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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-472 / 89-198

346

RUDOLPH S. QUIJAS,

Appellee,

vs.

MARILYN R. QUIJAS,

Appellant.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

Marilyn appeals from the district court's declaratory judgment holding her obligated to pay two $10,000 notes. **AFFIRMED.**

Warren G. Oxley of Walter Newport, P.C. & Associates, Davenport, for appellant.

Bobbi M. Alpers, Davenport, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

PER CURIAM

Rudolph and Marilyn had been married. While married they had several business enterprises. They held one-half interest in a business known as "The Tortilla Factory." In 1983, Rudolph gave two $10,000 promissory notes to his mother, Mary Louise Quijas. The parties were divorced July 9, 1985. Marilyn was awarded the parties' one-half interest in The Tortilla Factory subject to outstanding debts. David Macias owned the other one-half interest. Rudolph claimed the $20,000 loan was for The Tortilla Factory business. The decree of dissolution was not clear whether Rudolph was personally and solely responsible for payment of these two notes or if they were an obligation of The Tortilla Factory business, and thus, became the responsibility of Marilyn.

The notes became due and payable. On March 15, 1988, Rudolph filed a petition for declaratory judgment and requested the court declare and construe Marilyn's duties as to payment of the two $10,000 loans.

Marilyn, through her attorney Walter Newport, filed an answer and a request for production of documents. Then Marilyn's attorney filed a vouching in notice and a motion to file a third-party petition against David Macias. The vouching in notice sought to have David appear in this case through his attorney to defend Marilyn. The basis for Marilyn vouching in and third-party petition against David

is because of a hold harmless agreement she and David entered into in settlement of a lawsuit between them over The Tortilla Factory. She further notified David in this "Vouching In" if the undersigned (her attorney Walter Newport) was forced to appear and defend on her behalf, she would hold David liable for any and all costs and expenses (including judgments) for which she may be responsible.

As alleged by Marilyn, the relevant portions of this agreement provided The Tortilla Factory and David would hold Marilyn harmless from any and all claims, actions, or other liabilities from whatever sources associated with the operation and business of The Tortilla Factory from the inception of such business until the time of this agreement, regardless whenever such claims, actions, or liabilities may be asserted. Also, David agreed The Tortilla Factory and he would vigorously defend Marilyn at their own cost and expense. If they did not defend Marilyn, then she may defend herself and charge back all reasonable costs, including reasonable attorney fees, to them.

Marilyn's motion for leave to file a third-party petition to bring in David Macias as a third-party defendant was granted on July 29, 1988. Also, at this same time, a trial date was set for October 14, 1988. On August 5, 1988, a copy of the third-party defendant petition, together with the original notice, was served on

David M. Macias. On August 19, 1988, attorney Edward N. Wehr, entered his appearance for Marilyn. Wehr was then also David's attorney. After attorney Wehr appeared and undertook Marilyn's defense in this case, she apparently did not pursue the third-party action against David. The prayer in this petition requested the court award her judgment against David for any costs, expenses, judgments, attorney fees, settlement amounts, and any other out-of-pocket liabilities she incurred, in fact, be held harmless by David resulting from Rudolph's action against her.

After trial, the court found "it was the intention of the parties under the terms of the stipulated decree the $20,000 debt went to The Tortilla Factory." The court declared between these two parties the obligation for payment of the two $10,000 notes to Mary Louise Quijas is upon Marilyn. In its findings of fact, conclusions of law, and declaratory judgment, the trial court did not address and made no determination of David Macia's liability, if any. Marilyn appeals. We affirm.

Marilyn requests on appeal the district court's ruling be modified so the primary obligation for payment of the $20,000 debt is upon David Macias/The Tortilla Factory. Rudolph simply requests the district court judgment be affirmed.

We observe as between Marilyn and Rudolph there is no justicable or contested issue for us to decide in this appeal. Therefore, the trial court's declaratory judgment holding Marilyn obligated to pay the two notes in question is affirmed.

Marilyn's request for this court to modify the district court's ruling and place the primary payment obligation of the $20,000 debt upon David Macias/The Tortilla Factory, is another matter. We have gleaned the trial record, files, and transcript, and we fail to find Marilyn filed an Iowa Rule of Civil Procedure 179(b) motion to enlarge or amend the trial court's finding, conclusions of law, and declaratory judgment to decide David Macia's liability, if any, to Marilyn. The attempted appeal of this issue is governed by the holding in Estate of Grossman v. McCreary, 373 N.W.2d 113, 114 (Iowa 1985). In that case our supreme court held:

> Such a motion (rule 179(b)) is a condition precedent for preserving the "skipped" issues for appellate review. . . . It is well settled that a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. Similar cases so holding are legion.

(Citations omitted.)

The issue of David's liability to Marilyn for payment of the two notes in question was for the trial court to decide. The trial court did not address or decide this issue. Marilyn did not file a rule 179(b) motion to give

the trial court an opportunity to address and decide it. This issue has not been preserved for appeal.

An overlooked issue, called to the trial court's attention, might be resolved so as to avoid an appeal. If not, a ruling on it might avert a second trial and possible appeal. Id.

AFFIRMED.