IN THE COURT OF APPEALS OF IOWA

No. 7-519 / 96-0334

000139

RONALD D. GARMER, Executor of the Estate of WARD B. GARMER,

Plaintiff-Appellant,

vs.

KURT CHRISTENSEN,

Defendant-Appellee.

FILED
DEC 29 1997
CLERK SUPREME COURT

KURT CHRISTENSEN, CHRISTENSEN GARMER HOLDING CO., INC. d/b/a CHRISTENSEN-GARMER CORP.,

Counterclaimant-Appellee,

vs.

RICHARD D. GARMER, Executor of the Estate of WARD B. GARMER,

Defendant to Counterclaim-Appellant,

KEITH D. HAROLDSON,

Defendant to Counterclaim-Appellee.

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

Plaintiff appeals from the trial court's refusal to grant a new trial and decision to impose sanctions under Iowa Rule of Civil Procedure 80. **AFFIRMED.**

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, for appellant.

Peter S. Cannon and Patrick J. Burk of Connolly, O'Malley, Lillis, Hansen & Olson, L.L.P., Des Moines, for defendant appellees.

Gary R. Fisher of Dreher, Simpson & Jensen, P.C., Des Moines, for counterclaim defendant-appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

SACKETT, P.J.

Plaintiff-appellant Ronald D. Garmer, as executor of the Estate of Ward B. Garmer, appeals the trial court's refusal to grant him a new trial after the court entered an informal ruling dismissing his action against defendant-appellee Kurt Christensen. Plaintiff claims the trial court should not have denied his motion for a new trial and should not have awarded defendant attorney fees as a sanction under Iowa R. Civ. P. 80. Plaintiff contends he should have had a new trial based on his understanding the case was being continued. The trial court found he knew of the trial date but failed to appear. Defendant seeks an award of appellate attorney fees against plaintiff for appealing what defendant claims is a frivolous action. We affirm.

Plaintiff sued defendant Kurt Christensen, along with related corporate defendants, claiming a breach of fiduciary duty and conversion of property belonging to his father's estate. Defendant, in answering the petition, asked for sanctions under Iowa Rule of Civil Procedure 80. Plaintiff subsequently filed a substituted petition alleging defendant as bailee was not careful in storing furniture owned by plaintiff's deceased father, allowing moisture damage to the furniture. Plaintiff failed to attend discovery depositions for which he was noticed on three separate occasions and failed to participate in court-ordered mediation. He also failed to appear for a scheduled trial. Just prior to the trial, his then-current attorney filed a motion to withdraw as counsel based on plaintiff's lack of cooperation with the case. The trial court denied

his motion at that time since, the court reasoned, the attorney could cross-examine witnesses even in plaintiff's absence.

After the trial, the court indicated its inclination to dismiss the suit and asked defendant's attorneys to prepare a proposed decree. The court also gave plaintiff's attorney time to file any brief on behalf of his client concerning the issue of sanctions. Before the decree was entered, plaintiff's new attorney filed a motion for new trial. After a hearing on plaintiff's motion for new trial, at which plaintiff presented evidence, the trial court denied the motion for new trial, entered judgment dismissing the action, and entered a $5200 judgment against plaintiff, an Illinois attorney, on defendant's claim for sanctions. The trial court found from plaintiff's conduct that the action was frivolous. The trial court found plaintiff failed to comply with discovery procedures and court orders without good cause. The court also found plaintiff failed to show good cause for failing to appear for trial.

When reviewing the denial of a motion for a new trial, we look to the grounds for the new trial asserted in the motion and ruled on by the court. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). If the motion and ruling are based on a discretionary ground, such as attorney misconduct, we review for an abuse of discretion. *Rosenberger Enterprises, Inc. v. Insurance Service Corp. of Iowa*, 541 N.W.2d 904, 906-07 (Iowa App. 1995). In order to show an abuse of discretion, plaintiff must show 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). The findings of the district court are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the trial court's findings broadly and liberally. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988).

In response to plaintiff's appeal, defendant filed a motion to affirm and a request for appellate attorney fees. The supreme court denied the motion but permitted defendant to raise the issues in his appellee's brief. Defendant requests appellate attorney fees as a sanction under Iowa Rule of Civil Procedure 80 and on the basis of the decision in *Breitbach v. Christensen*, 541 N.W.2d 840 (Iowa 1995), for plaintiff's actions in filing a frivolous appeal.

Our review of the record reveals substantial evidence in support of the trial court's findings. The findings support the trial court's dismissal of this action and its imposition of sanctions against plaintiff. We conclude the trial court did not abuse its discretion in dismissing this action, imposing sanctions against plaintiff, and in denying plaintiff's motion for a new trial.

We also determine an award of appellate attorney fees of $500 is appropriate.

AFFIRMED.