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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-703 / 90-154

INVESTMENT PLANNING, INC., An Iowa Corporation,

Appellee/Cross-Appellant,

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vs.

IOWA-WISCONSIN CAPITAL, INC., An Iowa Corporation, and GEORGE WEITZEL,

Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Dubuque County, R. J. Curnan, Judge.

Iowa-Wisconsin Capital, Inc., appeals adverse jury verdict from breach of contract and interference with prospective business advantage. Investment Planning, Inc., cross-appeals a denial of attorney fees. **AFFIRMED ON ALL ISSUES.**

Patrick M. Roby and Diane Kutzko of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellants.

Lawrence L. Marcucci and Grant K. Dugdale of Marcucci, Wiggins & Anderson, P.C., West Des Moines, for appellees.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

George Weitzel was originally a shareholder in Investment Planning, Inc. (IPI). He left that company in 1983 and began a new investment company, Iowa-Wisconsin Capital, Inc. (IWC). The departure was not amicable, and Weitzel and IPI filed suits against each other. A settlement agreement was entered into whereby Weitzel was to receive $10,000 for his stock in IPI, which was valued at $270,000, and he was allowed to keep IPI's customer list. IWC also agreed not to cause the customers of IPI to rescind any annuity contracts made prior to the settlement agreement.

IPI brought this suit alleging that IWC and Weitzel had breached the settlement agreement by inducing former customers of IPI to rescind their annuities, thereby causing IPI to lose commissions. A jury found for IPI on its claims for breach of contract and intentional interference with prospective business advantage. The district court entered judgment against IWC for $54,989.16 and against Weitzel for $18,382.30. The court denied defendants' motion for judgment N.O.V. and IPI's application for attorney fees. Defendants appealed and IPI cross-appealed.

Defendants contend IPI was not the real party in interest. They claim Erwin Hafeman was the sole shareholder of IPI at the time the petition was filed, but Hafeman changed the name of the company to Dubuque Holding

Company. A different corporation later purchased the name of Investment Planning, Inc. However, Hafeman was not a shareholder of the later IPI. Defendants assert it is an entirely different corporation.

Defendants furthermore contend IPI did not present sufficient evidence to create a jury question on its claim for intentional interference with prospective business advantage. They believe the court should not have allowed IPI to amend its petition to conform to the proof by including a claim IWC interfered with prospective relations with existing customers.

Finally, defendants contend the court should have set aside the jury award of damages for breach of contract. They state IPI did not sufficiently show any damages were caused by defendants' conduct.

In its cross-appeal IPI claims the court should have awarded it attorney fees because the settlement agreement specifically gave it the right to recover attorney fees.

Our standard of review is on assigned errors of law. Iowa R. App. P. 4.

I. Real Party in Interest

IWC alleges IPI is not the real party in interest. To ascertain the validity of IWC's claim, we must trace the history of IPI.

The record shows prior to the filing of this action, the original Investment Planning, Inc., was wholly owned by

Erwin J. Hafeman. On July 31, 1985, Hafeman sold all his shares in the original Investment Planning, Inc., to Finn Investment Security Corporation (formerly known as U.S. Investment Security Corporation, formerly known as Harold F. Miller & Co.). In the same transaction, the original Investment Planning, Inc., changed its name to Dubuque Holding Company. The corporate name of Finn Investment Security Corporation was changed to Investment Planning, Inc. It is the present Investment Planning, Inc. [IPI], which brought this action. This action was filed August 13, 1986.

Although there are some technical mistakes in the petition, these are not fatal to IPI's claim. The proper parties are before the court. The new IPI acquired the stock and name of the original Investment Planning, Inc. IPI, under its former name as U.S. Investment Security Corporation, preserved its claims against IWC in the action for breach of contract settled by the other parties in 1983.

> We liberally construe the real party in interest rule. The purpose of such rules "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."

City of Ames v. Schill Builders, Inc., 274 N.W.2d 708, 713 (Iowa 1979) (citations omitted).

The original Investment Planning, Inc., settled its claims against IWC on the day of trial in 1983. The only

party not included in that settlement was U.S. Security Investment Corporation, now known as Investment Planning, Inc. (IPI). Final judgment in the present case would constitute res judicata against all interested parties. Thus, by including IPI as plaintiff, the purpose of the real party in interest rule is effected.

We determine IPI is the correct real party in interest. We affirm the trial court on this issue.

II. Amendment to Conform to the Proof

IWC argues the trial court abused its discretion in allowing IPI to amend its petition to conform to the proof.

> Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Iowa R. Civ. P. 88.

The Iowa Supreme Court recently stated:

> An amendment to conform to the proof should usually be allowed when it does not substantially change the issues. The trial court has considerable discretion in ruling on a motion for leave to amend, and we will reverse only when a clear abuse of discretion is shown. ..."[O]ur real inquiry in reviewing on a motion to amend is whether the ruling lacks a solid legal basis."

Steckelberg v. Randolph, 448 N.W.2d 458, 460 (Iowa 1989) (citations omitted).

Our review of the original petition and the alleged facts and testimony convinces us the trial court did not abuse its discretion. The original petition alleged interference with prospective business advantage with the

investment annuity companies. The amendment to conform to the proof alleged interference with prospective business advantage with the customers. The point of the allegation appears to remain the same. The amendment was necessary merely to clarify the relationships between the actors in this case. We determine the amendment did not substantially change the issues before the court.

We affirm the trial court on this issue.

III. Sufficiency of the Evidence on Intentional Interference with Prospective Business Advantage

IWC claims IPI did not present sufficient evidence on each element of interference with prospective business advantage. The Iowa Supreme Court has laid out the essential elements:

> 1. Existence of a prospective business contract or relationship.
>
> 2. Defendants know of the prospective contract or business relationship.
>
> 3. Defendants intentionally and improperly interfered with the prospective contract or business relationship.
>
> 4. Defendants' interference prevented the prospective contract or business relationship.
>
> 5. The amount of damage sustained by plaintiff.

See Nesler v. Fisher and Co., Inc., 452 N.W.2d 191, 195-97 (Iowa 1990).

The gist of IPI's claim is IWC knowingly violated the 1983 settlement by obtaining the rescission of several IPI clients' annuities. These clients then apparently bought annuities through IWC. This resulted in at least two different commission losses to IPI due to two separate annuity rollovers. The commission losses are IPI's alleged damages.

Elements 1 and 2 are not seriously disputed. Element 3 is the most contested. However, the settlement agreement in 1983 specifically prohibited IWC from encouraging IPI clients to rescind their annuity accounts held by IPI. IWC appears to concede it worked to get IPI's clients to rescind their annuities. IWC apparently told IPI's clients the IPI annuity company was being investigated and other companies were no longer dealing with it. We determine from the evidence presented the jury could find IWC's interference with prospective business advantage was intentional and improper.

Element 4 was fulfilled because IPI lost the annuity accounts due to IWC's improper and intentional interference. The loss of the annuity accounts resulted in lost commissions on two separate annuity "roll-overs." These lost commissions are the damages required by element 5.

We determine there was sufficient evidence to create a jury question on IPI's claim of interference with prospective business advantage. We affirm the trial court on this issue.

IV. Breach of Contract

IWC appeals the adverse jury verdict on the breach of contract claim. IWC claims the jury's findings of fact were not supported by substantial evidence.

We are bound by the jury's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We review the evidence in the light most favorable to the findings of the trier of fact. See Poulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981). We do not weigh the evidence or pass on the credibility of the witnesses. Leaders v. Dreher, 169 N.W.2d 570, 573 (Iowa 1969).

The jury considered all the evidence. It was able to evaluate the witnesses. The special verdict form indicates the jury fulfilled its duty thoughtfully and carefully. IWC does not contend the jury failed to follow instructions concerning the alleged breach of contract. We find substantial evidence to support the jury's findings of facts.

We affirm the trial court on this issue.

V. Attorney Fees

IPI cross-appeals the trial court's order refusing attorney fees. IWC claims the cross-appeal was not timely filed, and the settlement agreement did not give IPI an absolute right to attorney fees.

IWC filed its appeal within the thirty-day limit for appeal from a final judgment. IPI filed its cross-appeal within five days after the appeal was filed, but not within the thirty-day limit for appeals.

The Iowa Supreme Court has addressed this question without answering it.

> There is no dispute about the facts. The thirtieth day after the judgment fell on Saturday, January 30. Dowie filed a timely appeal on Monday, February 1 [fn. 1: When the last day for filing an appeals falls on a Saturday the time therefore shall be extended to include the next day which is not a Sunday or legal holiday. Iowa Code § 4.1(22) (1981).]; however, the corporation did not appeal. The cross-appeal was filed on the following day, February 2. Although the thirty day period for taking a direct appeal had passed, Colonial's cross-appeal against Dowie was timely filed because it was filed within five days after Dowie had taken his appeal. Iowa P. App. P. 5(a) "[a] cross-appeal may be taken within the thirty days for taking an appeal or in any event within five days after the appeal is taken.").
>
> We need not decide whether Colonial may maintain a timely cross-appeal against the corporation. At oral argument Colonial indicated that it was no longer interested in pursuing the cross-appeal against the corporation, and we deem it has abandoned that cross-appeal and that this issue is now moot.

Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279, 281 (Iowa 1983).

We also decide we need not address this issue. We determine the the trial court was within its discretion in refusing to grant attorney fees.

Section 5(h) of the settlement agreement reads:

> With respect to rescissions initiated by IWC, directly or indirectly, in whole or in part on or subsequent to December 7, 1983, USISC [now IPI] specifically reserves its right to seek damages beyond its actual commission losses, including,

> without limitation, punitive damages, attorney fees and such equitable relief as the Court may deem appropriate.

Our supreme court has expressed Iowa's policy on attorney fees in contract cases.

> The right to recover attorneys' fees as part of the costs does not exist at common law. They cannot be so allowed in the absence of a statute or agreement expressly authorizing it. In order that they may be so taxed the case must come clearly within the terms of the statute or agreement.

Thorn v. Kelley, 257 Iowa 719, 726, 134 N.W.2d 545, 548 (1965) (emphasis added); see also Frost v. Cedar County Board of Supervisors, 163 N.W.2d 432, 434 (Iowa 1968).

The settlement agreement does not provide for attorney fees as an absolute right. Rather, it reserves IPI's right to seek attorney fees, along with punitive damages and "equitable relief as the Court may deem appropriate." IPI sought attorney fees, as it had the right to do. The trial court denied attorney fees, as it did not "deem [them] appropriate."

We determine the trial court did not abuse its discretion in denying attorney fees to IPI. We affirm the trial court on this issue.

We affirm the trial court on all issues.

AFFIRMED ON ALL ISSUES.