IN THE COURT OF APPEALS OF IOWA 000197

No. 7-129 / 96-0232

FILED
NOV 25 1997
CLERK SUPREME COURT

TOM KOTH d/b/a KOTH REFRIGERATION,
Appellant,

vs.

HAROLD GANGESTAD, PARKS MARINA, INC., DENNIS E. GRANT, WILLIAM SINGER, and DAKOTA COUNTY SAVINGS BANK OF SOUTH SIOUX CITY, NEBRASKA,
Appellees.

Appeal from the Iowa District Court for Dickinson County, Charles H. Barlow, Judge.

Tom Koth d/b/a Koth Refrigeration appeals from a district court order dismissing its petition to enforce a mechanic's lien. **AFFIRMED.**

Harold W. White of Fitzgibbons Brothers, Estherville, for appellant.

Richard J. Barry of Montgomery, Barry & Bovee, Spencer, for appellees Gangestad and Parks.

No appearance for remaining appellees.

Heard by Cady, C.J., and Huitink and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

The plaintiff appeals the trial court's dismissal of his petition to enforce a mechanic's lien against the owner of property for improvements to the property. Authorization for the improvements came from the tenant of the property. Because the plaintiff had no express or implied contract with the owner to make the improvements and because the tenant did not act as an agent of the owner in authorizing the improvements, the plaintiff's claim was properly dismissed. We affirm the trial court.

I. Background & Facts.

In 1987, Harold Gangestad sold the subject property to Parks Marina, Inc. (Parks) by installment contract. Parks leased the "front building" to Robert and Cindy Tetmeyer by lease dated November 22, 1991 for a term of three years commencing February 1, 1992. The lease provided the premises were to be used for a "Family Restaurant," and included an option to purchase the entire real estate (including both buildings) for $190,000.

Robert Tetmeyer hired Koth Refrigeration of Milford to remodel the building he intended to use as a restaurant. Tom Koth remodeled the building from January 4 to May 18, 1992.[1] Tetmeyer was unable to make his final payment of $12,296.75

[1] Koth replaced the air conditioning system with four central air units, connected water supply lines and distributed them, added natural gas piping, installed furnaces in the attic and ran duct work, remodeled two bathrooms, broke cement to install plumbing in the floor, and installed an exhaust fan, walk-in cooler, evaporator coils, and a condensing unit.

to Koth. Koth filed a mechanic's lien on June 22, 1992, for this amount and served Tetmeyer with the lien. The mechanic's lien listed "Bob Tetmeyer DBA. Country Rose" as the "owner, agent, or trustee of said real estate." Gangestad and Parks were not served with the lien.

Koth filed a petition to foreclose the mechanic's lien on August 16, 1994. The petition listed Gangestad and Parks as defendants, and indicated Tetmeyer, "as agent of the owner acted with the owner's authority to secure the material and labor aforementioned."

The district court ruled there was no showing of an express or implied contract between Koth and Parks, granted the defendants motion for directed verdict and sustained their motion to dismiss the case.

II. Foreclose on Mechanic's Lien.

Actions to enforce mechanic's liens are tried in equity. Iowa Code § 572.26. Our scope of review is de novo. *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994). We examine the entire record and determine the parties' rights anew from the evidence presented. *Northwestern Nat'l Bank v. Metro Ctr., Inc.*, 303 N.W.2d 395, 397 (Iowa 1981). Although we give weight to the fact findings of the district court, we are not bound by them. Iowa R. App. P. 14(f)(7).

Section 572.2 of the Iowa Code governs who is entitled to a mechanic's lien, and it requires the existence of a contract with the property owner or the owner's agent. If there is not an express contract, to be entitled to a mechanic's lien, there

must be facts that give rise to an implied contract. *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d at 192. The burden of proof is upon the mechanic's lien claimant to prove an express or implied contract. *Sulzberger*, 351 N.W.2d at 192. A meeting of the minds is essential to prove an express or implied contract existed. *Giese Construction Co. v. Randa*, 524 N.W.2d 427, 430 (Iowa App. 1994). "Fundamental to establishment of a mechanic's lien on property is proof of such an express or implied contractual arrangement binding the person then possessing an ownership interest." *Id.* (quoting *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 709 (Iowa 1985)).

When a contractor performs work pursuant to an express contract with someone other than the owner of the property, the mechanic's lien cannot be enforced. *See, e.g., Geise,* 524 N.W.2d at 431; *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d at 712; *Guldberg v. Greenfield*, 259 Iowa 873, 146 N.W.2d 298, 301 (1966); *Des Moines Sav. Bank v. Goode*, 106 Iowa 568, 573, 76 N.W. 825 (1898).

In regard to an express contract, the evidence in this case is uncontroverted that Koth had no direct contact with Gangestad or Parks about making improvements to the building. Chapter 572 permits enforcement of a mechanic's lien against an owner whose agent has made a contract with a contractor. *Giese*, 524 N.W.2d at 431. In order for Koth to establish the existence of a contractual relationship sufficient to support imposition of a mechanic's lien, it had to prove such a contract was made with an agent of Gangestad or Parks.

An express agency relationship exists when a principal manifests to an agent he may act on the principal's behalf and the agent consents to do so. *Id.* An agent has apparent authority when the principal has acted in a manner that leads persons dealing with the agent to believe the agent has authority. *Id.* Apparent authority, between the principal and third persons, is determined by what the principal said and did rather than by the acts or statements of the purported agent. *Id.*

Koth has no evidence Tetmeyer was an agent of the owners of this property. Koth's only argument to prove Tetmeyer was an agent of the owners was that the lease between Parks and Tetmeyer authorized Tetmeyer to use the building for a "family restaurant" and that Parks toured the building with Tetmeyer when Koth was remodeling it. These facts fall far short of establishing an express agency relationship or apparent authority to act.

Koth contends the trial court erred in concluding it could not recover under the theory of implied contract or quantum meruit. "A quasi contract or contract implied in law rests upon the equitable principle that one shall not be permitted to unjustly enrich himself at the expense of another or to receive property or benefits without making compensation therefor." *Id.* (quoting *Guldberg v. Greenfield*, 146 N.W.2d 298, 301 (1966)). Ordinarily, one who pleads an express oral contract cannot recover under an implied contract or quantum meruit. *Id.* (citing *Guldberg v. Greenfield*, 146 N.W.2d 298, 301(1966)).

The trial court correctly determined that the circumstances of this case do not give rise to a contract implied in law. Not only did Koth plead the existence of an express contract by arguing Tetmeyer was an agent of the owners, but the equitable circumstances which would justify an implied contract do not exist. Koth opted to use very informal arrangements in making its business contracts. He did not even have a written contract with Tetmeyer. He assumed Tetmeyer was the owner of the building and made no investigation to find out otherwise. Koth and Tetmeyer had done business previously. Koth only looked to Tetmeyer for payment. Only when Tetmeyer could not pay did Koth look to enforce his mechanic's lien against the owners of the property. While the owners may be enriched by Koth's work, the circumstances of this case do not lead to the conclusion that they have been *unjustly* enriched and must be required to compensate Koth for the work. We affirm the trial court.

AFFIRMED.

000353

IN THE COURT OF APPEALS OF IOWA

FILED
DEC 29 1997
CLERK SUPREME COURT

No. 7-573 / 96-0232
Filed December 29, 1997

STATE OF IOWA,
Appellee,

vs.

KENNETH JUDGE,
Appellant.

Appeal from the Iowa District Court for Jasper County, Peter A. Keller, Judge.

Defendant appeals the judgment and sentence entered upon his conviction of lascivious acts with a child in violation of Iowa Code section 709.8 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Steven Johnson, County Attorney, and Christine Branstad, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Huitink, JJ.

HUITINK, J.

Kenneth Judge appeals his conviction of lascivious acts with a child.

I. Background Facts and Proceedings.

Judge was charged with this offense in August 1995 based on allegations he fondled his two-year-old daughter, L.J., in April 1993. At Judge's July 1996 trial his then nine-year-old step-daughter, L.H., testified she awoke during the night to find Judge in the bed she shared with L.J. and saw Judge's hand in L.J.'s underpants. L.H. also testified Judge threatened to hurt her if she told anyone what she saw.

The district court, over Judge's objections, admitted evidence of Judge's sexual misconduct subsequent to April 1993. These include Judge's January 1996 conviction of lascivious acts with a child and acknowledged sexual contact with a four or five-year-old girl in 1995.

Judge denied any inappropriate sexual contact with L.J. He presented evidence that L.J. was still wearing diapers and not underwear when his allegedly inappropriate contact occurred. The record also includes evidence that Judge and the mother of L.H. and L.J. were involved in a custody dispute at the time these allegations were made.

During deliberations, the jury sent a note to the court stating:

> "Due to the lack of evidence, we're unable to reach a decision. What happens now?"

The court responded to this inquiry by submitting the following questions:

> "(1) Are you hopelessly divided on the issue of guilty or not guilty? If so, let me know; or (2) Do all jurors agree that there is a lack of evidence? If you answer yes to number 2 above then you should re-read the instructions and continue to deliberate. After doing so, if you cannot reach a decision, let me know. (S) Judge Keller."

The jury answered yes to both questions and also stated:

> "We read instructions, have discussed issue, still divided. (S) Foreman."

The court's questions and the jury's answers were returned to the court along with the jury's verdict finding Judge guilty. Upon receipt of the verdict, the court polled the jury to confirm the unanimity of its verdict. The record contains no reference to the court's questions and the jury's answers until after the jury was discharged and the court identified the documents including the questions and answers as exhibits to be included in the record.

Judge's motions for new trial and arrest of judgment were denied. The district court entered judgment in conformity with the jury's verdict and sentenced Judge to a term of incarceration not to exceed five years.

On appeal Judge contends the district court erred by admitting evidence of his 1996 lascivious acts conviction and 1995 sexual contact with another child. He also argues his conviction for this offense lacks sufficient evidentiary support. Lastly, Judge argues the district court's failure to direct the jury to reconsider its verdict in

view of its answers to the questions submitted during deliberation necessitates a new trial.

II. Scope of Review.

Our scope of review is for correction of errors of law. Iowa R. App. P. 4. On evidentiary issues, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

III. Other Crimes, Wrongs, or Acts Evidence.

Iowa Rule of Evidence 404(b) proscribes the use of other crimes, wrongs, or acts to prove the defendant acted in conformity with the bad character such acts may show. *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979). Such evidence may, however, be admissible to prove the defendant's motive or intent. *State v. Arcivia*, 495 N.W.2d 364, 367 (Iowa App. 1992). If the court determines evidence is relevant for this purpose, its probative value must be balanced against the danger of unfair prejudice resulting from its admission. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). This balancing test requires the court to consider the need for and strength of the challenged evidence in support of the issues raised and the degree to which the evidence could unduly influence the jury to decide the case on an improper basis. *Plaster*, 424 N.W.2d at 231-232.

In this case the district court correctly determined Judge's conviction and sexual contact with another child were relevant to prove he fondled L.J. for the purpose of arousing or satisfying his sexual desires. *See State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1982) (other crimes meet the test of relevance as bearing on the accused's intent). We also agree with the district court's conclusion that this evidence has substantial probative value. Because of Judge's parental relationship with L.J. and her age, the act of touching L.J.'s genitals was subject to innocent explanation and the State needed this evidence to prove the requisite intent.[1] Although the emotional force of this evidence is undeniable, we cannot say the district court's ruling on this evidentiary question was an abuse of discretion. We affirm on this issue.

IV. Sufficiency of the Evidence.

The standard of review in challenging the sufficiency of the evidence is well established. *State v. Lampman*, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. *State v. Aldape*, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the

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[1] Contrary to Judge's contention this is not a case in which the requisite intent inheres in the accused's lascivious acts. *See State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979); *State v. Marvin*, 197 Iowa 443, 444, 197 N.W.315, 316 (1924).

record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. *Bass*, 349 N.W.2d at 500; *Hall*, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984); *Hall*, 371 N.W.2d at 188.

Our review of the record discloses substantial evidentiary support for the jury's verdict. As already noted, there is evidence Judge placed his hand inside of L.J.'s underwear touching her pubes or genitals. Judge's subsequent conviction for committing the same offense and touching a four-year-old girl's crotch were sufficient proof of his sexual intent. The jury was free to reject Judge's denials and accept the testimony of the State's witnesses. We accordingly affirm on this issue.

V. The Verdict.

The gist of Judge's last contention is that the jury's responses to the court's inquiries indicate the jury misunderstood the law and the verdict was not an expression of their true intentions. The State disputes this assertion arguing the jury's responses have no significance in view of their unanimous decision to convict. Both

parties agree the circumstances presented here implicate the insufficient verdict provisions of Iowa Rule of Criminal Procedure 21(6). This rule provides:

> If the jury renders . . . a verdict of guilty in which it appears to the court that the jury was mistaken as to the law, the court may direct the jury to reconsider it, and it shall not be recorded, until it is rendered in some form from which the intent of the jury can be clearly understood . . . .

The court is afforded considerable discretion in the application of this rule. *State v. Mumford,* 338 N.W.2d 366, 370 (Iowa 1983).

We find no abuse of discretion in the district court's decision to accept the jury's verdict. Any uncertainty regarding the jury's intention to convict or unanimity of its verdict was satisfactorily resolved by the court's poll of the jury. Based upon the results of the poll, the court could reasonably infer any reasonable doubt inherent in the jury's answers to its earlier inquiries was resolved by its subsequent unanimous decision to convict.

We have considered all of Judge's appellate contentions and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.