agent's duty to protect the client's interest by obtaining the highest price possible.

> It is elementary that an agent must be loyal in transacting the business of his principal. An agent is under the legal duty to fairly and fully disclose all facts within his knowledge, germane to the subject-matter of the agency, and in the strictest good faith impart to his principal all information that would control, or have a tendency to influence, the conduct of the principal. It is his duty to secure the highest price possible. It is his duty to inform his principal as to the true value of the land and to communicate any offers made therefor. He occupies a position of confidence, and must bear true allegiance to his principal. The principal has a right to rely on the statements of the agent in relation to the subject-

> matter of the agency. The agent must make a full, fair, and prompt disclosure of all the circumstances affecting the principal's right or interests.

Githens v. Johnson, 195 Iowa 646, 649, 192 N.W. 270, 272 (Iowa 1923). Plaintiff's expert's opinion was that Preul had a duty to fully investigate and disclose the present market value of the farms and to advise Kral to obtain tax advice on any capital gains issues. Preul testified that he did evaluate the market value by comparing the tracts to other lots sold in the area, but no documentation verifying the comparables appears in the record. He also testified that he did not advise Kral to discuss capital gains tax issues with an attorney or accountant. Roger Preul was concerned about Kral's ability to handle his finances around the time of the transactions. A memo in the record detailing a conversation between Kristin Rowedder, the plaintiff and conservator in this action, and Preul, states that Preul admitted that "[o]ne person is robbing [Kral] blind."

The plaintiff has shown there is a genuine issue of material fact as to whether Preul breached his duty to Kral. We reverse the district court's dismissal of the claim for negligence against defendants McCord Insurance, Berneil Preul, and Roger Preul, and remand to the district court for further proceedings not inconsistent with this opinion.

SUMMARY JUDGMENT GRANTED TO THE HELKENNS. The plaintiff next contends summary judgment should not have been granted to the Helkenns because there is a genuine issue of material fact as to whether the Helkenns were involved in a civil conspiracy to wrongfully purchase land from Kral. The

district court granted the motion finding the record was devoid of any evidence of a wrongful act to support a claim for civil conspiracy.

"Under Iowa law, '[a] conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish by unlawful means some purpose not in itself unlawful.'" *Wright v. Brooke Group, Ltd.*, 652 N.W.2d 159, 171 (Iowa 2002) (quoting *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 232 (Iowa 1977)). It is the underlying wrongful acts that give rise to the claim, not the conspiracy itself. *Basic Chems.*, 251 N.W.2d at 233. Civil conspiracy is merely a method to impose vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert. *Wright*, 652 N.W.2d at 172. The wrongful conduct taken by a co-conspirator need not be an intentional tort, but the conduct itself must be actionable in the absence of a conspiracy. *Id.* at 174.

According to the plaintiff's brief, the wrongful conduct that supports their claim is that:

> Mark Helkenn knew at the time that Gary Kral could be easily influenced to make unwise financial decisions. Mark Helkenn, despite his "concerns," saw to it that his brother, Raymond Helkenn, was first in line to buy 40 acres of farm ground at the $2,000.00 per acre price, a price which Plaintiff contends was too low and damages her ward, Gary Kral. . . . Further, as part of the transaction, Mark Helkenn–and others (Defendant Roger Preul)–influenced Gary Kral to provide Mark Helkenn a "right of first refusal" on the property where Mark Helkenn was living at the time for no consideration.

We agree with the district court that these actions do not amount to an actionable tort on which to base a claim of civil conspiracy. The district court held this action did not meet the required elements of fraud and plaintiff has not appealed this

finding. The plaintiff points us to no case law identifying similar conduct as actionable. To survive a motion for summary judgment, the non-moving party cannot rely on mere allegations but must set forth specific facts to support a prima facie claim. *Humphries v. Trustees of the Methodist Episcopal Church of Cresco, Iowa*, 566 N.W.2d 869, 872-73 (Iowa 1997). The district court did not err in granting the Helkenn's motion for summary judgment.

CONCLUSION. The district court did err in granting the motion for summary judgment in favor of the Preuls and McCord Insurance. The district court did not err in granting the Helkenns' motion for summary judgment. Since the plaintiff's claim of civil conspiracy is not based on actionable conduct, this claim fails as a matter of law.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.