FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-118 / 89-26

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COMMERCIAL STATE AGENCY, INC.,

Appellant,

vs.

STOTLER AND COMPANY,

Appellee.

Appeal from the Iowa District Court for Pocahontas County, Louie F. Beisser, Judge.

Commercial State Agency appeals from a district court judgment following a jury verdict rejecting its claim for conversion against Stotler and Company, a commodities broker. **AFFIRMED.**

James L. Kramer of Johnson, Erb, Latham, Gibb & Carlson, P.C., Fort Dodge, for appellant.

Mark S. Brownlee and Stephen G. Kersten of Kersten & Carlson, Fort Dodge, and Thomas F. Kolter and Jeffry M. Henderson, Chicago, Illinois, for appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

PER CURIAM 25

Commercial State Agency (appellant) filed suit against Stotler and Company (appellee), a commodities broker, alleging conversion of certain commodity accounts. Before trial, Arrowhead Ranch, Inc., Rod Amlie, Rodney Farms, and Tim and Don Flaherty assigned any interest they might have in this case to appellant. Appellant alleged all the listed entities had credit balances in their commodity accounts and appellee converted these funds to its own use. Appellee answered and asserted various counterclaims. Appellee did not plead an oral guaranty by Rod Amlie binding the entities included in this litigation.

In November 1987, Rod Amlie pleaded guilty to embezzlement by a bank officer and false entries in bank reports and transactions. At trial he was serving a federal prison sentence.

At trial, evidence was produced to show Rod Amlie had control, either solely or through his wife, of Commercial State Agency and other entities that had assigned their claims to Commercial. Amlie controlled several other commodity accounts with debit balances. Appellee's chief executive officer testified Rod Amlie had made an oral guaranty to them permitting the use of credit balances in accounts he controlled to reduce debit balances in other accounts.

The jury was instructed on conversion as well as on appellee's defenses of promissory estoppel and oral guaranty. The jury returned a verdict in favor of appellee.

Commercial State Agency, Inc., appeals. We affirm.

Commercial contends the district court erred in: (1) permitting Stotler to assert the defense of an oral guaranty that was not pleaded; (2) instructing the jury wrongful conduct was an essential element of a conversion claim; (3) instructing the jury on Stotler's defense of an oral guaranty; (4) determining there was sufficient evidence to submit promissory estoppel as a defense; (5) instructing the jury on punitive damages; and (6) failing to grant a new trial or judgment notwithstanding the verdict based on its conversion claims.

Our scope of review is for errors at law. Iowa R. App. P. 4.

Commercial State Agency, Inc.'s (appellant), principal claim in this appeal is the trial court erred in permitting Stotler and Company (appellee) to rely upon the defense of an oral guarantee by Mr. Amlie. Appellant argues this defense was not pleaded and was not disclosed by way of discovery. Appellee argues the issue was tried by consent of the parties.

We observe the matter of oral guarantee was thoroughly delved into and addressed during both appellant's, as

plaintiffs, and appellees, as defendants, cases at trial before any objections were made by appellants. The objections were not timely made. Before any objection was made, appellant had introduced substantial evidence of an oral guarantee through witnesses Mr. Amlie and Mr. Egan. In fact, appellant made no objection, at trial, to the testimony of Kathleen Sandstrom, which covered the same subject material.

We recite the pertinent portion of Iowa Rule of Civil Procedure 106 as follows:

> 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.

Appellee refers to the case of Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 391 (Iowa 1975), wherein our supreme court acknowledged unpleaded issues as being tried by consent of the parties. We quote as follows:

> It is significant no objections were lodged by the defense to the direct testimony, and, perhaps more important, the more specific and larger portion of the information was brought out by defendant's own cross-examination of Godbersen. The following statement of law dictates defendant cannot now dispute plaintiff's right to present the issue on appeal:
>
> > Permitting the introduction of evidence on an issue not specifically pleaded obviates the necessity of its formal presentation. Where, as here, parties proceed without objection to try an issue, even though not presented by

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> the pleadings, it amounts to consent to try such issue and it is rightfully in the case.

We affirm the trial court on this issue. Appellant's claim it was caught by surprise is without merit. Also, the court did not err in any manner when it instructed the jury regarding the oral guaranty by Mr. Amlie.

Appellant's claim the trial court instruction number eighteen, on the tort of conversion, was erroneous, is without merit. Specifically, appellant argues the court's err in instructing the jury on the element of its exercise of dominion or control over the account was wrongful.

The trial court instructed the jury in instruction number seventeen the definition of conversion as follows:

> A "conversion" is properly defined as a distinct act of dominion or ownership wrongfully exerted over another's personal property in denial of or inconsistent with the person's title or right therein, or in derogation, exclusion, or defiance of such title or right.

The central concept is the act of dominion or control was contrary to another's rights. This concept is properly conveyed in instruction numbers seventeen and eighteen, particularly when they are read and construed together, not piecemeal or in artificial isolation. See Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988).

We affirm the trial court on this issue.

Appellant also claims the trial court erred in instructing the jury on the defense of promissory estoppel

and guaranty contract. Appellant argues one promise cannot support both theories. Our search of the trial record reveals, in addition to evidence of the oral guaranty Mr. Amlie gave to Mr. Egan, there was evidence of another promise by Mr. Amlie. This had to do with Mr. Amlie's promise to wire margin funds on a daily basis in exchange for a reduction in margin notes for certain accounts. This allegedly exposed appellee to a greater risk from market changes. There is testimony and evidence Mr. Amlie failed to wire the margin funds as promised. The evidence also supports promissory estoppel and the trial court did not err in instructing the jury accordingly.

Appellant contends the trial court failed to instruct the jury may consider appellee's wealth in setting the amount of punitive damages. The parties at trial stipulated into evidence appellant's (defendant's) net worth was $40,000,000. The court instructed the jury on punitive damages in its instruction number twenty-six. In that instruction was included the following excerpt:

> In determining the amount of punitive damages, if any, to be awarded the Plaintiff, the Court can give you no exact rule, but you should be guided by your careful and well-considered judgment and allow, if any, such an amount and such only as you shall find the Plaintiff entitled to receive in addition to their actual damages under all the facts and circumstances as shown by the evidence and under these Instructions. (Emphasis ours.)

We determine the stipulation in evidence of defendant's net worth being $40,000,000, and the court's instructing

the jury to consider all of the facts and circumstances as shown by the evidence, satisfies the requirement of showing the pecuniary condition of defendant to the fact finder. See Hall v. Montgomery Ward & Co., 252 N.W.2d 421, 424 (Iowa 1977).

Appellant finally claims it was entitled to judgment notwithstanding the verdict or new trial. It relies upon the same reasons we have already addressed in this opinion. In addition, we are guided by Iowa Rule of Appellate Procedure 14(f)(3) as follows: "In ruling upon motions for new trial the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." We hold the case was properly submitted to the jury and the verdict effectuates substantial justice. We affirm the trial court on this issue.

The trial court is affirmed on all issues presented and argued on appeal.

AFFIRMED.