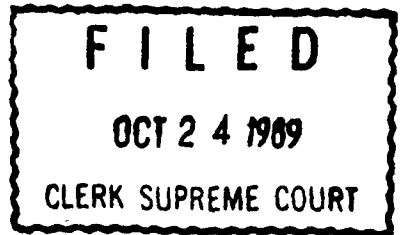


IN THE COURT OF APPEALS OF IOWA

No. 9-394 / 88-1470



MAHBOD SERAJI and MEHRI SERAJI,

Plaintiffs-Appellees,

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vs.

MICHAEL ALLEN PERKET and LENERTZ, INC.,

Defendants-Appellants.

Appeal from the Iowa District Court for Johnson County,
Thomas M. Horan, Judge.

Defendant Lenertz appeals a judgment for punitive
damages. **REVERSED.**

James A. Lorentzen and Michael D. Huppert of Patterson,
Lorentzen, Duffield, Timmons, Irish, Becker & Ordway,
Des Moines, for the defendants-appellants.

Gregg A. Geerdes and Philip M. Reisetter, Iowa City,
for the plaintiffs-appellees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

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Defendant-appellant Lenertz, Inc. appeals a judgment rendered against it for punitive damages following an accident between a truck driven by their employee, defendant Michael Allen Perket, and a car driven by plaintiffs-appellees, Mahbod Seraji and Mehri Seraji. Perket is not a party to the appeal. The jury's verdict assessed no punitive damages against Perket, despite having been instructed they could do so. Compensatory damages were awarded to plaintiffs against both Perket and Lenertz. Those damages have been paid and are not challenged on appeal.

Defendant Lenertz contends the award of punitive damages was not supported by substantial evidence. It also contends the verdict awarding punitive damages was not consistent with the instructions and the jury's refusal to award punitive damages against defendant Perket. The basic issues to be addressed are: (1) Can a corporation be assessed punitive damages as a result of the acts of an agent when a jury specifically finds no punitive damages should be assessed against the agent? (2) If they can, is the evidence here sufficient to support an award of punitive damages against the corporation? We reverse the award of punitive damages.

In Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983), the Iowa court determined the Restatement rules are the

proper rules to apply when determining corporate liability for punitive damages for acts of an employee.

This rule is termed the complicity rule. Morris, Punitive Damage in Personal Injury Cases, 21 Ohio St. L.J. 216, 221 (1960). It is expressed by the Restatement (Second) of Agency § 217C and the nearly identical Restatement (Second) of Torts § 909, which states:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or the managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1979).

Briner, 337 N.W.2d at 861.

A corporation is liable for the tortious conduct of its employees, Bethards v. Shivers, Inc., 355 N.W.2d 39, 45 (Iowa 1984); Burr v. Apex Concrete Co., 242 N.W.2d 272, 276 (Iowa 1976), and this includes liability for punitive damages under circumstances of complicity set out in section 909 of the Restatement (Second) of Torts. Bethards, 355 N.W.2d at 45. However, there must first be an act or conduct by the employee of a nature such as would justify a punitive damage award. Lenertz contends when the jury refused to award punitive damages against Perket, they

in essence made a finding he was not guilty of conduct to support a punitive damage award; therefore, an award cannot stand against them.

Corporate liability for punitive damages usually is based on a vicarious liability theory, unless there is some conduct that may appropriately be characterized as a corporate act, rather than an act of an individual agent or employee. See Ellis, Punitive Damages in Iowa Law: A Critical Assessment, 66 Iowa L. Rev. 1005, 1039 (1981). Before assessing vicarious liability for punitive damages, there must first be a finding the agent's conduct would justify an award of punitive damages. See Briner, 337 N.W.2d at 861. The tort that injured plaintiffs was the negligent driving of the truck. This was an act by an employee, not a corporate act. See Ellis at 1039.

The refusal of the jury to award punitive damages against Perket indicates the jury did not find an act of the agent justifying an award of punitive damages. The failure to find conduct of Perket justifying punitive damages precludes an award against Lenertz. See Bethards, 355 N.W.2d at 45; Briner, 337 N.W.2d at 861. We reverse the award of punitive damages.

Even if this were not the case, there is insufficient evidence to support an award of punitive damages. Under the rule approved in Briner, "exemplary damages can

properly be awarded against a principal because of an act by an agent only if (a) a managerial agent of the principal authorized or ratified the act, (b) the agent himself is shown to have been acting in a managerial capacity, or (c) the principal is shown to have been reckless in retaining an unfit agent." Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 382 (Iowa 1983).

To find Lenertz liable for Perket's acts, we must find there is substantial evidence to support an award. The claim made at trial, the issue submitted, and the claim in defendant's brief is there is substantial evidence showing Lenertz was reckless in hiring and retaining Perket because he allegedly was not a competent driver.

Plaintiffs make a series of statements as to why there is substantial evidence to support submission based on this theory. Plaintiffs' brief fails to direct us to where in the record the evidence supporting these statements appears. We therefore must make our own independent assessment of the record.¹

Plaintiffs contend Perket's driving during his employment with Lenertz shows Lenertz was reckless in

1. Plaintiffs' attorney is directed to Iowa R. App. P. 14, which provides in applicable part: "a. Appellant's brief. The brief of appellant shall contain . . . (5) [a]n argument . . . with citations to the authorities relied on and to the pertinent parts of the record" Subsection (b) of rule 14 makes these requirements applicable to the appellee.

retaining Perket. We find Perket had the following incidents or accidents during employment with Lenertz:

1. On July 5, 1983, Perket, in turning the truck, hit something overhead and did \$1,000 damage to the truck.
2. On October 11, 1983, Perket, while backing into a tight area, hit something, bending a mirror and denting a door on his truck.
3. On March 24, 1984, in North Carolina, Perket hit an overhang over gas pumps and damaged an 18" x 18" plastic light cover.

Defendant Lenertz made a determination in its company records Perket could have prevented these accidents. Plaintiffs contend Perket's driving record was such Lenertz was reckless in hiring him.

There is no evidence Perket had, prior to this time, been involved in an accident involving substantial property damage or personal injury. A review of a Department of Transportation abstract of Perket's driving record in an eleven-year period preceding the accident indicates Perket lost his license once for driving a motorcycle without a proper validation. He had moving violations which included three speeding tickets of nineteen miles per hour or less over the speed limit in 1979, and his license was revoked that year. Perket received a citation for driving eleven to nineteen miles per hour over the speed limit in 1980, and for driving on the wrong side of the road and inattentive driving in 1983.

This evidence falls short of the culpability level necessary to support an award of punitive damages. See Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 384 (Iowa 1983). We cannot accept plaintiffs' argument it was reckless conduct to hire and retain Perket. In a Utopia it may be possible to hire only perfect people. This is not a Utopia. Perket has been employed as an over-the-road trucker for an extended period of time. He obviously, in that period of time, has logged considerable hours of driving. He also has made some mistakes and errors in judgment. Suffice it to say most human beings have. Perket was licensed as a driver when hired and while employed. There is no evidence here to find a willful or reckless disregard. See Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 167 (Iowa 1984); Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 879-80 (Iowa 1983); see also Holcomb v. Hoffschneider, 297 N.W.2d 210, 214-15 (Iowa 1980); Restatement (Second) of Torts § 908 (1979).

We reverse the award of punitive damages. Costs on appeal are taxed to appellee.

REVERSED.