IN THE COURT OF APPEALS OF IOWA

No. 0-694 / 89-1738

ERROL GARREN and NANCY GARREN, Individuals,

Appellants,

vs.

FIRST REALTY, LTD.,

Appellee.

FILED
SEP 24 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

The Garrens appeal a district court judgment awarding them $5,400 plus interest from First Realty for First Realty's negligence in failing to inform them the house they purchased was in a flood plain. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR A NEW TRIAL.**

John R. Hearn, Des Moines, for appellants.

William B. Serangeli of Smith, Schneider, Stiles, Mumford, Schrages, Zurek, Wimer & Hudson, P.C., Des Moines, for appellee.

Considered en banc.

OXBERGER, C.J.

The McLaughlins were the owners of a home located in Clive. In 1979, the City of Clive notified the McLaughlins by letter their property had been included in the City's flood fringe overlay district.

Around 1985, the Garrens were looking for a home in the Clive area. At the time, the McLaughlins were trying to sell their home through Rose Babcock, an agent for First Realty. After seeing a sale sign on the McLaughlins' property, the Garrens contacted a former acquaintance, Vicki Daniel, who also was employed by First Realty. Ms. Daniel was not the listing agent for the McLaughlin home.

The Garrens' mortgage lender required an appraisal of the property. The appraiser did not indicate that the property was included in a flood hazard area. A title examination also failed to indicate the property's inclusion in the flood fringe area. In November 1985 the Garrens purchased the home. In May 1986 the Garrens' property was flooded.

Prior to filing suit, the Garrens' claims against the appraiser and the mortgage lender were settled and they were released. The Garrens then settled with the McLaughlins, leaving only First Realty as a defendant. The Garrens sought to recover based on theories of negligence, fraud, breach of fiduciary duty, breach of contract, and

negligent misrepresentation. Pursuant to First Realty's motion for directed verdict, all claims except negligence were dismissed by the district court.

Following trial, the jury returned its verdict finding that the Garrens' damages were $36,000. The jury then apportioned fault as follows: the Garrens, one percent; First Realty, fifteen percent; First Union Mortgage Corporation, fifty percent; and the McLaughlins, thirty-four percent. The district court then entered judgment against First Realty for $5,400. The Garrens appealed challenging several of the trial court's rulings.

We review this case for correction of errors at law. Iowa R. App. P. 4. Findings of fact bind us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

BREACH OF CONTRACT CLAIM.

The Garrens contend the trial court erred by directing a verdict in favor of First Realty on their contract claim. We agree.

In its ruling on First Realty's motion for a directed verdict on the Garrens' contract claim, the trial court reasoned:

> no matter how much a real estate agent may indicate to a buyer that they have their interests at heart, the point of fact is, as the record indicates, that the real estate company and its agents always represent the seller unless there is some specific contract, as the record also alludes to, in regard to a buyer specifically paying a real estate agent to go look for a piece of property for me to buy. (emphasis added)

We disagree. The rule has been adopted in Iowa that a real estate broker is agent of the party who first employs him or her, and this may be the buyer even though it is anticipated that the fee will be received from the seller. Menzel v. Moore, 362 N.W.2d 465,475 (Iowa 1985); citing Havner v. Miller, 183 N.W. 509,511 (Iowa 1921); 12 C.J.S. Brokers § 32 (1980).

Real estate brokers and salesmen represent their clients in the capacity of agent. Miller v. Iowa Real Estate Com'n, 274 N.W.2d 288, 292 (Iowa 1979) (emphasis added). The relationship between a broker or agent and his or her principal is confidential and fiduciary, including strict duty of undivided loyalty and disclosure. Menzel, 362 N.W.2d at 474.

Further, a broker or agent may represent both buyer and seller only with knowledge and consent of both. Id. at 475. Agency may be proven not only by direct evidence of an agreement between the parties, but also by circumstantial evidence, such as words and conduct, from which an intention to create an agency may be fairly implied. Id. at 475.

The record in this case indicates that after the Garrens contacted Vicky Daniels, Ms. Daniels told them she believed she could negotiate the price of the house down below the listed price and would look out for the Garrens' best interest. She further advised the Garrens about

interest rates, the most beneficial manner of financing and tailored terms of the Garrens offer to help them purchase the home. Ms. Daniels testified that she did not inform the Garrens that she was working for the sellers of the home at the time of the transaction, and that the Garrens would have believed she was acting in their best interests. Further, there is no indication that Ms. Daniels ever told the Garrens at any time that she was not representing them. The Garrens assert that an oral contract existed between them and First Realty as a result of an agency relationship created by Vicki Daniels. Whether an oral contract existed, what its terms were, and whether it was breached ordinarily are questions for the trier of fact. Dallenback v. Mapco Gas Products, Inc., 459 N.W.2d 483 (Iowa 1990).

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, an issue is for the

jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

We believe there exists ample evidence from which reasonable minds could differ regarding whether an agency relationship existed between the Garrens and First Realty, a contract had been formed, and if so whether a breach occurred. We reverse the trial court's dismissal of the Garrens' breach of contract claim against First Realty.

Determining that the trial court erred in failing to allow the claim of contract to be considered by the jury does not however end our inquiry. We next consider whether the Garrens were prejudiced by the failure to submit the breach of contract claim. The Garrens argue that had the breach of contract claim been submitted and the jury returned a plaintiff's verdict on this theory, there would have been no comparative fault considered and no reduction in the verdict for the percentage of fault of the other parties. We agree.

In determining whether the Comparative Fault Act, Iowa Code chapter 668 applies to a claim, the Iowa Supreme Court has looked to the claims mentioned in chapter 668. See Tratchel v. Essex Group, Inc., 452 N.W.2d 171,180 (Iowa 1990). Iowa Code section 668 is entitled "Liability in Tort - Comparative Fault." Section 668.1 defines fault 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.

Breach of contract is not mentioned in chapter 668. Had the legislature intended chapter 668 to cover contract actions, it could have easily included breach of contract in section 668.1. It would be beyond the scope of this court to expand the clear definition in the statute.

Our reasoning further recognizes that sections throughout chapter 668 refer to "actions brought under this chapter." This court notes that contract actions are not brought under chapter 668. We therefore hold that Iowa's comparative fault does not apply to contract claims. We find that the failure of the trial court to submit the Garrens' contract claim was prejudicial and remand for a new trial on their contract claim.

FRAUD CLAIM.

The Garrens' claim the trial court erred by directing a verdict in favor of First Realty on their fraud claim. In directing the verdict on this issue the trial court found "this record is void of any evidence on which any claim can be made for fraud." We disagree.

To prove fraud, a party must establish each of the following elements by a preponderance of clear, satisfactory, and convincing evidence; (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to

deceive, (6) reliance, and (7) resulting injury and damage. Grefe v. Ross, 231 N.W.2d 863, 864 (Iowa 1975)(citation omitted).

REPRESENTATION: Ordinarily mere silence in an arm's length transaction does not serve to create actionable fraud, but this is not the case when one party has superior knowledge of facts, resulting in an inequality of condition or knowledge between parties. The party with superior knowledge has a duty to disclose material facts which may be favorable to him, and unfavorable to the other party. Smith v. Peterson, 282 N.W.2d 761 (Iowa App. 1979).

Misrepresentation denotes not only words spoken or written but also any other conduct that amounts to an assertion not in accordance with the truth; accordingly, under certain circumstances, there may be not only misrepresentations by making affirmative false statements, but also misrepresentations by silence resulting from the failure to disclose the existence of something which the other person has reason to believe would be disclosed. Sedco Intern., S.A. v. Cory, 522 F.Supp. 254 (D.C.Iowa 1981), aff'd, 683 F.2d 1201 (....), cert. denied, 459 U.S. 1017 (....). Concealment of or failure to disclose material facts can constitute "fraud." Cornell v. Wunschel, 408 N.W.2d 369 (Iowa 1987).

The record indicates that First Realty failed to inform the Garrens that the home purchased was in a flood zone

area. First Realty admits that knowledge of such information was readily ascertainable in their office. Testimony indicated that it is common practice within the industry to research and convey this information to clients. We hold there was sufficient evidence for which reasonable minds could find that First Realty's failure to disclose this information constituted misrepresentations by silence.

FALSITY: There is no contradicting evidence that the information represented to the Garrens on the offer-to-buy and the multiple listing form was false. The home was clearly in a flood zone.

MATERIALITY OF THE MATTER REPRESENTED: A misrepresentation is material if a reasonable person would attach importance to it in making a decision regarding the transaction in question. Sedco Intern., S.A. v. Cory, 522 F.Supp. at ____. This court finds it reasonable that a person would consider it important to know whether a home was in a flood zone before purchasing it.

SCIENTER AND INTENT TO DECEIVE: Scienter and intent to deceive are closely related and are shown not only when the speaker has actual knowledge of the falsity of his representation but also when he speaks in reckless disregard of whether his representations are true or false. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149 (Iowa 1984). The requirement of scienter is met when the

evidence shows that the representations were made in reckless disregard of their truth or falsity. Id. We find, based upon the accessibility of the flood zone information, that reasonable minds could have found that the failure to disclose such information was reckless disregard.

RELIANCE: Reliance on information is justifiable where person acting with reasonable and ordinary prudence and caution would have a right to rely on the representations. Kaiser Agr. Chemicals, a Div. of Kaiser Aluminum & Chemical Corp. v. Ottumwa Production Credit Ass'n, 428 N.W.2d 681 (Iowa App. 1988). When individual acts on representations of another and relies in good faith, he has no duty to further investigate. Cedar Falls Bldg. Center, Inc. v. Vietor 365 N.W.2d 635. The Garrens were prospective purchasers of property. First Realty was engaged in the business of real estate sales. We find nothing in the record which indicates the Garrens did anything other than rely in good faith upon the representations surrounding the transaction, which included the uninformed belief that their home was not located in a flood zone.

If one asserts that a thing is true within his or her personal knowledge or makes a statement as of his or her own knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on their part, when in fact he has no knowledge as to whether his assertion is

true or false and his statement proves to be false, he is culpable as if he willfully asserted that to be true which he absolutely knew to be false and is equally guilty of fraud. 37 Am. Jur.2d Fraud and Deceit § 203 (1968).

In the case before us, testimony was offered that statements were made by Vicki Daniel's that she would provide information to the Garrens as was needed to purchase the home. Both the offer-to-buy and the multiple listing form had a line for which zoning was to be disclosed. The zoning was listed on each as residential, when in fact the property was zoned both residential and "floodway fringe." Testimony indicated that it is the common practice of First Realty to review such forms prior to the completion of a transaction. We therefore conclude that reasonable minds could have found the representations on the offer-to-buy and the multiple listing form to be willful assertions by First Realty. In addition, First Realty admits that at the time of the Garren transaction, it knew of its duty to supervise Vicki Daniels; the fiduciary character of the realtor's relationship with the client; the ethical duty to discover and disclose the existence of flood zoning classifications; and that there were flood areas in the Clive area. We find there is sufficient evidence for which reasonable minds could differ on Garrens' claim of fraud and hold the trial court erred in directing a verdict in favor of First Realty on this issue.

We next consider whether the Garrens were prejudiced by the trial court's refusal to submit the claim of fraud. Garrens argue that because fraud is an intentional tort, it is a wrong which cannot be compared in assessing comparative fault. They assert that had the trial court submitted the fraud claim, the jury would have been required to render a verdict on that claim without comparing the fault of other parties. We agree. Comparative fault does not apply to fraud actions in Iowa. See Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 180 (Iowa 1990).

Under appropriate circumstances, a plaintiff may be entitled to both actual and punitive damages in a fraud case. Id. at 176. Comparative fault was applied to the verdict in this case. Had the claim of fraud been submitted to the jury, there would not have been a comparative fault reduction in the verdict. We find the Garrens were prejudiced and remand for a new trial on the issue of fraud.

CLAIMS AGAINST THE SELLERS.

The Garrens contend the trial court erred by instructing the jury that the McLaughlins, the sellers, had a duty "to disclose all known facts of information" which had a "bearing upon the value of the property" and which they had reason to believe the realtors and the buyers neither knew nor should have known. In addition, the Garrens argue the

trial court erred by allowing the jury to compare the sellers fault with First Realty's fault because there was insufficient evidence to show the McLaughlins had any knowledge of the house's flood zoning classification. We disagree.

The letter, whereby the City of Clive notified the McLaughlins that the house was located in the flood fringe, was admitted into evidence. We find no evidence contradicting the fact that the McLaughlins received this information.

We next consider whether the trial court was correct in admitting evidence of the nature of Garrens' claims against parties other than First Realty and releases made to those settling parties. Iowa Rule of Evidence 408 provides in part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

First Realty argues that evidence concerning the settlements and releases Garrens accepted and offered was admissible because the jury was required to apportion fault and the identity of the parties was necessary. Based upon this court's reasoning regarding the applicability of Iowa's Comparative Fault Act, chapter 668 to contract and fraud actions, we find no merit to this argument.

First Realty next argues that because Garrens' claims against the settling parties are identical to their claims against First Realty and the parties have "bought their way out of trouble," the settling parties will testify against First Realty. As a result, their settlements affect their credibility. This court finds no basis to accept the reasoning that settling parties who have by their actions removed themselves from the dispute have thereby affected their credibility.

First Realty next argues to this issue that the settlements and releases deal directly with the credibility of the plaintiffs with regard to their claims, particularly to Garrens' conversations with First Realty's agents and the degree of reliance upon those conversations. We find no merit to this argument. We find in this circumstance no reason to abandon the clear public policy which undergirds rule 408. This rule promotes extra-judicial resolution of disputes by eliminating the "danger" of being prejudiced by offers to buy peace. Miller v. Component Homes, Inc., 356 N.W.2d 213 (Iowa 1984). We therefore direct, on remand, that evidence in this case, of prior settlements and releases involving the McLaughlins, as the sellers, Cameron Brown, as the lender, and its FHA appraiser, Alan Hutchison, shall not be admitted in accordance with Iowa Rule of Evidence 408.

The Garrens assert that the trial court erred in failing to give the jury adequate instructions on the applicable law. We agree.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W. T. Rawleigh Medical Co. v. Bane, 171 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301. A corollary to these rules is that the trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983); McDivitt v. Des Moines City R. Co., 141 Iowa 689, 697-98, 118 N.W. 459, 463 (1909). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Clinton Land Co., 340 N.W.2d at 234. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party

urging submission." Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972); Campbell v. Martin, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

A second corollary is that the trial court has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d 234. We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522 (citing Adam v. T.I.P. Rural Elec. Coop, 271 N.W.2d 896, 900-01 (Iowa 1978)).

Because this court finds there is substantial evidence by which a jury could find an agency relationship existed between the Garrens and First Realty, proper instructions were necessary to communicate to the jury the manner in which the realtor-client relationship arises. In addition, we find the trial court's instructions failed to accurately state the duty a real estate broker has to a purchaser where a realtor-client relationship has been established.

We have considered all remaining issues presented and except as modified, affirm the trial court.

Each party will pay their own attorney fees. Costs are taxed to the appellant.

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

All judges concur except Sackett and Habhab, J.J., who dissent.

SACKETT, J. (dissenting)

I dissent. I would affirm. Flood plain information is of public record. I am not ready to accept the majority's opinion the failure of a realtor to disclose all information of public record is fraud.

Habhab, J., joins this dissent.