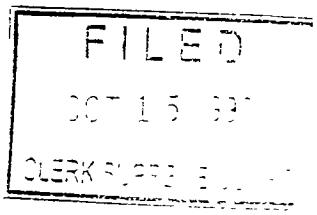
IN THE COURT OF APPEALS OF IOWA

No. 1999-119 (9-335) / 98-1102
Filed October 15, 1999



DEVANI GRIFFIEON,

Plaintiff-Appellee,

vs.

HARLEY GRIFFIEON,

Defendant-Appellant.

Appeal from the Iowa District Court for Decatur County, Dale B. Hagen, Judge.

Defendant appeals from the district court's judgment for plaintiff entered after a jury trial on plaintiff's claims alleging sexual assault and battery. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Warren L. Bush, Wall Lake, for appellee.

Heard by Streit, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Harley Griffieon appeals an adverse judgment in a suit brought by his daughter. The district court entered judgment for the daughter following a jury trial on her civil claims of sexual assault and battery. Defendant contends the district court erred in not allowing him to amend his answer four days before trial to include a statute of limitations defense. He also claims the trial court erred in overruling his motion to amend to conform to the proof. Because we find no abuse of discretion in the trial court's rulings, we affirm.

I. Background Facts and Proceedings. Plaintiff, Devani Griffieon, is the daughter of the defendant, Harley Griffieon. At the time of trial, Devani was twenty-two years old. She alleged that from November 17, 1992, her seventeenth birthday, through the Iowa State Fair in August, 1994, her father engaged in inappropriate sexual contact with her. After Devani reported the conduct to authorities in March, 1995, Harley pleaded guilty to incest.

Devani filed a civil suit against her father on July 5, 1996, alleging sexual assault and battery and intentional infliction of emotional distress. Trial was scheduled to commence August 11, 1997. Three days before trial, Harley filed a voluntary bankruptcy petition and a stay issued on all proceedings. Harley did not allege a statute of limitations defense at any time before this first trial date.

On January 9, 1998, the bankruptcy court's stay order was modified to allow trial on counts one through four of Devani's petition.[1] A new scheduling order was filed January 30, 1998, stating pleadings were to be closed on April 1, 1998. A new trial date was set for April 28, 1998.

On April 24, 1998, four days before trial and approximately twenty-one months after Devani filed her petition, Harley filed his motion for leave to amend his answer to allege a statute of limitations defense. The plaintiff vigorously resisted the motion and it was denied by the trial court. The court noted the deadline for amendments had passed and concluded that it would be unfair to require plaintiff to come forward with evidence to refute an affirmative defense which was not raised until four days prior to trial. At the close of the evidence, the court denied Harley's renewed motion to amend his answer to conform to the proof offered at trial. The jury returned a verdict for Devani and awarded compensatory and punitive damages.

Harley appeals. He contends the trial court abused its discretion in failing to grant his motions for leave to amend.

II. Scope of Review. We reverse rulings on motions to amend pleadings only upon a clear showing of abuse of discretion. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa App. 1997) (citations omitted) (finding discretion abused in denial of motion to amend where motion was unresisted and filed seven months before trial).

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[1]The remaining counts were fraudulent conveyance claims unrelated to issues presented by this appeal.

III. The Merits. Harley first contends the trial court should have allowed him to amend his answer to assert the statute of limitations as a defense. The statute of limitations is an affirmative defense which must be asserted in a separate division of a responsive pleading. *Krupke v. Witkowski,* 256 N.W. 2d 216, 218 (Iowa 1977). Failure to plead an affirmative defense normally results in its waiver, unless the issue is tried with the parties' consent. *Dutcher v. Randall Foods,* 546 N.W.2d 889, 893 (Iowa 1996).

Iowa Rule of Civil Procedure 69 governs amendments to pleadings:

> (d) Amendments. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Leave of court is required to give the other side the right to object to amendments which might affect their preparation for trial. *Norwest Bank Marion National Ass'n v. L.T. Enter, Inc.,* 387 N.W 2d 359, 365 (Iowa App. 1986). The trial court has considerable discretion in allowing amendments. *Whalen v. Connelly,* 545 N.W.2d 284, 293 (Iowa 1996).

We cannot conclude the trial court abused its discretion in denying the defendant's motion to amend. Devani filed her petition on July 5, 1996, alleging Harley began his sexual assaults on November 17, 1992, and continued them through September, 1994. Trial was originally set for August 11, 1997. Harley did not raise

the statute of limitations as a defense prior to the first trial date. Three days before trial was scheduled to begin, he filed a bankruptcy petition and a stay issued. On January 9, 1998, the bankruptcy court modified the stay to allow a trial on four counts of Devani's petition. The new scheduling order closed pleadings on April 1, 1998 Harley first sought to amend his answer to include a statute of limitations defense on April 24, 1998, just four days prior to trial and after the discovery deadline was closed. To allow amendment of Harley's answer just days before trial would have been clearly prejudicial to Devani. Because the statute of limitations had not been raised as an affirmative defense as required by law, there was no reason for Devani to prepare to rebut such a claim. The time for discovery had passed. The denial of Harley's motion to amend presents no abuse of discretion.

Defendant next contends the trial court erred in failing to grant his renewed motion to amend his answer made at the close of the evidence. Harley moved to amend his answer to conform to the proof and requested the court to instruct the jury regarding his statute of limitations defense. At trial, Harley had testified the last improper sexual contact he had with plaintiff occurred in June, 1994. Plaintiff did not object to this testimony, but presented persuasive evidence that Harley's sexual abuse of Devani continued through at least August of 1994.

Harley contends that as a result of his testimony, the issue of the statute of limitations was tried by consent. We find this contention meritless. It is true that when a party introduces evidence without objection on an issue not raised by the pleadings, the court may consider the matter tried by consent. Iowa R. Civ. P.119;

Folkers v. Britt, 457 N.W.2d 578, 580 (Iowa 1990). However, consent will not be found where the evidence was also admissible on a different issue that was raised by the pleadings. *Dutcher*, 546 N.W.2d at 893. A party cannot be expected to object to evidence on the basis it goes to an issue not raised in the pleadings when the same evidence is also admissible on another issue properly raised. *Id.* When the evidence is relevant to an issue already properly in the case, its introduction would not signal to the opposing party that a new issue is being tried. *Id.* Here, the nature and extent of Harley's sexual abuse of Devani was central to other issues in this case. Devani would have had no legitimate reason to object to this evidence. The issue of the statute of limitations was not tried by consent. The trial court did not abuse its discretion in denying the defendant's motions.

AFFIRMED.