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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STEVEN T. GIBSON and JUDI L. GIBSON,

Plaintiffs-Appellants,

vs.

IRENE H. ROHWEDDER and NORMAN SIVERTSEN, in their capacities as Administrators of the Estate of Esther M. Slocum,

Defendants,

RUHL AND RUHL REALTORS, INC.,

Defendant-Appellee.

STEVEN T. GIBSON and JUDI L. GIBSON,

Plaintiffs-Appellants,

vs.

ROY A. BUSH,

Defendant-Appellee.

8-365
87-1341

Appeal from the Iowa District Court for Scott County (Nos. L 69278 & 71486), John A. Nahra, Judge.

Plaintiffs appeal two separate orders granting summary judgment and an order overruling their motion to amend their petition. **AFFIRMED.**

Kent A. Simmons of Liebbe & Simmons, Davenport, for plaintiffs-appellants.

Craig A. Levien and Vicki L. Seeck, Davenport, for defendant-appellee Ruhl and Ruhl Realtors.

Michael K. Bush of Carlin, Hellstrom & Bittner, Davenport, for defendant-appellee Roy A. Bush.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SCHLEGEL, P.J

Plaintiffs Steven and Judi Gibson appeal two separate orders granting summary judgment and an order overruling their motion to amend their petition. Plaintiffs contend that: (1) the district court abused its discretion in not allowing them to amend their petition to claim damages for repair of termite damage; (2) the realtor's failure to insure a proper termite inspection prior to closing breached their duty towards plaintiffs and should render them liable for punitive damages and attorney fees; and (3) the plaintiffs' attorney at closing, Roy A. Bush, should be liable for failing to insure that a proper termite inspection was completed prior to closing.

On December 27, 1983, plaintiffs Steve and Judi Gibson executed a real estate agreement with defendants Norman Sivertsen and Irene Rohwedder in their capacities as administrators of the Estate of Esther Slocum. The purchase agreement was for a house that had been Mrs. Slocum's homestead in Davenport, Iowa. The real estate purchase agreement was submitted through Ruhl & Ruhl, Inc., a local real estate agency, and handled by Gary Quigley, an employee and agent of Ruhl & Ruhl. Attorney Roy A. Bush represented the Gibsons at the closing.

The real estate contract provided that the estate or realtor was to complete a termite inspection prior to closing. The termite inspection was not done until after the closing was completed, nor had any information been

given to plaintiffs regarding an inspection of the property. However, the closing did continue and the Gibsons accepted the deed transferring the property to them.

Two to three hours after closing, a termite inspection took place. No evidence of termites was found. Several months later the plaintiffs learned their house was heavily infested with termites that had caused structural damage to the house. The estate then treated the premises for the damage at its expense and offered to repair the property. The plaintiffs then filed a lawsuit in July 1984 seeking to rescind the real estate contract and recover certain types of damages.

The district court granted the estate's summary judgment motion in 1985. This ruling was reversed by the court of appeals and in May 1987 a trial was held on the issue of rescission. The district court denied the Gibsons' request for rescission and found that adequate remedies existed at law for the alleged breach of contract. The court further ordered that a trial be held on the remaining issues, and the Gibsons sought to amend their prayer for relief by adding a specific claim for compensatory damages for the costs of repairing the termite damage to the premises. The plaintiffs' motion to amend was denied and summary judgment was entered in favor of Ruhl & Ruhl, the estate, and attorney Bush. The estate has

subsequently been dismissed as a defendant by the plaintiffs. The Gibsons filed notice of appeal on September 24, 1987.[1]

I. The Gibsons first contend that the district court abused its discretion in not allowing them to amend their petition to claim damages for repair of the premises. The district court denied plaintiffs' leave to amend and stated:

> The original petition in this cause of action was filed on or about July 23, 1984. Since that time the Plaintiffs have successfully amended their petition four times: the Plaintiffs amended their petition on August 9, 1984; a second amendment to the petition was granted by this Court on about December 14, 1984. On May 15, 1985 the Plaintiffs again requested leave to amend the petition, and on December 9, 1986, they made a third request to amend; these two motions were granted by this Court on December 31, 1986. On January 21, 1987, this Court issued a specific order requiring that all motions for changes in pleadings be filed on or before February 3, 1987. The deadline for making amendments to the pleadings was set to insure that this case would be plead in a suitable form far enough in advance of trial that all parties would be apprised of the issues.
>
> The Plaintiffs' petition was filed over three years ago; they have had ample time within which to supplement or amend their pleadings to add new theories of recovery. Plaintiffs originally filed a trial certificate in this case on December 14, 1984, indicating that the issues were joined and that the Plaintiffs would be ready for trial.

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1 Defendant-appellee Ruhl & Ruhl filed a motion to dismiss this appeal. They contend that the amount in controversy before this court is less than the amount required by rule 3 of the Iowa Rules of Appellate Procedure. As this case involves an interest in real estate, we find no merit to this claim.

> On balance, the Court must deny the Plaintiffs' motion to amend.

Iowa Rule of Civil Procedure 88 provides that leave to amend a petition should be freely given when justice so requires. It is within the court's discretion as to whether an amendment should be allowed, and the court's decision will be reversed only if there is a clear abuse of that discretion. Willson v. City of Des Moines, 386 N.W.2d 76, 83 (Iowa 1986). The bounds of fair discretion are exceeded if the ruling lacks a sound legal basis. Johnston v. Percy Const., Inc., 258 N.W.2d 366, 371 (Iowa 1977). Although allowance of an amendment is the general rule and denial the exception, we are reluctant to find an abuse of discretion in a trial court ruling granting or denying a party leave to amend. Id. at 370-71 (citations omitted).

Based upon the record in this case, we see no reason to disturb the trial court's ruling. Plaintiffs were afforded a full and fair opportunity to litigate their claims within a reasonable period of time. More importantly, however, to allow the plaintiffs to pursue a new theory of recovery based upon repair damages would substantially alter the issues in this case and would unfairly prejudice defendants. See Smith v. Village Enterprises, Inc., 208 N.W.2d 35, 37 (Iowa 1973).

II. The Gibsons further challenge the trial court's summary judgment orders entered in favor of defendants Ruhl & Ruhl and attorney Bush. In reviewing the grant or denial

of a summary judgment motion, this court is guided by the same principles utilized by a trial court in making that determination. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Drainage Dist. No. 119 v. Inc. City of Spencer, 268 N.W.2d 493, 500 (Iowa 1978).

A. Ruhl & Ruhl, Inc.

1. Willful Disregard. The Gibsons claim that a material issue of fact exists upon Agent Quigley's conduct as a managing agent for Ruhl & Ruhl. They argue that a reasonable jury could infer that Agent Quigley covertly ordered a rush inspection and allowed the closing to proceed for his own personal gain and that of Ruhl & Ruhl. The Gibsons further state that such conduct should be regarded as intentional or in reckless disregard of their rights under the purchase agreement and that they are entitled to punitive damages.

Before punitive damages may be recovered, there must be sufficient evidence in the record to show that the defendant acted illegally or improperly with willful or reckless disregard of plaintiff's rights. Engel v. Vernon, 215 N.W.2d 506, 517 (Iowa 1974). Mere mistake or negligence is not enough, and a plaintiff must show that a defendant intentionally committed a wrongful act without just cause or excuse. McCarthy v. J. P. Cullen and Son Corp., 199 N.W.2d 362, 369 (Iowa 1972).

Our careful review of the record fails to support the Gibsons' contentions. The record is devoid of any evidence that Quigley acted covertly with the termite inspector Newberry for his own personal gain. The record fails to support a finding that Quigley knew or should have known that the termite inspection was negligently performed, or that he knew or should have known that the house was infested with termites before the closing took place. The evidence is unclear as to whether either Ruhl & Ruhl or Quigley were aware of the fact that the inspection had not taken place at the time of closing; however, such negligence does not rise to the level of an intentional commission of a wrongful act.

We fail to find any merit to plaintiffs' claim.

2. Attorney Fees. The Gibsons claim that they are entitled to attorney fees as a matter of law. Apparently they argue that they were forced to litigate this lawsuit because of Newberry's failure to inspect the premises prior to closing, and attempt to do so under the authority of Turner v. Zip Motors, Inc., 245 Iowa 1091, 1097, 65 N.W.2d 427, 432-33 (1954). In Turner, the court held that a person who, through the tort of another, has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation from the tortfeasor for expenditures thereby incurred.

The evidence does not support a finding that the Gibsons should be entitled to recover attorney fees from Ruhl & Ruhl. Turner applies to expenses incurred in third-party litigation, which is not the case here. Furthermore, we have difficulty in accepting plaintiffs' argument that they were forced into this litigation, where the evidence indicates that the estate offered to repair the premises and the Gibsons rejected that offer.

We affirm the trial court's decision granting Ruhl & Ruhl summary judgment.

B. Attorney Roy A. Bush. The Gibsons further contend that the trial court erred in granting summary judgment in favor of their attorney, Roy A. Bush. They contend that a fact issue exists as to whether Bush made an inquiry or investigation upon facts material to the transaction, and that if he did possess such information, an issue exists as to whether he failed to disclose this information to his clients.

In his motion for summary judgment, defendant Bush asserted that he would be liable if and only if two conditions are met: (1) that sellers Sivertsen and Rohwedder were found to have breached the contract, and said breach was the proximate cause of plaintiffs' damages and (2) sellers were found not liable to plaintiffs as a direct and proximate result of plaintiffs' alleged waiver of the contractual requirement for a termite inspection at

or prior to closing. The trial court, in granting Bush's motion for summary judgment, adopted this reasoning. The court found that the sellers maintained and completed their obligations under the offer to purchase, as evidenced by their offer to repair the house and pay for reasonable living expenses during the repair period. The court thus found no breach by sellers, and that no damages were proximately caused by them. The court further failed to find that Bush had breached his professional standard of care to the Gibsons.

A lawyer has a duty to his client to exercise ordinary care in handling the client's work. Baker v. Beal, 225 N.W.2d 106, 112 (Iowa 1975). In determining the scope of the attorney's duty, courts must give effect to the fiduciary role of the attorney and the heavy responsibility this imposes on him to represent and protect the client's interests with respect to the subject matter of the employment. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56-57 (Iowa 1977) (citation omitted). Based upon the evidence presented, we see no reason to disturb the trial court's findings. The record is devoid of any evidence that Bush failed to protect his clients' interests. Furthermore, we agree with the trial court that in the absence of any evidence that the sellers failed to comply with their obligations towards the Gibsons, Bush cannot be held liable to them.

We accordingly affirm the trial court's decision granting summary judgment in favor of defendant Bush.

AFFIRMED.