



IN THE COURT OF APPEALS OF IOWA

KENNETH D. KRAMER,

Appellant,

vs.

CARDINAL INDUSTRIAL
CONTRACTORS, INC.,

Appellee.

Filed September 9, 1977

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2-58885

Appeal from Floyd District Court - B. C. Sullivan, Judge.

Appeal from trial court's ruling which permitted defendant to amend its answer on the day of trial.

AFFIRMED.

Alfred A. Beardmore, of Charles City, and Charles James Suk, of Dingle & Suk, Ltd., of Rochester, Minn., counsel for appellant.

Warren L. DeVries, of Mason City, and William Pappas, of Mason City, counsel for appellee.

Submitted to Albee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

This appeal focuses upon whether the trial court abused its discretion in permitting the defendant to amend its answer on the day of trial to allege the plaintiff's contributory negligence as an affirmative defense. The court below entered a judgment in favor of the defendant Cardinal Industrial Contractors, Inc. in an action for damages due to an injury sustained by the plaintiff resulting from a fall into an open pit.

On October 24, 1975, the day of the trial, the defendant filed an amendment to his answer, wherein he alleged the contributory negligence of the plaintiff. Upon submission of the case, the jury found for the defendant and answered special interrogatories finding both the defendant and plaintiff negligent.

The record in this case indicates that the plaintiff-appellant did not make a timely objection or otherwise resist the amendment to the answer in the court below, and, therefore, did not preserve the error on appeal. In *Miller v. King*, 240 Iowa 1336, 1341, 39 N.W.2d 307 (1949), the court held that in order to preserve error on appeal, an amendment to a pleading must be challenged in the trial court either by resistance to the motion to amend or by a motion to strike the amendment if it is filed before opportunity for resistance. Accord, *McCormick Harvesting Machine Co. v. Richardson*, 89 Iowa 525, 532, 56 N.W. 682 (1893).

Notwithstanding appellant's failure to make a timely objection to appellee's amendment, the fact that appellant proceeded to try the case on the merits implies that he consented to the amendment and waived any error which may have existed. However, assuming arguendo that error was preserved, we feel that the trial court did not abuse its discretion by permitting the amendment on the day of trial. Rule 88, Rules of Civil Procedure. Decisions regarding such amendments are within the sound discretion of the trial court and should be allowed when justice so requires if they do not substantially change the issue. See, *Atlantic Veneer Corp. v. Sears*, 232 N.W.2d 499, 503 (Iowa 1975); *Galbraith v. George*, 217 N.W.2d 598, 601 (Iowa 1974); *Smith v. Village Enterprises, Inc.*, 208 N.W.2d 35, 37 (Iowa 1973); *Brown v. Guiter*, 256 Iowa 671, 675, 128 N.W.2d 896 (1964). The allowance of amendments is the rule, and we do not believe that this amendment would change the issue to such an extent as to convert this into one of the exceptions. Therefore, we affirm the decision of the trial court.

AFFIRMED.