FILED
MAY 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORMAN L. CAMPBELL,

Petitioner-Appellant,

vs.

GARY K. KAMPSEN and FRANCIS F. SANDERS, d/b/a SANDERS CONSTRUCTION CO.,

Respondents-Appellees.

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8-310
87-1599

Appeal from the Iowa District Court for Scott (72363), L.D. Carstensen, Judge.

Petitioner appeals the district court's order entering summary judgment in favor of respondents. **REVERSED AND REMANDED.**

John G. Ames, Coal Valley, Illinois; and Dennis J. Naughton, Dubuque, for petitioner-appellant.

Marc Gellerman, Bettendorf, for respondents-appellees.

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

SCHLEGEL, P.J. 80

Petitioner Norman L. Campbell appeals the district court's order entering summary judgment in favor of respondents Kampsen and Sanders (Sanders Construction) and denying his motion for summary judgment. Because we believe an entry of summary judgment was improper in this case, we reverse and remand.

This case was originally filed by plaintiff Sanders Construction in small claims court to recover $1,000 from Campbell for installation and correction of a waterproofing system in Campbell's home. Campbell counterclaimed, seeking damages for allegedly faulty work. In July 1985 the small claims court awarded Sanders Construction $1,000, rejected Campbell's counterclaim, and awarded attorney fees in the amount of $5,116.12 to plaintiff's attorney. Campbell filed an application for discretionary review by the supreme court pursuant to Iowa Code section 631.16(2), which was denied.

In September 1986, Campbell filed a pro se "petition for equitable relief from judgment," asking that the small claims judgment be set aside on the grounds that it had been procured by "extrinsic and intrinsic fraud, collusion, misrepresentation, and perjury," and later filed an amended petition based upon the court's award of attorney fees. Campbell subsequently moved for summary judgment and Sanders Construction responded by filing a cross-motion for

summary judgment. The district court granted summary judgment in favor of Sanders Construction. The district court held that because petitioner failed to procedurally perfect his appeal from small claims and since the issues and the litigants in both the small claims action and the district court action were identical, Campbell was effectively precluded from relitigating the issues. Campbell has appealed from the court's order granting Sanders' motion and denying his motion.

The governing principles regarding motions for summary judgment were concisely stated in Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978):

> In reviewing the grant or denial of summary judgment motions, we view the underlying facts contained in the pleadings and the inferences to be drawn therefrom in the light most favorable to the party opposing the motion, and give such party the benefit of any doubt as to the propriety of granting summary judgment. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied, and to reverse the grant of summary judgment if it appears from the record there is an unresolved issue of material fact.

Id. at 795-96. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law. Hall v. Barrett, 412 N.W.2d 648, 650 (Iowa App. 1987) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986)). The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Hall, 412 N.W.2d at 650.

I. **Sanders' Motion for Summary Judgment.** In entering summary judgment in favor of Sanders Construction, the trial court relied upon the doctrine of issue preclusion. We believe that the trial court's reliance on this doctrine is in error in light of our supreme court's decision in Village Supply Co., Inc., v. Iowa Fund, Inc., 312 N.W.2d 551 (Iowa 1981). In Village Supply, the court, in considering whether an issue adjudicated in a small claims judgment should have preclusive effect in a subsequent regular district court trial, stated:

> In material part, the Restatement Comment to clause (c) [Restatement (Second) of Judgments section 68.1] states that a compelling reason for denying issue preclusion exists when "the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim." We believe that this statement describes the situation in the adjudication of small claims in Iowa. Giving preclusive effect to small claims adjudications in subsequent regular district court trials would be inconsistent with maintaining the simplicity and informality of small claims procedures.

Id. at 554 (emphasis added). The supreme court recently reaffirmed this holding in State, ex rel., v. Hydro Mag, Ltd., No. 87-1377, slip op. at 16-17 (filed February 22, 1989).

We hold that the trial court was in error in relying upon the doctrine of res judicata as the basis for its ruling on Sanders' motion for summary judgment.

II. **Campbell's Motion for Summary Judgment.** Campbell's original 89-page petition for equitable relief from the small claims judgment asserts that, among other claims, the small claims judgment must be set aside on the ground that it had been procured by "extrinsic and intrinsic fraud, collusion, misrepresentation, and perjury." Campbell's amended petition focuses on the court's award of $5,116.12 in attorney fees to Sanders as being beyond the jurisdictional authority of the small claims court, and Campbell's motion for summary judgment similarly claims that the court lacked subject matter jurisdiction because of the attorney fees award In denying Campbell's motion, the district court stated that Campbell's complaints about the small claims action were matters which could have been resolved on appeal, and essentially denied the motion on the basis of res judicata, which we previously held to be in error.

As the district associate judge in the small claims action noted, the written agreement entered into by the parties and made a part of the record stated that Campbell agreed to be held liable for reasonable attorney fees in the event suit was brought to collect on the contract. The court awarded Sanders $1,000, and "that attorney's fees . . . be awarded and taxed as costs against the defendant, Norm Campbell, in the amount of $5,116.12."

We believe that the trial court was in error in denying Campbell's motion for summary judgment because a genuine issue of material fact exists as to the reasonableness of the attorney fee award. Sanders' attorney, Marc Gellerman, filed an affidavit for fees in the amount of $3,779.80 on March 4, 1985, which the small claims court had before it in entering judgment on July 26, 1985. In awarding $1,336.32 in excess of the amount Marc Gellerman alleged in his affidavit, the district associate judge stated that the amount of the award included the fact that Sanders had to defend on Campbell's original counterclaim, despite the fact that such expenses were included in Gellerman's affidavit.

We return the case to the district court for a hearing on the issue of attorney fees, and for the reception of additional evidence if the judge deems the record inadequate for purposes of rendering judgment.

REVERSED AND REMANDED.