IN THE COURT OF APPEALS OF IOWA

FILED
DEC 23 1986
CLERK SUPREME COURT

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IN THE MATTER OF THE ESTATE OF GARNOT GILES STOLTENBERG, a/k/a G. G. STOLTENBERG, a/k/a GARNOT G. STOLTENBERG, Deceased,	
MYRNOT SMITH and **BETH GIRRES,**	
Plaintiffs-Appellants,	Filed December 23, 1986
vs.	
ERNA PAULINE STOLTENBERG, ORPHA MARTHA BEGHTEL, FREDERICK STOLTENBERG, and **FREDERICK STOLTENBERG,** Executor of the Estate of Garnot Giles Stoltenberg, Deceased,	6-206 85-1679
Defendants-Appellees.	

Appeal from the Iowa District Court for Cerro Gordo County (No. Probate 18851) - L. D. Lybbert, Judge.

Plaintiffs appeal and defendants cross-appeal from judgment for defendants in an action contesting a will. **AFFIRMED.**

Randall E. Nielsen of Pappajohn, Shriver, Eide & Nicholas, Mason City, for plaintiffs-appellants.

Darrell J. Isaacson of Laird, Burington, Heiny, McManigal, Walters & Winga, Mason City, for defendants-appellees.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

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Plaintiffs appeal and defendants cross-appeal from a judgment for defendants in an action contesting a will. Plaintiffs assert that certain deposition testimony should have been excluded as hearsay. Defendants claim that the trial court erred in overruling their motion for directed verdict. We affirm.

In 1980, decedent Garnot Stoltenberg executed a will leaving his estate of approximately $240,000 to his two elderly sisters, Erna Stoltenberg and Orpha Beghtel, with equal shares in the bulk of the estate to his three children in the event that the sisters predeceased him. Both sisters were living when he died in 1983, and his two daughters, Myrnot Smith and Beth Girres, contested the will alleging lack of testamentary capacity and undue influence.

At trial, the daughters introduced evidence that decedent's relationship with them had become strained at the time of the decedent's divorce from their mother in 1952 but that reconciliation had occurred over the years. Various witnesses testified that decedent had, at various times, expressed an intent to leave property to his children. Other witnesses testified that he had acknowledged to them executing the will in question in accordance with its stated terms. Evidence was also introduced concerning a stroke suffered by decedent in 1977.

The daughters at trial sought to show that decedent had an abnormally-close relationship with one of his sisters, Erna, who testified at trial, inter alia, that decedent felt that his daughters did not love him. A deposition of the other sister, Orpha, was taken in the State of Washington where she resides. The following exchange took place as counsel for the daughters questioned her concerning a communication from the first sister:

> Q. Did she, in anyway, indicate at that time what your brother had provided for in his Will? A. She wrote me about it—

MRS. BEGHTEL: Is that all right to say?—She wrote me that he wanted to leave things to my sister and I. But my sister told him, she said, You can't do that. You have children. You've got to remember them. Now, she wrote me that. I don't know. That's what she wrote me, that she told him you can't do that.

Q. Did she indicate that he took her advice or did what he wanted to do? A. Well, do you want me to tell you? He said that we were old. We were unable to work.

MR. VANDENBERG: Just a moment. Identify who said that and where you found out that was said, and so on.

A. Oh. Well, my sister wrote it. That's the only thing.

Q. I would like some indication of what your sister indicated. A. She just said that we were old and we needed help. We wouldn't be here much longer and then it would probably all go to the children. But he said while we were old and they were young and all working and had good jobs, he wanted us to have it. That's what she wrote me. That's all I know.

When defendants sought to introduce the entirety of the deposition testimony, plaintiffs objected on hearsay grounds to the portion quoted above. The objection was overruled on the ground that the testimony in question was elicited by counsel for plaintiffs. The court later stated that the testimony was admissible for the additional reason that it was evidentiary in nature and tended to impeach the testimony of the first sister and further stated that admission of the testimony was not sufficiently prejudicial to warrant a new trial. During trial, plaintiffs agreed that the deposition could be considered for at least some purposes but it is presently disputed whether they offered the entirety of it as a part of their case in chief.

Defendants' motion for directed verdict was overruled. The trial court entered judgment in accordance with the jury's verdict for defendants in an order which also overruled plaintiffs' motion for new trial.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding upon us if supported by substan-

tial evidence. Iowa R. App. P. 14(f)(1). We are not, however, bound by the trial court's determinations of law. Blunt, Ellis & Loewi, Inc. v. Ingram, 319 N.W.2d 189, 192 (Iowa 1982).

The central issue in the present case is whether the fact that the plaintiffs elicited the contested testimony in the deposition of Orpha Beghtel prevented them from objecting to its use by the defendants on the basis of hearsay. The plaintiffs contend that based on the holding of the Iowa Supreme Court in Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980), the fact that the objector elicited the testimony at the deposition does not prevent them from objecting to it when offered by the other party at the trial. The defendants contend that because the deposition of Orpha was procured by the plaintiffs in order to perpetuate her testimony and because according to defendants the plaintiffs made Orpha's deposition part of their case in chief, plaintiffs were precluded from objecting to its use. The trial court held the contested testimony was clearly elicited by the plaintiffs and that, had Orpha actually been present at trial, the plaintiffs would have had no grounds to object to the introduction of that portion of Orpha's testimony. The trial court further held that even if it was error to allow the hearsay testimony, such error was not prejudicial. With respect to the trial court's finding that plaintiffs were precluded from objecting to defendants' use of Orpha's deposition, we must disagree.

The defendants claim that the plaintiffs introduced the entire deposition of Orpha Beghtel in its case in chief pursuant to an agreement between the parties and the court and that, therefore, the plaintiffs have no grounds to object to the defendants' use of Orpha's deposition. The record clearly does not support this assertion. At the time the trial court was entertaining defendants' motion for a directed verdict, counsel for the plaintiffs inquired about defendants' use of that portion of Orpha's testimony regarding Erna's letter to Orpha describ-

ing the decedent's intent concerning provisions in the will. At that time, counsel for plaintiffs strenuously objected to any use of that part of the deposition by the defendants well in advance of the offer of the deposition. Further evidence that Orpha's deposition was to be offered in the defendants' case in chief is found in an exchange between counsel for plaintiffs and the trial court:

> MR. NIELSEN: We would rest at this time subject to the reading of a couple of depositions which it has been indicated to us will be read during the defendant's case and that is deposition of Orpha Beghtel and the deposition of Dr. Stephen Westly.
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> (A hearing in chambers, out of the presence of the jury, commenced at 9:04 a.m., September 19, 1985.)
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> THE COURT: Let the record show these proceedings take place in chambers out of the presence and hearing of the jury. That at the close of yesterday's proceedings, counsel for the plaintiff contestants stated that he rested, except for certain portions of the deposition of a doctor and what?
>
> MR. NIELSEN: Also Orpha Beghtel and possibly Judge Bovard.
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> THE COURT: Certain portions of decedent's doctor's deposition and Orpha Beghtel, decedent's sister, as well as certain testimony of Judge Bovard, as to which matters plaintiffs expect will be presented in the form of depositions or testimony as a part of the case for the defendants. It makes it a little difficult to rule on what I assume will be some motions for directed verdict at this time, but in the interest of expediency, it appears to me that we can do it this way by— If defendant agrees that for the purposes of their motion for directed verdict, the matters just recited will be included or regarded as having been included in the plaintiff's case.

The record thus reveals that the plaintiffs did not introduce Orpha's entire deposition in its case in chief, but rather it was defendants who introduced the deposition in its entirety. The plaintiffs desired to introduce a portion of Orpha's deposition regarding a conversation between Orpha and Erna concerning what they would do with the property they received under decedent's will. The plaintiffs, however, consistently objected to any use of that portion concerning Erna's letter to Orpha.

Iowa Rule of Civil Procedure 144 provides that:

> Any part of a deposition, so far as admissible under the rules of evidence, may be used upon the trial or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, either:
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> (a) To impeach or contradict deponent's testimony as a witness; or
>
> (b) For any purpose if, when it was taken, deponent was a party adverse to the offeror, or was an officer, partner or managing agent of any adverse party which is not a natural person; or
>
> (c) For any purpose, if the court finds that the offeror was unable to procure deponent's presence at the trial by subpoena; or that deponent is out of the state or more than one hundred miles distant from the trial, and such absence was not procured by the offeror; or that deponent is dead, or unable to testify because of age, illness, infirmity or imprisonment.
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> (d) On application and notice, the court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

Because Orpha was at the time of trial 85 years of age and resided in the State of Washington, the plaintiffs propounded Orpha's deposition and therefore it was admissible at trial under rule 144(c).

Iowa Rule of Civil Procedure 145(b) provides that "[a] party does not make deponent his own witness by taking his deposition or using it solely under R.C.P. 144 'a,' or 144 'b.' A party introducing a deposition for any other purpose makes the deponent his witness, but may contradict his testimony by relevant evidence." Therefore, when defendants offered Orpha's deposition in its entirety at trial under rule 144(c), defendants made Orpha their witness under rule 145(b).

The plaintiffs, in support of their position, cite to Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980). In Osborn, the defendants, prior to trial, took the deposition of an expert witness expected to be called by plaintiff to

testify at trial. 290 N.W.2d at 896. The expert did not testify at trial because he had moved to Utah. Id. at 897. The plaintiff sought to introduce the entire deposition at trial. Id. The defendants objected to any use of the deposition by plaintiff. Id. The trial court did not exclude the entire evidence, but did exclude certain portions. Id.

In considering the question of whether defendants in that case had the right to make objections at trial to the questions and answers in the expert's deposition, the Iowa Supreme Court cited with approval the following passage from 26A C.J.S. Depositions § 100, at 455:

> [A] party offering a deposition . . . cannot urge objections to any portion thereof offered by him, although a deposition thus offered by one party is subject to any valid objection by the other party, notwithstanding the objecting party may have taken the deposition or propounded the questions or interrogatories objected to, since it cannot be inferred from a party's procuring a deposition to be taken that he is bound to admit the statements contained in it.

290 N.W.2d at 898. The court therefore held that when the plaintiff offered the expert's deposition, the defendants had a right to object to the use of the deposition. Id. The Osborn court went on to hold:

> The above authorities lead us to believe that in the situation where the opponent (plaintiff) offers at trial deposition questions propounded by the other party (defendant) and answers received thereto, then the other party has the right to object at trial under the "rules of evidence," rule 144, to any such questions or answers. This right is without regard to the provisions of rules 158(d) and (e), which we believe apply only to the situation where the propounder of the deposition questions is offering the deposition into evidence at trial; however, those rules apply only as to that portion of the deposition wherein he asked the questions. Therefore, rules 158(d) and (e), did not operate to restrict defendant's right to object at trial, on any grounds, to the Wardle deposition questions defendant propounded and the answers thereto.

Id. at 899.

We find the rule enunciated in Osborn applicable to the present case. We are not faced with the situation where the propounder of the deposition is offering the deposition into evidence at trial. Rather, the defendants were offering into evidence questions asked by plaintiff, the answers to which they were not bound to admit. The plaintiffs therefore properly objected to defendants' use of the deposition. This rule applies whether the deposition was propounded on the basis of discovery or for evidentiary purposes. We therefore hold that the trial court erred in overruling plaintiffs' objections.

Our inquiry, however, does not end here. The defendants contend that the portion of Orpha's deposition describing Erna's letter to Orpha discussing the decedent's testamentary intent is admissible under a variety of exceptions to the hearsay rule. The trial court, in its ruling, found that such portion of Orpha's deposition was admissible under either Iowa Rule of Evidence 803(3) (declarant's then existing mental, emotional, or physical condition) or under rule 805 (hearsay within hearsay). We need not address that issue, for even assuming that it was error to allow the hearsay testimony into evidence, it was not sufficiently prejudicial to require the granting of a new trial.

Under Iowa law, a judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party. Baysinger v. Haney, 261 Iowa 577, 581-82, 155 N.W.2d 496, 498-99 (1968). The trial court, therefore, generally has considerable discretion in determining whether prejudice has resulted. We note, however, that prejudice is presumed when error appears due to admission of improper evidence over a proper objection, unless absence of prejudice is affirmatively established. Madison v. Colby, 348 N.W.2d 202, 204 (Iowa 1984); Vine Street Corp. v. City of Council Bluffs, 220 N.W.2d 860, 863 (Iowa 1974).

The plaintiffs claim that the following portion of Orpha's deposition was

highly prejudicial:

> Q. I would like some indication of what your sister indicated. A. She just said that we were old and we needed help. We wouldn't be here much longer and then it would probably all go to the children. But he said while we were old and they were young and all working and had good jobs, he wanted us to have it. That's what she wrote me. That's all I know.

The following testimony, however, was elicited from Erna directly at trial by counsel for plaintiffs:

> Q. Did he ever talk to you about how he wanted to distribute his property after he died? A. He just said Sis and I are old. We'll only live a few more years. We need the money. Then it goes to the rest of them. Because the young people are working and don't need it. That was his way of talking to me.
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> Q. When he said the rest of them, who was he referring to? A. The children.
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> Q. His children? A. Yes.
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> Q. So would you agree with me, then, if I said that he wanted his sisters to have the money while they were alive? A. Yes.
>
> Q. And then he wanted his estate to go to his children? A. Then it can go to the children.

Mary Stoltenberg testified that the decedent had told her approximately two weeks before his death that he had made a will and that he had left everything to his sisters because they were old and needed money. Judge Gilbert Bovard, the preparer of decedent's will before assuming his duties as judge, testified that it was decedent's intent that if both sisters survived him, they were to share equally in the estate. Judge Bovard further testified that it was decedent's desire that in the event his sisters pre-deceased him, the bulk of the estate should then go to the children. Shirley Carroll, a close friend of the decedent, testified that the decedent had told her that his property would go to his sisters first and then to his children.

It is abundantly clear from the record that substantially the same testimony that was contained in Orpha's deposition was elicited without objection from

other witnesses at trial. Admission of hearsay evidence is not prejudicial error when substantially the same evidence is in the record without objection. Miller v. Bonar, 337 N.W.2d 523, 528 (Iowa 1983); Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1236, 150 N.W.2d 642, 648 (1967). The error in admitting the contested portion of Orpha's deposition was harmless and therefore does not require the granting of a new trial.

The defendants moved for a directed verdict after the close of plaintiffs' case and reiterated the motion at the close of their own case. The defendants therefore contend on cross-appeal that the trial court erred in overruling their motion for a directed verdict. We disagree.

In considering the propriety of a motion for directed verdict, we view the evidence in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 14(f)(2). In the present case, the jury found for the defendants. Even assuming that the plaintiffs had failed to satisfy the elements required to show lack of testamentary capacity and undue influence and that the trial court subsequently erred in refusing to grant the motion, we have held that ordinary errors against a party are cured by a verdict in its favor. Nassif v. Pipkin, 178 N.W.2d 334, 337 (Iowa 1970). Thus, any error by the trial court in refusing to grant the motion was harmless.

AFFIRMED.