IN THE COURT OF APPEALS OF IOWA

No. 1-418 / 00-0110
Filed December 28, 2001

DAN DUBERSTEIN, DAVID DUBERSTEIN, and COLONIAL HOUSE II, an Iowa Partnership,
Plaintiffs-Appellees,

vs.

BRETT ANDERSON,
Defendant-Appellant,

and

JAMES SHIPLEY,
Defendant.

BEVERLY DUBERSTEIN,
Intervenor-Appellee,

vs.

DAN DUBERSTEIN, DAVID DUBERSTEIN, and COLONIAL HOUSE II, an Iowa Partnership,
Intervention Defendants-Appellees,

and

BRETT ANDERSON,
Intervention Defendant-Appellant,

and

JAMES SHIPLEY,
Intervention Defendant.

FILED

Appeal from the Iowa District Court for Polk County, Richard Blane, Judge.

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Defendant Brett Anderson appeals from the district court ruling granting intervenor Beverly Duberstein a new trial following a jury verdict in Anderson's favor on Duberstein's claims of negligence and breach of fiduciary duty. **AFFIRMED.**

R. Mathieson Duncan and Mariclare Thinnes Culver of Duncan, Green, Brown, Langeness & Eckley, P.C., Des Moines, for appellant.

Michael M. Sellers of Sellers Law Office, West Des Moines, for intervenor appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

Defendant Brett Anderson appeals the decision of the district court to grant a new trial to intervenor Beverly Duberstein on her claims of negligence and breach of fiduciary duty. He contends the court should have granted him a directed verdict. In the alternative, he contends the court should not have granted Beverly's request for a new trial. We affirm.

Beverly was formerly married to Dan Duberstein. While they were married, Beverly and Dan, together with Dan's brother, David Duberstein, entered into a partnership to purchase an apartment complex, Southern Manor Apartments. Beverly had a twenty-five-percent interest, Dan a twenty-five-percent interest, and David a fifty-percent interest in the partnership. Dan and Beverly also owned another apartment complex, Colonial House II, through a partnership. Beverly was the managing general partner for both properties.

Southern Manor experienced financial difficulties. In 1992 the Dubersteins worked with Anderson, an attorney, and James Shipley, a realtor, to obtain refinancing for the property. As the result of a new loan, the parties placed funds in an escrow account to be used for repairs to the property. Only Anderson had access to the account. When Beverly requested money from the account, Anderson provided it. Beverly did not always use the funds for repairs to Southern Manor. She used some funds to pay property taxes for Colonial House II and other funds to pay personal income taxes for herself and Dan. In 1993 Anderson and Shipley assisted in obtaining financing for Colonial House II. A similar escrow account was set up.

When Beverly and Dan were divorced in 1995, Beverly was awarded Dan's interest in Southern Manor Apartments, so she became an equal partner with David. The property award was upheld on appeal. *In re Marriage of Duberstein*, No. 95-0468 (Iowa Ct. App. July 26, 1996).

Later in 1995 David filed suit against Beverly, claiming her actions as managing general partner of Southern Manor caused him to incur damages (the mismanagement suit). The district court found for David on his claims of breach of the partnership agreement, breach of fiduciary duty, conversion, fraud, and negligence. The court found Beverly had not made necessary repairs to the property, and had not paid property taxes, which had caused a decrease in the value of the property. The court also found Beverly had taken funds from the Southern Manor escrow account for her own use. Considering offsets, David was awarded about $90,000 in compensatory damages and $10,000 in punitive damages. The partnership was dissolved, and Southern Manor was sold.

In January 1998 Dan, David, and Colonial House II filed suit against Anderson and Shipley, claiming defendants had improperly claimed a one-percent origination fee for their assistance in obtaining refinancing for Southern Manor and Colonial House II. Beverly intervened, claiming David had been fully compensated for his interest in Southern Manor, and asking that any recovery in the case be awarded to her.

Anderson admitted during discovery that he had taken funds from the escrow accounts for his own use. He stated he had fully repaid these funds into the escrow account. He stated that at no time had any of the partners requested

funds from the escrow account that he was unable provide. Based on Anderson's admissions, Beverly amended her petition to bring claims of negligence and breach of fiduciary duty against him. She asserted Anderson's juggling of funds in the escrow accounts caused Southern Manor not to be repaired in a timely fashion and this in turn caused her to be assessed damages in the mismanagement suit. This appeal solely concerns Beverly's claims against Anderson.

The case was tried to a jury. The jury found Anderson was not at fault regarding Beverly's claims against him based on the judgment against her in the mismanagement case. The jury found Anderson owed Beverly a fiduciary duty, but had not breached that duty. Based on the jury's verdict, the district court dismissed Beverly's petition.

Beverly filed a motion for new trial. The district court determined Beverly was entitled to a new trial on her claim Anderson should be liable for the judgment against her in the mismanagement case. The court concluded the verdict was not supported by the evidence because Anderson admitted he took money from the escrow account. The court stated that at a new trial, "the issue would be whether Defendant Anderson's negligence was a proximate cause of damage to Intervenor Beverly Duberstein in the mismanagement case."

Similarly, on the issue of breach of fiduciary duty, the court found the evidence did not support the jury's verdict that Anderson had not breached a fiduciary duty to Beverly. The court stated:

> If the jury had found that such diversion by Anderson had not proximately caused Intervenor damage, the Court could find this

> consistent with the evidence. But the jury did not get to Verdict Question No. 60 on the proximate cause issue. Again, this court must find that the verdict on this issue is not supported by sufficient evidence and a new trial must be granted on Intervenor's claim for breach of fiduciary duty.

Anderson appealed the decision granting Beverly a new trial.

I. Directed Verdict

Anderson contends the district court should have granted his motion for directed verdict. He claims Beverly did not present substantial evidence to support each element of her claims. Specifically, he claims she failed to present any evidence that his actions proximately caused her damages. He admits he took money from the escrow accounts but states that he replaced it. Anderson asserts that Beverly never requested funds from the escrow accounts that he was unable to provide.

Our review of a district court's denial of a motion for directed verdict is for correction of errors of law. *Pierce v. Staley*, 587 N.W.2d 484, 485 (Iowa 1998). A directed verdict may be granted where a plaintiff's claim is not supported by substantial evidence. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 873 (Iowa 1989). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). We review the evidence in the light most favorable to the nonmoving party. *Pierce*, 587 N.W.2d at 485.

We find no error in the district court's conclusion that Beverly presented sufficient evidence to create a jury question on the issue of negligence. Beverly alleged that she requested funds from the Colonial House II escrow fund to pay

personal income taxes for herself and Dan but Anderson told her these funds were unavailable except for repairs. Beverly claims Anderson told her this because he had withdrawn all of the funds in the Colonial House II escrow fund at that time. Beverly then took funds from the Southern Manor escrow fund to pay for taxes, which exposed her to liability to David in the mismanagement case because she used partnership funds to pay for a nonpartnership debt. As noted above, David was a partner in Southern Manor, but not Colonial House II.

We also find no error in the district court's conclusion Beverly presented a jury question on the issue of breach of fiduciary duty. Beverly alleged Anderson was acting as her attorney at that time, and he should have advised her not to use funds from the Southern Manor escrow fund to pay the personal income taxes of herself and Dan. Beverly asserts Anderson breached his fiduciary duty to her, as his client, to give her advice.

II. New Trial

Anderson claims the district court abused its discretion in granting Beverly a new trial. He again asserts that Beverly failed to produce evidence to show that his actions were the proximate cause of her damages.

In ruling upon motions for new trial the district court has broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). We find such an abuse when the court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 859 (Iowa 2001). In this context, "unreasonable" means

not based on substantial evidence. *Id.* We are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

We find no abuse of discretion in the district court decision to grant Beverly a new trial on her claims of negligence and breach of fiduciary duty. As noted above, there was evidence in the record from which the jury could have found Anderson's actions were the proximate cause of Beverly's damages.

We affirm the decision of the district court.

AFFIRMED.