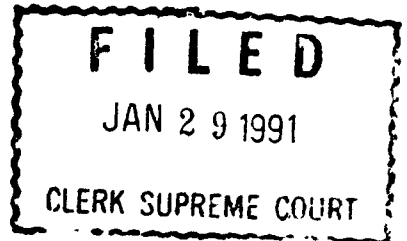


IN THE COURT OF APPEALS OF IOWA

No. 0-639 / 90-269



VANDER LINDEN DRUG STORE, INC.,
Plaintiff-Appellee/Cross-Appellant,

313

vs.

HUSKER NEWS COMPANY,
Defendant-Appellant/Cross-Appellee.

HUSKER NEWS COMPANY,
Third-Party Plaintiff,

vs.

PELLA NATIONAL BANK and IOWA TRUST AND SAVINGS BANK,
Third-Party Defendants.

Appeal from the Iowa District Court for Marion County,
Michael J. Streit, Judge.

Defendant Husker appeals judgment awarding damages for breach of contract, tort, and fraud. Plaintiff Vander Linden cross-appeals denial of punitive damages and sanctions. **AFFIRMED IN PART; REVERSED IN PART.**

Allan Orsborn and Gregory G. Milani of Keith, Orsborn, Milani & Neary, Ottumwa, for Husker News Company.

Michael W. Thrall and Joseph A. Quinn of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for Vander Linden.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Defendant Husker News Co. appeals on numerous grounds a judgment on a jury verdict in favor of plaintiff Vander Linden Drug Store and finding total damages to be \$16,965.35. The jury determined that Husker had committed a breach of contract and fraud and was ninety percent at fault for damages suffered by plaintiff. Plaintiff cross-appeals a directed verdict on the issue of punitive damages and a denial of sanctions. We affirm in part and reverse in part. .

(1) The Record

Husker News Co. is a wholesale magazine and book distributor based in Atlantic. It shipped its merchandise to Walter Hopf, a Husker regional sales representative, who called on Vander Linden Drug Store, a retailer in Pella, to take orders and make deliveries. Hopf also was responsible for delivering statements of account to Husker's customers and for collecting payments. He was authorized to make deposits of payments to Husker to his personal account for the purpose of safeguarding cash. Hopf did not, however, deliver the account statements, and he frequently converted payments to his personal use.

Under Vander Linden's contract with Husker, Hopf picked up old and out-dated merchandise for which Vander Linden was to receive credit against its account balance. Vander Linden prepared an inventory, or tally, of returned books

and magazines which it gave to Hopf. Hopf then issued a credit memo to Vander Linden for the returned items and subtracted this amount from the balance which he had indicated was due. Hopf destroyed the tallies of the returned items, and Vander Linden did not retain a copy. Hopf shipped the items to Husker, which inventoried the items it received and issued credit to the customer based upon Husker's own count.

Over the course of several years, at least from 1982 through August 1988, Hopf converted thousands of dollars to his personal use. Hopf took retailer checks payable to Husker, endorsed them "Husker News Co. by Walter Hopf," and deposited them to his personal account. There were at least two theories advanced at trial as to how Hopf stole these funds and from whom.

Under the first theory, Hopf issued an incorrect credit memo to Vander Linden. The credit memo stated a dollar value which was lower than the amount actually due Vander Linden. Husker credited Vander Linden's account based upon an accurate inventory and the correct amount due. Because of the frequency of transactions, Hopf's failure to distribute account statements, and Vander Linden's failure to examine check endorsements, Hopf occasionally appropriated a check from Vander Linden to Husker. Hopf thereby skimmed the difference between the credit correctly issued by Husker and the credit Vander Linden incorrectly believed (because of the false credit memos) it should

receive. In this scenario, advocated by Vander Linden, Hopf stole from Vander Linden, and Husker was not harmed.

Under the second theory, Hopf issued a correct credit memo to Vander Linden, accurately stating the amount due. Hopf then obtained out-dated books and magazines from other sources which he added to items returned by Vander Linden. (Hopf testified that Husker had sent him promotional and other special items not included in the regular customer orders which he stored in his garage and later added to customer returns.) Husker credited Vander Linden's account based upon an inaccurately high tally. Because of the frequency of transactions, Hopf's failure to distribute account statements, and Vander Linden's failure to examine check endorsements, Hopf occasionally appropriated a check. He thereby skimmed the difference between the credit incorrectly issued by Husker (because of the extra items added) over the credit properly due Vander Linden. In this scenario, advocated by Husker, Hopf stole funds from Husker, and Vander Linden was not harmed.

Vander Linden offered the testimony of two owners or managers showing that the first scenario had been the method by which Hopf had attempted in 1982 and 1986 to defraud two other stores while in the employ of Husker. (Husker challenges this testimony because, it contends, the witnesses were not disclosed and their testimony was offered solely to prove character and propensity. See Iowa R. Civ. P. 122(d)(1); Iowa R. Evid. 404(b).) Vander Linden

offered testimony showing that Husker originally believed Vander Linden had suffered the loss and introduced Hopf's loosely-worded admission to Husker that he had been stealing. Vander Linden placed in evidence the credit memos issued by Hopf. It also offered a summary showing the amount of credit issued by Husker and the difference between Husker's amounts and the amounts issued by Hopf. These exhibits show only that the amount of credit issued by Husker is consistently greater than the amount issued by Hopf.

Hopf testified at this civil trial, however, and maintained that the second scenario, in which he stole from Husker, was in fact the method he used to convert the credit to his own use. There was no evidence to show the actual value of the return books and magazines Vander Linden delivered to Hopf.

(2) Sufficiency of Evidence

Husker News complains that it was entitled to a directed verdict at the close of evidence. It contends that Vander Linden failed to prove that it had suffered any damages because there is no evidence in the record to show that the funds misappropriated by Hopf came out of Vander Linden's pocket. We agree.

Pursuant to Iowa Rule of Appellate Procedure 14(f)(2), "[i]n considering the propriety of a motion for directed verdict the court views the evidence in the light most

favorable to the party against whom the motion was made." We presume that the movant has admitted the truth of all evidence offered by the resisting party and every favorable inference that may be deduced from that evidence. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 27, 284 (Iowa 1976). To overrule the motion, we must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ on the question of how a substantially supported element should be resolved, the issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

The only issue before us is whether there is substantial evidence in the record to support a finding that the plaintiff has, in fact, suffered an injury. Proof that injury to a protected interest has been incurred is a critical element in tort, fraud, and contract actions and cannot be presumed. See, e.g., Wilson v. Nepstad, 282 N.W.2d 664, 667 (Iowa 1979) (noting duty of care created to protect class of persons who have suffered a particular harm); Schulz v. Hoffman, 254 Iowa 868, 871, 118 N.W.2d 532, 534 (1963) (plaintiff failed to show that he suffered damage under contract); Howard v. Brown, 168 Iowa 410, 412-13, 148 N.W. 987, 989 (1915) (counterclaimant "seems to have overlooked the necessity of proving that he sustained damage" under contract); see also 25 C.J.S. Damages § 3 (1966) (object of damage award is compensation for injury

sustained); 37 C.J.S. Fraud § 3 (1943) ("consequent and proximate injury" a necessary element of fraud); 65 C.J.S. Negligence § 2(1) (1966) (proof of injury necessary for actionable negligence). It is well settled, moreover, that there is a "distinction between proof of the fact that damages have been sustained and proof of the amount of those damages." Natkin & Co. v. R. F. Ball Constr. Co., 255 Iowa 1156, 1167, 123 N.W.2d 415, 422 (Iowa 1963); accord Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981); Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971); Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968).

Contrary to suggestions made by Vander Linden, its evidence shows only that there was a discrepancy between the amount of credit issued by Husker and that issued by Hopf. Vander Linden offered no evidence, direct or otherwise, to link the difference in credit to an actual injury it suffered. Thus, while it may have proved the amount of damage it might have incurred, Vander Linden failed to prove the fact that the injury was sustained. The jury then was allowed to speculate whether an injury had been incurred based upon no evidence showing such an injury. This was error. In the absence of substantial evidence demonstrating injury to Vander Linden, neither the jury nor this court can properly reach the question of which theory more accurately reflects the manner in which Hopf stole the return credits. The defendant, therefore,

was entitled to a directed verdict at the close of evidence. We reverse the judgment of the trial court and vacate the award of damages.

(3) Dismissal of Counterclaim

Husker contends that the trial court should not have dismissed its counterclaim. The counterclaim sought damages for Vander Linden's alleged negligence in its dealings with Hopf and in failing to prevent injury to Husker. Husker notes that the jury found Vander Linden ten percent at fault and contends this shows Vander Linden failed to perform its duty to inspect the canceled checks endorsed by Hopf. We find this argument without merit.

Although Husker's failure to cite a single authority in support of this argument effectively acts as a waiver of the issue, Iowa R. App. P. 14(a)(3), we have evaluated the argument and find it without basis in law. The existence of a duty is a prerequisite to establishing claims of negligence. Larsen v. United Federal Sav. & Loan Ass'n, 300 N.W.2d 281, 285 (Iowa 1985). "The general rule of common law is that a person has no duty to prevent a third person from causing harm to another." Anthony v. State, 374 N.W.2d 662, 668 (Iowa 1985). Vander Linden had no duty to Husker to prevent Hopf from causing injury to Husker. The district court committed no error in dismissing the counterclaim.

(4) Sanctions

On cross-appeal, Vander Linden argues that the trial court should have granted its motion for sanctions under Iowa Rule of Civil Procedure 80(a). Vander Linden contends that Husker did not respond adequately to discovery requests and filed a frivolous counterclaim. In particular, Vander Linden complains that Husker and its counsel failed to disclose until the eve of trial various documents, including an admission by Hopf that he had been stealing. We affirm the finding of the trial court.

In Mathias v. Glandon, the Iowa Supreme Court held that our standard of review in rule 80 cases is abuse of discretion. 448 N.W.2d 443, 445 (Iowa 1989). This is in accord with a recent holding by the United States Supreme Court in Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359, 381-82 (1990), which, like the Iowa Supreme Court followed a majority of federal circuit courts in abandoning a "three-tier" standard in favor of the abuse of discretion standard.

The Mathias court also provides us with the following guidance:

Under our statute and rule an attorney must conduct a reasonable inquiry as to the facts and the law before the [instrument] is signed and filed. Compliance is measured by an objective, not subjective, standard of reasonableness under the circumstances. Our rule and statute make sanctions mandatory when a violation occurs, but whether a violation has occurred is a matter for the court to determine, and this involves matters of judgment and degree.

448 N.W.2d at 445-46 (citing O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987)). Along these same lines, the United States Supreme Court in Hartmarx indicates that the policy goals of these rules support this standard of review:

The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve [the] goal of specific and general deterrence. Deference to the determination of the courts on the front lines of litigation will enhance these courts' ability to control the litigants before them. . . .

110 S. Ct. at 2460, 110 L. Ed. 2d at 381. We therefore will disturb the district court's findings of fact only if they are clearly erroneous. Mathias, 448 N.W.2d at 445 (citing Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 933 (7th Cir. 1989)).

Having reviewed the record, we find nothing so clearly erroneous as to amount to an abuse of discretion. It appeared to the trial court that counsel's actions, based upon his knowledge, information, and belief, formed after reasonable inquiry, were well grounded and not interposed for an improper purpose. As for the various discovery requests, we are in no position to second guess the district court on this matter of degree. See Mathias, 448 N.W.2d at 445-46; see also Hartmax, 110 S. Ct. at 2460, 110 L. Ed. 2d at 381. In view of our holding, moreover, Vander Linden's various complaints resting on its assertion of the presence of an issue of material fact ring hollow.

(5) Appendix Inclusions

By order of the supreme court, we also consider the issue of whether either party has caused unnecessary parts to be included in the appendix and whether two pages included by Husker should be stricken. Unfortunately, this subsidiary issue is all too common, although it rears its head in different forms. Iowa Rule of Appellate Procedure 15(a) provides that the appendix is to contain only relevant portions of the record. The inclusion of irrelevant portions of the record results in two problems: additional printing expense and "an unwarranted reading burden on the members of the appellate courts." State v. Oppelt, 329 N.W.2d 17, 21 (Iowa 1983). This says nothing of the reams of motions, counter-motions, resistances, and orders generated by disputatious attorneys and the expense to the judiciary of sorting matters out and of determining what in the appendix, if anything, is unnecessary. This certainly should be counted among the worst of the problems.

Husker chose to follow the alternative method of designating the appendix contents pursuant to rule 15(c). Under this rule the appellant defers preparing the appendix until after a page proof copy of its brief has been filed. The first sentence of rule 15(b), which applies in all cases, states: "The parties are encouraged to agree as to the contents of the appendix" Under rule 15(b), if

the parties do not agree on the contents of the appendix, they must file a designation of the parts of the record that they wish to include.

Vander Linden filed a designation specifying approximately 450 additional pages of the record. Included in this were 359 consecutive pages of trial transcript, 35 pages of a deposition, numerous trial motions, jury instructions, and the verdict. Rule 15(b) directs the appellant to include portions designated by the appellee, but allows the appellant to demand payment for the cost of producing portions of the record which it considers "unnecessary for the determination of the issues presented." Husker, however, filed a motion to strike Vander Linden's designation, charging the entirety would be unnecessary. The supreme court (per Larson, J.) filed an order on July 25, 1990, and noting that the trial transcript is available for examination by the appellate court, see Iowa R. App. P. 15(a), disallowed Vander Linden's 359 pages of trial transcript designations. The supreme court, however, allowed the remainder of Vander Linden's designation and denied the remainder of Husker's motion to strike.

In spite of the supreme court's order, Husker filed a new designation of appendix reasserting its claim that the approximately 270 pages of material allowed by the supreme court's order is unnecessary and demanded tender of payment for those pages. In response, Vander Linden contends that

it had designated only 217 pages and that 17 of those are already designated by Husker. Vander Linden tendered a check for \$800 in payment for the disputed 200 pages at the maximum cost of \$4 per page. See Iowa R. App. P. 16(c).

Shortly thereafter, Vander Linden filed its own motion to strike portions of the appendix. It complained of two pages containing a letter purportedly sent by Husker's counsel to a third party. Vander Linden contends this letter was neither a part of the record nor included on Husker's original designation of appendix.

We address the second issue first. It is clear that counsel for Husker have included material in the appendix that is not a part of the record, apparently for the sole purpose of making additional record. We are singularly unpersuaded, therefore, by their complaint that they have been unable or should be afforded further opportunity to make a record and by their rationalization for inserting such material in the appendix. The only non-record items rule 15 permits are agreed statements pursuant to rule 15(f). Counsel for Husker have clearly and flagrantly violated rule 15. Vander Linden's motion to strike is sustained.

Finally, as concerns the disputed 200 pages designated by Vander Linden, it appears that the supreme court has already passed on this issue in favor of Vander Linden. Nevertheless, we have reviewed this material again and conclude that it is not unnecessary. Much of the material

is directly responsive to Husker's eight separate assignments of error or pertinent to Vander Linden's two assignments of error on cross-appeal.

After violating the spirit, if not the letter, of rule 15(b)'s command that "[a]ppellant shall include in the appendix the parts thus designated" by the appellee by taking the dispute to the supreme court, Husker's counsel have pressed their claim that these pages are unnecessary. The supreme court under rule 15(b) grants appellants the privilege of requiring appellees to share the cost of appendices when appellants consider designations unnecessary. This, they have done, with the result that Vander Linden has advanced \$800 of the cost for the appendix. The rule does not provide for a continued rehash of efforts to exclude the material, after advancement of costs has been made.

Husker's counsel, however, have prolonged and enmeshed this litigation with subsidiary issues and unreasonable stances. This typifies the type of behavior with which the appellate courts of this State are having to deal all too often. See Stone v. City of Wilton, 331 N.W.2d 398, 405 (Iowa 1983); State v. Oppelt, 329 N.W.2d 17, 21 (Iowa 1983); In re Lacaeyse, 461 N.W.2d 475, 478 (Iowa App. 1990). Such tactics unnecessarily add to the delay and unreasonable costs of the appellate process. Although there is authority for the imposition of sanctions directly on counsel when abuses such as these occur, Stone, 331 N.W.2d at 405, we decline to impose them in this case.

(6) Summary and Conclusions

Because of our holdings above, we need not address several other assignments of error. These include Husker's complaints about (a) severing its negligence counterclaim against Vander Linden and its negligence cross-claims against Pella National Bank and Iowa Trust and Savings Bank; (b) overruling its motions for a judgment non obstante verdicto or for new trial; (c) allowing two undisclosed witnesses to testify; (d) allowing witnesses to testify as to prior acts; and (e) instructing the jury that it may find "negligent employment." Also, we need not address Vander Linden's contention on cross-appeal that the trial court erred in failing to submit the issue of punitive damages to the jury.

We conclude that defendant Husker News was entitled to a directed verdict at the close of evidence because of the absence of substantial evidence demonstrating injury to plaintiff Vander Linden Drug Store. We therefore reverse the judgment and vacate the award thereon. We also conclude, however, that trial court properly dismissed a Husker counterclaim and affirm the judgment in that respect. We further hold that the trial court did not commit an abuse of discretion in denying Vander Linden's motion for sanctions pursuant to rule 80(a).

The cost of this appeal shall be taxed to plaintiff Vander Linden Drug Store.

AFFIRMED IN PART; REVERSED IN PART.