

IN THE COURT OF APPEALS OF IOWA

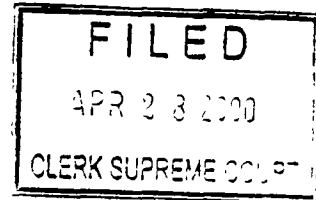
No. 1999-387 (9-640) / 98-2197

Filed April 28, 2000

TAMMY R. SHEPHERD and DEBORAHANNE DUVALIER,
Plaintiffs-Appellants,

vs.

DAN FLICK AND KAREN FLICK,
Defendants-Appellees.



Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

Plaintiffs appeal the district court's grant of judgment notwithstanding the verdict to defendants on the punitive damage element of a jury verdict.

REVERSED.

Garold F. Heslinga of Heslinga, Heslinga, & Dixon, Oskaloosa, and George L. Lind, Oskaloosa, for appellants.

Greg A. Life of Life Law Office, Oskaloosa, for appellees.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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ZIMMER, J.

Plaintiffs, Tammy Shepherd and Deborahanne Duvalier, appeal the district court's ~~grant~~ of judgment notwithstanding the verdict to defendants on the punitive damage element of a jury verdict. In a case where two wrongs do make a right, we reverse and reinstate the jury's award of punitive damages.

Defendants Dan and Karen Flick employed Shepherd and Duvalier at their restaurant. Shepherd and Duvalier filed suit in November of 1997, alleging assault, intentional infliction of emotional distress, and sexual harassment in violation of the Iowa Civil Rights Act ("ICRA"), Iowa Code Chapter 216. They included a prayer for punitive damages based on the assault.

Trial commenced in October of 1998. The jury returned a verdict for the plaintiffs on the sexual harassment count only¹ and awarded punitive damages. The Flicks filed a combined motion for judgment notwithstanding the verdict and new trial. The plaintiffs resisted the motions. The trial court granted the JNOV motion on the punitive damage claim, finding ICRA did not authorize such an award.

Shepherd and Duvalier appeal. Although they agree the ICRA does not authorize punitive damage awards, they contend JNOV was not the proper vehicle for vacating that part of the award because the Flicks did not raise that particular issue in their motion for directed verdict. Contrary to their position below, Shepherd and Duvalier argue the district court should have ordered a new trial.

¹ We note that the plaintiffs were not entitled to a jury trial on their claims under the ICRA but were mistakenly given one. See *Smith v. ADM Feed Corp.*, 456 N.W.2d 378, 384 (Iowa 1990).

I. Scope of Review. We review the trial court's grant of a motion for judgment notwithstanding the verdict for the correction of errors at law. *Seastron v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 345 (Iowa 1999). We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. *Id.* Our only inquiry is whether there was sufficient evidence to justify submitting the claim to the jury. *Id.*

II. Judgment Notwithstanding the Verdict. Shepherd and Duvalier claim because the Flicks' motion for directed verdict made no mention of the punitive damages, the Flicks were not able to challenge that part of the award in their JNOV motion. They also point out the Flicks did not challenge the instructions which permitted the punitive damages until their post-trial motions. The plaintiffs also urge that because the damage instructions contained an error of law, a new trial should have been granted instead of a JNOV.

Iowa Rule of Civil Procedure 243(b) provides that if a movant was *entitled* to a directed verdict at the close of the evidence and moved therefor, only then may the court enter JNOV. We agree the right to present a JNOV motion under rule 243(b) depends on first having moved for a directed verdict. See Iowa R. Civ. P. 243(b) and Comment. A JNOV motion must stand or fall on the grounds raised in the motion for directed verdict. *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995). The Flicks did move for a directed verdict but did not raise the punitive damage issue which formed the basis for the trial court's entry of JNOV.

Furthermore, the Flicks would not have been *entitled* to a directed verdict on the punitive damage claim at the close of the evidence. The only question on

a JNOV motion is whether there was sufficient evidence to submit the issue to the jury. *Snodgrass*, 601 N.W.2d at 345. The punitive damage claim went with the intentional tort claims, not the ICRA claim. Since there was sufficient evidence to submit the intentional tort claims to the jury, a punitive damage claim was submissible if properly limited to those claims. The error arose when the jury followed the instructions which misstated the law. The instructions should have told the jury that if it did not find for the plaintiffs on the assault claim, no punitive damages should be awarded. Instead, the instructions erroneously permitted the jury to award punitive damages even though it only found for the plaintiffs on the ICRA claim. See Iowa Code § 216.15(8) (1997); *City of Hampton v. Iowa Civil Rights Com'n*, 554 N.W.2d 532, 537 (Iowa 1996) (stating punitive damages are not available under ICRA). Neither plaintiffs nor defendants advised the trial court the damage instructions misstated the law before the case was submitted to the jury. Under these circumstances, we conclude a JNOV was not the proper vehicle for correcting the jury's award.

We think under normal circumstances the proper vehicle would have been to grant a new trial, because the issue was really the error of law contained in the instructions, not the sufficiency of the evidence to make out a jury question. A trial court is without discretion to deny a motion for new trial when the jury instructions contain a material misstatement of the law. *In re Estate of Todd*, 585 N.W.2d 273, 277 (Iowa 1998). We have already discussed why these instructions were erroneous. Assuming the parties had made the proper record on the erroneous jury instructions, the trial court would have abused its discretion if it had failed to grant a new trial.

However, these parties did *not* make the proper record. The issue here becomes whether the court may, *after* the case has been decided by the jury, set aside the verdict on a perceived error that was not pointed out by any party prior to the submission of the case. Our supreme court has held error preservation rules preclude the trial court from doing so. *Field v. Palmer*, 592 N.W.2d 347, 352 (Iowa 1999). The defendants delayed objections until it was too late for the problem to be corrected. See *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980). Errors to which objection could be made at trial may not be raised for the first time as grounds for new trial, *id.*, and cannot be considered by the trial court as a basis for granting the post-trial motion. See generally, *Field*, 592 N.W.2d at 352. When proper objections are not lodged, erroneous instructions stand as the law of the case. See *Randa v. U.S. Homes, Inc.*, 325 N.W.2d 905, 909 (Iowa App. 1982). Erroneous as it may be, the punitive damage award stands.

We reverse the grant of JNOV, sustain the denial of defendants' new trial motion, and reinstate the punitive damage award.

REVERSED.

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