FILED
MAR 23 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CORA E. BLESSING,	)	
Plaintiff-Appellant,	)	Filed March 23, 1988 36
vs.	)	
NORWEST BANK, MARION, N.A.,	)	7-395 86-1507
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Linn County (No. LA 12981), Paul J. Kilburg, Judge.

Plaintiff appeals from a judgment for defendant in her action for conversion, breach of contract, interference with contractual relations, and fraudulent misrepresentation. **REVERSED AND REMANDED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for plaintiff-appellant.

Iris E. Muchmore and Roger W. Stone of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Plaintiff appeals from a judgment for defendant in her action for conversion, breach of contract, interference with contractual relations, and fraudulent misrepresentation wherein plaintiff loaned her son and daughter-in-law (debtors) the money to pay off the balance due on a truck, but defendant bank retained title after receiving payment due to the debtors' default on other loans. We reverse and remand for a new trial.

The plaintiff, Cora E. Blessing, mortgaged her home in order to lend her son, Wendell Oliphant, the money needed to pay off his truck loan with Norwest Bank. In return, Wendell agreed to make Cora's mortgage payments and to give her title to the truck as security for the loan. Cora gave JoAnn Oliphant, Wendell's wife, a personal check for the loan balance, and JoAnn purchased a cashier's check with the proceeds. JoAnn took the check to Norwest and paid off the truck loan. According to JoAnn, Norwest's Steve Knutson told her that the bank would mail her the title to the truck. Mr. Knutson claimed that he informed JoAnn that retention of the title might be necessary due to problems with the Oliphants' other debts. Knutson knew that the cashier's check had been purchased with Cora Blessing's funds. The bank subsequently retained title to the truck.

On September 17, 1983, Wendell signed a new security agreement with Norwest, listing the truck as security. Wendell allegedly protested that the truck belonged to Cora. In October of 1983, Wendell signed a voluntary repossession agreement to keep Mr. Knutson from summoning the sheriff. Wendell had made Cora's mortgage payments prior to the time of repossession.

On January 15, 1985, Cora sued Norwest for conversion, breach of contract, intentional interference with contractual relations, and fraudulent misrepresentation. The trial court granted summary judgment in Norwest's favor on Cora's

conversion and breach of contract claims. The court ruled that Cora's failure to perfect any lien she may have had precluded her conversion theory and found no evidence to support her breach of contract claim that JoAnn and Wendell acted as her agents in dealing with Norwest. The trial court also overruled Cora's motion in limine seeking to prevent any mention of the Oliphants' conversion or failure to account for Norwest collateral on relevancy grounds. After the close of evidence, the trial court directed a verdict for Norwest on the fraudulent misrepresentation claim, ruling there was no evidence that Cora received or relied upon any Norwest misrepresentation. Following Cora's objections to jury instructions, the trial court submitted her intentional interference with contractual relations claim to the jury. The jury returned a verdict in Norwest's favor. The trial court overruled Cora's motion for new trial. Cora appeals.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4.

I. We first address whether the district court erred in granting Norwest's motion for summary judgment with respect to Cora's conversion claim. The purpose of a summary judgment is to avoid a trial where no genuine issue of material fact exists. Neoco, Inc. v. Christenson, 312 N.W.2d 559, 560 (Iowa 1981). In reviewing the grant of summary judgment under Iowa Rule of Civil Procedure 237, the question is whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. Suss v. Schammel, 375 N.W.2d 252, 254 (Iowa 1985). The resisting party must set forth specific facts showing there is a genuine issue for trial. Iowa Civil Rights Comm'n v. Massey-Ferguson, Inc., 207 N.W.2d 5, 8 (Iowa 1973); Iowa R. Civ. P. 237(e). The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justifying

denial of summary judgment. Byker v. Rice, 360 N.W.2d 572, 575 (Iowa App. 1984). Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984). We examine the record in a light most favorable to the party opposing the motion for summary judgment to determine if movant met his or her burden. Matherly v. Hanson, 359 N.W.2d 450, 453 (Iowa 1984). The entire record is examined, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any. Drainage District No. 119 v. Inc., City of Spencer, 268 Iowa 493, 499-500 (Iowa 1978), quoting Davis v. Comito, 204 N.W.2d 607, 611-12 (Iowa 1973). "Summary judgment is not proper if reasonable minds could draw . . . different inferences and reach different conclusions [from the undisputed facts]." Colton v. Branstad, 372 N.W.2d 184, 188 (Iowa 1985), quoting Walker Shoe Store v. Howard's Hobby Shop, 327 N.W.2d 725, 728 (Iowa 1982).

A conversion is defined as a distinct act of dominion wrongfully exerted over another's personal property in denial with his title or rights therein. Jensma v. Allen, 248 Iowa 556, 562, 81 N.W.2d 476, 480 (1957).

Restatement (Second) of Torts Section 222A provides:

What Constitutes Conversion

(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

(2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:

(a) the extent and duration of the actor's exercise of dominion or control;

(b) the actor's intent to assert a right in fact inconsistent with the other's right of control;

(c) the actor's good faith;

(d) the extent and duration of the resulting interference with the other's right of control;

(e) the harm done to the chattel;

(f) the inconvenience and expense caused to the other.

Section 223 of Restatement (Second) of Torts states that a conversion may be committed by intentionally dispossessing another of a chattel. Section 221 defines dispossession as, inter alia, taking a chattel from the possession of another without the other's consent, obtaining possession of a chattel from another by fraud or duress or barring the possessor's access to a chattel.

The district court granted Norwest's motion for summary judgment on this issue based on Cora's failure to perfect her interest by not complying with the filing statute; thus, Cora could have no claim for conversion since she had no interest in the truck. Iowa Code section 321.45 provides that no person shall have any claim, right, title, or interest to the subject vehicle unless said interest is noted on the certificate of title. See also § 321.50. Norwest refers us to In re Pittman, 346 N.W.2d 33, 36 (Iowa 1984), and analogizes Cora's claim herein with the claim of a family member in Pittman, wherein the court held that the failure to perfect a security interest meant that there was only a personal obligation between family members and not a secured interest. To reverse this line of reasoning with a corollary, we may say since Cora was owed a personal obligation by her son and daughter-in-law to make payments on her mortgage in return for the loan she advanced to obtain title to the truck, then she was under no compulsion to record her interest. Norwest argues since Cora had no present possessory interest in the truck, she cannot claim conversion. Accepting Norwest's viewpoint that the Oliphants' obligation to Cora was purely personal, we do not think this means Cora has no interest in the truck. Black's Law Dic-

tionary, 4th Ed. at 950 defines interest as "a right to have the advantage accruing from anything; any right in the nature of property, but less than title; a partial or undivided right." The deposition testimony is clear that Cora had an interest in the truck since her son agreed to make her mortgage payments and to give her title to the truck as security for the loan she provided.

We disagree with the district court's reasoning that since Cora did not have a perfected security interest, she could not recover on her conversion theory. We have already analyzed this issue, assuming Cora was owed only a personal obligation by the Oliphants. However, even if Cora had an unperfected security interest, she could still bring an action for conversion. Iowa Code section 554.1103 provides that the principles of law and equity, including, inter alia, the law relative to fraud, misrepresentation, and duress shall supplement the provisions of the Uniform Commercial Code. As Cora also claimed fraudulent misrepresentation in connection with the conversion claim, we find Cora properly could assert such claims, pursuant to the foregoing Code section, notwithstanding the fact Cora's interest was not noted on the truck's certificate of title.

Cora also refers us to the case of Sandhorste v. Mauk's Transfer, Inc., 252 N.W.2d 393 (Iowa 1977). In that case, which involved a plaintiff's interest based on an oral agreement, with no reflection of the interest noted on the certificate, the court did not go along with a strict interpretation of section 321.45(2) (perfection of interest in vehicle must be noted on certificate of title) and held that the certificate of title is prima facie proof of ownership, but not conclusive proof of ownership. Although Norwest points out Sandhorste involved an immediate buyer and seller, we do not place emphasis on this distinction.

The purpose of the statute regarding the notations of interests on certificates of title is for notice. Norwest had actual notice that Cora had an interest

in the title to the truck when the bank's officer, Steve Knutson, conversed with Wendell Oliphant.

Cora's claim for conversion is based on the alleged promise of Norwest to release the title of the truck in exchange for the full payment on the truck loan. Norwest knew of the agreement between Cora and the Oliphants that Cora was to get title to the truck as security in exchange for the loan to her son. The Oliphants paid off their bank note through their loan from Cora; but Norwest never released title of the truck after payment of the loan. JoAnn Oliphant testified in her deposition that Norwest told her title would be released and mailed upon the loan being paid; Norwest claims otherwise and admits this dispute. Norwest claims JoAnn was told that due to discrepancies in the Oliphants' farm plan, it would have to check to see if title could be released. Subsequently, Wendell Oliphant signed a new security agreement covering the truck; he claims he was coerced into doing so in expectation of the bank's helping them (the Oliphants) as much as possible.

We note that on the date JoAnn Oliphant delivered the cashier's check to Norwest to pay off the loan, a memo was attached to the Oliphant file from Steve Knutson stating, "Do not stamp notes paid or release loans on title until contacting Steve Knutson or Kathy Coons." JoAnn testified she relied on Knutson's stating he would mail the title and that had she known of the restrictions placed on the file, she would not have paid the proceeds to the bank.

We find a material fact was in dispute in analyzing Cora's claim for conversion; i.e., whether Norwest promised to release title to the truck upon repayment of the subject loan. We therefore reverse and remand this case for trial on plaintiff's conversion theory.

II. We next address whether the trial court erred in granting summary judgment for Norwest on Cora's breach of contract claim. Cora claims a genuine

issue of material fact existed as to whether an agency relationship existed between her and the debtors.

We have previously set forth in division I herein the principles of law to be applied in determining whether summary judgment is appropriate. To establish a prima facie case of agency, plaintiff must establish "manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to [her] control, and consent by the other so to act." Brown v. Schmitz, 237 Iowa 418, 424, 22 N.W.2d 340, 343 (1946). A review of the evidence before the trial court at the time of its ruling leads us to affirm the trial court in this regard. The only evidence we find to support Cora's theory is in the trial transcript; as such, it cannot be considered on a motion for summary judgment. See American Title Ins. Co. v. Stoller Fisheries, 227 N.W.2d 481, 486 (Iowa 1975).

III. Cora's third assignment of error is that the trial court erred in directing a verdict for Norwest on her fraudulent misrepresentation claim based upon the court's conclusion that she did not receive or rely upon any misrepresentation from the bank.

In determining whether a jury question was engendered when a party seeks a directed verdict, we apply the same principles as the trial court; specifically, we view the evidence in the light most favorable to the nonmoving party, regardless of whether such evidence is contradicted, to determine if reasonable minds could differ on the issue. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1985). If reasonable minds could differ, the issue is for the jury. Id. It is incumbent on the plaintiff moving for a directed verdict to present substantial evidence on each element of the claim to determine if a reasonable trier of fact could find for the plaintiff. Paulsen v. Russell, 300 N.W.2d 289, 296 (Iowa 1981). Evidence is substantial when a reasonable mind

would accept it as adequate to reach a conclusion. Baty v. Binns, 354 N.W.2d 777, 780 (Iowa 1984).

The elements of fraud include (1) a material misrepresentation (2) made knowingly (scienter) (3) with intent to induce the plaintiff to act or refrain from acting (4) upon which the plaintiff justifiably relies (5) with damages. Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981).

Cora argues that because the Oliphants were her agents and there was a fraudulent misrepresentation made to them, she in turn suffered a loss based on that fraudulent misrepresentation. Cora claims personal reliance is not necessary to recover under this theory.

At trial, Cora admitted she did not rely on any representation from the bank. Cora also stated that even if she knew the bank wasn't going to give the title to the truck to Wendell, she still would have loaned him the $18,000. She testified further on cross-examination:

> Q. So before the payment was made by you he [Wendell] had not told you about any promises, or anything, from the bank, is that right? A. That's right.
>
> Q. And as far as you knew you had already made the agreement with Wendell before any discussion occurred with the bank about delivering title, correct? A. Right.
>
> Q. And as far as you knew you had already obtained the money from Peoples Bank before any discussion of the title occurred? A. Yes.
>
> Q. And you had given the personal check to JoAnn before any discussion occurred about delivering the title, correct? A. That's right.
>
> Q. In fact, the only discussion where you were ever made aware of regarding the title was the discussion that JoAnn Oliphant had said she had with Steve Knutson on the date she delivered the check, correct? A. Right.

Viewing the evidence in a light most favorable to Cora, we find the trial court properly sustained Norwest's motion for directed verdict with respect to Cora's claim of fraudulent misrepresentation. We are not persuaded by Cora's agency theory that the Oliphants' reliance should be imputed to her. The only

reference which could possibly be construed as an agent-principal relationship between Cora and the Oliphants is the testimony of Cora wherein she stated JoAnn Oliphant acted on her behalf when she delivered the check to the bank. We do not think this is sufficient to establish manifestation of consent that the Oliphants were acting on her behalf and subject to her control with regard to this entire issue. We give little weight to the testimony of the Oliphants to the effect they were acting as agents. We find that Cora failed to establish a prima facie case of fraud and reject her imputed reliance theory.

IV. Cora contends the trial court erred in overruling her motion in limine seeking to exclude references to the Oliphants' conversion of Norwest's property and admitting such testimony at trial. Norwest claims error was not preserved on this issue since Cora's counsel elected not to object during trial to this line of testimony.

When the ruling on a motion in limine is adverse to a party seeking to exclude evidence, the movant must usually object during trial in order to preserve error. E.g., Yeager v. Durflinger, 280 N.W.2d 1, 5 (Iowa 1979). An exception exists to this rule where the motion is resolved in such a manner that it is beyond question that the challenged evidence will be admitted at trial. State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). In such cases, counsel need not object again during trial.

Cora's counsel presented arguments regarding her motion in limine. The court ruled after the arguments as follows:

> I'll agree I want to keep this on the focus of did the bank representative tell the daughter-in-law and/or the son, did they make to them a misrepresentation which was fraudulent and intentional and that's a fairly narrow focus. . . . I don't know as I can say, "No, I'm not going to let the Defendant get into any of this stuff, especially about what the relationship was between the mother and son and daughter-in-law," so to that extent I can't say or agree that I'm not going to let all or part of it in. I'll make those decisions based on the context of when they are presented as to whether or not they are

relevant on these two theories or on the overall transaction, so at this time I'll overrule the motion with the understanding, though, that I'm not going to let the trial get out of hand in the sense we are covering the whole waterfront. We are now limited, now, to two basic theories of recovery and one is the relationship between mother and her son and daughter-in-law and the bank's alleged interference with that relationship as it existed at that time and the second theory is, what did the bank officer or officers tell the daughter-in-law and son which constitutes a basis for fraudulent misrepresentation and damages to these people, to Mrs. Blessing, so you have got to be allowed the freedom to set out the circumstances that constitute the tort, if any, and I appreciate that and I understand that, but on the other hand, I don't intend to let this get so far afield that we are not focusing on the theories and the facts that go to establish them, so at this time I can't say this is good or bad. I'll have to do it as it is presented, so it's overruled.

JoAnn Oliphant testified on cross-examination regarding instances relative to conversion of funds by the Oliphants. Cora's counsel made no objection to this line of inquiry. Subsequently, in chambers Cora's counsel asked for a standing objection to the line of testimony regarding conversion of the property. The trial court ruled as follows:

BY THE COURT: Well, the motion in limine is to keep out matters which are strictly inflammatory and have no probative value, and you can rule on as matter of law, and the reason I didn't, or couldn't, rule on these things is because it is my feeling that we're walking a fairly narrow line here as to what is permissible and what is not. I think the jury is entitled to understand the background and financial arrangements of all the parties to get a clearer picture of what happened here. It would be very difficult to do this in an isolated, very narrow focus, and to that extent I overruled the motion, because it is hard, not knowing the material as to what is going to be offered, but now I think I have given you the parameters of what I am looking at by the rulings entered before, and to that extent you should have a pretty good idea of what I am thinking, anyhow, but as far as the motion and the preservation of error, I think the rules are such, unless it is a clear abuse, the overruling a motion does not preserve or prevent anything. It does preserve for trial the right to object on it and to that I can't go back and undo what's already done, and I guess to that extent I'm saying, "No, there is no standing objection."

Cora's counsel then stated:

BY MR. RILEY: I'm going to, I have made a decision; I'm not going to object unless I feel counsel is clearly abusing the Court's parameter, and I have made two objections that have been sustained, and I'm not going to object to matters on the conversion because

it is going to unduly or additionally prejudice my clients, but nonetheless at least I want to ascertain the Court's position on that.

After the above record was made in chambers, Wendell Oliphant testified; and on cross-examination relating to the conversion, Cora's counsel did not object.

We agree with Norwest that Cora's counsel made a knowing choice to remain silent when questions were asked during trial which came within the scope of Cora's motion in limine and thus we consider this argument waived on appeal. Neither do we find that the challenged evidence falls within the exception that counsel need not object during trial if the motion is resolved in such a manner that it is beyond question it will be admitted. The trial court, in overruling Cora's motion in limine, consistently referred to allowing the challenged evidence but did not want to "cover the whole waterfront." The court stated it would rule as the evidence was presented, since the court did not know the material which would be offered. Even after the court informed Cora's counsel before Wendell Oliphant testified that Cora would have no standing objection, Cora's counsel still elected not to object during trial. As such, we do not consider the merits of whether the court erred in overruling Cora's motion in limine with respect to conversion of defendant bank's property by the Oliphants.

V. Cora contends the trial court erred in refusing to strike the challenged conversion testimony or, in the alternative, failing to give the jury a limiting instruction. A motion to strike testimony must be made at the earliest opportunity after the grounds for the objection becomes apparent. It is not timely where the evidence comes in without objection and the grounds for the motion were apparent before it was made. Kleve v. General Motors Corp., 210 N.W.2d 568, 574 (Iowa 1973). Because Cora failed to preserve error at trial (see division IV herein), we do not consider the issue of whether the trial court should have

struck the testimony. With regard to rejecting Cora's proposed limiting instruction, the trial court felt that drafting an instruction limiting certain areas of evidence would be a monumental task; the jury could sort through the evidence and instructions and give the appropriate credibility to the issues they felt warranted consideration. We reject the notion that a trial court should instruct a jury to disregard evidence which was admitted without objection; we are in agreement with the trial court's rationale for rejecting the instruction.

VI Lastly, Cora asserts the trial court erred in failing to grant her motion for new trial. Because of our decision in division I of this opinion, we remand this case for new trial on Cora's conversion claim.

REVERSED AND REMANDED.

Sackett, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court's granting of summary judgment on the plaintiff's conversion claim. I would hold the plaintiff's conversion claim is barred by her failure to comply with Iowa Code section 321.45.

Section 321.45 provides that no person shall have any claim, right, title, or interest to the subject vehicle unless said interest is noted on the certificate of title. Because the plaintiff failed to comply with this statute, she has no legally recognizable interest in the truck. Accordingly, because she has no interest or record of present possessory interest in the truck, she cannot maintain an action for conversion of that interest.

Section 321.45 was designed to prevent disputes between people claiming security interests in vehicles. See Wella v. City of Davenport, 309 N.W.2d 450, 453 (Iowa 1981). The majority cites Sandhorste v. Mauk's Transfer, Inc., 252 N.W.2d 393 (Iowa 1977), to show that the court has not always strictly interpreted section 321.45. I find that Sandhorste is not dispositive of the issue. Sandhorste was specifically limited to the immediate buyer and seller. Id. at 398. That is not the situation in this case. In this case the plaintiff is trying to assert a third-party claim. These are exactly the types of claims that section was intended to bar in absence of a notation on the certificate of title. A strict interpretation, while sometimes harsh, is necessary to effectuate the legislative intent of the provision.

Additionally, the plaintiff's conversion action is based on an alleged promise made by the Bank to the debtors that they would release title upon full payment. Plaintiff admits she never spoke with the Bank. For this alleged promise to be binding on the plaintiff, an agency relationship would have to exist between the plaintiff and the debtors. The majority, however, as did the trial court,

found that no agency relationship existed In the absence of such a relationship, there is no basis for the conversion claim

For the above reasons, I would affirm the trial court's ruling.