FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HARRY WATERS, d/b/a RAINBOW HELICOPTERS,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	
CITY OF MONONA, IOWA,	)	3-89 / 2-68714
Defendant-Appellant,	)	
KENNETH PETERS,	)	
Defendant.	)	

Appeal from Clayton District Court - Robert J. Curnan, Judge.

Defendant appeals from a judgment on an adverse jury verdict holding it liable, pursuant to Iowa Code Chapter 613A, for damages to plaintiff's helicopter which were caused when a city employee ran into it with a utility tractor. AFFIRMED.

Donald H. Gloe and Marion L. Beatty of Miller, Pearson, Gloe, Burns & Beatty, P.C., Decorah, for defendant-appellant.

Barry S. Mueller of Kelly & Mueller, P.C., Postville, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

DONIELSON, J.

Defendant, City of Monona, appeals from a judgment on an adverse jury verdict holding it liable, pursuant to Iowa Code Chapter 613A, for damages to plaintiff's helicopter which were caused when a city employee ran into it with a utility tractor. The numerous issues raised by the city on appeal concern the adequacy of the pleadings to state a cause of action, the sufficiency of the evidence, the correctness of certain jury instructions, the propriety of a restriction on the city's closing argument, and the correctness of the trial court's exclusion from evidence certain alleged admissions against interest made by plaintiff in his deposition.

I.

The facts in this case are not substantially in dispute. Plaintiff owned a helicopter which was parked at an airport owned and operated by the City of Monona. Plaintiff used his helicopter for crop dusting, and the machine had two spray booms attached to its fuselage for that purpose. Kenneth Peters, a city employee, was mowing grass at the airport with a utility tractor. Apparently the spray booms extended out over the area which Mr. Peters was mowing, and when plaintiff refused to move the helicopter, Mr. Peters ran into the spray boom with his tractor.

Plaintiff initially recovered a judgment against Kenneth Peters, but he apparently found that judgment difficult to collect. He then filed the present lawsuit against the City of Monona. The city contends that Mr. Peters struck the helicopter intentionally because he was irritated about plaintiff's refusal to move the machine. Although plaintiff's petition alleged alternative theories of recovery based upon either negligence or intentional tort, the city contends that there is no substantial evidence to support a finding of negligence. The city argues that because the act was deliberate, Mr. Peters was acting outside the scope of city

employment at the time he damaged the helicopter, and therefore his liability is not attributable to his employer. See Iowa Code section 613A.2 (1981).

The trial court refused to direct a verdict for the city on these grounds, and the case was submitted to the jury. The jury returned a verdict for plaintiff and against the city. The city appeals from the resulting judgment.

II.

The primary issue raised on appeal concerns whether or not intentional conduct resulting in a tort can fall within the acting employee's "scope of employment" as contemplated by Iowa Code section 613A.2 (1981). We note at the outset that no substantial evidence exists in the record to support a finding that Mr. Peters ran into plaintiff's helicopter by accident. Evidence is substantial when a reasonable mind would accept it as adequate to support a conclusion. Briggs v. Bd. of Directors of Hinton Community School Dist., 282 N.W.2d 740, 743 (Iowa 1979). At trial, all of the eyewitnesses testified that Mr. Peters appeared to intend to hit the helicopter. Testimony also indicates that Mr. Peters threatened to move the helicopter himself if plaintiff did not get it out of his way. Finally, Mr. Peters admitted on cross examination that he hit the spray boom in an attempt to move the helicopter out of his way. The city is therefore correct in asserting that the jury could not have premised the city's liability on a finding that Mr. Peters was negligent in hitting plaintiff's helicopter.

The city is not correct, however, in its assertion that a finding of intentional conduct precludes, as a matter of law, a finding that the actor was within the "scope of his employment." As a rule, an act is within the scope of a servant's employment whenever it is necessary to accomplish the purpose of his employment and is intended for that purpose. See Sandman v. Hagen, 154 N.W.2d 113, 117 (Iowa 1967); West v. F. W. Woolworth Co., 1 S.E.2d 546, 548 (N. Car. 1939); Wood v. Southeastern Greyhound Lines, 194 S.W.2d 81, 83 (Ky. 1946); and Texas &

P. Ry. Co. v. Crown, 220 S.W.2d 294, 297 (Texas 1949). While an employer is generally not liable for "willful and malicious" acts of his employees, it is clear that where the employer's interests are being served by the employee's conduct, liability may attach. Ordinarily it is for the jury to decide whether or not a particular act falls within the actor's "scope of employment." Sandman at 118.

The common law test to determine whether the servant's act was outside the scope of his employment is "whether the [servant's] conduct is so unlike that authorized that it is 'substantially different.' " Sandman, at 117. That is, any deviation from the employer's business or interest must be substantial in nature to relieve the employer from liability. We point out that an act may be within the scope of the servant's employment despite the fact that it was forbidden by his employer. See Fowser Fast Freight v. Simmont, 78 A.2d 178, 181 (Md. 1951). See also Heintz v. Iowa Packing Co., 222 Iowa 517, 268 N.W. 607 (1936), and Lewis v. Schultz, 98 Iowa 341, 67 N.W. 266 (1896). Iowa Code section 613A.2 (1981) expands on the common law, and provides two elements which must be found for a municipal employee's act to fall within the scope of his employment. The jury must find that he acted in good faith, and also in a manner which "a reasonable person would have believed to be in and not opposed to the best interests of the municipality."[1]

The city cites as error the trial court's refusal to either direct a verdict for the city or grant a judgment notwithstanding the verdict on the ground that the jury could not have found that Mr. Peters acted in good faith and in a manner consonant with the best interests of the city. We do not agree. The jury was

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[1] This paragraph, which arguably provides a stricter standard than the common law test for "scope of employment," has been deleted in its entirety from the 1983 Iowa Code, presumably to enable future minicipal tort claims based upon the doctrine of respondeat superior to be adjudicated in conformity with prevailing common law.

properly instructed as to the elements it had to establish in order to find that Mr. Peters was acting within the scope of his employment when he damaged plaintiff's helicopter. For the court to enter a judgment notwithstanding the verdict of the jury under these circumstances it must be clear that reasonable minds could not disagree, and that the jury's determination on the issue was palpably wrong.

> In determining whether a jury question was engendered when a party seeks a directed verdict, dismissal, or judgment notwithstanding the verdict, the trial court views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted and every legitimate inference which may be reasonably deducted therefrom must be carried to the aid of the evidence and if reasonable minds can differ on the issue it is for the jury.

Meeker v. City of Clinton, 250 N.W.2d 822, 828 (Iowa 1977).

In the case at bar, the evidence indicated that Mr. Peters was mowing the grass at the airport before, during and after the incident. Despite testimony that Mr. Peters exchanged harsh words with plaintiff before hitting plaintiff's helicopter, and the obvious inference that Mr. Peters deliberately damaged the helicopter in anger, we are convinced that a jury question regarding Mr. Peters' intent was engendered. Mr. Peters testified that he was trying to move the helicopter out of his way so that he could finish his work. Moreover, the jury might have determined that had Mr. Peters really intended to damage the helicopter, he would have run his tractor directly into the fuselage rather than into the protruding spray boom. Taking into account the fact that Mr. Peters is of limited mental capacity, the jury could have found that, absent any intent to damage the helicopter, Mr. Peters acted in "good faith."

Clearly it was in the city's best interests to have Mr. Peters complete his mowing as quickly and as efficiently as possible. The city argues that in no way could it be construed to have been in its best interest to have plaintiff's helicopter damaged. We agree, however the city has misstated the real issue. The issue for

the jury to consider is not whether the actual result was "in and not opposed to the best interests of the municipality," but rather whether the intended result was. Once again we point out that the evidence produced at trial raised a jury question regarding Mr. Peters' intent when he ran into the spray boom.

III.

The city contends that the trial court's instructions on negligence were too general since they failed to set forth a specific act of negligence shown by the evidence or define the duties owed by the city's employee to plaintiff. As a threshold issue, we note that "[i]n order to urge this objection successfully on appeal . . . the objector must have asked the trial court for more specific instructions." Lang v. City of Des Moines, 294 N.W.2d 557, 561 (Iowa 1980). Plaintiff argues that since the city did not submit proposed written objections or dictate into the record the "exact language which it felt was needed to solve its objections," it waived its objections. We do not agree. Iowa Rule of Civil Procedure 196 only requires that objections to proposed instructions specify "the matter objected to and on what grounds." Our review of the record indicates that the city's objection was sufficiently specific to meet the requirements of rule 196, and alert the trial court to the basis of the objection. See Wambsgans v. Price, 274 N.W.2d 362, 365 (Iowa 1979).

Having determined that error has been properly preserved, we move on to review the merits of the city's objection. Jury Instruction number 8A provided that:

> "[n]egligence" is the want or omission of ordinary care; the failure to do something which a reasonably prudent person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do; or the doing of something which such a person, under such circumstances, would not do. "Ordinary care" is that degree of care which an ordinary careful and prudent person would exercise under the circumstances.

Jury Instruction number 12 further provided that:

> [I] n order for the plaintiff, Harry Waters, to recover under his claim against defendant, City of Monona, the burden of proof is upon the plaintiff to establish by a preponderance of the evidence either: (1) That Kenneth Peters was negligent in striking or moving [plaintiff's] helicopter with his tractor OR (2) That Kenneth Peters intentionally struck [plaintiff's] helicopter with his tractor.

We are of the opinion that instruction 8A adequately defined the duty of care owed by Mr. Peters to plaintiff, and that instruction 12 adequately detailed the specific act of negligence established by the evidence. Because the city does not challenge these instructions on any other ground, we hold that the trial court did not err in its instructions on negligence.

The city alleges error in the trial court's instruction on contributory negligence. The city has failed to preserve error on this issue, however, and we cannot entertain it. See Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 237 (Iowa 1974)("failure to take timely exception to instructions waives the right to assert error in them later").

IV.

At trial, the city requested an instruction to the jury informing them that Kenneth Peters had been a party to the lawsuit and had been adjudged to be in default for failure to file an answer. The city argued that Mr. Peters' status reflected upon his credibility as a witness, however the issue of Mr. Peters' status was never raised by the city during cross examination. The trial court denied the city's request, and the city cites error in that denial.

It is the duty of the trial court to submit to the jury instructions concerning all issues presented by the pleadings which have support in the record. By the same token, it is reversible error for the court to submit an instruction on an issue which has no support in the record. Steichen v. Shepherd, 216 N.W.2d 412, 414 (Iowa 1974). In the present case, no issue concerning the status of Mr. Peters had

been raised prior to the requested instruction, and no attempt had been made at trial to impeach his testimony. As plaintiff pointed out, the city requested an instruction for impeachment purposes without having ever tried to impeach the witness. The trial court was therefore obligated to refuse to give the requested instruction.

We note parenthetically that even had the city attempted to raise the issue of Mr. Peters' status as a party in default, the trial court had discretionary power to withhold that information from the jury. "The trial court has discretionary authority to exclude evidence when the probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury." Henkel v. R & S Bottling Co., 323 N.W.2d 185, 193 (Iowa 1982). Information concerning Mr. Peters' status was of little probative value since there is no indication that Mr. Peters entertained any interest in the outcome of the trial as a result thereof. Moreover, an instruction that Mr. Peters was a party in default was likely to mislead the jury as to who were the actual parties in interest.

V.

In deposition testimony, plaintiff offered his opinion (in response to direct questioning) that Mr. Peters' action of intentionally running into plaintiff's helicopter was not in "good faith" and was not in the city's best interests. The city requested permission to read this opinion testimony to the jury as an admission against interest. The trial court refused to allow the city to do so on the ground that it would invade the province of the jury to introduce opinion testimony concerning ultimate legal conclusions. The city cites error in the trial court's refusal.

"We have repeatedly said the receipt of opinion evidence, lay or expert, rests largely within the sound discretion of trial courts, and we will not reverse

their ruling unless manifest abuse of discretion is shown." Porter, 217 N.W.2d at 231. Moreover, if the trial court refuses to admit the opinion evidence, its ruling will be sustained on appeal if the evidence can be held to be inadmissible under any theory. Id. at 231. As a rule, opinion evidence is inadmissible if it calls for an opinion on a question of law. Hegtvedt v. Prybil, 223 N.W.2d 186, 189 (Iowa 1974). Since the opinion testimony the city sought to read to the jury called for an opinion concerning the standards of liability under Iowa Code section 613A.2 (1981), the trial court was within its discretion in refusing to permit its admission.

VI.

At trial, the city requested permission to read certain portions of plaintiff's petition to the jury. Plaintiff's petition alleged alternative causes of action, and two divisions charged that Kenneth Peters, while in the employment of the city, "intentionally, purposely, deliberately and with premeditation" ran into and damaged plaintiff's helicopter. The city additionally requested permission to explain to the jury that the general denial of this allegation contained in its answer was intended only as a denial of a certain part of the petition, and was not intended to deny the allegation that Mr. Peters had intentionally damaged the helicopter. The trial court refused the city's requests on the grounds that reading the pleadings to the jury would be misleading as to the position of the parties, that a party's intent concerning a general denial to allegations contained in a petition is not evidence, and that the city's proposed explanation of its answer was a misstatement of the law, since a general denial serves to deny all facts alleged in the paragraph denied.

We find the reasoning of the trial court to be sound. As we pointed out in Division IV of this appeal, "the trial court has discretionary authority to exclude evidence when the probative value is substantially outweighed by the danger of . . . misleading the jury." Henkel, 323 N.W.2d at 193. We will not disturb the

trial court's decision on these matters absent a clear abuse of discretion. There is no support in the record for the assertion that the trial court abused its discretion when it refused to allow the pleadings to be read to the jury and commented on by counsel.

We have reviewed all of the City of Monona's allegations on appeal and find them to be without merit. Finding no error in the court below, its judgment is affirmed.

AFFIRMED.