

IN THE COURT OF APPEALS OF IOWA

No. 9-230 / 88-1310

FILED

OCT 24 1989

CLERK SUPREME COURT

HAROLD ELCHLEPP and ROSEMARY ELCHLEPP,

Plaintiffs,

vs.

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DAVID GORDINIER,

Defendant.

DAVID GORDINIER,

Third-Party Plaintiff-Appellant,

vs.

CARI GORDINIER,

Third-Party Defendant-Appellee.

Appeal from the Iowa District Court for Linn County,
Thomas L. Koehler, Judge.

David appeals the district court's ruling granting Cari
a summary judgment. **AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED.**

Jacqueline Miller of Dolezal, Miller & Lewis, Cedar
Rapids, for appellant David Gordinier.

Gary L. Robinson of Klinger, Robinson & McCuskey, Cedar
Rapids, for appellee Cari Gordinier.

Robert Ford, Cedar Rapids, for the plaintiff.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ.

SCHLEGEL, J.

The marriage of David and Cari Gordinier was dissolved by a stipulated decree in January 1988. Cari's parents later sued David for an alleged debt. David responded to this suit by filing a third-party petition seeking indemnity from Cari on a theory that her actions had caused the suit by her parents. In addition, David also joined to his indemnity action several conversion claims against Cari.

David has appealed the district court's ruling granting Cari a summary judgment. The district court held that all of David's claims against Cari were barred by a general release clause in the stipulated dissolution decree.

David contends the general release is invalid because it was based on a mutual mistake of fact, namely the parties' lack of knowledge that Cari's parents would claim a debt. He also contends that his claim for indemnity should survive the general release because his right to indemnity did not arise until after the release was executed. In addition, he contends his conversion claims should survive the release because Cari had committed an ongoing or continuous conversion, some of which did not occur until after the release was executed.

The dissolution decree incorporated a stipulation signed by both David and Cari. The stipulation included a general release clause providing that each party released

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the other from "any and all obligations, suits, debts, claims and demands and obligations whatsoever . . . which either of them ever had, now has, or may hereafter have against the other . . . by reason of any matter . . . up to the date of the execution of this instrument."

In April 1988 Cari's parents, Harold and Rosemary Elchlepp, brought a suit against David for \$6,000 they had allegedly loaned him during the course of the marriage. David denied the existence of any such loan, and he alleged that his purported endorsement signature on the canceled check relied on by the Elchlepps had actually been forged by Cari.

David responded to the Elchlepp suit by filing the present third-party petition against Cari, seeking indemnity. He alleged that her actions in accepting and negotiating the check from her parents by forging his signature had caused the Elchlepps' suit against him.

David also joined to his indemnity claim several other claims against Cari, all relating to her alleged conversion (prior to the dissolution decree) of certain paintings which he had painted and which he claimed he owned.

Cari responded to David's indemnity and conversion claims by moving for summary judgment. She alleged that all of David's claims were barred by the general release in the parties' January 1988 stipulation.

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

David contends his claim of indemnity against Cari should survive the release that was incorporated into the dissolution decree. The language of the release is as follows.

Except as otherwise expressly provided, the parties shall and do hereby remise, release and forever discharge each other from any and all obligations, suits, debts, claims and demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other upon or by reason of any matter, cause or things up to the date of the execution of this instrument.

David sets forth two theories as to why the claim should survive this release. He argues that a mutual mistake of fact existed at the time of the decree. This mistake was the failure of either party to recognize the debt allegedly owed to Cari's parents. The trial court issued a summary judgment, stating that evidence of a mutual mistake of fact did not matter given the nature of the release.

The release in question is a contract, and its validity is governed by the usual rules relating to contract. Stetzel v. Dickenson, 174 N.W.2d 438, 439 (Iowa 1970). A release may be set aside for mutual mistake of a material past or present fact. Id. A summary judgment shall be issued only when there is no genuine issue as to a material fact. Iowa R. Civ. P. 237(c). There is clearly a genuine issue as to whether a mutual mistake existed between the parties. The trial court erred in granting a summary judgment on this issue.

In addition, David claims the right to indemnification from Cari on her parents' debt should survive in its own right or because the right to indemnification did not exist prior to the release. There is no Iowa case law which suggests that the right to indemnification or contribution should survive a release of all liability. However, the Iowa Supreme Court has held that a claim for indemnity does not accrue until a judgment has been entered against the party claiming the right to indemnification. Israel v. Farmers Mutual Insurance Association of Iowa, 339 N.W.2d 143, 146 (Iowa 1983). Even though the parents had loaned or given the money to David prior to the release, the claim for indemnity did not exist at that time and will never exist unless a judgment is entered against David. The release only discharged claims arising before the execution of the instrument. This claim for indemnity clearly arose subsequent to the execution of the decree. David should be allowed to present his claim against Cari for her share of the debt. From a purely equitable standpoint, it makes little sense to allow the parents of one party to wait until the other party has signed a release and then let them sue for their money, when in all probability their child will never be made to pay. The order of the trial court granting summary judgment is reversed and remanded.

David also contends that his claims against Cari regarding her destruction, or conversion, of his paintings

should be allowed. He argues that the tort of conversion⁵⁷ is ongoing and therefore part of the damage occurred after the signing of the release. The nature of conversion is not ongoing in the sense that a new cause of action arises every day. The cause of action in this instance arose prior to the signing of the release. If the paintings were destroyed at the time of the decree, any claim for them is barred by the release. If Cari is still in possession of the paintings in violation of the decree, David has other remedies at his disposal. David was granted all of the artwork in the original decree and must pursue it through enforcement of that decree. As a matter of law David has no valid claim for conversion of the paintings and the trial court was correct in granting Cari's motion for summary judgment on this issue. The costs of this appeal are to be assessed against the appellee.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.