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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-219 / 91-788

ESTATE OF SIDNEY B. SMITH, By and Through Its Personal Representatives, **WILLIAM SMITH** and **DAPHNE N. SMITH,**

Appellants,

585

vs.

JOHN NORTHUP and **MARVIN L. HEMBRY,**

Appellees.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Plaintiffs appeal and defendant Northup cross-appeals from a judgment of the district court awarding damages to plaintiffs based on defendants conversion of business funds. **AFFIRMED.**

John C. Conger of Wiggins & Anderson, P.C., West Des Moines, and Lawrence L. Marcucci of Higgs, Fletcher & Mack, San Diego, California, for appellants.

Chip Lowe of Adams, Howe & Zoss, P.C., Des Moines, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The plaintiffs, William Smith and Daphne Smith, as personal representatives of the Estate of Sidney B. Smith, appeal from rulings of the trial court in granting summary judgment on certain claims and in granting a motion for new trial on the issue of punitive damages. The defendant, John Northup cross-appeals asserting that the trial court erred in failing to grant a judgment notwithstanding a verdict as to the plaintiffs' claim of conversion and as to the defendant's claim for compensation, which latter claim was decided adversely to the defendant by jury verdict.

These matters arise out of the termination of a long-standing business relationship between Sidney B. Smith, a lawyer and certified public accountant, and the defendant John Northup, hereinafter referred to as "Northup." During the pendency of these matters, Sidney B. Smith passed away and his estate, acting through its personal representatives, was substituted as parties plaintiff. The decedent, Sidney B. Smith, his estate, and the estate representatives will be referred to as "Smith." Smith established his accounting firm in the early 1950s, and Northup, also a certified public accountant, joined that firm in 1953, and Marvin Hembry joined the firm in 1965.

Although Hembry was a party to this litigation through trial, he is not a party to this appeal.

This litigation stems from the efforts by Smith in 1987 and 1988 to dispose of his accounting business to other accounting firms. Although Smith offered to sell the business to Northup and Hembry, any negotiations between them fell through, and in October 1988, Smith did dispose of his business by selling it to another Des Moines accounting firm with the price dependent upon the billings of Smith's accounting clients who went with the purchasing third-party firm.

In the event few, if any, clients stayed with the purchaser, and a number of them went to an accounting firm formed by Northup.

It is the contention of Smith that Northup, particularly in October 1988, interfered with Smith's clients and with Smith's employees to such an extent that Smith's sale of his practice to the third-party firm became a nullity.

Smith filed an amended and substituted petition in three counts during the latter part of October 1988. The first count sought recovery of some $68,000 taken from Smith by Northup; the second count sought damages for interference with Smith's clients; the third count sought damages for interference with Smith's employees. Northup denied these allegations and asserted certain affirmative defenses; Northup filed his counterclaim seeking damages for Smith's failure to account for profits based on the

allegation that Northup and Smith were partners and further that Smith interfered with Northup's efforts to pursue his certified public accounting career.

Thereafter, Smith amended his petition to add Count IV alleging breach of fiduciary duty owed to Smith by Northup. Specifically, the duties alleged to have been breached by Northup were solicitation of clients of Smith and urging Smith's employees to terminate their employment relationship with Smith. Smith sought punitive damages with respect to Count IV.

Appropriate answers and affirmative defenses were pled by Northup and Smith made appropriate answers and affirmative defenses to the claims made upon him by Northup.

Northup, in June of 1990, filed his motion for summary judgment with respect to Count II of the petition (interference with clients), with respect to Count III (interference with employees), and with respect to Count IV (breach of fiduciary duty).

The trial court sustained Northup's motion for summary judgment as to Counts II and III, but overruled such motion with respect to Count IV, the breach of fiduciary duty allegation.

Smith appeals from this ruling, asserting that there were sufficient genuine issues of material fact as to preclude the granting of a motion for summary judgment.

Iowa Rule of Civil Procedure 237(c). The purpose of such motion is to enable the movant to obtain judgment promptly without the expense of trial when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); Davis v. Comito, 204 N.W.2d 607 (Iowa 1973). The court, of course, must view the record presented in the light most favorable to the resisting party. Id.

The trial court found that the two counts asserting interference with prospective clients and with employees presented no such genuine issues as to any material fact and granted summary judgment. With respect to Count IV, Breach of Fiduciary Duty, the trial court overruled the motion. It should be noted that the jury found for Northup on Count IV.

The trial court further determined that there was no evidence that Northup intentionally and improperly interfered with Smith's relationship with his clients or employees and that there was no proof that Northup had the necessary intent to injure or destroy Smith in those respects. We agree.

Smith had already reached an agreement with the third party purchaser on or about October 10, 1988, at which time Northup was offered employment with a new firm on the condition that he sign a covenant not to compete, an arrangement absent in his relationship with Smith. Two

days later, October 12, Northup told Smith he would not join the firm to whom Smith had sold his business. Smith then advised Northup to clean out his desk, which was done on October 13.

On October 14, a member of the third party purchaser met with Smith's employees and told them that they could apply for positions with the purchasing firm, that as many would be hired as it had business for. After this meeting was concluded, several of the Smith employees approached Northup regarding his future plans. He then met with the employees and advised them he was going into business for himself, that they could work for him but that each employee had to decide for himself or herself whether to stay with the purchasing firm or consider employment with Northup. Northup advised the employees that he believed that he could keep some of the existing business. He did not denigrate Smith, and, in the words of the trial court, Smith did not show that Northup "had any reason to want to injure or destroy Smith."

The record before the trial court on the motion for summary judgment reflected that Northup had only one conversation with a Smith client, one Kenyon, before Northup quit and that conversation was initiated by Kenyon. Northup made no attempt to solicit Kenyon's business.

The fact that some of the employees joined Northup or that some of Smith's clients went to Northup did not show the requisite intent to injure or destroy Smith's business. Northup left Smith because he did not wish to work for the third party takeover firm.

Smith treated Northup's conduct as interference with both "prospective contractual client relationships" (Count II) and as "prospective contractual employee relationships" (Count III). (Emphasis supplied.) This treatment was appropriate. Smith had sold his practice and had no clients after the sale. The purchase price was dependent on the number of Smith's former clients (and fees charged) that made new contractual arrangements for services with the purchasing firm. Under these circumstances, Smith had to show Northup intentionally and improperly interfered with these prospective clients. Preferred Marketing v. Hawkeye National Life, 452 N.W.2d 389 (Iowa 1990). Improper conduct requires the showing that the dominant purpose or intent is to financially injure or destroy the relationship. Harsha v. State Savings Bank, 346 N.W.2d 791 (Iowa 1984).

Protecting one's own interests is not an improper purpose under the teachings of Preferred Marketing and Harsha. Northup was free to continue his career in accounting after terminating his employment with Smith. Restatement (Second) Agency § 393.

The record contains no genuine issue as to any material fact with respect to these two counts of interference.

Northup was no longer an employee and had the right to pursue his own career. He did not solicit business from Kenyon or any other of Smith's clients, and he did not visit with the employees until after the purchasing firm visited with them and then only when asked by the employees to do so. Even then he advised the employees to decide for themselves what they wished to do.

After the court sustained his motion for summary judgment, Northup amended his counterclaim to seek compensation due for 1988, pursuant to his agreement with Smith.

Smith then filed another amendment to the amended and substituted petition, Count V, alleging the conversion of some $67,000 taken by Northup on the day prior to his advising Smith he would not go with the new purchaser. Smith also asked for punitive damages in that count.

The jury found for Smith on his claim of conversion, that Northup had converted to his own use some $45,000 from the Smith accounting business account. Northup had already disbursed $22,000 of the total of $67,000 taken to Hembry.

The jury also found for Smith on Northup's claim for compensation for 1988.

Northup contends the trial court erred in not granting his request for judgments notwithstanding the jury verdicts and with respect to these two issues.

Judgment notwithstanding a jury verdict is appropriate only when the trial court should have withdrawn the issue from the jury for lack of sufficient evidence. If a jury question was not presented by the evidence adduced, such judgment notwithstanding the verdict is proper. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990).

We review the evidence in the same manner as did the trial court in order to see if a jury issue was presented. Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990).

For a number of years prior to 1988, Smith had a practice of granting bonuses at the end of the calendar year, and Northup had over the years received such bonuses. There was no commitment, however, on the part of Smith to make such payments which were dependent on earnings for the year just concluded.

In October 1988, when Smith was in the process of selling his accounting business, Northup asked Smith about a bonus payment at that time. There was a factual dispute as to Smith's response, Smith contending that while acknowledging bonuses would normally be available that he did not agree to any immediate payment. Northup, on the other hand, contended that Smith agreed to the immediate payment of bonuses. On the following day, in the middle of October, Northup withdrew some $67,000 from the Smith bank accounts, and as aforesaid, distributed $22,000 to Hembry.

Such withdrawal made it difficult for Smith to meet his continuing office expenses. The year-end tally for 1988 reflected that no bonuses would be due because the cost of business operations for the year prohibited the giving of bonuses. It has been noted that after the sale to the third party, Smith was unable to transfer any significant portion of his clientele to his purchaser, and the last two and one-half months of 1988 reflected that fact. The sale of the business was never consummated, based upon it was a percentage of fees paid by Smith's clientele that went with the third-party purchaser.

We conclude there was sufficient evidence to submit to the jury the count alleging conversion.

The right of Northup to compensation in the approximate sum of $28,000 for 1988, as plead by him in his counterclaim, was similarly vigorously disputed by Smith. A jury issue was created on this issue, and the verdict for Smith was also supported by sufficient evidence.

Clearly, these factual disputes generated jury questions. We agree with the trial court that judgments notwithstanding these jury verdicts were not warranted under the record made. Toney v. Casey's General Stores, Inc., 460 N.W.2d 849 (Iowa 1990).

In finding for Smith on the issue of wrongful conversion, the jury also assessed punitive damages in the sum of $250,000.

The trial court granted Northup's motion for a new trial on the issue of punitive damages.

Punitive or exemplary damages are awarded when conduct of a party is so egregious that damages are given in order to deter others from committing similar wrongful acts. McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362 (Iowa 1972).

Although there is no mathematical relationship between actual and punitive damages, there must be some reasonable relationship to the actual damages incurred. Jacobson v. Benson Motors, 216 N.W.2d 396 (Iowa 1974). While punitive damages are normally established by the jury, their discretion is not unlimited. Kiner v. Reliance Ins. Co., 463 N.W.2d 9 (Iowa 1990).

Although the trial court thought it appropriate to submit the issue of punitive damages in conjunction with the instruction on the issue of conversion, the trial court believed the amount of punitive damages was shocking "to the conscience of the court." The trial court set it aside and granted a new trial. The trial court has considerable discretion in granting a new trial under the circumstances. The trial court heard the evidence, observed the witnesses and the litigants, and while satisfied that the issue of punitive damages should have been submitted, did not think the award of $250,000 was justifiable. We do not believe the discretion of the trial

court was abused under the circumstances nor that its rationale was unreasonable.

After reviewing the record in this cause, we affirm the actions of the trial court in (1) granting the defendant Northup's motion for summary judgment insofar as Counts II and III of the petition of the plaintiffs Smith are concerned; (2) in refusing to grant judgments notwithstanding jury verdicts with respect to the counterclaim of Northup for compensation and with respect to Count V (conversion); and (3) granting a new trial on the issue of punitive damages awarded to Smith by the jury.

AFFIRMED.