IN THE COURT OF APPEALS OF IOWA

No. 0-701 / 09-1483
Filed October 6, 2010

MCCOURT MANUFACTURING,
Plaintiff-Appellee,

vs.

THOMAS RASMUSSEN,
Defendant-Appellee,

vs.

JACQUELINE TRIPLETT,
Intervenor-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

Appeal from the district court's grant of summary judgment. **AFFIRMED.**

Richard D. Crotty, Council Bluffs, for appellant.

Lyle W. Ditmars and Sara J. Millsap of Peters Law Firm, P.C., Council Bluffs, for appellee McCourt Manufacturing.

Earl G. Greene, III, of Pansing, Hogan, Ernst & Bachman, L.L.P., Omaha, Nebraskafor appellee Thomas Rasmussen.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

SACKETT, C.J.

Jacqueline Triplett, the intervenor in this case, appeals from the district court's grant of summary judgment in favor of plaintiff, McCourt Manufacturing, Inc. (McCourt), in its suit against defendant, Thomas Rasmussen, for contribution following a jury verdict for Triplett against McCourt in her underlying suit for damages she suffered when a chair manufactured by McCourt collapsed. Triplett contends the court erred in granting summary judgment because factual issues remain as to whether McCourt may seek contribution from Rasmussen under Iowa Code section 668.6 (2009).[1] Triplett further contends section 668.6 does not apply because liability of the parties was determined in the underlying lawsuit and the judgment against Rasmussen in that case is valid. We affirm.

Background Facts and Proceedings. In April of 2002 Triplett attended an event organized by her employer and was injured when a rented chair she sat in collapsed. In 2003 she sued McCourt, the chair's manufacturer, and "Fund Ways, Inc., a/k/a Tom's Rental-Tops Rental." Fund Ways rented the chairs to Triplett's employer for the event. "Fund Ways, Inc., a/k/a Tom's Rental-Tops Rental, Defendant" filed an answer.

At trial Rasmussen testified as a shareholder and former officer of Fund Ways. He testified Fund Ways was a company his father started and all the employees were family members. Rasmussen further testified that he was president of "another company," his own sole-proprietorship business, Tom's

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[1] Although Triplett's injury occurred in 2002 and her suit against McCourt was filed in 2003, for ease of reference we will refer to the 2009 Code unless otherwise noted because section 668.6 has remained unchanged since its enactment in 1984.

Rental, which he started in the 1980s. He later changed the business name to Tops Rental. His Tom's Rental-Tops Rental purchased tents, tables, and chairs, then leased them to Fund Ways, which then rented them out for events. Tom's Rental-Tops Rental is a separate business from the family-owned corporation, Fund Ways, but their offices are in the same building.

At the conference on jury instructions, McCourt submitted a statement of the case and sought jury instructions identifying "Tom's Rental-Tops Rental" as a separate entity on the jury verdict form for the jury to consider when apportioning liability under Iowa Code chapter 668. The attorney appearing for "Fund Ways, Inc., a/k/a Tom's Rental-Tops Rental" objected to the proposed instructions referring to Tom's Rental-Tops Rental as a separate entity:

> I object to the statement of the case insofar as it indicates that there are three defendants. I believe there are two defendants. I don't believe Top's defendant is a defendant. I don't believe Tom is mentioned in the case, also known as Fund Ways, Inc.
>
> I object to instruction number 14 for essentially the same reason. Top's Rental is only a name in the lawsuit. It is not an entity. It has—no person or entity has ever been served with a summons on behalf of Tom's Rental. Tom's Rental has always been designated as an also known in the pleadings and also known of Fund Ways, Inc., and not a separate entity.
>
> I object to number—instruction number 15 for the same reasons as I indicated in instruction—to instruction number 14 insofar as Tom's Rental is concerned. I object to number 16 for the same reasons. Tom's Rental is not a party to the lawsuit. I object to instruction number 18 for the reason that Tom's Rental is not a party to the lawsuit but only as an also known of Fund Ways, Incorporated.
>
> I object to the special verdict insofar as it has any questions or inquiries with regard to Top's—Tom's Rental or Top's Rental for the same reason that they—those two names are not entities. They are not parties to this lawsuit.
>
> They're only included in the case in any fashion because they're designated as also knowns of Fund Ways, Inc., and I believe that that is the only place that Tom's Rental is designated

> as a party to these instructions, but if I've missed anywhere, any mention that I missed, I want the same objection to apply to that particular instruction.

The court responded:

> I will overrule your objections. The court has found on the basis of the answers as filed that Tom's Rental-Tops Rental have appeared and subjected themselves to the jurisdiction of the court as a separate entity.

On the special verdict form, the jury found McCourt at fault, Tom's Rental-Tops Rental at fault, and Fund Ways, Inc. not at fault. It apportioned the fault 75% to McCourt and 25% to Tom's Rental-Tops Rental.

The amount of the verdict was upheld on appeal. *See Triplett v. McCourt Mfg. Corp.*, No. 06-1826 (Iowa Ct. App. Sept. 19, 2007).

In April of 2008 McCourt filed suit against Rasmussen, seeking contribution because it had paid "more than its equitable share" of the judgment and Rasmussen was refusing to pay, claiming he was not bound by the verdict in the tort suit because the court did not have jurisdiction over him.

In July of 2008 Thomas Rasmussen d/b/a Tops Rental f/k/a Tom's Rental filed a petition to vacate judgment. He claimed the judgment against him should be vacated

> because he was never named a party defendant in the underlying lawsuit, never had service of summons obtained upon him, never had counsel of record appear on his behalf, either before or during trial, and was not able to properly defend himself at any stage of these proceedings.

Also in July, Triplett petitioned to intervene in McCourt's contribution suit. Triplett was allowed to intervene.

In June of 2009 McCourt moved for summary judgment against Rasmussen. It asserted there was no judgment entered against Rasmussen in the tort case or, alternatively, any judgment was void for lack of jurisdiction because Rasmussen was not a party in the tort case. Defendant Rasmussen did not resist the motion for summary judgment and his attorney agreed the motion should be granted. Although we find no separate resistance in the record,[2] Triplett filed a "statement of undisputed facts and memo of authorities in resistance to the motion of summary judgment," claiming factual issues remain whether the appearance of the attorney for "Fund Ways, Inc., a/k/a Tom's Rental-Tops Rental, Defendant" eliminated the necessity of service upon Rasmussen individually. Triplett also claimed liability against Rasmussen was determined in the underlying tort suit because the judgment against him was valid.

Following a hearing, the district court granted McCourt's motion for summary judgment, finding Rasmussen was never served and there was no valid judgment against him from the tort suit. This ruling cleared the way for McCourt to proceed with its action for contribution. Triplett appeals.

Scope and Standards of Review. We review a district court's grant of summary judgment for correction of errors at law. *Campbell v. Delbridge*, 670 N.W.2d 108, 110 (Iowa 2003). Summary judgment is proper judgment if the record reveals a conflict only concerning the legal consequences of undisputed facts. *City of Fairfield v. Harper Drilling Co.*, 692 N.W.2d 681, 681 (Iowa 2005).

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[2] Triplett's briefs make no mention of a resistance. The docket printout in the appendix shows the statement of undisputed facts was filed in July, but does not show any resistance was filed.

The moving party is entitled to a judgment as a matter of law "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Iowa R. Civ. P. 1.981(3). An issue of fact is "material" only when the dispute involves facts that might affect the outcome of the suit, given the applicable governing law. *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988). The requirement of a "genuine" issue of fact means the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* In a motion for summary judgment, the non-moving party enjoys the benefit of every legitimate inference that could reasonably be deduced from the record. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001).

Discussion. Viewing the record in the light most favorable to the nonmoving parties, the following material facts are undisputed. Rasmussen is a sole proprietor doing business as Tops Rental, which was formerly known as Tom's Rental. Fund Ways, Inc. is a corporation and is not also known as Tom's Rental or Tops Rental. Rasmussen was not served with an original notice or summons in the underlying tort case either individually or as Tom's Rental-Tops Rental. Rasmussen did not retain an attorney to represent him or authorize or knowingly permit an attorney to appear for him or file any answer or other responsive pleadings in the tort case. Rasmussen's testimony as a witness in the tort case was as a shareholder and former officer of Fund Ways, Inc. The jury in the tort case found Tom's Rental-Tops Rental at fault in Triplett's injury and allocated 25% of the fault to Tom's Rental-Tops Rental.

"[T]here are only two ways to acquire personal jurisdiction: (1) by service of process on the defendant; or (2) by defendant's voluntary appearance and submission." *Fisher v. Keller Indus., Inc.*, 485 N.W.2d 626, 628 (Iowa 1992) (citation omitted). Iowa Rule of Civil Procedure 1.302 requires that "notice to the defendant, respondent, or other party against whom an action has been filed . . . be served in the form and manner provided by this rule." The official comments provide "[t]he requirements of this rule . . . are jurisdictional" and "jurisdiction of the defendant is not obtained until service." Alternatively, "when a party appears at trial in person or by counsel with actual notice of the trial, this is sufficient notice for judgment to be entered against that party." *In re Estate of Falck*, 672 N.W.2d 785, 792 (Iowa 2003); *see Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 261 Iowa 419, 430, 155 N.W.2d 478, 485 (Iowa 1967) (noting "if a party appears in person or by attorney he submits himself to the jurisdiction of the court"). However, testifying as a witness in a trial does not constitute an "appearance" for purposes of personal jurisdiction. *Nixon v. Downey*, 42 Iowa 78, 80-81 (1875). "A judgment may be considered void where the court acted without or in excess of its jurisdiction." *Johnson v. Mitchell*, 489 N.W.2d 411, 414 (Iowa Ct. App. 1992).

Although Triplett argues there are facts to be developed concerning the attorney's actions in filing an answer for Tom's Rental-Tops Rental and statements made in the jury-instruction conference, there is nothing in the record in the summary judgment proceeding to show Rasmussen retained the attorney,

authorized the attorney to answer for him or file any responsive pleadings for him, or knowingly acquiesced in the attorney's actions or statements.

The following legal conclusions flow from the undisputed facts. The district court did not have personal jurisdiction of Thomas Rasmussen, who does business as Tops Rental, which was formerly known as Tom's Rental. Any verdict or judgment concerning Rasmussen is void. The jury's allocation of fault among the "parties" under Iowa Code chapter 668 is void as to Rasmussen, as he was not a party in the tort suit. Under section 668.6(2) McCourt may seek to enforce contribution from Rasmussen because "the percentages of fault of each of the parties to a claim for contribution have not been established by the court."

Triplett also argues the judgment is valid because Rasmussen did not appeal it and the time for appeal has passed. This argument is without merit because the judgment is not merely voidable, but is "absolutely void" because it was rendered without the court having personal jurisdiction. *See Woodmen Accident Co. v. Dist. Ct.*, 219 Iowa 1326, 1327, 260 N.W. 713, 714 (1935).

There being no genuine issue of material fact, McCourt was entitled to judgment as a matter of law. The district court did not err in granting McCourt's motion for summary judgment.

AFFIRMED.