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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HARLAN COMMUNITY SCHOOL DISTRICT OF SHELBY AND HARRISON COUNTIES, IOWA,	)	
Plaintiff-Appellee,	)	118
vs.	)	
LAVONNE GRULKE and GLORIA MINER,	)	
Defendants,	)	8-558
and WAYNE PAUL GRULKE,	)	88-24
Defendant-Appellant,	)	
EMCASCO INSURANCE COMPANY,	)	
Intervenor-Appellee.	)	

Appeal from the Iowa District Court for Pottawattamie County (No. 57336), Keith E. Burgett, Judge.

Defendant Wayne Grulke appeals the district court's order granting the plaintiff's motion for summary judgment. **REVERSED.**

Bennett Cullison, Jr. of Cullison & Cullison, P.C., Harlan, for defendant-appellant and defendants.

J. C. Salvo of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for plaintiff-appellee.

Robert Kohorst of Kohorst Law Firm, Harlan, for intervenor-appellee.

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

PER CURIAM

Defendant, Wayne Grulke, appeals the district court's order granting the plaintiff's motion for summary judgment.

Plaintiff, Harlan Community School District, sued the defendant for conversion of money. The plaintiff moved for summary judgment asserting that Wayne's mother, Lavonne Grulke, had previously admitted giving money she appropriated from the plaintiff to Wayne, and that Wayne, in his deposition, admitted receiving such money.

Plaintiff's motion for summary judgment was based upon an affidavit sworn to by the plaintiff's attorney, the deposition of Wayne Grulke, and other court documents. The defendant on appeal argues 1) the affidavit supporting the motion for summary judgment sets forth facts that are inadmissible in evidence and 2) there exists genuine issues of fact. We reverse.

Our review is on errors assigned. Iowa R. App. P. 4. Upon reviewing a motion for summary judgment, the moving party must have demonstrated the absence of any genuine issue of material fact and showed that he was entitled to judgment as a matter of law. Hall v. Barrett, 412 N.W.2d 648, 650 (Iowa App. 1987).

On appeal the record is examined in a light most favorable to the party opposing the motion for summary judgment to determine if the movant's burden was met. Id. We have recognized that a motion for summary judgment

should not be granted if reasonable minds can differ as to how the issue should be resolved. Steinbach v. Meyer, 412 N.W.2d 917, 918 (Iowa App. 1987).

Plaintiff's motion for summary judgment is based partially on an affidavit of J. C. Salvo, attorney for the plaintiff. Mr. Salvo in his affidavit stated that he was present in the courtroom during the criminal prosecution of Mrs. Grulke. He further stated that during the trial Mrs. Grulke testified "that over a period of years she gave directly to, paid to creditors of or otherwise provided for the benefit of her son, Wayne . . . the monies she misappropriated from [the plaintiff]." Wayne objects to this evidence as inadmissible because it is hearsay. We agree.

Clearly, it is an out-of-court statement offered to prove the truth of the matter asserted. Iowa Rule of Evidence 801. It does not fall under any of the exceptions to the hearsay rule. Iowa Rules of Evidence 802-806. Affidavits used to support a motion for summary judgment are to set forth only such facts which would be admissible in evidence. Iowa R. Civ. P. 237(e). Therefore, the hearsay portion of Mr. Salvo's affidavit may not be used to support the summary judgment motion.

But that finding is not dispositive, for contrary to the urging of the defendant, we are unable to find, after examining the court's ruling, that the trial court placed

any reliance whatsoever on the hearsay testimony in reaching its decision.

From the language of Iowa Rule of Civil Procedure 237(e), it is clear that if the plaintiff's motion was properly "supported," the motion was correctly sustained. Mead v. Lane, 203 N.W.2d 305, 306 (Iowa 1972). But a motion for summary judgment is not supported as required by this rule unless the movant meets his burden to show there is no genuine fact issue. Id. at 306-07. The court in Mead quoted with approval the following taken from the Notes of Advisory Committee on 1963 Amendment to F.R.Civ.P. 56(e): "Where the evidentiary matter in support of the motion does not establish the absence of a geniune issue, summary judgment must be denied even if no opposing evidentiary matter is presented." Mead, 203 N.W.2d at 307.

When the hearsay testimony of Mr. Salvo's affidavit is excluded, we are unable to say that the other evidentiary matter in support of the motion establishes the absence of a genuine issue of fact. In this respect, all the evidence must be viewed in the light most favorable to the party resisting the summary motion. Liska v. First National Bank in Sioux City, 310 N.W.2d 531, 534 (Iowa App. 1981). In addition, if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts, the issues must be reserved for the fact finder at trial and summary judgment is inappropriate. Id.

When we examine that part of the record which plaintiff relies on to support its motion in the light most favorable to the defendant, we conclude that reasonable minds could draw different inferences and reach different conclusions. Accordingly, summary judgment should not have been granted.

We also note that although Wayne does not dispute the assertion that his parents gave him money over the years, at the hearing and in his deposition, he did dispute that the money he received was the plaintiff's. He consistently asserted that he thought the money was from his grandfather's estate or money rightfully belonging to his parents.

Conversion is the act of wrongful control or dominion over chattels in derogation of another's possessory right thereto. Welke v. City of Davenport, 309 N.W.2d 450, 451 (Iowa 1981). To maintain an action for conversion, the plaintiff must have a possessory right in the property converted. Id. at 452. The ownership of the money in question remains under dispute. Therefore, Wayne, by his own testimony, created an issue of material fact.

Finally, the plaintiff asserts the defendant should be precluded from defending himself on appeal because he did not resist by document the motion for summary judgment at the trial level. At that time the defendant was representing himself. We find no written resistance to the motion filed by Wayne. However, Wayne did appear at that

hearing and defended himself by giving testimony under oath.

While it is true that a party adverse to the motion may not "rest upon the mere allegations or denials of his pleading," summary judgment will only issue if it is appropriate. Iowa R. Civ. P. 237(e). Whether the adverse party defends his position by affidavit or orally before the court does not remove the initial burden placed on the movant to show there is no genuine issue as to any material fact.

REVERSED.

Hayden, P.J., and Habhab, J., concur; Sackett, J., dissents.

SACKETT, J.(dissenting)

I respectfully dissent. I would affirm the trial court.

The majority on appeal has decided this case on issues not preserved for review in the trial court.