

IN THE COURT OF APPEALS OF IOWA

No. 5-366 / 94-392

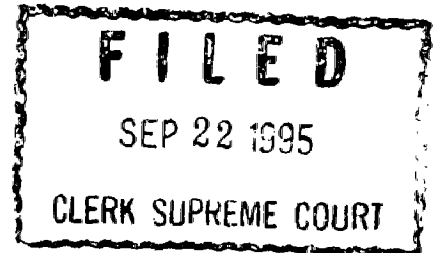
**STEVEN WINEGARDEN, NANCY NEHRING, JON MILLER and
SHIRLEY MILLER**

Appellees,

vs.

MARION NEHRING and MARY JANE NEHRING,

Appellants.



Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Appeal from forcible entry and detainer action, consolidated with a petition for writ of certiorari. **AFFIRMED IN PART, REVERSED IN PART AND WRIT ANNULLED.**

Robert D. Hall and J. Tiffin Hall, Ankeny, for appellants.

Christopher P. Jannes and Becky S. Knutson of Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines, for appellees.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

CADY, J.

In this consolidated appellate proceeding the defendants, Marion and Mary Jane Nehring, contest a district court order granting plaintiffs, Steven Winegarden, Nancy Nehring, Jon Miller and Shirley Miller, possession of a farm located in rural Polk County and attorney fees. Marion Nehring also contests a contempt finding. We affirm in part, reverse in part and annul the writ of certiorari.

Marion and Mary Jane Nehring lived on a 372 acre farm in Polk County for more than thirty-four years. The farm consists of approximately 327 acres of tillable land. Marion farmed the property continuously until 1992, with the exception of the 1985 planting season.

In July 1992, Marion called his daughter, Nancy Nehring, requesting she and her husband, Steven Winegarden, lend him \$35,000. Steven and Nancy had loaned Marion and Mary Jane more than \$100,000 in the past to pay farm debts. In order to protect their substantial financial commitment to the farming operation and keep the farm in the family, Nancy and Steven offered to purchase the farm.

Marion and Mary Jane signed an agreement to sell the farm proposed by Steven and Nancy. In exchange for the sale of the entire 372 acres, Steven and Nancy agreed to pay a purchase price of \$412,000. The contract contained a clause stating the agreement was the entire agreement between the parties and no other agreements exist. It as well provided amendments to the contract had to be in writing and signed by both parties. Although the contract required the seller to vacate the premises and

deliver possession of the farm, Steven and Nancy allowed Marion and Mary Jane to live in the farm home and to keep their farm equipment on a portion of the land, pursuant to an oral agreement.

Steven and Nancy subsequently executed a farm lease for the 327 tillable acres to Jon and Shirley Miller. The lease covered the 1993 crop season, with automatic renewal unless terminated in accordance with Iowa Code section 562.7 (1993).

In August 1993 Marion and Mary Jane visited Steven and Nancy at their home in California. Marion informed Steven he wished to resume the farming operation. Steven reminded him he had no right to do so, as it had been leased to the Millers. Upon Marion's return to Iowa, he began disking and applying fertilizer to the land. Because of these actions, Steven and Nancy sent Marion a certified letter informing him that he had no right to farm the land. The letter also stated Steven and Nancy were terminating the farm tenancy and right of occupancy the following month. An additional termination of the farm tenancy was served personally upon Marion and Mary Jane.

Marion and Mary Jane did not vacate the property. A notice to quit was served upon them. Marion resumed farming of the land, including plowing an alfalfa field planted by the Millers and tilling property in a government set-aside program.

Steven and Nancy initiated a forcible entry and detainer action. Marion and Mary Jane claimed they were owners of a life interest in a portion of the property, which included their home and the surrounding ten acres, pursuant to an oral

agreement with Steven and Nancy. Marion argued he agreed to a lower sale price in exchange for this life estate in the home and that Steven and Nancy agreed to lease back agricultural property for \$30,000 cash rent per year. He further argued he did not farm the land in 1993 because he learned of the Millers' lease and it would be too late to put a crop in if he were to fight in court.

The district court ruled in favor of Steven and Nancy, holding the written agreement integrated all terms and conditions of the sale. The court also ruled the evidence introduced by Marion and Mary Jane violated the statute of frauds and the parol evidence rule. The district court noted that while partial performance may provide an escape from the statute of frauds, no partial performance occurred in this case since Marion did not farm the property in 1993. The district court granted possession of the land to plaintiffs and awarded them \$2785.50 in attorney fees.

Marion and Mary Jane appealed. The district court granted a supersedeas bond to stay enforcement of the judgment on the residential portion of the farm. The court did not allow for a bond to be posted to cover the agricultural property.

Steven and Nancy subsequently filed an application to show cause why Marion should not be held in contempt under Iowa Code section 665, alleging he had cut trees on the agricultural property, removed a barrier restricting access to the property and had driven his pickup truck across a hayfield located on the portion farmed by the Millers. The district court concluded Marion willfully violated the order granting possession, and ordered him to serve twenty days in jail plus pay \$1000 for costs and

attorney fees.

Marion filed a petition for writ of certiorari from the contempt finding. It was consolidated with the appeal in the forcible entry and detainer action.

I. Possession of Farm

Marion and Mary Jane contend the district court erred in holding the evidence introduced at trial violated the statute of frauds and the parol evidence rule. They argue that conveying title to their property as well as their possession of the home area was sufficient consideration and sufficient partial performance to except their oral contract from the statute of frauds. Marion and Mary Jane also contend the court erred in refusing to consider parol evidence to ascertain the terms of the oral agreement and the interest Marion and Mary Jane had in the property. They next claim they are entitled to specific performance of the original oral agreement. Finally, they contend the district court erred in awarding Steven and Nancy attorney fees pursuant to Iowa Code section 562A.34(2) (1993).

A. Standard of Review

An action for forcible entry and detainer is an equitable proceeding. *See* Iowa Code § 648.5 (1993). Our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In equity cases, especially when considering the credibility of the witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). *See Recker v. Gustafson*, 279 N.W.2d 744,

748 (Iowa 1979).

B. Statute of Frauds

The statute of frauds does not bar the enforcement of unsigned or oral contracts coming within its provisions. *In re Eickman's Estate*, 291 N.W.2d 308, 313 (Iowa 1980). Iowa Code section 622.32 (1993) provides:

Except when otherwise provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by the party's authorized agent:

...

...

3. Those for the creation or transfer of any interest in lands, except leases for a term of not exceeding one year.

The impact of the statute of frauds is not to void the contract but to render incompetent oral proof of its existence. *Recker*, 279 N.W.2d at 748.

A determination that the statute of frauds is applicable does not end our inquiry. *Recker*, 279 N.W.2d at 748. Iowa Code section 622.33 (1993) allows for an exception to the statute of frauds where partial performance of the oral contract exists. A party who partially performs under the agreement may avoid the impact of the statute of frauds and introduce evidence of the oral contract. *Gardner v. Gardner*, 454 N.W.2d 361, 363 (Iowa 1990).

A claimant's action, in order to constitute partial performance, must relate exclusively and unequivocally to the agreement to transfer land. *Knight v. Anderson*, 292 N.W.2d 411, 416 (Iowa 1980); *Davis v. Davis*, 261 Iowa 992, 1002-03, 156

N.W.2d 870, 877 (1968). Moreover, extrinsic evidence establishing an agreement for the creation of an interest in real estate may be admitted where the agreement is established by an adverse party. *Gardner*, 454 N.W.2d at 363. *See also Ross v. Ross*, 256 Iowa 326, 126 N.W.2d 369 (Iowa 1964); *Hardy v. Duam*, 219 Iowa 982, 259 N.W. 561 (Iowa 1935).

We disagree with the trial court the evidence presented by Marion and Mary Jane violated the statute of frauds. Here, both parties admitted to the existence of an oral “agreement” to let Marion and Mary Jane live in the home and keep their farm equipment on the property. The adverse party, Steven and Nancy, admitted there was an agreement for Marion and Mary Jane to live upon the land, contrary to the provisions of the written contract itself. We find the evidence presented by Marion and Mary Jane did not violate the statute of frauds.

As well, Marion and Mary Jane’s actions constituted sufficient partial performance to except it from the statute of frauds. While the actions of conveying title to Steven and Nancy is in accordance with their duties under the written contract, Marion and Mary Jane remaining in the house is exclusively referable to the oral contract itself. The written contract specifically states Marion and Mary Jane should vacate the premises and deliver possession to Steven and Nancy. No evidence exists of any other written agreement, such as a lease or rental contract. We find the evidence of the oral agreement presented by Marion and Mary Jane did not violate the statute of frauds.

C. Parol Evidence Rule

The parol evidence rule, when applicable, excludes extrinsic evidence which is solely offered for the purpose of varying, adding to, or subtracting from a written agreement. *Kroblin v. R.D.R. Motels, Inc.*, 347 N.W.2d 430, 433 (Iowa 1984). The written agreement between the parties here is fully integrated and constituted the final and complete expression of the agreement for the sale of the real property. However, we find the parol evidence introduced here was not meant to vary, add to or subtract from the written agreement, but rather to show the existence of a separate, independent oral agreement. As such, the evidence of the oral agreement does not violate the parol evidence rule.

D. Specific Performance of the Oral Agreement

While the evidence presented does not violate the statute of frauds or the parol evidence rule, Marion and Mary Jane must further prove the terms of the oral contract by clear, satisfactory and convincing evidence before specific performance of the contract can be granted. *Davis v. Davis*, 261 Iowa 992, 998-99, 156 N.W.2d 870, 874 (1968). A court cannot enforce a contract unless it can determine what it is. *Id.* at 1001, 156 N.W.2d at 876.

An oral agreement to transfer an interest in land must be established by more than a mere preponderance of the evidence. *Peterson v. Peterson*, 355 N.W.2d 26, 28 (Iowa 1984). A greater quantum of proof is required as enforcement of such an agreement without convincing evidence would tend to frustrate the purpose of the

statute of frauds. *Id.* To sustain proof of an oral contract, terms must be sufficiently definite. *Burke v. Hawkeye Nat. Life Ins. Co.*, 474 N.W.2d 110, 113 (Iowa 1991). In order to be binding, an agreement must be definite and certain as to its terms to enable the court to give it an exact meaning. *Davis*, at 1001, 156 N.W.2d at 876. Contract terms are sufficiently definite “if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance.” *Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 420 (Iowa 1970).

Here the only term of the oral agreement not in dispute is that Marion and Mary Jane were to live in the home and keep equipment on the land after the written contract took effect. Marion and Mary Jane claim the oral agreement was for them to have a life estate in their home and surrounding ten acres and a lease to farm the agricultural property for \$30,000. Steven and Nancy, however, contend they only agreed to let Marion and Mary Jane live in the home area until it became financially unfeasible to keep the farm. They also claim they never agreed to allow Marion to lease the property back from them. Marion and Mary Jane presented no evidence concerning terms dealing with pertinent considerations, such as the time when the agricultural lease would begin, the type of payments to be made, responsibility for repairs and improvements to the land and the home, rights to sublease the area, and methods of farming.

While “vagueness, indefiniteness and uncertainty are matters of degree, their existence as to any of the essential terms of an agreement is adequate reason for

refusal to direct specific performance.” *Davis*, at 1001, 156 N.W.2d at 874. The evidence presented by Marion and Mary Jane leaves too much to speculation, especially with regards to the duties of each party and the conditions relative to their performance.

We find Marion and Mary Jane have not met their burden of proving by clear, convincing, and satisfactory evidence, the existence of an oral contract for a life estate in the home area and the for the lease of the agricultural property. We agree with the trial court specific performance of the oral contract should not be granted. We also find that Steven and Nancy should be awarded possession of the real property, including the home area, in accordance with the terms of the original written contract.

E. Attorney Fees

The district court awarded attorney fees to plaintiffs in the amount of \$2785.50, pursuant to Iowa Code § 562A.34 (1993). A party generally has no claim for attorney fees as damages in the absence of statutory or written contractual provisions allowing such an award. *Hockenberg Equipment Co. v. Hockenberg's Equipment and Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993). No written agreement for attorney fees existed in this case.

The statutory provision of the Uniform Residential Landlord and Tenant Law relied upon by the trial court, provides for a recovery of actual damages and reasonable attorney fees where “a tenant remains in possession of real property without the landlord’s consent after expiration of the term of the rental agreement or

its termination . . . and if the tenant's holdover is willful and not in good faith." Iowa Code § 562A.34 (1993).

We find, however, this code section inapplicable to the facts of this case. No landlord-tenant relationship existed between the parties under the terms of the original written contract, and the additional oral agreement was too indefinite to establish the terms of a rental agreement under the Uniform Act. Moreover, the uncertainty in the terms of the oral agreement did not render Marion and Mary Jane's possession in bad faith.

We find attorney fees should not have been awarded in this case. We reverse the district court award of attorney fees. As well, we find no appellate attorney fees can be awarded.

II. Contempt

Marion contends the district court did not have jurisdiction to hold a contempt hearing on matters other than the agricultural portion of the real estate, as a supersedeas bond was posted to stay the judgment on the residential property. He maintains the trees were cut on the land adjacent to, but not on, the agricultural land. Marion also argues the court erred in admitting several photographs taken by Jon Miller because there was no evidence indicating the date and times they were taken. He additionally maintains Steven and Nancy failed to prove his actions were contumacious beyond a reasonable doubt. Marion also argues the district court erred in awarding Steven and Nancy attorney fees on the contempt action.

A. Standard of Review

Contempt judgments must be reviewed to ensure substantial evidence supports judgment of contempt. *Ervin v. Iowa Dist. Court*, 495 N.W.2d 742, 744 (Iowa 1993). Because of the quasi-criminal nature of proceeding, a finding of contempt must be established by proof beyond a reasonable doubt. *Phillips v. Iowa Dist. Court*, 380 N.W.2d 706, 708-09 (Iowa 1986). Substantial evidence is such evidence as could convince a rational trier of fact that alleged contemner is guilty of contempt beyond a reasonable doubt. *Ervin*, at 744-45.

B. Jurisdiction of the District Court

The district court concluded Marion Nehring willfully violated its order by cutting down trees on the agricultural portion of the real property. Marion contends he only entered upon property and cut down trees on areas that were not being farmed, and as such were residential property. He claims his actions took place only on residential property covered by the bond, which deprives the district court of jurisdiction.

Ordinarily, upon perfection of an appeal, the district court loses jurisdiction over the merits of the controversy until some portion of the case is remanded back for further action. *In re Marriage of Novak*, 220 N.W.2d 592, 596 (Iowa 1974). However, the trial may enforce a decree unless a party posts a supersedeas bond for that portion of the judgment. *In re Marriage of Russell*, 479 N.W.2d 592, 596 (Iowa App. 1991).

Most of Marion's actions took place on an area of property separate and distinct from the home area occupied by himself and Mary Jane. As well, Jon Miller testified Marion entered upon tillable land and damaged crops. The language of the supersedeas bond does not cover this land. We find the district court had jurisdiction to hold a contempt hearing as Marion's actions directly affected the agricultural property.

C. Photographs

Marion contends the trial court abused its discretion by admitting thirteen photographs into evidence. He argues the photographs were admitted without sufficient foundation.

Generally, the admissions or exclusion of photographs into evidence rests largely within the sound discretion of the trial court. *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 805 (Iowa 1994). The trial court has the best opportunity to examine the photographs and hear the evidence. *Id.* The district court's ruling on the admission of photographs will not be disturbed "except upon a clear showing of abuse of discretion." *Twyford v. Weber*, 220 N.W.2d 919, 924 (Iowa 1974).

A witness must identify the photograph as a substantial representation of the conditions as they existed at the time in question in order for the photograph to be admissible into evidence. *Elkin v. Johnson*, 260 Iowa 46, 148 N.W.2d 442, 445 (1967). When a photograph is verified by a witness who knows about the facts represented or scenes or objects photographed, and who says the photograph correctly

and accurately portrays such facts, the photograph is admissible into evidence. *Mater v. Illinois Central Railroad Co.*, 234 N.W.2d 388, 394 (Iowa 1975).

In an effort to lay a foundation for the admittance into evidence several photographs depicting damages allegedly inflicted by Marion Nehring, Jon Miller testified as to his observations of the real property, including portions of the land which had been driven through, tractor tracks, destroyed beans, cut trees, posts removed, and Marion's pickup truck loaded with chain saws. Jon Miller also testified the photographs fairly and accurately depicted what he observed on the particular days he was describing.

Jon Miller's testimony adequately laid the foundation for the admission of the photographs. He specifically noted the photographs were depicting the scenes he observed. We find the trial court did not abuse its discretion in admitting the exhibits.

D. Evidence of Contumacious Actions

Marion contends the evidence presented did not establish he was contumacious and that his conduct was willful. He claims the order setting the supersedeas bond was vague and created uncertainty as to what property was included in the staying portion of the original order. Moreover, Marion contends the evidence falls short of proof beyond a reasonable doubt.

An action for contempt of court is treated in the nature of a criminal proceeding. *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 140 (Iowa 1988). No person may be punished for contempt unless the allegedly contumacious actions have

been established by proof beyond a reasonable doubt. *Id.* Contempt is sufficiently shown if some of the default was willful. *Id.*

The supersedeas bond posted covered only residential property and did not cover agricultural property. Marion and Mary Jane live in a house on a small portion of the land. Jon Miller testified a majority of the actions taken by Marion occurred in areas separate and distinct from the residential property occupied by Marion and Mary Jane. Moreover, Marion entered tillable farm land and damaged growing crops. The evidence presented showed Marion's pickup truck parked in a hay field. He was observed cutting down trees adjacent to the hay field, some of which had fallen onto the hay and damaged it. Evidence was also presented showing damage to agricultural property due to a pickup truck driving across fields.

We find substantial evidence exists to support the district court's determination Marion was willfully violating the court's order beyond a reasonable doubt. As such, we agree with the district court's determination that Marion's actions constituted contempt of court.

E. Attorney Fees

The district court ordered Marion to pay \$1000 in costs, including attorney fees to the plaintiffs as part of the contempt action. Again, generally, absent statutory or contractual provision, attorney fees may not be awarded. *Hockenberg*, 510 N.W.2d at 158 (Iowa 1993). Even with contempt proceedings, the right to recover attorney fees as part of costs does not exist at common law. *Wilson v. Fenton*, 312

N.W.2d 524 (Iowa 1981). Our contempt statute does not allow for an award of attorney fees in connection with contempt actions. See Iowa Code § 665 (1993).

We recognize a narrow exception to general rule against attorney fees exists where the defendant “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Hockenberg*, 510 N.W.2d at 158 *quoting Alyeska Pipeline*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622, 44 L. Ed. 2d 141, 154 (1975). A plaintiff seeking attorney fees under this narrow exception must prove the culpability of the defendant’s conduct rose to the level of oppression or connivance to harass or injure another. *Hockenberg*, at 159-60. This involves intentional conduct likely aggravated by cruel and tyrannical motives, and exceeds the culpability necessary to support a claim for punitive damages. *Id.*

The evidence does not show Marion’s actions rose to the level of oppressive or conniving. The pictures introduced do not establish the necessary standard of proof, and there was otherwise no evidence to support a sound inference that Marion’s actions justified an award of attorney fees. Marion’s actions were contemptuous, but there was insufficient evidence his conduct was influenced by cruel and tyrannical motives. We find the district court erred in awarding attorney fees in connection with the contempt proceeding.

AFFIRMED IN PART, REVERSED IN PART AND WRIT ANNULLED.