

**IN THE COURT OF APPEALS OF IOWA**

No. 6-165 / 05-0993  
Filed April 26, 2006

**CARGILL INCORPORATED,**  
**A Delaware Corporation,**  
Plaintiff-Appellee,

**vs.**

**MARVIN R. MITCHELL and**  
**MARLENE M. MITCHELL,**  
Defendants-Appellants,

MAURICE D. MITCHELL,  
Defendant.

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Appeal from the Iowa District Court for Dallas County, William H. Joy,  
Judge.

Marvin and Marlene Mitchell appeal a district court ruling in favor of the  
plaintiff in an action to subject a judgment debtor's property to the judgment.

**AFFIRMED.**

David L. Leitner, West Des Moines, for appellant.

Jacob D. Bylund, Kimberly J. Walker, and Ross W. Johnson of Faegre &  
Benson, L.L.P., Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**HUITINK, J.**

Marvin and Marlene Mitchell appeal a district court ruling in favor of Cargill, Inc. in an action, brought pursuant to Iowa Code section 630.16 (2003), to subject a judgment debtor's property to the judgment. We affirm.

**I. Background Facts and Proceedings**

Cargill filed a breach of contract action against Marvin Mitchell in February 2004, after he failed to deliver soybeans pursuant to a contract. Cargill filed a motion for summary judgment in the breach of contract action in March 2004, which Marvin did not resist. The district court granted the motion and entered a judgment in excess of \$200,000 against Marvin Mitchell in April 2004. Cargill's attempts to collect the judgment resulted in the filing of this action pursuant to Iowa Code section 630.16.

Cargill sought a declaration that Marvin's transfer of all his assets, including his interest in his farm operation, to his wife Marlene for one dollar on March 16, 2004, was fraudulent and therefore Cargill was entitled to Marvin's 2004 crops or the proceeds thereof. Cargill further sought a declaration that its interest in Marvin's farm products or the proceeds was senior to any interest of defendant Maurice Mitchell, Sr., Marvin's father, in the same property.

In April 2005 the district court granted Cargill's motion for summary judgment as to Maurice, concluding Cargill's interest in 2004 crops allegedly owned by Marvin was senior to that claimed by Maurice. Maurice did not appeal the ruling. The matter proceeded to trial with the remaining defendants, Marvin and Marlene, in May 2005.

The district court filed its ruling on June 3, 2005. The court concluded the March 16, 2004 transfer of Marvin's assets to Marlene was a fraudulent conveyance under the common law and under Iowa Code sections 684.4(1)(a) and (b)(2), and 684.5(1). It set aside the March 16, 2004 transfer of assets, permitted Cargill to levy upon Marvin's 2004 corn crop, declared Marvin the owner of certain soybeans, and entered judgment against Marlene in the amount of approximately \$27,000.

Marvin and Marlene appeal, arguing the district court erred in (1) denying their motion to dismiss or for a directed verdict and (2) denying their motion to amend their answer to conform to the proof.

## **II. Motion to Dismiss**

Cargill argues Marvin and Marlene failed to preserve error on this issue. We agree.

At the close of Cargill's case, counsel for Marvin and Marlene moved to dismiss the action, arguing Cargill failed to meet its burden of proof as to its fraud claim. The district court denied the motion, and Marvin and Marlene presented evidence. During closing statements, defense counsel requested "that my comments . . . regarding a motion to dismiss be . . . considered incorporated in this closing statement."

When a motion to dismiss "made at the close of plaintiff's evidence is not renewed at the end of trial, any error by the trial court in overruling the motion is deemed to be waived." *Quad County Grain, Inc. v. Poe*, 202 N.W.2d 118, 120 (Iowa 1972). Counsel's incorporation of comments regarding the motion to dismiss during closing statements did not serve to renew the earlier motion. The

defendants made no other statements in regards to the motion to dismiss at the close of evidence. Moreover, the trial court did not rule on a motion to dismiss any time after the close of evidence. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

Marvin and Marlene failed to renew the motion to dismiss at the close of evidence. Even if counsel’s comments could be considered a renewal of the motion, the trial court’s failure to rule on the motion leaves us with nothing to review on appeal. We must therefore affirm the district court’s ruling.

### **III. Motion to Amend**

Cargill’s petition included the following allegations:

25. In between the filing of [Cargill’s motion for summary judgment in the breach of contract action] and the entry of judgment, by agreement dated March 16, 2004, . . . Marvin Mitchell purports to transfer all of his interest in all of his property to Marlene Mitchell for one dollar (\$1.00).

. . . .  
48. [N]o security agreement was executed by Marvin and/or Marlene Mitchell in connection with the March 2004 Note and April 2004 Financing Statement.

Marvin and Marlene admitted these two paragraphs in their answer. At trial, they moved to amend their answer and change the answer to allegations in paragraphs 25 and 48 from “admit” to “deny.” The district court denied the motion. On appeal, Marvin and Marlene contend the district court erred by failing to permit the amendment of their answer to conform to the proof.

We review the district court’s denial of the motion to amend for an abuse of discretion. *Lake v. Schaffnit*, 406 N.W.2d 437, 441 (Iowa 1987). We accord

the district court considerable discretion when ruling on such motions; therefore, we reverse only when a clear abuse of discretion is shown. *Bennett v. Redfield*, 446 N.W.2d 467, 474-75 (Iowa 1989).

The defendants' motion to amend was made pursuant to Iowa Rules of Civil Procedure 1.457 and 1.402. Rule 1.457 provides:

When issues *not raised by the pleadings* are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

(Emphasis added.) The rule addresses issues which were not raised in the pleadings but were nonetheless tried by consent of the parties. The rule has no application here, where the defendants sought to amend their answer with respect to two particular factual allegations raised by in the petition and admitted by defendants.

To the extent the defendants' motion to amend was pursuant to rule 1.402, it was untimely. The defendants filed their answer on December 3, 2004. The district court's scheduling order, filed December 21, 2004, set a trial date of May 11, 2005 and stated, "Pleadings shall be closed sixty days before trial." The defendants made their motion during trial and renewed it at the close of the evidence, well beyond the deadline for the close of pleadings.

Moreover, the proposed amendment to paragraph 48 of the defendants' answer, which related to Cargill's interest in certain property vis-à-vis Maurice, would have improperly changed issues already decided by the district court in Cargill's motion for summary judgment granted as to Maurice prior to trial. As for

the proposed amendment to paragraph 25, Marvin and Marlene admitted at trial that Marvin conveyed *all* his assets to Marlene in the March 16 document, not just his jointly-held property. Thus, there is no factual basis for Marvin and Marlene to deny paragraph 25 of the petition. The district court was well within its discretion in denying the motion to amend.

**AFFIRMED.**