

IN THE COURT OF APPEALS OF IOWA

No. 6-803 / 96-0781

**M.I.R. CORPORATION, INC. d/b/a
HAWKEYE DELIVERY & SERVICES,**

Plaintiff-Appellee/Cross-Appellant,

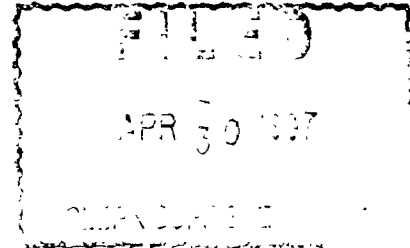
vs.

**GAMMA GROUP, LTD., and KEY
EMPLOYMENT SERVICES, LTD.,**

Defendants-Appellants/Cross-Appellees,

**DONALD D. JAYNE, DENNIS LEININGER,
and MARION McELVOGUE,**

Defendants.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer,
Judge.

Parties appeal and cross-appeal from jury verdict in action involving contract
and fraud claims arising from the provision of temporary employment services.

AFFIRMED.

John C. Conger of Wiggins, Anderson & Conger, P.C., West Des Moines, for
appellants/cross-appellees.

Patrick W. O'Bryan, Des Moines, for appellee/cross-appellant.

Heard by Cady, P.J., and Huitink, J., and McCartney, S.J.* Streit, J., takes no
part.

* Senior judge from the Second Judicial District serving on this court by order
of the Iowa Supreme Court.

McCARTNEY, S.J.

The defendant, Gamma Group, Ltd., dba Key Temps and Key Employment Services (hereinafter "Key"), appeals from certain rulings of the district court arising out of the trial of a cause of action brought against it by M.I.R. Corporation, Inc., dba Hawkeye Delivery Services (hereinafter "Hawkeye").

Hawkeye filed its petition against the defendants Key, Donald Jayne, Dennis Leininger, and Marion McElvogue alleging various claims of negligence, breach of fiduciary duty, negligent misrepresentation, fraud, equitable estoppel, and breach of contract. The defendants denied those allegations and counterclaimed against Hawkeye asserting Hawkeye had breached a contract with Key by failing to pay certain invoices as submitted for temporary employee services and also breach of contract and fraudulent conduct arising out of the hiring by Hawkeye of a temporary employee provided by Key to Hawkeye. Key further sought punitive damages in its counterclaims.

At the trial of the cause held in November 1995, Hawkeye dismissed its claims against the defendants Jayne, Leininger, and McElvogue. At the conclusion of all the evidence, Hawkeye then dismissed all of its claims against Key except its claim of breach of contract. The trial court, at the conclusion of all evidence, sustained the motion for directed verdict made by Hawkeye to dismiss the demand for punitive damages made by Key. The trial court allowed the claim of Key that Hawkeye breached its contract and that its conduct was fraudulent.

Consequently, the cause was submitted to the jury on the claim of Hawkeye that Key breached its contract with Hawkeye and on the counterclaim of Key that Hawkeye had breached its contract with Key and that Hawkeye had committed common law fraud.

The jury found for Hawkeye in the sum of \$17,600 on its claim that Key had breached its contract; and the jury in like fashion found in favor of Key in the sum of \$4920 on its claim for fraud and breach of contract. No punitive damages were considered since that issue had been withdrawn from jury consideration by the trial court. Various post-trial motions were filed by the parties which were all overruled. Judgments were entered based upon the verdicts and Key filed its notice of appeal and Hawkeye filed its cross-appeal.

Hawkeye provides delivery services for various businesses in the Des Moines area and, in so doing, provides a number of trucks and drivers who pick up merchandise sold by the businesses and deliver the same to various purchasing customers. Hawkeye utilized computers in tracking orders to be obtained and delivered, matching those orders with its trucks and personnel.

Key provides two distinct services for employers. The first service is to seek out and obtain permanent employees that employers need in their operations. Secondly, Key also provides temporary employees. Remuneration to Key is paid by the employers -- in the case of permanent placement, by receiving a portion of the newly-placed employee's salary; and in the case of temporary services, by charging

the employer so much per hour for the temporary employee services. The temporary employee is then paid directly by Key. In the event a temporary employee is hired permanently by the employer, the remuneration is altered in accordance with the prior agreement between the employer and Key.

Hawkeye sought Key's temporary services, seeking temporary employees to work on its computers. In accordance with this request, Key provided three temporary employees over a relatively short period of time to deal with the problems and added computer capabilities that Hawkeye perceived were necessary for its business.

Computer personnel were provided one at a time covering a period from December 1993 to the following January. The third computer person provided by Key, one McMullen, left Hawkeye after about one week, testifying that without proper documentation from what had been done by prior computer experts on this job he could not complete the job properly.

Within a few days, the Hawkeye computer system went down and, in so doing, eliminated the existing operating systems and erased the data base that Hawkeye had installed. All computers in the system went dead and the testimony reflected that no data could be retrieved.

Key proffered testimony that the corrections and improvements were being made properly by its temporary employees; and Hawkeye provided testimony that the computer work performed by Key's employees was not done properly.

Key, on appeal, contends the trial court erred in its instructions to the jury by advising the jury that Hawkeye sued Key claiming it had a contract with the latter for "computer services and that the defendant has breached that contract." It is the contention of Key that it is not a provider of computer services but is, in fact, a provider of personnel on a temporary basis who, in turn, provide the services.

There was considerable testimony that an agent of Key's who was in charge of procuring technical personnel to work on computers made extensive promises to Hawkeye that its people could make the necessary corrections, that they would rewrite the old programs and network existing computers so that data could be shared, that documentation would be provided for the program, and that work would be completed by the first of the following year. The testimony on behalf of Hawkeye was that this agent assured Hawkeye it would have a "fully integrated modular system that would work over a network" The agent further expressed his expertise in working on computers and that the improvements Hawkeye desired from its computer system would be effectively and properly attended to. This testimony was before the court and the jury.

Our review of jury instructions is for errors at law. Iowa R. App. P. 4.

It is clear from a review of the extensive record of the trial of this cause that the claim of Hawkeye was based upon promises made by the agent of Key and his assurances that the programs sought would be provided by personnel provided by Key to Hawkeye's satisfaction. Although the defendant contends it simply provided

people, not computer services, Hawkeye's suit was based on its understanding that a contract to provide adequate and proper services had been made by Key, regardless of how Key now represents itself. There was substantial evidence to generate a jury question on this matter as to whether or not there was a contract between the two parties for the provision of adequate and competent improvements and changes to Hawkeye's computers and the computer programs. The court thus stated the law properly as applicable to the facts and theories of the case. Failure to submit such theories that have support in the record would be error. *Adam v. T.I.P. Rural Elec. Coop.*, 271 N.W.2d 896 (Iowa 1978).

Key further claimed two grounds of error that are closely related to the foregoing. It asserts the court erred in not granting its motions for directed verdict and for judgments notwithstanding the verdict on the issue of whether or not a contract had been breached by Key.

There is substantial evidence that a contract did exist. Iowa Rule of Appellate Procedure 14(f), among other principles, states that in considering the propriety of a motion for directed verdict, the evidence must be viewed in the light most favorable to the party against whom the motion is made, and the trial court has a broad discretion in determining whether the verdict effectuates substantial justice. We find there was sufficient evidence to submit to the jury whether or not there was a contract between the parties and whether or not Key had breached it.

Key further asserts error on the part of the trial court in submitting to the jury the issue of causation, asserting there is no evidence to support Hawkeye's contention that the work done by the people supplied by Key was in any way the cause of the total breakdown of the computer system and its loss of data.

The question of proximate cause is generally for the jury. Iowa R. App. P. 14(f)(10). There was sufficient evidence of causation to submit the issue to the jury. There was extended testimony that the work done by the people provided by Key was unsatisfactory, the network would go down almost hourly, and there were serious computer problems with billings and in properly managing its vehicles and drivers to attend to the pick-up and delivery of merchandise.

Our review is to determine whether or not there was sufficient evidence to submit the matter of causation, and whether the foregoing recitals of problems experienced by Hawkeye, once Key people began working on the programs, is sufficient to submit this issue to the jury. Hawkeye experienced no computer problems prior to the commencement of work by the people provided by Key. Hawkeye wanted its system upgraded for additional functions. There was testimony that poorly executed computer programs could wipe out the data already stored in the computers. The jury chose to believe this testimony rather than the explanations tendered by Key's expert witnesses.

We see no need to disturb the jury verdict in this regard. Consequently, the trial court ruled appropriately in denying the appellant's motions for directed verdict

and for judgment notwithstanding the verdict. Key is not entitled to a new trial as requested.

Key asserts the trial court was in error in failing to grant its motions for directed verdict and for judgment notwithstanding the verdict on the issue of damages awarded by the jury to Hawkeye. Key further asserts the damages were excessive.

Hawkeye experienced a total loss of its business information stored on its computers. Evidence adduced in support of its damages consisted of the monies paid by it to Key (some \$4500) for services the jury could find were not properly provided, the costs of reintroducing the lost data (approximately \$13,600), and some \$16,350 paid to computer experts and programmers to make the system useable. These items offered in support of Hawkeye's claim for damages total some \$34,450 and the jury award was \$17,600.

Damages are primarily a question for the fact trier. *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149 (Iowa 1984). Upon review, we take the evidence in a light most favorable to the plaintiff. *Claus v. Whyle*, 526 N.W.2d 519 (Iowa 1994). Mathematical precision in proving the amount of damages is not required; reasonableness is required. *Galucha v. Naso*, 147 Iowa 309, 126 N.W. 146 (1910).

Under these circumstances and these standards, we do not believe it appropriate to interfere with the findings of the jury. The trial court acted properly in overruling Key's motions for directed verdict and for judgment notwithstanding the verdict.

Finally, Key asserts on its counterclaim that it was entitled to the submission of punitive damages and asserts the trial court erred in not submitting that issue to the jury. Key argues that since the jury found for Key on its claim that Hawkeye acted fraudulently, it was entitled to have the issue submitted.

Punitive damages or exemplary damages are awarded when the offender's conduct has been willful and wanton with a reckless disregard of another's rights. *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171 (Iowa 1990). Legal malice need not be actual malice but may be inferred from the wrongful and continued conduct of the actor committed with reckless disregard for the other. *Kansas City Life Ins. Co. v. Hullinger*, 459 N.W.2d 889 (Iowa App. 1990). Fraud in and of itself does not give rise to punitive damages. *Holcomb v. Hoffschneider*, 297 N.W.2d 210 (Iowa 1980). The fraud must be gross, outrageous, and done with an evil motive. *Id.* at 214-15 (citing Restatement (Second) of Torts § 908 (1979)).

This was a commercial transaction. The parties hotly disputed each other's position with respect to the quality of work done by Key's employees. These positions were straightforward and not occasioned by spite. Hawkeye employed a person who asserted he was no longer a temporary employee of Key's when contacted by Hawkeye. Hawkeye asserted this worker was not its employee but an independent contractor. Given Hawkeye's troubles with its computers and programs, which troubles it believed were caused by the people Key provided, its conduct did not rise

to the level of outrageousness needed for imposition of punitive damages, and its conduct was not motivated by evil.

Consequently, we find that the trial court acted properly in not submitting the issue of punitive damages.

Hawkeye, as cross-appellant, contends the trial court erred in submitting Key's counterclaim to the jury and in overruling Hawkeye's motion to dismiss. Key did submit sufficient evidence to justify the submission to the jury of its claim that Hawkeye had breached its agreement with Key by employing certain people whom Key had previously provided.

Again, we are unwilling to disturb the jury verdict in this regard and, therefore, find that the trial court did not err in refusing to dismiss Key's counterclaim and in submitting the issue to the jury.

AFFIRMED.