FILED
APR 30 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DON TED FEDERWITZ and **MARY JANE FEDERWITZ**,

Plaintiffs-Appellants,

vs.

SEERY & DOLLAR, A Partnership; **ROBERT W. SEERY; JOHN P. DOLLAR; GARY M. COX**,

Defendants-Appellees,

MOUNTAIN & SELLERS, A Partnership; **MOUNTAIN, SELLERS, WETSCH, MAGEE & KAISER**, A Partnership; and **BRUCE MOUNTAIN**,

Defendants.

Filed April 30, 1985

SEERY & DOLLAR, A Partnership,

Plaintiff-Appellee,

vs.

FRONTIER FENCE CO., INC.,

Defendant-Appellant.

5-54
84-926

Appeal from the Iowa District Court for Polk County - Ray Hanrahan, Judge.

Plaintiffs appeal from partial summary judgment for defendants in a legal malpractice action. AFFIRMED.

Ned A. Stockdale of Blackburn, Stockdale & Brownlee, P.C., Fort Dodge, for appellants.

Dennis W. Johnson and Quentin B. Boyken of Belin, Harris, Helmick, Heartney & Tesdell, Des Moines, for appellees.

Considered by Donielson, P.J., and Snell and Schlegel, JJ.

PER CURIAM

The plaintiffs, Don and Mary Federwitz, negotiated an agreement with U-Haul for the sale of certain real estate and retained defendant, John Dollar of the Seery & Dollar law firm, to represent them in the transaction. The sales agreement provided that the sellers, the Federwitzes, were to provide an abstract by the time of closing on June 30, 1980. The agreement also contained a time is of the essence clause.

A title opinion was issued by Harold J. Crawford, an attorney for the title insurance company, showing several clouds on the title which would have to be cured by June 30, 1980, the date of the closing. John Dollar and Gary Cox, of Seery & Dollar, cleared up all of the defects with the exception of one. This involved an assignment of the property by Edward Goldman, Louis Casp, and Robert Helmick. There was no indication of the marital status of these people so it became necessary to determine whether these people had spouses who might have a dower interest in the property. The ultimate problem centered on obtaining a Quit Claim Deed from Kay Roddick, the former wife of Robert Helmick.

On June 24th or 25th, Dollar left on vacation. Prior to leaving, he contacted Crawford, who he believed was representing U-Haul, and stated that he was ready to close on June 30, "subject to a very minor title objection (the deed from Roddick) which would be cleared up within several days of said June 30 date."

On June 27, 1980 Cox telephoned Roddick, who was living in Chicago, and prepared a Quit Claim Deed. Cox testified that he spoke with Crawford on June 27, and advised him that he would not have the deed by June 30, and that it would arrive a few days later. Cox testified that he expressed a willingness to travel to Illinois but that Crawford told him that physical possession of the deed was not required and that the trip to Illinois would not be necessary.

The closing was not held and on July 1, U-Haul sent a termination letter

advising the plaintiffs that it was withdrawing from the agreement because it had not closed on June 30, 1980.

Seery & Dollar then filed a suit against U-Haul on behalf of the plaintiffs seeking specific performance and later an amendment was made asking for money damages. At the beginning of the action, Seery & Dollar were the attorneys of record, but when it became apparent that Dollar and Cox may be required to appear as witnesses Bruce Mountain was hired as the attorney of record. Dollar and Cox continued to actively participate in the proceedings.

On September 9, 1981, U-Haul filed a motion for summary judgment. In support of the motion, U-Haul filed copies of the purchase and sale agreement, U-Haul's termination letter, an affidavit of U-Haul's real estate representative, and plaintiffs' response to U-Haul's request for admissions. U-Haul also filed a brief in support of the motion for summary judgment. Dollar prepared a resistance to the motion for summary judgment which was not accompanied by a supporting brief or affidavit. The motion for summary judgment was sustained on November 17.

On December 1, Dollar filed an application to reconsider the ruling granting the summary judgment, over Mountain's signature. Attached to this application were excerpts of depositions of Harold Crawford and Patricia Buchanon, an employee of U-Haul, as well as an affidavit by Dollar stating that Dollar never received a response to his request prior to June 30, of whether U-Haul was prepared to close the transaction on June 30. In his opinion, he knew of no valid title objections which existed as of June 30, 1980. He further stated that on June 30, Federwitz had completely complied with his obligations and was ready to close.

Dollar then filed a notice of appeal on December 14, 1981. Plaintiffs, the Federwitzes, commenced a legal malpractice action on March 4, 1982, and the appeal of the summary judgment was not pursued.

On April 6, 1982, Seery & Dollar filed a petition against the plaintiffs for

alleged unpaid attorney fees. Plaintiffs counterclaimed, alleging virtually the same cause of action for legal malpractice. The two cases were consolidated.

Following trial to the court, Judge Hanrahan entered partial summary judgment, finding that plaintiffs had failed to prove that the Seery & Dollar defendants had not exercised reasonable care. The trial court found that, notwithstanding Judge Wifvat's ruling to the contrary, the record made on the motion for summary judgment in the U-Haul litigation did show the existence of disputed material facts.

Federwitz has appealed and on appeal they assert: (1) that the trial court erred in determining that there were genuine issues of material fact in a summary judgment which had been entered against the plaintiffs; (2) that the trial court erred in considering additional evidence, which had not been presented by Dollar when he filed the motion for summary judgment, in making the determination that there were genuine issues of material fact; (3) that statements by Harold Crawford to Gary Cox regarding the need to obtain the quit claim deed before the closing were inadmissible hearsay; and (4) that the court erred in finding that Seery & Dollar were not negligent in the handling of the case.

In an attorney malpractice action, the plaintiff bears the burden of establishing not only that the lawyer acted negligently in handling the client's affairs, but that the lawyer's negligence proximately caused the client's loss. Baker v. Beal, 225 N.W.2d 106, 109 (Iowa 1975). In other words, the plaintiff must prove that "absent the lawyer's negligence, the underlying suit would have been successful." Id.

In determining whether the attorney acted negligently in handling the client's affairs, the trial court is not free to redecide the issues of the first case. Morris v. Getscher, 708 F.2d 1306, 1310 (8th Cir. 1983). Rather, the court deciding the legal malpractice case is limited to deciding whether "the evidence of negligence and the probable result of that negligence presented at the malpractice

alleged unpaid attorney fees. Plaintiffs counterclaimed, alleging virtually the same cause of action for legal malpractice. The two cases were consolidated.

Following trial to the court, Judge Hanrahan entered partial summary judgment, finding that plaintiffs had failed to prove that the Seery & Dollar defendants had not exercised reasonable care. The trial court found that, notwithstanding Judge Wifvat's ruling to the contrary, the record made on the motion for summary judgment in the U-Haul litigation did show the existence of disputed material facts.

Federwitz has appealed and on appeal they assert: (1) that the trial court erred in determining that there were genuine issues of material fact in a summary judgment which had been entered against the plaintiffs; (2) that the trial court erred in considering additional evidence, which had not been presented by Dollar when he filed the motion for summary judgment, in making the determination that there were genuine issues of material fact; (3) that statements by Harold Crawford to Gary Cox regarding the need to obtain the quit claim deed before the closing were inadmissible hearsay; and (4) that the court erred in finding that Seery & Dollar were not negligent in the handling of the case.

In an attorney malpractice action, the plaintiff bears the heavy burden of establishing not only that the lawyer acted negligently in handling the client's affairs, but that the lawyer's negligence proximately caused the client's loss. Baker v. Beal, 225 N.W.2d 106, 109 (Iowa 1975). In other words, the plaintiff must prove that "absent the lawyer's negligence, the underlying suit would have been successful." Id.

In determining whether the attorney acted negligently in handling the client's affairs, the trial court is not free to redecide the issues of the first case. Morris v. Getscher, 708 F.2d 1306, 1310 (8th Cir. 1983). Rather, the court deciding the legal malpractice case is limited to deciding whether "the evidence of negligence and the probable result of that negligence presented at the malpractice

trial showed by a preponderance" of the evidence that the result of the first trial would have been different. Id.

It is apparent, therefore, that the trial court erred in finding that the summary judgment should not have been granted. In the findings of fact the trial court stated:

> With due respect to the contrary opinion, the record made on the motion for summary judgment in the U-Haul litigation did establish the existence of disputed material facts not determinable on such a motion.

This is clearly a redecision of the issue in the first case. From a reading of the findings of fact, it is clear that the judge based this finding on evidence which had not been presented at the time that the question of whether the summary judgment should be granted was first raised. The trial court erred, therefore, in finding that the motion for summary judgment should not have been granted.

The record before Judge Wifvat on the motion for summary judgment consisted of the motion for summary judgment filed by U-Haul alleging that the sales agreement between the two parties was an integrated agreement in which time was of the essence and that the time for closing the agreement could not be extended without the written consent of both parties. In support of this motion, U-Haul attached copies of the purchase and sale agreement, U-Haul's termination letter, an affidavit of U-Haul's real estate representative, and Federwitz's response to request for admissions which contained the following in part:

> 1. That the Purchase and Sale Agreement attached to Plaintiff's Petition which Purchase and Sale Agreement is dated April 4, 1980, is the complete and total agreement between Don Ted Federwitz and U-Haul International, Inc.
>
> RESPONSE: Admitted as far as written agreements are concerned.
>
> 2. That the Purchase and Sale Agreement, a copy of which is attached to Plaintiff's Petition, provides that the Purchase and Sale Agreement must close on or before June 30, 1980, unless mutually extended in writing by both parties.
>
> RESPONSE: Plaintiff admits No. 2.

3. That the Purchase and Sale Agreement which is attached to Plaintiff's original Petition herein includes the term that time is of the essence of this agreement.

RESPONSE: Plaintiff admits No. 3.

* * *

8. That Don Ted Federwitz did comply with all terms of the Commitment for Title Insurance referred to in previous admission except Item L of Schedule B-1.

RESPONSE: Plaintiff admits except as to failure to comply with Item L; Item L did (does) not constitute a valid title objection as phrased; additionally, Item L was cleared eventually and could have been cleared by the closing date if so demanded.

9. That U-Haul did require that all requirements set forth in Schedule B, Section 1, had to be complied with prior to closing.

RESPONSE: Specifically denied; U-Haul never responded to a specific offer to close and moreover, their legal representative, Mr. Crawford, specifically failed to require that the item 1 matter be cleared by any particular date.

10. That on June 30, 1980, all of the requirements for closing as set out in Commitment for Title Insurance, a copy of which is attached hereto and marked Exhibit A, were not complied with as required in said Commitment for Title Insurance.

RESPONSE: Plaintiff denies as to seller's obligations; as to buyer's obligations, this would be admitted.

* * *

12. That there was no extension of time limit for the execution of this contract entered into between the Plaintiff or any Defendants.

RESPONSE: Plaintiff admits No. 12.

Dollar prepared a resistance to the motion for summary judgment which provided:

COMES NOW the Plaintiff and hereby resists Defendant's Motion for Summary Judgment, and in support thereof states:

1. First of all, many of the Defendant's contentions in this motion are based upon Admissions filed by the Plaintiff, and these matters, of course, are correct as far as they go.

2. There are, however, many extremely relevant matters which were not covered by the Admissions (or were denied).

3. The basic flaw with Defendant's Motion is that

> numerous highly relevant facts are still in dispute; for example, the "legal capacity or status" of at least one individual, namely Harold Crawford, must be determined by the Court to resolve this case; the parties hereto and Mr. Crawford, are sharply in dispute on this matter.
>
> 4. That Defendant's prime contention appears to be that because the transaction did not close on time, they are without legal responsibility regardless of what they may have done or not done; such a position is clearly outside the law; instead of focusing solely on Plaintiff's obligations (as Defendant's are doing) the obligations of the Defendant's need to be examined; after all, it is they who are alleged to have breached the agreement.
>
> 5. That as to the central question of whether Defendants breached the agreement, again, relevant facts are disputed and must be decided, and then the law applied to the facts; the disfavored status of summary judgment should certainly require a trial on the merits in this case.

This resistance was not accompanied by supporting brief or affidavit.

On the basis of this record, Judge Wifvat entered the summary judgment stating that the purchase and sale agreement referred to was a complete and total agreement, that there was no modification, that time was of the essence, and that the sale did not close on June 30, the day provided for in the agreement.

Dollar then filed, over Bruce Mountain's signature, an untimely motion to reconsider which included a brief in support of the motion, deposition excerpts by Harold Crawford, the attorney who prepared the title opinion, and Patricia Buchanan, an employee of U-Haul, and an affidavit by Dollar. Although these depositions were available to Dollar when he prepared the resistance, they were not attached because he was uncertain whether they had been filed of record. The depositions were not, in fact, filed of record.

Dollar then filed a notice of appeal of the order granting the summary judgment. Plaintiffs then commenced the legal malpractice case against Dollar and chose not to pursue the appeal.

The primary issue is whether Dollar acted negligently in handling the resistance to the summary judgment and whether his negligence proximately

caused the plaintiffs' loss as a result of the non-performance of the real estate contract. Baker v. Beal, 225 N.W.2d 106, 109 (Iowa 1975).

An attorney has a duty to his client to exercise ordinary care in handling the client's work. Id. at 112. This obligates the attorney to use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances. Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977).

In determining whether the trial court's judgment is to be upheld, we must determine if there is substantial evidence to support the finding. Associated Grocers of Iowa Coop., Inc. v. West, 297 N.W.2d 103, 106 (Iowa 1980). We must construe the evidence in the light most favorable to the trial court's judgment. Manson State Bank v. Diamond, 227 N.W.2d 195, 196 (Iowa 1975).

Keeping our scope of review in mind, we find the trial court's judgment that plaintiffs have failed to establish by a preponderance of the evidence that the Seery defendants did not exercise reasonable care in the handling of the real estate transaction or in the handling of the litigation against U-Haul to be in error.

The evidence presented at the hearing indicated that John Dollar was prepared to close the real estate transaction on June 30. He had discussed the matter of the quit claim deed from Kay Roddick before he left town on vacation with Harold Crawford, whom he believed to be U-Haul's attorney, and told Crawford that, in his opinion, the only thing necessary to cure the cloud on the title was an abstracting showing the divorce of Kay Helmick Roddick and Robert Helmick. Dollar testified that after this conversation he felt that the quit claim deed presented no problem and that the transaction would be able to close on June 30.

The testimony of Gary Cox also substantiates the finding that the law firm could have reasonably believed that the transaction would close. Cox testified that he spoke with Crawford on June 30 and told him that he would travel to

Illinois to obtain the quit claim deed from Roddick if the deed was needed to close that day. Cox stated that Crawford told him that the trip would not be necessary.

The plaintiffs objected to the trial court allowing this testimony on the ground that Crawford's statements to Cox constituted inadmissible hearsay. Hearsay is a statement by an out-of-court declarant offered to prove the truth of the matter asserted. Iowa R. of Evid. 801(c). The advisory comment of Federal Rule of Evidence 801(c) which contains the same definition of hearsay explains:

> If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay.

In this case, the statement by Crawford did not constitute hearsay. It was not offered for the truth of the matter, i.e. whether the quit claim deed was necessary in order to close the deal. Rather, it was offered for the purpose of showing that the statement was made to Dollar and Cox, and it was upon the basis of the statement that Dollar and Cox did not attempt to obtain the deed prior to the closing. The statement was offered to establish the basis for Dollar and Cox failure to obtain the deed, and not to prove the truth of whether the deed was necessary to close.

On the basis of the evidence presented, we find that the attorneys did not act negligently in handling the real estate transaction.

Similarly, the record does not support a finding that the attorneys acted negligently in handling the action against U-Haul for specific performance in which the summary judgment was issued. As was stated earlier, it is not the duty of this court to determine whether the first court acted improperly in granting the motion for summary judgment, but rather we must look to "whether the evidence of negligence and the probable result of that negligence presented at the malpractice trial" show by a preponderance of the evidence that the summary judgment would not have been granted. Morris v. Getscher, 708 F.2d 1306, 1310 (8th Cir. 1983).

Plaintiffs claim that Dollar failed to properly resist the motion for summary judgment and his negligence in handling the motion resulted in the adverse verdict. They point to the fact that Dollar failed to file briefs or affidavits in support of the motion and that he was negligent in relying on the responses to the request for admissions to establish a genuine issue of material fact. Iowa R. Civ. P. 237(c)(1). Iowa Rule of Civil Procedure 237(c)(1) provides that the party opposing the motion may file affidavits. This is not a mandatory requirement. In determining whether to grant the motion, the court is to look to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Iowa R. Civ. P. 237(c)(1).

Seery and Dollar argue that the resistance combined with the response to the request for admissions created a genuine issue of material fact and that had the appeal from the summary judgment been pursued, the order granting the summary judgment would have been reversed.

Plaintiffs claim that the responses to request for admissions should not be considered because they constitute extrinsic evidence and are not admissible under the Statute of Frauds and the parol evidence rule. The three responses which the attorneys based their claims on are as follows:

> 8. That Don Ted Federwitz did comply with all terms of the Commitment for Title Insurance referred to in previous admission except Item L of Schedule B-1.
>
> RESPONSE: Plaintiff admits except as to failure to comply with Item L; Item L did (does) not constitute a valid title objection as phrased; additionally, Item L was cleared eventually and could have been cleared by the closing date if so demanded.
>
> 9. That U-Haul did require that all requirements set forth in Schedule B, Section 1, had to be complied with prior to closing.
>
> RESPONSE: Specifically denied; U-Haul never responded to a specific offer to close and moreover, their legal representative, Mr. Crawford, specifically failed to require that the item L matter be cleared by any particular date.

> 10. That on June 30, 1980, all of the requirements for closing as set out in Commitment for Title Insurance, a copy of which is attached hereto and marked Exhibit A, were not complied with as required in said Commitment for Title Insurance.
>
> RESPONSE: Plaintiff denies as to seller's obligations; as to buyer's obligations, this would be admitted.

The Iowa statute of frauds provides:

> Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party charged or by his authorized agent.
>
> 3. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year.

Iowa Code § 622.32 (1983).

Under the parole evidence rule, extrinsic evidence may not be received for the purpose of varying or contradicting the terms of an integrated contract; it does not however exclude evidence offered for the purpose of giving meaning to those terms. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 831 (Iowa 1976).

We find that the responses to the request for admissions were not offered to vary or contradict the agreement but rather were offered to show that Dollar was prepared to close the transaction on June 30.

While filing the resistance and the response to request for admissions was not everything that Dollar could have done to resist the motion for summary judgment, we find that his failure to do more did not establish negligence. See, Kurtenbach v. TeKippe, 260 N.W.2d 53, 65 (Iowa 1977) and Iowa Civil Jury Instruction No. 20.1. [Mere errors in judgment are not grounds for negligence if the attorney otherwise acts with a reasonable degree of care, skill and diligence.]

The findings of the trial court are affirmed.

AFFIRMED.