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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

REX TOWNSEND,	)	
Plaintiff-Appellant,	)	Filed August 26, 1980
vs.	)	
CARROLL M. ROSE,	)	0-167 2-63875
Defendant-Appellee.	)	

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Plaintiff appeals jury verdict for defendant in action based on an alleged fraudulent business transaction. AFFIRMED.

Keith E. Uhl and Ann Fitzgibbons of Scalise, Scism, Gentry, Brick & Brick, Des Moines, for plaintiff-appellant.

Ed Skinner and Mary Hellweg, Altoona, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Plaintiff, Rex Townsend, appeals from jury verdict for defendant, Carroll Rose, in action based on an alleged fraudulent business transaction. As grounds for reversal, plaintiff asserts the trial court erred in admitting certain testimony elicited by defense counsel during cross-examination of the plaintiff. Specifically, plaintiff contends: The testimony was erroneously admitted because it constituted hearsay evidence; the trial court allowed defense counsel to exceed the proper scope of cross-examination in obtaining the testimony; and the testimony should have been excluded because it was elicited from plaintiff during cross-examination in an effort to establish an affirmative defense that had not been pleaded. We affirm the judgment of the trial court.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Plaintiff and defendant had been business and social acquaintances for several years when in January 1976 the defendant attempted to interest plaintiff in the purchase of a one-third interest in an Iowa distributorship for the Milwaukee Shell Corporation, a seller of prefabricated homes. At that time, defendant owned the entire distributorship. In January 1976 and again in early March, plaintiff went with defendant to the corporation's Wisconsin headquarters and toured the plant. On both trips, plaintiff met John O'Sharon, the corporation's president, who accompanied plaintiff, defendant, and several others on the tours of the plant.

On March 21, 1976, plaintiff received a telephone call from defendant, during which defendant directed plaintiff's attention to an advertisement in the Des Moines Sunday Register for Milwaukee Shell's prefabricated homes. Defendant also informed plaintiff during this call that if he wanted a share of the Iowa distributorship, he had to get the money to defendant that day. Plaintiff met with defendant that afternoon to discuss the particulars of the transaction and at that time plaintiff gave defendant a check for $21,866.66 with the understanding he was buying a one-third interest in the Iowa distributorship and would shortly receive delivery of a model prefabricated home. When by September 21, 1976, plaintiff had received nothing from Milwaukee Shell and had been unsuccessful in his attempt to obtain a refund of his investment, he met with O'Sharon at the corporation's headquarters. O'Sharon gave plaintiff a receipt, signed by the defendant, acknowledging plaintiff's purchase of one-third of the Iowa distributorship and one model prefabricated home. Also at that time plaintiff was

assured, apparently by the defendant, production would soon begin and everything was going as expected. On November 16, 1976, the Milwaukee Shell Corporation went bankrupt; plaintiff still had received nothing in return for his investment.

In June 1977 plaintiff filed a petition alleging a cause of action for fraud against the defendant. Defendant's answer denied each of the allegations of the petition, but did not state any affirmative defenses. At trial and during his direct examination, plaintiff testified he had met with the defendant on several occasions at the corporation's headquarters to discuss the purchase of one-third of the Iowa distributorship. Specifically, plaintiff's testimony indicated that during these visits the defendant made certain statements to him regarding the corporation's successful financial status and the assured success of the contemplated investment. Plaintiff testified his decision to invest in the operation was made in reliance on these and other statements made by the defendant the product had certain unique construction features assuring its marketability.

On cross-examination, defense counsel elicited an admission from the plaintiff that O'Sharon had also been present during the plaintiff's tours of the corporation's headquarters and O'Sharon had made substantially the same representations to the plaintiff as the defendant had made. Plaintiff's counsel objected unsuccessfully to this line of questioning, making basically the same arguments as those made before this court; the jury returned a verdict for the defendant and the trial court entered judgment accordingly. Plaintiff's motion for a new trial was overruled by the trial court and plaintiff appealed.

II.

Plaintiff's first contention on appeal is the trial court erred in admitting his testimony under cross-examination, concerning statements made by O'Sharon because those statements constituted hearsay and were outside the scope of any recognized exception to the hearsay rule. We are not persuaded by this argument.

Hearsay has been defined by the Iowa Supreme Court as an oral or written statement, other than one made by the declarant while testifying at the hearing or trial, that is offered into evidence to prove the truth of the matter asserted. State v. Jeffs, 246 N.W.2d 913, 916 (Iowa 1976); State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976); State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976); Tonini v. Maloney, 228 N.W.2d 91, 93 (Iowa 1975); State v. Branch, 222 N.W.2d 423, 426 (Iowa 1974). The hearsay rule is based on the

principle that when an out-of-court statement is offered to prove the truth of the matter asserted, the credibility of the person making the statement is an essential concern; therefore, out-of-court statements are admitted into evidence only when the credibility of the asserter can be tested by cross-examination. 6 J. Wigmore, Evidence § 1766 (Chadbourn rev. 1976).

In some instances, oral or written statements may be used in such a fashion the credibility of the asserter is not a concern. This occurs when the statement is not offered to prove the truth of the matter asserted, but is offered instead for some other purpose. For example, a recognized distinction exists between statements offered to prove the truth of the matter asserted and statements offered to prove the mere fact such statements were made or to illustrate the effect of such statements on subsequent actions of the hearer. State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976). See also Prestype v. Carr, 248 N.W.2d 111, 117-18 (Iowa 1976); State v. Leonard, 243 N.W.2d 887, 890 (Iowa 1976); Crane v. Cedar Rapids & Iowa City Railway, 160 N.W.2d 838, 845-46 (Iowa 1968), aff'd, 395 U.S. 164, 89 S. Ct. 1706, 23 L. Ed. 2d 176 (1969). Because such statements are not offered to prove the truth of the matter asserted, they do not fall within the scope of the hearsay rule. Leonard, 243 N.W.2d at 890; State v. Watson, 242 N.W.2d 702, 705 (Iowa 1976); State v. Miller, 204 N.W.2d 834, 843 (Iowa 1973). See also 6 J. Wigmore, Evidence § 1788 (Chadbourn rev. 1976).

We agree with the trial court that defense counsel's cross-examination, designed to elicit from plaintiff certain out-of-court statements made by O'Sharon, did not call for hearsay. The statements of O'Sharon were not introduced by the defendant to prove the truth of the matter asserted, that is, they were not intended to prove the prefabricated homes manufactured by Milwaukee Shell were of a superior quality. Instead, O'Sharon's statements were introduced as evidence of the fact they were made, they were made by someone other than the defendant, and such statements could have influenced the plaintiff's decision to invest in the production of prefabricated homes. It is immaterial for these purposes whether O'Sharon's statements about the quality of the product are true or false, and thus the hearsay rule does not apply to them. See McCormick's Handbook of the Law of Evidence § 249, at 589 (2d ed. E. Cleary 1972). The trial court did not err on hearsay grounds in allowing defense counsel to cross-examine plaintiff concerning out-of-court statements made by O'Sharon.

III.

Plaintiff next contends as grounds for reversal the trial court erred in allowing defense counsel to cross-examine him concerning O'Sharon's statements because such matters, which were not brought out during direct examination of the plaintiff, were outside the scope of proper cross-examination. We find this argument unconvincing.

As a general rule, the right to cross-examine a witness is limited to questions pertaining to matters raised on direct examination. Avery v. Harms Implement Co., 270 N.W.2d 646, 650 (Iowa 1979); State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974); Uhlenhopp v. Steege, 233 Iowa 368, 372, 7 N.W.2d 195, 197 (1942). However, this restriction is not so narrow as to allow only a categorical review of matters testified to on direct. Avery, 270 N.W.2d at 650; see Trachta v. Iowa State Highway Commission, 249 Iowa 374, 390, 86 N.W.2d 849, 859 (Iowa 1957). It may extend to any matter within the fair scope of direct examination, Avery, 270 N.W.2d at 650, including matters directly or indirectly raised on direct examination, Uhlenhopp, 233 Iowa at 372, 7 N.W.2d at 197. Thus, presumptions or inferences reasonably raised during direct examination may be rebutted on cross-examination. Avery, 270 N.W.2d at 650; In re Estate of Poulos, 229 N.W.2d 721, 725 (1975); Dioptron Co. v. Dimmitt, 245 Iowa 450, 456, 62 N.W.2d 749, 752 (1954). While reasonable latitude should be given to the cross-examining party, determination of the permissible scope of cross-examination rests within the discretion of the trial court. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975); State v. Droste, 232 N.W.2d 483, 489 (Iowa 1975); State v. Menke, 227 N.W.2d 184, 191 (Iowa 1975).

We believe the trial court properly exercised its discretion in allowing defense counsel to cross-examine plaintiff about statements made by O'Sharon. Admittedly, the name of O'Sharon was not mentioned during direct examination of the plaintiff. However, plaintiff did testify on direct he made several tours of Milwaukee Shell's headquarters and various people were present during these tours. It would not have been unreasonable for the jury, after hearing plaintiff's testimony during direct examination, to infer the only people present during the tours were those people whose names plaintiff mentioned. Accordingly, defendant was entitled to rebut that inference on cross-examination.

Furthermore, recognizing the main purpose of cross-examination is to detect falsehood and thus to arrive at the whole truth, the Iowa Supreme Court has held the cross-examiner should be accorded greater latitude where direct examination has not

resulted in a full and fair disclosure of the necessary facts. Eno v. Adair County Mutual Insurance Association, 229 Iowa 249, 258-60, 294 N.W. 323, 328-29 (1940). In Eno, the court quoted with approval the following passage from Wigmore:

> [T]he counsel producing [the witness on direct examination] will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Some one must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent.

Id. at 329 (quoting 5 J. Wigmore, Evidence § 1368 (Chadbourn rev. 1974)).

Similarly, whether by design or by inadvertence, plaintiff in the instant case failed to disclose two important facts during direct examination: The president of the Milwaukee Shell Corporation, John O'Sharon, accompanied plaintiff on his tours of the company's headquarters, and O'Sharon made to the plaintiff many of the same representations the defendant is alleged to have made to him concerning the quality of Milwaukee Shell's prefabricated homes and the success of its operations. Because plaintiff failed to make a full and fair disclosure of these material facts to the jury, defendant was entitled, as in Eno, to conduct a cross-examination designed to present a complete version of the relevant facts. We conclude the trial court did not err in allowing defendant to cross-examine with respect to a subject not directly raised during the direct examination of the plaintiff.

IV.

Plaintiff's final contention on appeal is that the trial court erred in permitting defendant to cross-examine him concerning the statements of O'Sharon because this cross-examination was an attempt by the defendant to establish an affirmative defense not specially pleaded. Plaintiff's argument is without merit.

In Iowa the defendant's answer must specifically admit or deny each allegation contained in the plaintiff's petition; furthermore, the answer must specially plead the existence of any additional facts deemed to constitute a defense. Iowa R. Civ. P. 72. A defense that must be specially pleaded is one that alleges facts "in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect." Iowa R. Civ. P. 101.

Thus, a defendant may counter the allegations of a petition either by denial of the facts alleged or by specially pleading additional facts in a defense, as by raising affirmative defenses. A denial is appropriate where the defendant seeks to challenge

the truth of the plaintiff's allegations. F. James & G. Hazard, Civil Procedure, § 4.7 (2d ed. 1977). An affirmative defense, on the other hand, is appropriate where the defendant directly or implicitly concedes the plaintiff's claim, but asserts other facts that preclude the right to recover. Morrow v. New Moon Homes, Inc., 548 P.2d 279, 294 (Alaska 1976); Rollins v. Leibold, 512 P.2d 937, 940-41 (Alaska 1973); Horst v. Morand Brothers Beverage Co., 96 Ill. App. 2d 68, 80, 237 N.E.2d 732, 738 (1968); Armstrong v. Johnson Motor Lines, Inc., 12 Md. App. 492, 500, 280 A.2d 24, 29 (1971); Texas Gulf Sulphur Co. v. Robles, 511 P.2d 963, 965 (Wyo. 1973). See also Foods, Inc. v. Leffler, 240 N.W.2d 914, 920 (Iowa 1976); Baker v. Beal, 225 N.W.2d 106, 114 (Iowa 1975); Henschel v. Hawkeye-Security Insurance Co., 178 N.W.2d 409, 420 (Iowa 1970) (all defining affirmative defense as one resting on facts not necessary to support plaintiff's case). It is clear in the instant case the defendant's cross-examination concerning the statements of O'Sharon was not intended to establish an affirmative defense. Defendant does not concede plaintiff's claim against him, as he would were he raising an affirmative defense; instead defendant has denied each allegation contained in the petition. Since defendant has not raised an affirmative defense, he was not required to specially plead one.

Nor has plaintiff convinced us the defendant's cross-examination was intended to establish a right to contribution or indemnification without naming O'Sharon as a third party defendant as required by Iowa R. Civ. P. 34(a). Rather, it would appear defendant's purpose in questioning plaintiff about O'Sharon was to provide the jury with a full and fair representation of those facts relevant to the question of plaintiff's alleged reliance on defendant's representations.

We affirm the ruling of the trial court.

AFFIRMED.