IN THE COURT OF APPEALS OF IOWA

No. 1-523 / 91-295

FILED
JUN 25 1992
CLERK SUPREME COURT

416

ALFRED HETTINGER,

Appellee,

vs.

LINZY E. MARTIN and MARTIN AND WILSON, P.C.,

Appellants.

Appeal from the Iowa District Court for Delaware County, Alan L. Pearson, Judge.

Martin appeals from a judgment against him, following a jury trial, in this legal malpractice action. **AFFIRMED.**

Max E. Kirk of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for appellants.

Mark H. Rettig of Hines, Pence, Day & Powers, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J.

Plaintiff Alfred Hettinger brought this legal malpractice action against his former attorney, Linzy E. Martin, and his firm, Martin & Wilson, P.C., alleging Martin was negligent in representing him in an earlier action filed against Hettinger by Farmers & Merchants Savings Bank. A jury entered a verdict for Hettinger in his legal malpractice suit. Martin appeals. We affirm.

In late 1980 or early 1981, Hettinger agreed to financially assist his son-in-law, David Zirtzman, in starting a farming operation. In February 1981, Hettinger purchased certain equipment, livestock and feed grains for Zirtzman. To finance this purchase, Zirtzman and Hettinger both signed a promissory note in favor of Farmers & Merchants Savings Bank for $28,778. Zirtzman gave the bank a security interest in the property to secure the loan.

Another note was executed by the Zirtzman for $28,778. The note permitted renewals or extensions without notice to the guarantors. Hettinger was asked by the bank to endorse this note in February 1982 after Zirtzman had already paid the bank $8,000 of the original indebtedness. Hettinger remarked that he would have no real risk under the note because the remaining $20,000 of the debt would be covered by the collateral. Gerald Burke, a vice president of the bank, stated "That's right." The original promissory note was marked "paid" and returned to Hettinger at that time.

On May 19, 1981, Hettinger was asked by Burke to execute a loan guaranty agreement in favor of the bank for $28,778 concerning Zirtzman's indebtedness.

From February 1981 to March 1983, Zirtzman borrowed additional sums from the bank without notice to Hettinger. These loans were secured by the same collateral as the original loan. Eventually, Zirtzman was unable to repay the loans. The bank then informed Hettinger it expected him to pay $28,000 under the loan guarantee agreement. Hettinger offered to pay $20,000 in exchange for the machinery and livestock he originally purchased for Zirtzman. The bank sold the collateral and applied the proceeds to other debts owed by Zirtzman.

In July 1983, the bank filed suit against Hettinger to collect under the loan guaranty agreement. Hettinger contacted Linzy Martin to represent him in this litigation. In January 1984, the bank filed a motion for summary judgment. Martin, as Hettinger's attorney, did not file a resistance. As a result of this motion, judgment was entered in favor of the bank against Hettinger for $28,778, plus interest and costs.

Hettinger then obtained new counsel and filed a claim against the bank alleging the bank had engaged in fraud in its application of the proceeds from the sale of the collateral. Hettinger v. Farmers & Merchants Savings Bank, 436 N.W.2d 377, 378 (Iowa App. 1988). His claims were

based on the bank's failure to apply the proceeds from the sale of the collateral to the guaranteed loan first. Id. We found his claims were compulsory counterclaims, and so were barred in a later action. Id. at 380.

In May 1988, Hettinger filed this legal malpractice action against Martin alleging that Martin was negligent in handling Hettinger's defense to the bank's lawsuit. Hettinger alleged he had a defense to the bank's claim and that he would have prevailed in the underlying suit. Hettinger claimed Burke made negligent misrepresentations which induced him to sign the loan guaranty agreement and endorse the note. Hettinger believed the note had been paid down to $20,000 and it was secured by collateral. He also stated he was unaware the note permitted renewals or extensions without notice to him. Hettinger testified he would never have signed the loan guaranty agreement if he knew it was supposed to guaranty an unsecured note.

Following trial, the jury returned a verdict in favor of Hettinger for $54,424.94. The jury found in special interrogatories that Hettinger's endorsement of the note and the loan guaranty agreement were invalid because they had been obtained by negligent misrepresentation. The jury did not find a misapplication of the proceeds of collateral would have been proven. Martin has filed this appeal.

I. Because this action was tried at law, our review is for the correction of errors at law. See Iowa R. App. P.

4. If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Cedar Falls Building Center, Inc. v. Vietor, 365 N.W.2d 635, 638 (Iowa App. 1985). We must view the evidence in the light most favorable to the one in whose favor the verdict was rendered. Id.

II. In a legal malpractice case a plaintiff must show: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney breached that duty; (3) the breach of duty proximately caused the plaintiff's injuries; and (4) the plaintiff suffered actual damages. Dessel v. Dessel, 431 N.W.2d 359, 361 (Iowa 1988). In the present case Martin is only disputing the element of proximate cause.

To establish proximate cause in a legal malpractice action, the plaintiff must show that, but for the attorney's negligence, the loss would not have occurred. Blackhawk Building Systems, Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988). In an action based upon the negligent handling of a lawsuit, the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful. Id. In attorney malpractice cases the law does not impose an implied guaranty of results. Martinson Manufacturing Co., Inc. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984). Martin's claims in this case are based on his

arguments that Hettinger could not have prevailed in the underlying suit.

III. Martin first claims the issue of negligent misrepresentation regarding the loan guaranty agreement should not have been submitted to the jury. He contends the tort of negligent misrepresentation requires an affirmative act, unless the parties are in a confidential or fiduciary relationship, in which case there may be liability for nondisclosure. Martin claims Burke did not make any affirmative misrepresentations to Hettinger. He also claims Hettinger and Burke did not have a confidential relationship, and thus, Burke could not be liable under a theory of negligent misrepresentation based on nondisclosure. Martin does not claim, however, the jury instructions were incorrect. He claims there was not sufficient evidence of negligent misrepresentation to submit the issue to the jury.

Martin has cited no cases, and we cannot find any, which support his view of the law of negligent misrepresentation. A confidential relationship is not considered an element of negligent or fraudulent misrepresentation. A confidential relationship merely acts to shift the burden of proof to the party seeking to uphold the transaction. Punelli v. Punelli, 364 N.W.2d 259, 261 (Iowa App. 1984).

Ordinarily, mere silence in an arms-length transaction does not serve to create actionable fraud. First National Bank in Lenox v. Brown, 181 N.W.2d 178, 182 (Iowa 1970); Smith v. Peterson, 282 N.W.2d 761, 767 (Iowa App. 1979). This is not the case, however, where one party has superior knowledge of the facts, resulting in an inequality of condition or knowledge between the parties. Smith, 282 N.W.2d at 767. The party with the superior knowledge then has the duty to disclose those material facts which may be favorable to him and unfavorable to the other party. Id. In these situations, silence will qualify as a misrepresentation. First National Bank, 181 N.W.2d at 182.

In this case there was substantial evidence Burke had superior knowledge concerning the terms of the loan guaranty agreement and he failed to reveal the facts to Hettinger, even though he knew Hettinger believed the agreement guaranteed a loan secured by collateral. We conclude this issue was properly submitted to the jury.

IV. Martin also claims there was not sufficient evidence to submit to the jury Hettinger's claims of negligent misrepresentation concerning his endorsement of the note. Again, Martin admits the jury instructions on this issue were correct.

Concerning this endorsement, Hettinger testified he believed his signature was only a recognition that $8,000 had been paid on the note. He told Burke he was relieved

his responsibility was reduced to $20,000, and the collateral should cover that amount. Burke replied, "That's right." We conclude there was sufficient evidence to submit this issue to the jury.

V. Martin contends the verdict against him should be reversed because Hettinger failed to establish a standard of care for Burke. Martin has not cited any authority in support of this issue, and therefore, we deem it to be waived. Iowa R. App. P. 14(a)(3).

VI. Martin contends he should be granted a new trial because the district court should not have submitted Hettinger's claim of misapplication of the collateral proceeds to the jury.

We determine that even if this issue was erroneously submitted to the jury, Martin was not prejudiced. The jury did not find Hettinger's claim concerning misapplication of proceeds would have been proven in the underlying suit. A party may not appeal from a finding or conclusions of law not prejudicial, no matter how erroneous, unless the judgment itself is adverse. Fankell v. Schober, 350 N.W.2d 219, 221 (Iowa App. 1984).

VII. Finally, Martin contends he should be granted a new trial because the district court failed to instruct the jury that there was no confidential relationship between Hettinger and the bank, or in the alternative, to instruct the jury on the issues of a confidential relationship.

Parties to a lawsuit are entitled to have their legal theories submitted to a jury as long as they are supported by pleadings and substantial evidence. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1980). All instructions must be read and construed together, not piecemeal or in artificial isolation. Id. While we will not reverse and order a new trial for marginal or technical omissions, we will do so if the instructions as a whole are insufficient to convey the applicable law. Id.

As we discussed above, a confidential relationship is not an element of a claim of negligent misrepresentation. We conclude the district court's refusal to instruct the jury on confidential relationships was not error in this case. The jury was properly instructed on the law concerning negligent misrepresentation.

VIII. We have considered all of the issues presented on appeal by the defendant Martin. We affirm the judgment entered by the district court. Costs of this appeal are assessed to Martin.

AFFIRMED.

Habhab, J., concurs; Sackett, J., specially concurs without opinion.