IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40938

NORMAN P. HYMEL, JR.,

Plaintiff-Counter-Defendant-Appellee-Cross-Appellant,

VERSUS

UNC INC.,

Defendant-Counter-Claimant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(91 CV 1665)

August 30, 1995

Before SMITH, WIENER, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

I.

In August 1991, UNC Resources (predecessor in interest to UNC Incorporated) purchased all of the outstanding stock in Normco, a Louisiana corporation. Norman P. Hymel, Jr., owned 67% of Normco

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

stock, and his lawyer and brother-in-law Tracy Barstow owned the remaining 33%. UNC gave Hymel a $2,350,000 promissory note and other consideration for his stock in Normco.

The note provided for three $50,000 payments and a single $2,200,000 payment. The final payment was to be due on July 31, 1986. UNC made all three $50,000 payments on time but failed to make the $2,200,000 payment, relying upon § 3.1(f)(ii) of the Joint Merger Agreement between the parties. UNC claimed that section 3.1(f)(ii), which was incorporated by reference into the note, conditioned its obligation to make the final payment on certain earning contingencies. In relevant part, the clause provides:

> No payment or issuance of cash, stock or other consideration or compensation under (A) this section 3.1 (except under subsection (a)(iii)(C) thereof, the proviso at the end of this subsection (f) to the extent of the 1986 Payment defined therein and the note described in subsection 3.1(a)(iii)(B) to the extent of $50,000) (B) the Hamer Agreement or (C) paragraph 5 of said Employment Agreement, including without limitation any other payment under the notes described in subsections (a)(ii) and (a)(iii)(B) of this Section 3.1 or issuance of Equivalent UNC Stock under subsection (a)(iii)(D) of this Section 3.1, shall be made during the period commencing April 1, 1986, and continuing through July 31, 1991, except to the extent the aggregate value (on the intended date of such issuance or payments) of such cash, stock or other consideration or compensation issuable or payable (the "Current Payment Value"), when added to the aggregate value (at the time of payment or issuance) of all cash, stock and other consideration and compensation previously paid or issued under such items (the "Prior Payment Value"), does not exceed an amount equal to the sum of the 1986 payment (if made) plus 25% of the Cumulative Pre-Tax Earnings of the Surviving Corporation through March 31 immediately preceding any date on which such payment or issuance would otherwise occur, and any portion of such payment or issuance which exceeds such amount shall be <u>deferred</u> (pro rata) until such time (but not later than July 31, 1991) as such Current Payment

> Value when added to such Prior Payment Value does not exceed an amount equal to the sum of the 1986 Payment (if made) plus 25% of the Cumulative Pre-Tax Earning of the Surviving Corporation through March 31 immediately preceding the date of any such deferred payment or issuance; provided, however, that in the event that Cumulative Pre-Tax Earnings for the period commencing on the Cut-Off Date and ending on March 31, 1986 are equal to or exceed the sum of $28,800,000, Hymel shall receive Equivalent UNC Stock and/or cash having an aggregate value of $500,000 (the "1986 Payment") in addition to any amounts which may become payable under Section 3.1(a)(iii)(D), with principal and interest portions thereof being determined as set forth in Section 3.1(a)(iii)(C)(y).

Joint Merger Agreement § 3.1(f)(ii). Hymel did not object to UNC's failure to pay at the time. Five years passed. On July 1, 1991, Hymel demanded payment, and UNC refused.

II.

Hymel sued on the note in state court, and UNC removed to federal court. Hymel moved for summary judgment. UNC raised two defenses: first, that the note would have bound it to pay only if earning contingencies in the Joint Merger Agreement had been met; and alternatively, that the note was invalid as based upon an error of fact. The error of fact UNC alleged was that it had intended to purchase Normco only if the note's final payment were contingent on its future earnings. In support of this second, alternative defense, UNC offered three affidavits concerning collateral litigation between Hymel and Barstow.

The district court granted Hymel's motion for summary judgment on the note and awarded interest. UNC appealed, and a panel of this court reversed. Hymel v. UNC, Inc., 994 F.2d 260 (5th Cir.

1993) ("Hymel I"). The panel agreed with the district court's interpretation of the note but held that it had erred in granting summary judgment because UNC had shown a genuine issue of material fact regarding its error-in-fact defense.

The panel noted that, under Louisiana law, price can be the principal cause of a contract. Id. at 265. Price embraces the issue of whether an obligation to pay is contingent or absolute. Accordingly, the panel reversed the grant of summary judgment and remanded for further proceedings on the issue of whether UNC's alleged error in fact vitiated the contract. Id. at 265-66.

On remand, the case was tried to a jury, which rejected UNC's error-in-fact argument and assessed reasonable attorneys' fees and collection costs in favor of Hymel. The court entered judgment on the verdict.

III.

UNC's first argument on appeal is that the district judge acted as an advocate for Hymel throughout the trial. In support of its claim, UNC offers us a plethora of strained interpretations of various questions and comments by the judge.

Eileen Hall, the attorney who drafted the Joint Merger Agreement and advised UNC during the merger negotiations, testified on behalf of UNC. On direct, Hall was asked about her understanding of changes she made in drafts of the Joint Merger Agreement. Presumably, this question was intended by UNC's counsel to draw out what Hall thought the Joint Merger Agreement meant, specifically

whether UNC's obligation to pay Hymel the $2,200,000 was contingent. Hymel's counsel objected to this question, and the court responded by stating:

> I want to know what she thought she was doing. We'll tell her and everybody else what she was doing, but I want to know what she thought she was doing, or what she said she thought she was doing.

Although UNC characterizes this as an attack on Hall's credibility, we read it as overruling Hymel's objection and underscoring the relevance of the questions Hall was being asked by counsel for UNC. By saying "We'll tell her and everybody else what she was doing," the court was simply stating that the issue of what the contract in fact meant, having been already resolved against UNC by the Fifth Circuit, was not before the court. Only what UNC thought the contract meant (the error in fact defense), "what [Hall] thought she was doing," or, in other words, "what she said [to UNC] she thought she was doing" was at issue. The court was not attacking Hall's credibility; rather, it was overruling Hymel's objection and allowing UNC's direct examination of Hall to proceed unimpeded.

After reviewing the record, we conclude that the court's questions to various witnesses did nothing more than unearth relevant information in a fair and efficient manner. At no time did the judge function as an advocate for either side.

IV.

UNC argues that the district court erred by allowing and making various comments about the legal meaning of the note. Because the meaning of the note was not at issue in the trial, UNC

argues that all of these comments were "completely irrelevant" and served only to confuse the jury and prejudice UNC.

Having been addressed by this court, the legal import of the terms of the note was law of the case at trial. We held in Hymel I that the terms of the note "clearly and unambiguously bound UNC to pay the final payment of 2.2 million dollars to Hymel." 994 F.2d at 262. "All that Section 3.1(f)(ii) provides with regards to the final payment is that it could be deferred to 1991 if certain profit contingencies were not met in 1986." Id. at 263.

This argument is misguided. UNC correctly states that parol evidence is admissible to show error in fact, even where the contract language is clear and unambiguous. Id. at 263 n. 10. We are aware, however, of no law supporting UNC's leap from that principle to its conclusion that the terms of the contract itself are not admissible on the issue of error in fact. UNC was represented by counsel in the preparation and signing of the Joint Merger Agreement. If the agreement said that UNC got "X and only X," that would tend to disprove UNC's claim that it thought it was getting "Y." Although not dispositive, the plain words of the contract are at least relevant as to whether UNC made an error in fact.

V.

UNC complains of the court's exclusion of evidence relating to the lawsuit brought by Barstow against Hymel. We review a ruling on admissibility for abuse of discretion. Davis v. Odeco, Inc., 18

F.3d 1237, 1247 (5th Cir.), cert. denied, 115 S. Ct. 78 (1994). Any error that does not affect the substantial rights of the parties is not a ground for reversal. Washington v. Department of Transp., 8 F.3d 296, 299 (5th Cir. 1993).

Barstow's testimony at trial illuminated one version of the facts underlying the lawsuit. Barstow, who owned 33% of Normco stock, was to receive a lesser amount of compensation than Hymel, but according to otherwise identical contractual terms. Barstow testified that he had been out of the loop during the later stages of the merger negotiations and thus was unaware of the inclusion of Joint Merger Agreement section 3.1(f)(ii) in the contract until closing.

When he discovered the change, not fully understanding its implications, he called Hymel out of the closing and expressed his concern that payment on the note had been made contingent. Hymel assured Barstow that he shouldn't worry because he, Hymel, would pay his $300,000 note payment on February 12, 1984. Hymel invited Barstow to draft an agreement memorializing this personal guaranty, and assured him that he would sign it.

The deal with UNC closed, and Barstow later prepared the written agreement; Hymel, however, never signed it. When UNC did not pay him, Barstow sued Hymel to recover on the unfulfilled guaranty promise.

In defense against Hymel's original motion for summary judgment, UNC argued error in fact. Evidence of the Barstow-Hymel litigation was offered in support of the error-in-fact argument.

When this court vacated the grant of summary judgment, we mentioned the evidence of the Barstow-Hymel litigation and stated that it was relevant to the issue of error in fact. Hymel I, 994 F.2d at 262.

By the time of trial, Barstow's suit had been dismissed for want of prosecution. Before trial, the district court ruled that Barstow would not be allowed to testify about the lawsuit and that it would not be mentioned in the presence of the jury. In violation of this ruling, counsel for UNC asked Hymel whether Barstow had sued him. Hymel's counsel objected, and the court sustained the objection, instructing the jury that:

> . . . there has been some mention that a lawsuit was filed by Mr. Barstow . . . the Court wishes to advise you the suit was dismissed for non-prosecution. It's not relevant to the issues of the case. So I'm instructing you to disregard the fact that a lawsuit was filed.

UNC argues that this instruction prejudiced it by creating the impression that the Barstow-Hymel suit had been meritless. As the instruction correctly stated that the suit had been dismissed for non-prosecution and further stressed that it was not relevant to any issue in the case, it did not prejudice UNC. The district court properly excluded evidence of the lawsuit.

Although UNC argues that the relevance of this evidence is law of the case after our holding in Hymel I, the rules do not mandate the admission of all relevant evidence. First, the pleadings of the suit were hearsay. FED. R. EVID. 801; Johnson v. Ford Motor Co., 988 F.2d 573, 579 (5th Cir. 1993). Second, evidence of the suit could have been excluded under FED. R. EVID. 403. Barstow was allowed to testify in full about the factual basis for the suit.

Accordingly, there might have been a basis for the district court to exclude the evidence as cumulative or a waste of time. In addition to the fact that the suit was dismissed for lack of prosecution, mention of it might have confused the issues.

In order for the court properly to exclude relevant evidence under rule 403, the probative value must be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403. Because the relevance of the lawsuit is law of the case, the district court erred in holding the litigation "irrelevant." This court may affirm, however, if there is any ground upon which the ruling they may be upheld.

Although the evidence of the lawsuit was relevant, it was not of great probative value. The lawsuit went to Barstow's understanding of an agreement between himself and Hymel, which in turn went to both men's states of mind at the time of the closing. At best, the lawsuit tends to prove that Barstow, after a quick reading of the Joint Merger Agreement, interpreted UNC's obligation on the final payment as conditional. This interpretation, in turn, would tend to support the reasonableness of UNC's claimed error in fact about the meaning of the contract. This relevance is attenuated, and therefore the probative value of the lawsuit evidence could have been substantially outweighed by any of the rule 403 considerations mentioned above. The exclusion of the evidence pertaining to the lawsuit was proper.

VI.

Next, UNC claims the trial court erred in excluding from evidence various business records of UNC. The documents in question were generated after the closing of the Normco merger, and UNC sought to introduce them as business records under FED. R. EVID. 803(6) in order to show that it treated the obligation to Hymel as contingent on its own books.

The business record hearsay exception applies only to records made "at or near the time" of the events they describe. Rule 803(6). The Normco merger closed in August 1981. The oldest of the documents offered by UNC was generated on March 5, 1982. Given the length of time between the date at which UNC's intent is relevant and the dates on which the documents were generated, the district court did not abuse its discretion in excluding the documents.

VII.

UNC also argues that it anticipatorily breached the agreement with Hymel as early as 1984, when Hymel understood that UNC did not intend to pay the last portion of the note unless the earning contingencies were satisfied. Accordingly, UNC argues that the prescriptive period had expired before Hymel filed suit in July 1991, just a few days before the deferred due date of the note.

Hymel responds that UNC did not finally and unequivocally renounce its obligation to pay on the note until its letter of repudiation dated July 15, 1991. Accordingly, Hymel argues that

the prescriptive period should run from this date. In the alternative, Hymel asserts that UNC's $50,000 payments in 1984 and 1986 were continuing performance of UNC's obligations and would have tolled the running of prescription even if it had begun in 1984.

Hymel is plainly correct, for the reasons he has stated. Because these points decide the issue, we need not reach the question of which prescriptive period applies to the promissory note. Additionally, Hymel is correct that the issue of prescription is a legal one and thus was properly removed from the jury's consideration. UNC's argument is without merit.

VIII.

UNC contends that the district court erred by allowing Hymel to use the "Golden Rule" and "Reverse Golden Rule" arguments in closing. One challenged argument by counsel for Hymel was as follows:

> When you bought your house, if you bought one, and signed the mortgage, did it ever occur to you to tell those people when you signed that note, "Gee, I know I promised to pay you this money, but I didn't think I was going to have to." That's kind of what's happened here . . . .

UNC also challenges Hymel's counsel's statement in closing argument that UNC could have cured its error, and a hypothetical question to the jury as to whether the jurors try to cure mistakes they make.

Our caselaw forbids the Golden Rule argument only in relation to damages. Stokes v. Delcambre, 710 F.2d 1120, 1128 (5th Cir. 1983). This argument was on the merits of the factual error

defense, not damages. In addition, UNC made no objection to it. Accordingly, we review only for plain error. Id. The remarks of Hymel's counsel were not plainly erroneous.

IX.

UNC challenges the court's award of damages, claiming that it improperly assesses interest on interest. The note provides, however, that "all past due interest and/or principal shall bear interest from maturity until paid, both before and after judgment, at the rate of nine percent (9%) per annum." (Emphasis added.) UNC's argument is foreclosed by the plain language of the contract.

Finally, UNC claims that the district court erred by requiring a portion of the judgment to be paid in "salable stock." This issue was not briefed by UNC. Therefore, it was waived. Port Arthur Towing Co. v. John W. Towing, Inc., 42 F.3d 312, 319 (5th Cir. 1995).

X.

The note provides that if it were ever placed in the hands of an attorney for collection, UNC would "pay reasonable attorneys' fees and collection costs to the holder . . . ." The jury found the plaintiff's reasonable attorneys' fees to be $289,399 plus any other attorneys' fees since March 16, 1994, and found the collection costs to be $29,399.48 plus any other collection costs since March 16, 1994. At the time of the judgment, Hymel had introduced no evidence of fees or costs after March 16. After trial, Hymel

moved for inclusion of the later expenses. The court refused to amend the judgment.

On cross-appeal, Hymel argues that the court's refusal to include the later-proven costs was a judgment contrary to the verdict. It was unreasonable for the court, Hymel argues, to expect up-to-the-minute evidence on attorneys' fees at the end of the trial. We are unpersuaded. Certainly, Hymel's counsel could have kept time records for the first part of the trial and submitted a reasonable extrapolation as evidence of how much time would be spent. We find no abuse of discretion in the court's failure to include additional fees.

AFFIRMED.