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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

A. M. KAGIN and DON KAGIN, INC.,)
Plaintiff-Appellee,)
vs.)
ALAN J. BROTMAN,)
Defendant-Appellant.)

Filed November 20, 1984

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4-376
84-211

Appeal from the Iowa District Court for Polk County - Luther T. Glanton, Judge

Defendant appeals from judgment for plaintiff coin dealers in their action seeking damages for conversion of certain numismatic materials. REVERSED AND REMANDED.

Joyce J Green, Des Moines, for defendant-appellant.

John P. Roehrick of Roehrick & Hassel, P.C., Des Moines, for plaintiff-appellee

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

DONIELSON, P.J.

Defendant appeals from judgment for plaintiff coin dealer in its action seeking damages for conversion of certain numismatic materials, asserting that (1) the trial court abused its discretion by striking defendant's answer and prohibiting him from introducing evidence in defense of the claim as a sanction for failure to appear for a discovery deposition; (2) certain lists admitted into evidence at trial on the issue of damages failed to satisfy foundational requirements for admission, (3) the trial court erred in quashing a subpoena seeking production of the underlying documentation supporting the lists; (4) the trial court should not have considered certain coins not offered or admitted into evidence; (5) evidence was insufficient to support the trial court's inference that certain coins were converted by defendant; and (6) evidence was insufficient to support an award of punitive damages. We reverse and remand.

On January 22, 1981, plaintiff coin dealers filed a petition seeking actual and punitive damages resulting from defendant's alleged conversion of certain coins at a time when he was employed by them. Defendant retained Robert Mannheimer as his legal counsel from January 1981, until December 1981, when he withdrew. Defendant then retained the services of Raymond Rosenberg. On May 13, 1983, Rosenberg filed an application to withdraw. At the time, defendant was living out of state but had a local mailing address to which notice was sent by certified mail

On May 17, 1983, a Notice of Deposition was filed requesting the defendant to appear nine days later for a deposition. A copy of the notice was hand-delivered to counsel for the defendant, who forwarded the notice to the defendant. Defendant did not appear for the deposition and, five days later, his counsel was permitted to withdraw.

On June 1, 1983, plaintiff filed a motion for sanctions including, but not limited to, striking of defendant's answer and preclusion of any defense to the claim. By professional statement, counsel for plaintiff advised the court that

defendant contacted them and said he would not be present on June 28 for the hearing scheduled on the motion for sanctions. On July 7, 1983, the court entered an "order" sustaining the motion, striking the answer, and prohibiting defendant from presenting a defense to plaintiff's claim. The order also granted "a default upon their cause of action" and, by separate order, a trial on the issue of damages was scheduled. The order imposing sanctions provided, inter alia, that defendant "in changing counsel, causing motions to compel and sanction requests to be filed and failing to appear or cooperate in the Plaintiff's discovery and preparation of this case, . . . caused delay . . . ."

Defendant appeared pro se for trial on the damages issue and, after some evidence was presented, was ordered to obtain new counsel. A new trial was scheduled and present counsel was then obtained.

Following trial, the court awarded plaintiff actual damages of $59,345 and punitive damages of $118,690. Defendant has appealed.

I.

Defendant argues that the trial court abused its discretion in imposing excessively harsh sanctions for failure to comply with discovery procedures. We decline to reach the merits of this claim since the appeal on this particular question is untimely.

On July 7, 1983, two orders were entered by the lower court. One imposed sanctions including granting the plaintiff a default. A second order set the date for the hearing on damages and also provided that:

> Defendant . . . being in default, the Plaintiff . . . is hereby awarded judgment against the Defendant . . . together with interest at the legal rate from and after the 22nd day of January, 1981 . . . .

(emphasis added). We conclude from this language that a default judgment was entered on that date. Thus, pursuant to Iowa R. App. P. 5(a), it was necessary to take an appeal within 30 days from entry of the judgment.

The fact that damages had not been determined when the default judgment was entered does not effect its finality. "A case, for purposes of appeal, may have more than one final order." Green v. Advance Homes, Inc., 293 N.W.2d 204, 207 (Iowa 1980). The initial order will be considered final if it establishes "the substantial rights of the parties and place[s] beyond the issuing court the power to return the parties to their original positions." Id. In the present case, the parties' rights with respect to liability were conclusively established on July 7, 1983. This court lacks the jurisdiction with respect to any matters raised by this final judgment since more than 30 days has passed since its entry.

II.

Defendant also claims that certain lists admitted into evidence at trial did not satisfy the foundation for the business records exception to the hearsay rule. Plaintiff argues that objections made to the admission of the lists were insufficient to provide a basis for review on appeal.

In considering the sufficiency of an objection to preserve error, "the test is whether the exception taken alerted the trial court to the error which is urged on appeal." Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982), quoting Dutcher v Lewis, 221 N.W.2d 755, 759 (Iowa 1974). The purpose is "to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit . . . ." Goetzman, 327 N.W.2d at 745, quoting State v. Baskin, 220 N.W.2d 882, 886 (Iowa 1974). We believe the defendant's objections met these standards, thereby preserving error.

Four lists, Exhibits 3-6, were admitted into evidence over the defendant's objection. These exhibits were typewritten lists of certain coins or currency with a brief description. The cover sheet of each exhibit was a series of numbers produced by an adding machine with a total indicated at the bottom. Defendant's first objection was to the admission of Exhibit 3:

> I object. I do not know when this list was prepared. It seems to be prepared for the purposes of this litigation and not in the ordinary course of business.

We recognize that this objection could have been phrased with more particularity. There was no mention of the fact that defendant believed the exhibit was hearsay. Nor did defendant specifically point out that because the list was not prepared in the ordinary course of business it did not meet the foundational requirements for admission of a business record. Yet we are not willing to characterize an objection as improper merely because it could have been phrased better. The objection was sufficient to alert the trial court judge of the error urged on appeal. This is all that is required.

The business records exception to the hearsay rule as set out in Iowa R. of Evid. 803(6) is not an obscure principle of law. It seems reasonable to assume that the trial court and counsel for the plaintiff were familiar with the exception. In order for evidence to be admissible under that exception, the trial court must find, inter alia, that the record was "kept in the course of a regularly conducted business activity" and that the record was made "at or near the time" the events occurred which are the subject of the record. Iowa R. Evid. 803(6). Defendant's objection specifically points out that these foundational elements were not met. Thus, we believe it was sufficient to preserve error for appeal.

We also conclude that defendant's objections to the remaining exhibits were also proper. The objection to Exhibit 4 was: "I do not know when this exhibit was prepared." Counsel objected to admission of the other two exhibits on similar grounds, adding at one point, "I don't believe the proper foundation has been laid." Once again, we recognize the objections could have been phrased better. However, it is clear from the record that counsel was merely paraphrasing her original objection to Exhibit 3, specifically pointing out what foundational requirement had not been met. We therefore conclude that error was properly

preserved with respect to all four exhibits. Accordingly, we will address the merits of defendant's claim.

The exhibits in question were lists of coins and currency that the plaintiff had determined to be missing as well as their value. Because the lists were offered at least in part to prove the truth of the matter asserted, they are hearsay. See Madison v. Colby, 348 N.W.2d 202, 204 (Iowa 1984); State v. Fingert, 298 N.W.2d 249, 251 (Iowa 1980).

It is unclear from the record under which particular hearsay exception plaintiff was attempting to admit the exhibits. Two exceptions would be applicable. Iowa Rules of Evidence 803(6) (records of regularly conducted activity) and 803(5) (recorded recollection).

We agree with the defendant that the foundational requirements for Iowa Rule of Evidence 803(6) have not been met. Arthur Kagin testified that around the time defendant was discharged he began making handwritten lists of items that he believed to be missing. The lists admitted into evidence were typewritten copies of the original handwritten lists. During trial, counsel for plaintiff specifically stated:

> [A]ll the typewritten exhibits that have been received into evidence were prepared by our office for purposes of this litigation . . . from lists that Mr. Kagin had previously prepared sometime in the past.

A typewritten document of an original handwritten list would constitute "hearsay within hearsay" or double hearsay. "Included hearsay is inadmissible, upon proper objection, unless it independently comes within a recognized exception to the hearsay rule." In re Estate of Poulos, 229 N.W.2d 721, 727 (Iowa 1975); see also Iowa R. Evid. 805.

Plaintiff has failed to show that the handwritten lists or the typewritten documents were made in the regular course of business at or about the time of the events recorded. Nor has it shown that the method of preparation was such as to

indicate their trustworthiness. In fact, it is evident from the record that the typewritten documents admitted into evidence were prepared specifically for purposes of litigation. For these reasons, we conclude that the trial court erred in overruling defendant's objections to Exhibits 4-6.

Although the issue was not properly preserved at trial, we note parenthetically that the documents would not have been admissible under Iowa Rule of Evidence 803(5) as a past recollection recorded. Plaintiff did not show that the witness using the records once had knowledge but at the time of trial had insufficient recollection to enable him to testify fully and accurately. Nor did plaintiff show that the record was made when the matter was fresh in his memory and recorded correctly.

The presumption of prejudice inherent in the erroneous admission of evidence was not overcome in this case. We therefore reverse and remand for a new trial on the damages issue.

III.

Following the admission of Exhibits 3-6, defendant served upon Arthur Kagin a subpoena duces tecum for underlying documentation of three of these exhibits The trial court quashed the subpoena on the grounds that the requested documents could have been procured through discovery. Defendant argues that the court erred in quashing the subpoena, and claims that pursuant to Iowa Rule of Evidence 1006, the underlying documentation should have been provided by the opposing party. Since we have determined that the exhibits in question were inadmissible, we find it unnecessary to address this issue.

IV.

The defendant's fourth assignment of error is that the trial court improperly considered evidence not offered or admitted into the record. Specifically, he maintains that the court found as a basis for damages specific coins which were plaintiff's property and were sold by the defendant without the plaintiff's

knowledge. These coins were represented by Exhibits 1A-1D and 2A and 2B, which were never offered or admitted into evidence. The plaintiff asserts that the trial court did not rely on these exhibits. Rather, it is argued that the court relied on Exhibits 1 and 2 which were properly admitted into evidence. These exhibits were checks allegedly used to repurchase the coins sold without the plaintiff's knowledge.

A review of the trial court's findings of fact and conclusions of law convinces us to agree with the defendant's assertions. The court referred to Exhibits 1A-1D and 2A and 2B several times and at one point specifically stated:

> The Court finds that Exhibits 1A-1D and Exhibits 2A and 2B were the Plaintiff's coins and were sold by the Defendant without the Plaintiff's knowledge.

Thus, it is clear the court placed reliance on exhibits that were not admitted into evidence. Since the trial court can consider only evidence made legally part of the record, we reverse on this issue. See Richardson v. Richardson, 248 Iowa 477, 481, 79 N.W.2d 769, 771 (1956).

V.

We also agree with defendant's claim that the trial court drew improper inferences of guilt as to actual damages incurred by the defendant. The specific finding in question reads as follows:

> That since Exhibits 1A-1D and Exhibits 2A and 2B were given to the Defendant to price and he converted them and thereafter sold them, it is reasonable to infer that the coins reflected on Exhibit 3 were also converted by the Defendant.

This court recognizes that the trial court's finding of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R App. P. 14(f)(1). However, we are not bound by findings of fact which result from erroneous application of the law. In re Estate of Voelker, 252 N.W.2d 400, 402 (Iowa 1977). In this case the trial court drew an inference solely based on exhibits that were not a part of the record. As discussed in the previous section,

this is contrary to law. Furthermore, the inference must fail in this particular case due to the inadmissibility of Exhibit 3 as discussed in Section II of this opinion. Accordingly, we reverse in this respect

VI

Defendant's final claim is that the lower court erred in awarding punitive damages Because of our disposition of the previous issues we find it unnecessary to address this claim

REVERSED AND REMANDED.