FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD J. SCHROEDER,)
Plaintiff-Appellee,) Filed Sept
vs.) 113
DUBUQUE INSULATION & SIDING CO.,) 3-224 / 2-69408
Defendant-Appellant.)

Appeal from Dubuque District Court - Robert J. Curnan, Judge.

Defendant appeals from a judgment on a jury verdict in favor of plaintiff in his suit for wages claimed to be due, and for punitive damages. AFFIRMED IN PART AND REVERSED IN PART.

Randal J. Nigg of Reynolds, Kenline, Breitbach, McCarthy, McKay & Nigg, Dubuque, Iowa, for defendant-appellant.

Michael A. Stapleton, Dubuque, Iowa, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden and Sackett, JJ.

SCHLEGEL, J.

Defendant appeals from a judgment on a jury verdict in favor of plaintiff on plaintiff's claim for wages due and for punitive damages. We affirm in part and reverse in part.

This case arises out of the employment of plaintiff by defendant from 1977 to 1979. Plaintiff was employed to establish and manage a carpet sales division of defendant's business. In addition, plaintiff sold certain other items and jobs. The dispute concerns plaintiff's claim that defendant failed to pay plaintiff commissions to which plaintiff claims he is entitled in connection with his sale of two roofing jobs. The first such sale was at or near the end of 1977, and the second sale was during April of 1978.

Trial was had to a jury, and the jury found that plaintiff was entitled to compensatory damages and punitive damages. Defendant claims that the court was in error in failing to direct a verdict on behalf of the defendant on the ground that plaintiff's claims were barred by the statute of limitations. He also claims it was error for the trial court to submit the issue of punitive damages to the jury.

I. When the facts concerning commencement of the running of the statute of limitations are in dispute, the issue is for the determination of the jury. Lamb v. United Security Life Co., 59 F.R.D. 44, 47 (S.D. Iowa 1973); In re Estate of Plumb, 256 Iowa 938, 945, 129 N.W.2d 630, 634 (1964); In re Estate of Thorne, 202 Iowa 681, 686, 210 N.W. 952, 954 (1926). It is an affirmative defense which the defendant must prove by a preponderance of the evidence. Baines v. Blenderman, 223 N.W.2d 199, 203 (Iowa 1974).

Plaintiff claimed that the amounts owed to him were in the nature of a continuous open and running account, and that the statute of limitations didn't commence to run until the account was complete, or in this instance, upon his termination of employment. Evidence was submitted as to the practice of carrying a continuing account of the amounts to which plaintiff was entitled, and there was evidence from which the jury could find that plaintiff's claims were a

part of an open, running account. See Broughton v. Nicholson, 150 Iowa 119, 122-23, 129 N.W. 814, 815 (1911). From the evidence, the jury could have found that the statute of limitations as to plaintiff's claims didn't commence to run until his employment with defendant was terminated. We do not pass upon whether the amounts claimed were wages, and therefore subject to Iowa Code section 614.1(8) (1977). It was not error for the trial court to submit this statute of limitations issue to the jury. Overruling defendant's motion for directed verdict on this issue was not error.

II. Defendant claims there was insufficient evidence in the record to warrant the submission of the issue of punitive damages to the jury. He also asserts that plaintiff's claim is for a breach of contract which, under Iowa law, does not entitled plaintiff to punitive damages.

Plaintiff's argument that punitive damages are allowable for a breach of a contract of employment, as an exception to the general rule, is without support in the Iowa decisions. The Iowa Supreme Court failed to adopt that exception in Pogge v. Fullerton Lumber Co., 277 N.W.2d 916 (Iowa 1979). In that case, certain guidelines were established for the allowance of punitive damages, but such an exception as urged by plaintiff, though referred to, was not adopted. Id. at 919-20. See Freeman v. Bonnes Trucking, Inc., ___ N.W.2d ___, ___ (Iowa 1983) (employee's recovery of punitive damages from employer was predicated upon fraud).

Plaintiff's claim, being one arising out of a breach of contract, cannot be the basis of an award of punitive damages. We hold that the issue of punitive damages was improperly submitted to the jury and that the judgment for punitive damages must, accordingly, be set aside.

The judgment for compensatory damages is affirmed. The judgment for punitive damages is reversed.

AFFIRMED IN PART AND REVERSED IN PART.