

FILED

JUN 24 1980

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY JANE EATON,)

Plaintiff-Appellant,)

Filed June 24, 1980

vs.)

DRAKE UNIVERSITY,)

Defendant-Appellee.)

0-132
2-63998

Appeal from Polk District Court - Gibson Holliday, Judge.

Plaintiff appeals from judgment for defendant-university in her suit seeking an injunction against and damages from defendant as result of its continued operation of a large air conditioner near her residence. - AFFIRMED.

Mary Jane Eaton, Des Moines, pro se.

James Evans Cooney, of Ahlers, Cooney, Dorweiler, Haynie & Smith, Des Moines,
for defendant-appellee.

Heard by Oxberger, C.J., and Carter and Snell, JJ. Donielson and Johnson, JJ.,
take no part.

PER CURIAM

Plaintiff appeals from a judgment for defendant-university in her suit seeking an injunction against and damages from defendant as a result of its continued operation of a large air conditioner near her residence. Plaintiff contends the trial court erred in denying her request for a jury trial, in denying her motion for a continuance to secure a witness for trial, in admitting evidence regarding offers of settlement, in admitting testimony that allegedly violated the attorney-client privilege, and in overruling her motion for a new trial. We affirm.

On April 15, 1976, plaintiff filed her petition alleging defendant had created a nuisance by constructing a large air conditioner near her residence. Plaintiff asserted that the air conditioner emitted noise and fumes to the extent that it interfered with the comfortable enjoyment of her life and property. Plaintiff sought permanent injunction and damages. Defendant filed an answer denying plaintiff's allegations and subsequently filed an amendment to its answer seeking attorney fees because of plaintiff's allegedly unreasonable refusal to accept a number of settlement offers proposed by defendant. Seven days after the filing of defendant's amendment to its answer, plaintiff filed a written demand for a jury trial, which the trial court overruled. Plaintiff subsequently filed a motion for a continuance for the purpose of securing a witness for trial. The trial court overruled the motion for continuance but offered to grant plaintiff a period of time after the rest of the trial was completed within which to produce the witness. Plaintiff rejected trial court's offer and the witness was never produced. The case was tried to the court and the trial court found in favor of defendant. Plaintiff filed a timely motion for a new trial which was overruled by the trial court.

Our review is for the correction of errors at law. Iowa R. App. P. 4. In this case tried to the court, the trial court's findings of fact have the effect of a special verdict. Id. They are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Plaintiff contends the trial court erred in denying her request for a jury trial. Iowa R. Civ. P. 177(b) provides in pertinent part: "A party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue." The

only written demand for a jury trial in the record was made seven days after defendant's amendment to its answer raising the new issue of assessing defendant's attorney fees as costs. This is the only issue to which plaintiff's demand for jury trial was timely. With regard to the other issues, plaintiff's demand was untimely and although the trial court had discretion to grant plaintiff's request for a jury trial on those issues pursuant to rule 177(d), we decline to conclude that the trial court abused its discretion in denying plaintiff's request for a jury trial on the other issues previously pleaded. See Schupbach v. Schuknecht, 204 N.W.2d 918, 920 (Iowa 1973). With regard to the issue raised by defendant's amendment to its answer, we conclude that plaintiff was entitled to a jury trial on the sole issue of including defendant's attorney fees as costs taxable to plaintiff. See Universal C.I.T. Credit Corp. v. Jones, 227 N.W.2d 473, 475 (Iowa 1975). However, since defendant did not receive a judgment in its favor on that issue, plaintiff was not prejudiced by the trial court's ruling and a reversal is not justified on such harmless error. Baysinger v. Haney, 261 Iowa 577, 583, 155 N.W.2d 496, 499 (1968).

II. Plaintiff contends the trial court erred in denying her motion for a continuance to secure the presence of a witness at trial. A ruling on a motion for a continuance is within the broad discretion of the trial court and we will only interfere when an abuse of that discretion is clearly shown. Madison Silos v. Wassom, 215 N.W.2d 494, 498 (Iowa 1974). In light of the evidence that the trial court offered to allow the case to remain open for a period of time after the close of the other evidence and defendant's counsel's offer to take the witness's deposition, we cannot conclude that the trial court abused its discretion in denying the motion for continuance when plaintiff rejected those offers. Cf. Winklemans v. Des Moines Northwestern Railway, 62 Iowa 11, 13-14, 17 N.W. 82, 82-83 (1883) (denial of continuance was proper when trial court had already allowed the case to remain open to give party time to produce witnesses).

III. Plaintiff contends the trial court erred in admitting certain offers of settlement into evidence. With regard to the offers of settlement made by plaintiff that were admitted in evidence, we note that plaintiff's counsel expressly made no objection to the admission of that evidence. In light of that failure to object, plaintiff may not complain of the admission of that evidence on appeal. See Ferguson v. Stillwell, 224 N.W.2d 11, 13 (Iowa 1974) (quoting Cestner v. Wright, 256 Iowa 638, 652, 127

N.W.2d 583, 591 (1964)). Plaintiff's contention of error in the introduction of defendant's offers of settlement is also without merit. Defendant introduced the evidence of its offers of settlement to prove plaintiff's recalcitrance rather than its own liability. Thus, the evidence was properly admitted. Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 921 (Iowa 1979).

IV. Plaintiff contends the trial court erred in allowing the defendant to cross-examine her on matters within the attorney-client privilege on the ground that those matters are inadmissible under section 622.10, The Code 1979. This contention is without merit with regard to those inquiries concerning plaintiff's prior legal counsel in the case since those inquiries were not directed toward any communication between plaintiff and those attorneys. With regard to those inquiries concerning whether plaintiff's attorney recommended that she accept defendant's offer of settlement, we think the record affirmatively established that plaintiff's answer of "In 1979, it was shown to me, and nobody suggested I take it" was not sufficiently prejudicial to warrant a reversal. See Bellew v. Iowa State Highway Commission, 171 N.W.2d 284, 291 (Iowa 1969).

V. Plaintiff contends the trial court erred in overruling her motion for a new trial. We will interfere with a trial court's ruling on a motion for a new trial only when the evidence clearly shows an abuse of discretion. Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978). From our review of the record, we cannot conclude that the trial court abused its discretion in refusing to grant plaintiff a new trial.

AFFIRMED.