FILED.
SEP 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

UNGER INSURANCE, LTD., Plaintiff-Appellee,	)	Filed September 25, 1986 235
vs.	)	
RAYMOND C. THEDE and **NORMA E. THEDE,** d/b/a **THEDE TRUCKING,** Defendants-Appellants.	)	6-274 85-1900

Appeal from the Iowa District Court for Greene County (No. 16760) - James C. Smith, Judge.

Defendants appeal from the district court's award of summary judgment to plaintiff, contending that the trial court abused its discretion in refusing to grant them leave to amend their answer and that the court erred in sustaining plaintiff's motion for summary judgment. **AFFIRMED.**

Robert L. Horak and Anne M. McNamara of Horak Law Offices, Jefferson, for defendants-appellants.

Michael F. Mumma of Mumma Law Firm, Jefferson, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM 236

On July 19, 1985, the plaintiff, Unger Insurance, Ltd., filed its petition seeking recovery from the defendants, Raymond C. Thede and Norma E. Thede, doing business as Thede Trucking, for nonpayment of account for insurance premiums and services, for breach of implied contract, and on the basis of quantum meruit. Attached to plaintiff's petition was a bill of particulars specifying the insurance and services allegedly provided to the defendants. The defendants' answer, filed on August 12, 1985, admitted certain of the allegations, including admissions that the insurance and services alleged by the plaintiff to be received and accepted by the defendants had, in fact, been received and accepted by them and that both Raymond and Norma Thede are proprietors of Thede Trucking. That answer was filed by James D. Beatty, the attorney representing the defendants at that time.

Also on August 12, 1985, a motion to make more specific was filed on behalf of the defendants by Robert L. Horak, who had been retained by the defendants to represent them. On August 16, 1985, Beatty filed an application to withdraw as counsel for the defendants together with an application to withdraw the answer he had filed on the defendants' behalf. On October 1, 1985, the former application was sustained and the latter application overruled.

On October 30, 1985, plaintiff filed a motion for summary judgment together with supporting brief and affidavit. Defendants' resistance to the summary judgment motion, brief in support of the resistance, affidavits, and an amendment to their answer were filed on November 25, 1985, at 4:00 P.M. Hearing on plaintiff's motion for summary judgment had previously been set for the following day, November 26, 1985, at 9:30 A.M.. The twenty-day period during which the amendment could be made without leave of court under Iowa R. Civ. P. 88 had, by this time, passed. No formal application for leave to

amend the answer was filed by the defendants, and their oral request for leave to amend, made at the hearing on the motion for summary judgment, was made only upon the suggestion of the district court. This oral request was overruled and the district court thereupon granted plaintiff's motion for summary judgment. This appeal followed.

The defendants first contend that the district court abused its discretion when it refused to grant the defendants' leave to amend their answer. In their amendment, defendants sought to withdraw their answer and substitute a denial insofar as the answer admitted that Norma E. Thede and Raymond C. Thede were proprietors of Thede Trucking. In addition, the amendment set forth as affirmative defenses the allegations that Norma E. Thede was not a partner of Raymond C. Thede and was not doing business as Thede Trucking, that the defendants did not order or accept the insurance involved in this action, and that there was no agreement between the parties to pay interest on the alleged insurance or services.

The allowance or disallowance of amendments to pleadings under Iowa R. Civ. P. 88 is a matter for the exercise of the trial court's discretion. Chao v. City of Waterloo, 346 N.W.2d 822, 825 (Iowa 1984). This discretion is broad and will not be interfered with on appeal unless the discretion is abused. Kellar v. Peoples National Gas Co., a Div. of InterNorth Inc., 352 N.W.2d 688, 692 (Iowa Ct. App. 1984). Although the allowance of amendment to pleadings is the rule and denial the exception, amendment is not permissible if it will substantially change the issues. Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 225 (Iowa Ct. App. 1984). Amendments to pleadings should not be allowed on the eve of trial or later if they substantially change the defense. Parker v. Tuttle, 260 N.W.2d 843, 846 (Iowa 1977).

As we read the district court's ruling on the motion for summary judgment, the court was persuaded that the defendants' amendment, if allowed, would substantially change the issues. At the time of the hearing, the issues in the case, as framed by the pleadings, did not include the proprietorship of Thede Trucking nor the acceptance of the insurance by Thede Trucking, as both of these issues had been admitted by the defendants in their answer. We cannot say that the district court abused its discretion when it denied the defendants' leave to amend.

The defendants' second argument is that, as genuine issues of material fact remain to be determined, the district court improperly sustained plaintiff's motion for summary judgment. As we have held that the district court did not err when it disallowed defendants' amendment, we need not consider issues which may have been raised by that document.

When a district court is confronted with a motion for summary judgment, it is required to examine, in the light most favorable to the party opposing the motion, the entire record before it including pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any, to determine whether any genuine issue of material fact is generated thereby. Drainage District No. 119, Clay County v. Incorporated City of Spencer, 268 N.W.2d 493, 499 (Iowa 1978). Summary judgment is properly granted only where there is no issue as to a material fact and the moving party is entitled to judgment as a matter of law. Froning & Deppe, Inc. v. South Story Bank & Trust Co., 327 N.W.2d 214, 215 (Iowa 1982). If an examination of the record discloses any allegations of ultimate fact which, if found true, would constitute a good defense to an action, a summary judgment motion must be overruled. Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974). The burden is on the moving party to show that

no genuine issue of material fact exists. Neoco v. Christenson, 312 N.W.2d 559, 560 (Iowa 1981).

In the present case, the admitted relevant portions of the petition and the answer establish that Thede Trucking is a proprietorship owned by both defendants and that the defendants received and accepted the insurance and services at issue here. These portions of the answer are binding upon the defendants unless withdrawn or in some way avoided. See Burns v. Chicago, Ft. M. & D.M. Ry. Co., 110 Iowa 385, 389, 81 N.W. 794, 795 (1900); Leo v. Leo, 239 Iowa 873, 876-77, 32 N.W.2d 777, 779-80 (1948). As we have noted above, the district court overruled both the defendants' application to withdraw their answer and their motion for leave to amend. They were therefore bound by their answer notwithstanding allegations in their affidavits which sought to raise factual issues already laid to rest by the pleadings. The remaining sections of the affidavits and record before the district court fail to raise any genuine issue of material fact. Accordingly, we affirm the district court's grant of summary judgment to the plaintiff.

AFFIRMED.