FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-163 / 88-780

CAPITOL FEDERAL SAVINGS BANK,

Plaintiff-Appellee,

vs.

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AMERICAN REAL ESTATE, LTD.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, C. H. Pelton, Judge.

Bank sued appraiser for negligently-performed appraisal. Both parties appeal, challenging the claims submitted to the jury and the damages. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.**

John C. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport, for defendant-appellant.

Joseph G. Van Winkle of Gamble, Riepe, Webster, Davis & Green, Des Moines, for plaintiff-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ., but decided en banc.

PER CURIAM 59

This case addresses issues of an appraiser's liability for an inaccurate appraisal made because of a miscalculation of the number of acres in an unplatted tract of land.

Plaintiff-appellee Capitol Federal Savings Bank in 1979 lent $314,000 on a tract of unplatted land in Davenport, Iowa to Norman Dean Properties, Inc. Dean utilized an appraisal made by defendant-appellant American Real Estate, Ltd. in obtaining the loan. Dean defaulted on the loan in 1984 and Capitol accepted deeds in lieu of foreclosure for several tracts of real estate, including the one appraised by American, and discharged Dean from any further responsibility on the obligations to them. When Capitol discovered the discrepancy in acreage, they sued American, alleging negligence and breach of contract in performing the appraisal. American filed a third-party action for contribution or indemnity against Dean. Dean was in default at the time of trial.

The facts at trial showed Dean asked American to appraise the unplatted tract of land. The land was vacant. American was given a metes and bounds description of the unplatted ground. The description given American stated the tract contained 24.70 acres, more or less. The tract in question actually contains just less than fifteen acres. There was about a ten-acre discrepancy.

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American appraised the land and supplied Dean with the appraisal that Dean gave to Capitol when he obtained the loan. It provided in relevant part:

> Mr. Norm Dean
> RE: Appraisal of market value of vacant 24.7-acre tract fronting 3000 West Kimberly Road, Davenport, IA.
>
> * * *
>
> As a result of my investigation, based upon my knowledge and experience and upon my analysis of the following data, it is my opinion the market value of the subject property as of August 10, 1979, is $430,000 ($17,409/Acre).

The appraisal also contained the following:

> CONTINGENT AND LIMITING CONDITIONS
>
> The legal description used in this report is assumed to be correct.
>
> No survey of the property has been made by the appraiser and no responsibility is assumed in connection with such matters. . . .
>
> * * *
>
> Information furnished by others is assumed to be true, correct, and reliable. A reasonable effort has been made to verify such information, however, no responsibility for its accuracy is assumed by the appraiser.

After submission of evidence, the trial court submitted the case to the jury on Capitol's negligence count against American. The trial court refused to submit the Capitol contract claim and the American claim against Dean to the jury. The jury returned a verdict in favor of Capitol and against American for $57,389. Both parties have appealed. We reverse.

American contends (1) the trial court erred in refusing to instruct the jury it could allocate a proportion of fault to Capitol and Dean, and (2) the trial court erred in

instructing the jury on the measure of damages. Capitol on cross-appeal argues (1) the trial court erred in directing a verdict against it on its breach of contract claim, (2) the jury's damage award was so inadequate a new trial should have been ordered, and (3) the trial court erred in refusing to sever Dean as a party.

I. Fault of Capitol and Dean

Defendant contends the jury should have been instructed it could apportion part of the fault to Capitol and part to Dean. It argues Capitol was negligent because it did not obtain an independent survey of the real estate, it did not disperse the loan in "progress payments," and it did not require the loan proceeds to be used to improve the land. American contends Capitol had a legal duty to use ordinary care in transacting its business, and its conduct was not prudent. American contends Dean's fault should have been submitted to the jury because he provided inaccurate information regarding the acreage to both Capitol and American, and conveyance of this misinformation constituted negligent misrepresentation.

Capitol is the claimant in this matter and Dean was a third-party defendant as well as a person who settled with the claimant. They both are "parties" in this action. Iowa Code §§ 668.2, 668.7 (1987). Therefore, the issue of their fault, if any, should be submitted to the jury under Iowa Code section 668.3 if there is substantial evidence of

their fault. Evidence is substantial when a reasonable person would accept it as adequate to reach a conclusion, regardless of whether the evidence might support a different finding. Miller v. Eichhorn, 426 N.W.2d 641, 643-44 (Iowa App. 1988).

"Fault" is defined as:

> one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also *includes breach of warranty, unreasonable* assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages.

Iowa Code § 668.1 (1987). "Fault" encompasses not merely acts of a negligent nature but the unreasonable failure to avoid an injury or to mitigate damages as well. Miller, 426 N.W.2d at 643.

The problem is the inaccurate acreage reference that apparently was prepared by an engineering firm. The preparation of a legal description is not an area of expertise of either a real estate lender or an appraiser. The mistake was not hidden. As aptly pointed out at trial and at oral argument to this court, the acreage discrepancy could have been easily discovered by simple multiplication and division, a computation apparently not made by either Dean, American, or Capitol.

We agree with American's assessment that there was substantial evidence Capitol did not use prudent business

practices. There was testimony on cross-examination by Capitol's expert witness on appraisal, Gullickson, and a former vice president of Capitol, that it was prudent for a lender to order its own appraisal when a preliminary plat had not been accepted.

As a lender of money on real estate, Capitol obviously had certain expertise in the real estate area. American stated the number of acres in the tract but made no representations they had verified the acreage. Rather, American, in their limiting conditions, clearly specified they made no survey and assumed no responsibility in connection with such matters and they assumed the information furnished was correct. This clearly put Capitol on notice that these matters were not verified. The limiting conditions established a duty on the part of Capitol to inquire and not rely exclusively on the representations made in the appraisal. There is substantial evidence of negligence on Capitol's part. It should have been submitted. We do not find substantial evidence on American's other allegations of negligence on Capitol's part.

American contends Dean's fault should have been submitted to the jury. It argues Dean was at fault for supplying false information regarding the acreage to Capitol and American and allowing them to rely on the information when he knew, or should have known, it was

false. Dean provided a plat and legal description of the property to American when the appraisal was requested. American asserts Dean's duty *not* to convey misinformation is derived from the tort of negligent misrepresentation set forth in Restatement (Second) of Torts § 552 (1977). This section provides in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons *for whose benefit and guidance he* intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. (emphasis added)

This tort has been recognized in Iowa, Beeck v. Kapalis, 302 N.W.2d 90, 97 (Iowa 1981), and it was specifically applied in the case of a negligent appraisal in Larsen v. United Federal Savings & Loan Association, 300 N.W.2d 281, 287-88 (Iowa 1981).

A prerequisite for this liability is that a defendant is only subject to liability if "he has failed to exercise the care or competence of a reasonable man in obtaining or

communicating the information." Restatement (Second) of Torts § 552 comment e (1977). What is reasonable is dependent upon the circumstances. Id.

Dean owned the land. He was familiar with it. The difference between the acreage shown and the actual acreage was a difference of over ten acres in a tract represented to be less than thirty acres. There is evidence of negligence on Dean's part. It should have been submitted. We determine the issue of Capitol's and Dean's negligence should have been submitted. We reverse and remand for a new trial on these grounds.

II. Measure of Damages

American contends the trial court did not properly instruct on the issue of damages. The trial court's instruction to the jury with regard to damages was as follows:

INSTRUCTION NO. 18

> If you find that plaintiff has established its claim against defendant, then plaintiff is entitled to recover damages for its actual losses. Plaintiff claims to have lost the difference between the 1979 appraised value of the property on which it made a loan and the actual value of the property in 1979.
>
> You are instructed that the maximum measure of damages is the value of the property stated in the 1979 appraisal--$430,000.00--minus its actual 1979 value of $228,000, a difference of $202,000. It is for you to determine the actual amount of damages proximately caused by defendant, determined from the evidence and in accordance with these instructions.

American contends this is not correct because the appropriate measure of damages is the difference between the amount of money loaned by Capitol, $344,000, and the actual value of the land in 1979, $228,000. Under this formula Capitol's damages would not have exceeded $116,000. American contends use of the $430,000 appraisal figure is inappropriate in determining damages because Capitol did not have the entire value of the real estate at risk. Instead, American contends Capitol only had at risk the amount it loaned Dean. Capitol argues the court's instruction was correct because it based loan amounts upon eighty percent of the value of collateral. Since Dean's land had been appraised at $430,000, Capitol was willing to lend Dean $344,000, or eighty percent of the value of the land.

The goal is to place an injured party in as favorable a position as if no wrong had occurred. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 421 (Iowa 1983). In Larsen, 300 N.W.2d at 288-89, a negligent appraisal case, the Iowa Supreme Court found the appropriate measure of damages to be the difference between the incorrect appraised value and the actual value of the property at the time of the appraisal. American asserts Larsen is not applicable because the injured parties in Larsen were home buyers who relied on the negligent appraisal and believed they were purchasing a home worth $45,000 when the home was

only worth $25,000. American contends Capitol was not relying on the appraisal to purchase the property, but only used it to ensure its loan was secured. We reject this argument.

III. Breach of Contract Claim

Capitol contends the trial court erred in refusing to submit its breach of contract claim. The trial court conceded plaintiff had pled and proven a contractual claim, but the court concluded the "contract claim collapses into a professional negligence claim," and on this basis refused to submit both the negligence and contract claims to the jury. We find no error.

The essence of Capitol's action was that American had a duty to perform services in compliance with the standards and requirements established by the appraisal profession. The Iowa Supreme Court has recognized an overlap can exist between tort and third-party beneficiary contract claims in malpractice actions. Millwright v. Romer, 322 N.W.2d 30, 32 n.1 (Iowa 1982). The court has determined a "third-party beneficiary contract theory 'is conceptually superfluous since the crux of the action must lie in tort [and] there can be no recovery without negligence.'" Id. (quoting Heyer v. Flaig, 70 Cal. 2d 223, 227, 449 P.2d 161, 164, 74 Cal. Rptr. 225, 228 (1969)).

IV. Adequacy of Damages

Capitol contends it was entitled to a new trial because the damages awarded were not adequate. We have reversed for a new trial. We therefore do not address this issue.

V. Severence of Dean

Capitol contends Dean should have been severed as a party. We reject this argument.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.

All judges concur except Donielson, P.J., and Habhab, J. who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. It is difficult to conceive Capitol had a duty to get an independent survey when American testified (through its owner, Terrell Honnold) it knew the function of its appraisal was to enable Dean to obtain a loan from Capitol. The language in Larsen v. United Fed. Sav. & Loan Ass'n., 300 N.W.2d 281, 286-87 (Iowa 1981), suggests if American knew, or should have foreseen, Capitol would rely on its appraisal, then an action for a negligent appraisal can arise therefrom. Expert evidence presented at trial established an appraiser has a duty to use the legal description and calculate the acreage. American cannot escape this professional obligation by adding qualifying limitations and conditions to its appraisal. In any case, American's limiting conditions state it would take reasonable efforts to verify information provided to it. Surely Capitol could have relied on American to use "simple multiplication and division" to compute the actual acreage of the land it had been asked to appraise.

In ruling Dean's alleged negligence should have been submitted to the jury, I am afraid the majority is establishing an ironclad rule that a landowner is presumed to know the extent of his or her land holdings. The majority correctly notes a prerequisite for Dean's liability under the theory of negligent misrepresentation

is Dean's failure to exercise the competence of a reasonable man in obtaining or communicating the acreage information. However, when the majority applies this standard it ignores the fact that American itself testified it was reasonable to rely on Dean's engineer for an acreage estimate.

In this case American, once again through the testimony of its owner Terrell Honnold, testified Dean had retained it to do an appraisal. Dean provided American with a plat and legal description of the property which was to be appraised. Honnold testified he believed both the plat and the legal description had probably been provided to Dean by Major Engineering, as Major Engineering had been doing similar work for Dean. Honnold stated it was common to see the amounts of acreage computed at the end of a legal description and for it to be a reliable computation. Honnold further testified American had experience with Major Engineering and found its work to be authoritative and reliable. No evidence was presented to demonstrate why Dean's reliance upon, and conveyance of, information from the plat and legal description, would not constitute the exercise of reasonable care. American's owner testified as to the reliability of Major Engineering's information and Dean's conveyance of that information to American and Capitol could not have constituted negligent misrepresentation. I would affirm the trial court's decision in its entirety.

Habhab, J., joins this dissent.