IN THE IOWA COURT OF APPEALS

FILED
MAY 26 1981
CLERK SUPREME COURT

259

GLEN ROCCA,	)	
Plaintiff-Appellee,	)	Filed May 26, 1981
vs.	)	
DONALD ROSS, JAMES GLEASON, and GREATER MARKETS, INC., d/b/a THE OTHER PLACE,	)	1-41 / 63687
Defendant-Appellant.	)	

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Defendants appeal from judgment entered on a jury verdict against them in a personal injury action. AFFIRMED.

George Lindeman and John T. McCoy of Lindeman & Yagla, Waterloo, Iowa, for defendants-appellants.

Harry W. Zanville of Clark & Butler, Waterloo, Iowa, for defendant-appellant James Gleason.

Max E. Kirk and William C. Ball of Ball & Nagle, Waterloo, Iowa, for plaintiff-appellee.

Frederick G. White of Kepford, White & Miller, Waterloo, Iowa, for defendant-appellant Greater Markets, Inc. d/b/a The Other Place.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendants James Gleason and Greater Markets, Inc. appeal from judgment entered on a jury verdict against them in a personal injury action. Plaintiff's claim against said defendants was based upon an allegation that Gleason, acting within the scope of his employment by Greater Markets, Inc. aided and abetted defendant Donald Ross in assaulting plaintiff in a bar owned and operated by Greater Markets, Inc. Ross was also a defendant against whom recovery was awarded by the jury, but he has not appealed. In considering defendants' several assignments of error, defendants Gleason and Greater Markets, Inc. will sometimes be referred to collectively as defendants.

I. We first consider defendants' contention that plaintiff's claim is barred by the statute of limitations set forth in section 614.1(2), The Code. This contention arises from the fact that a separate division of plaintiff's petition charging that Gleason aided and abetted an assault perpetrated by Ross was added to the case by an oral amendment to the petition allowed by the trial court on June 27, 1975 during a prior trial of the issues. This amendment was more than two years after the alleged assault and resulting injuries to plaintiff. For purposes of the retrial in 1979, this oral amendment was reduced to writing and formed the only basis for plaintiff's claim against defendants.

We conclude that the amendment in question did not, as defendants claim, assert a new and distinct cause of action or a wholly different legal theory of liability so as to be barred by the two-year period of limitation contained in section 614.1(2), The Code. Plaintiff's original petition was filed and service of original notice on defendants was obtained prior to the time the bar of this statute became applicable. That petition alleged in part: "That defendant Gleason as manager and employee of [Greater Markets, Inc.] was negligent in the following particulars: a. by encouraging defendant Ross to attack plaintiff, b. by conspiring with defendant Ross to attack plaintiff and remove plaintiff from the premises." Defendants negligence in failing to protect or aid plaintiff from the assault and in permitting the defendant Ross to remain on the premises was also alleged in the original petition. After all of these allegations it was further alleged in the original petition "that defendant Gleason's wrongful acts or omissions were willful, wanton or grossly negligent and plaintiff therefore prays for punitive damages against defendant Gleason and Greater Markets, Inc." From our review of this petition and the proposed amendment thereto on July 27, 1975, we can only conclude that the amendment did not inject a new theory of recovery. It only served to separate existing legal theories into separate counts. The case of Pease v.

Citizens State Bank, 210 Iowa 331, 228 N.W. 83 (1930), relied upon by defendants for a contrary result, is readily distinguishable on the facts and does not support the statute of limitations claim advanced in the present case. Because we conclude that this claim was not barred at the time of the 1975 amendment, we need not determine whether present Iowa R. Civ. P. 89 should be given retroactive effect for purposes of the assertion of this claim during the retrial in 1979.

II. We next consider defendants' claim that the trial court erred in failing to instruct the jury that defendants could not be liable for aiding and abetting Ross's actions in assaulting plaintiff unless Gleason expressly intended to bring about an assault. In this regard the trial court instructed that the jury must find that Gleason aided and abetted Ross "in the commission of an assault and battery upon the plaintiff." Aiding and abetting were separately defined in the trial court's instructions. These definitions were as follows: "To aid is to help, assist, support, promote the course of accomplishment of, help in advancing or bring about. To abet is to encourage, counsel, insight, and instigate the commission of an assault and battery." The underlying precept of aiding and abetting is a requirement that the accessory in some way associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. See State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977). We believe that the trial court's instructions adequately conveyed this concept to the jury. Specific intent comes into play in aiding and abetting cases only where the act of the principal is not criminal or, as in a civil case, not actionable absent such intent. Cf. Lott, 255 N.W.2d at 109. Assault and battery is by its very nature a willful act and actionable as such without further showing of specific intent. The trial court did not err in overruling defendants' exceptions to the instructions on the ground just discussed.

III. Defendants next urge that the trial court erred in not sustaining their motion for directed verdict in the court below on the grounds that the evidence at trial as a matter of law did not create a jury issue on plaintiff's claim of aiding and abetting. We disagree. Defendant Ross testified that Gleason encouraged him to strike plaintiff and gave assurances that he would not be interfered with if he did so. There was some corroboration for this testimony. This evidence must be viewed in the light most favorable to plaintiff. Iowa R. App. P. 14(f)(2). If it is so considered, the matter of defendants' liability, if any, on a theory of aiding and abetting, was properly for the jury to determine.

IV. We next consider together defendants' claims that they are entitled to a new trial as a result of error in (a) the trial court's allocation of peremptory challenges among the parties, and (b) the trial court's curtailment of voir dire examination by defendants. As to the first contention, we conclude that under the standard adopted in Wilson v. Ceretti, 210 N.W.2d 643, 646-47 (Iowa 1973), the allocation of peremptory challenges in the present case does not justify reversal. There has been no showing that such allocation resulted in a clear and convincing probability of prejudice to defendants.

As to the second contention, defendants urge that they were improperly limited in their voir dire examination of those prospective jurors who had had some experience with epilepsy. No record was made of the actual voir dire proceedings. In a record made after the conclusion thereof, it was made to appear that counsel for defendants were permitted to inquire as to which prospective jurors had had contact with persons suffering from epilepsy and the nature of the prospective juror's relationship with such person. Attempts to question further concerning the symptoms involved was prevented by rulings of the trial court. Based upon this sketchy record, we can find no reversible error. There are no fixed rules governing the scope of voir dire examination. Its limits are subject to the sound discretion of the trial court. Elkin v. Johnson, 260 Iowa 46, 50, 148 N.W.2d 442, 444 (1967). No abuse of that discretion appears in the present case. Moreover, there is no showing that any prospective juror identified as having had experience with epilepsy actually served as a juror in the case. The extent of voir dire permitted in the present case offers no basis for reversal.

V. We next discuss the twelve assignments of error advanced in divisions VI, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX and XX of defendants' brief. All relate to trial court rulings on the admissibility of evidence during the trial. We have given careful consideration to each of these twelve rulings of the trial court and conclude that when they are viewed either individually or collectively, such rulings provide no ground for reversal of the judgment. This is because said rulings were either correct and involve no error or because the evidence involved was in no way prejudicial to the defendant.

VI. We next consider other assigned errors which relate to trial court instructions.

Defendants urge that the trial court erred in using the word "wanton" as the measure of conduct required to support an award of exemplary damages. The objection lodged at trial was that the plaintiff's theory of the case was based upon willful conduct of the defendants and therefore plaintiff's right to recover exemplary damages should be conditioned upon a finding of willfulness. Defendants did not urge at trial that conduct which falls within the trial court's definition of "wanton" will not legally support an award of exemplary damages. Nor does our review of the instruction reveal any substantive error in this regard. Based upon this posture of the case, defendants' contention appears to be that because plaintiff's evidence might be viewed as showing a greater culpability on defendants' part than is legally required to support an award of exemplary damages, plaintiff should be held to such higher standard of proof. We disagree. The instruction contained an adequate standard for the jury's determination of the exemplary damage claims.

Next defendants seek to predicate reversal on a written response made by the trial court to the jury in answer to questions posed concerning instructions. This issue was purportedly raised in the trial court by a motion for new trial. On appeal, defendants treat the court's response to the jury's questions as if it were an additional jury instruction. They urge the response constitutes trial court error because (a) it was made without notice to the parties or counsel and (b) it was substantively erroneous. As to the alleged failure to give notice to the parties or counsel, we note that this argument, based on Iowa R. Civ. P. 197, was raised in the motion for new trial only with respect to alleged "oral instructions" which are not otherwise identified in the record. The argument advanced on appeal is that the written response to the jury's questions violated Iowa R. Civ. P. 97. We conclude that this issue was not raised in the trial court and may not be considered for the first time on appeal.

As to claimed substantive error in the law embodied in the trial court's written response to the jury's questions this was urged in the motion for new trial only as follows: "The court . . . misstated the law by stating that a different amount of punitive damages could be awarded against the master than against the servant." This ground of the motion for new trial was denied by the trial court and we believe properly so. The trial court's instructions and forms of verdict contemplated separate awards of exemplary damages, if any, be made against each of the defendants. No objection was made by defendants to this method of submission. No reason has been made to appear why, if separate awards were to be made, such awards are required to be the same as to Gleason and Greater Markets, Inc. Nor is this issue argued on appeal. On appeal, defendants are arguing that because Greater Markets, Inc.'s liability is vicarious, there can only be a single recovery of punitive damages against Gleason and Greater Markets, Inc. collectively. That issue was not raised in the trial court and will not be considered for the first time on appeal.

VII. Lastly, we consider defendant's assertion that a new trial should be granted because the jury verdict fails to effectuate substantial justice between the parties. As stated in Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 861 (Iowa 1973), "The judge should not grant a new trial merely because reasonable men might disagree with the jury's conclusion." To the extent such relief is available, we believe it ordinarily must come, if at all, from the trial court. Defendants' separate claims of error have been considered by this court and rejected. No challenge has been made to the amount of the verdict. No abuse of trial court discretion has been shown in the denial of a new trial. We have considered all matters presented and find no basis for reversal.

AFFIRMED.