FILED
APR 30 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WINGS TRANS., INC., A Corporation, ARNOLD H. DELANCEY, MARK RITCHIE, DARWIN GAPPA, and JOHN HUNTLEY,

Plaintiffs/Cross-Appellants,

vs.

HARRY HAHN d/b/a OFF BROADWAY ADULT EMPORIUM and DEBRA MERRITT,

Defendants-Appellants.

Filed April 30, 1985

5-01
83-721

Appeal from the Iowa District Court for Pottawattamie County - J. C. Ervin, Judge.

In actions consolidated for trial and appeal, plaintiff appeals from judgment in an equitable action for an accounting and defendant appeals from judgment in a tort action from which plaintiffs cross-appeal. AFFIRMED IN PART; REVERSED IN PART: AND REMANDED.

Richard Bruckner, Omaha, Nebraska, and F. J. Kraschel and John W. Kocourek of Kraschel & Comes, Council Bluffs, Iowa, for appellants.

Lyle A. Rodenburg, Council Bluffs, Iowa, for appellees.

Heard by Oxberger, C.J., Hayden, and Sackett, JJ.

This is a complex corporate law case which is comprised of several claims made before the trial court and many issues for our review. The litigation consists of a legal action, #52119, and an equity action for an accounting, #52117, which were consolidated for trial.

In July, 1981, Wings Transportation was incorporated with Hahn, Delancey, and Merritt as directors. Delancey was named president and operated the trucking business. His responsibilities were to purchase the necessary trucks, obtain loads for the trucks to carry, hire drivers, secure the necessary permits and licenses, keep records, and manage the day-to-day operations of Wings. Hahn supplied the finances. In January, 1982, while Delancey was hospitalized for a back injury, Hahn and Merritt took action purporting to oust Delancey from the corporation. When Hahn took over management of the business a dispute arose with truck drivers who had been hired by Delancey. Ultimately none of these drivers were permitted to take loads to Florida under a lease with Wings on which their names appeared as drivers.

The legal action, #52119, was brought in four divisions. Acting on behalf of Wings, Delancey brought Division I against Hahn and Merritt claiming conversion of corporate property and various acts of mismanagement by Hahn. In Division II, Wings, through Delancey, requested an injunction requiring Hahn to return books, records, and corporate equipment. In Division III, Delancey claimed personal damages from wrongful ouster, conversion of his personal property, diverted mail, and termination of water service. In Division IV, three truck drivers, Ritchie, Gappa and Huntley, claimed damages by reason of breach of contract and intentional interference with contractual rights. All plaintiffs in # 52119 claimed both compensatory and punitive damages. In the accounting action, # 52117, filed by Hahn on behalf of Wings against Delancey, Hahn claimed $20,000 was missing.

The following issues are raised in this appeal: (1) whether the court erred in failing to grant Hahn's motion to sever case # 52119 from case # 52117 and hear the equitable issues first; (2) whether the court erred in dismissing plaintiff Wings' claim in Division I of the petition; (3) whether the court committed reversible error in failing to instruct the jury on certain legal issues in Division III; (4) whether the jury's verdict in Division III was supported by substantial evidence; (5) whether the jury's verdict in Division III was excessive as influenced by passion and prejudice; (6) whether the court committed reversible error by submitting the plaintiff drivers' claim in Division IV to the jury when it had directed a verdict for defendant prior to submitting the case to the jury; (7) whether the court erred in holding that the plaintiff truck drivers were dischargeable-at-will and granting judgment notwithstanding the verdict in Division IV; (8) whether the court erred in its accounting decision in # 52117 in that it failed to order an accounting to ascertain the amounts due from Delancey after it had found the plaintiff was entitled to one, that it failed to enter judgment for the total amount shown due in the evidence and reports, and that it failed to make findings on the ownership interests of the parties in the property in question.

In the interest of consistency and clarity, we shall address the issues raised pertaining to each division of the law action by using division designations corresponding to those used in the petition. All issues in the accounting action will be resolved in Division V of our opinion. However, as a preliminary matter, we must decide whether it was proper for the trial court to consolidate the law action with the accounting action for trial in spite of Hahn's motion for severance and for hearing of the issues in the accounting case first.

After Hahn's motion, an order was entered September 2, 1982, and filed in both the law action and accounting action directing that an appointed special master make his report to the court within 90 days, after which an evidentiary hearing would be held to determine the following: (1) ownership interest of Harry

Hahn and/or Arnold Delancey in Wings; (2) the beginning of the corporate existence and transaction of business of Wings; and (3) the parties legally in control of the business of Wings at all times material herein. However, Hahn withdrew his request for a special master on January 4, 1983, and the trial court entered an order on the same date dismissing the special master and directing that the two cases be consolidated into one trial.

Hahn now complains that the court's failure to sever the consolidated cases severely prejudiced him. He cites State v. Simmons, 290 N.W.2d 589, 594 (Iowa), cert. denied, 449 U.S. 842, 101 S. Ct. 123, 66 L. Ed. 2d 50 (1980), for the proposition that "trial of the equitable issues first is the rule rather than the exception." He also cites Morningstar v. Meyers, 255 N.W.2d 159, 161 (Iowa 1977), for the exception to this rule: "[T]he case which is most likely to dispose of the whole controversy should be tried first in order to avoid an unnecessary second trial." Hahn argues that both the general rule and the exception are applicable here because the accounting action, being equitable in nature, would have foreclosed Delancey's legal claims altogether if the ruling were favorable to Hahn.

This argument, however, does not address itself to grounds militating against the consolidation of these separate claims. Iowa Rule of Civil Procedure 185 provides:

> Unless some party shows he will be prejudiced thereby the court may consolidate separate actions which involve common questions of law a fact or order a single trial of any or all issues therein. In such cases it may make such orders concerning the proceedings as tend to avoid unnecessary cost or delay.

Hahn's motion for severance claimed no prejudice aside from the assertion that the court and jury would be confused. This is not enough. Consolidation of separate cases is a matter within the trial court's discretion, Schupbach v. Schuknecht, 204 N.W.2d 918, 920 (Iowa 1973), and we find that the trial court's decision to combine the claims was proper in this litigation.

I.

Division I was an action by Wings against Hahn and Merritt for conversion of corporate property and various acts of mismanagement by Hahn. Delancey brought the action for Wings alleging that he was a shareholder, director, and president of the corporation. The trial court entered a directed verdict on behalf of Hahn and Merritt based on its finding that Delancey lacked standing to sue on behalf of the corporation in any capacity.

Standing is a jurisdictional issue, see Northbrook Residents Ass'n. v. Iowa State Dept. of Health Office for Health Planning and Development, 298 N.W.2d 330, 331 (Iowa 1980), which is decided by the court as a question of law. See 21 C.J.S. Courts § 112 (1940). We find that the trial court's dismissal of Division I was proper in light of the substantial evidence presented that Delancey never bought into the corporation to become a shareholder and that on January 11, 1982, he was legitimately removed as a director and president. Therefore, when Delancey filed the Division I complaint on February 12, 1982, he had no capacity whatsoever to sue for Wings.

We affirm the trial court on Division I.

II.

Wings, through Delancey in Division II, requested an injunction requiring Hahn to return books, records, and corporate equipment. After a hearing, the court entered an order denying the injunction and allowed Hahn to keep all the equipment and to operate the corporation. Since no claims of error were raised regarding Division II, we will give it no further consideration.

III.

A. Jury Instructions. Division III involves Delancey's personal claim against Hahn and Merritt (principally Hahn) for conversion of his property, among which was a 1981 International Harvester Eagle Semi Tractor and a 1974 Kenworth Semi Tractor, shutting off his water service, diverting his mail, and wrongfully

ousting him as a director and as president of Wings. The trial court found that Delancey had been legitimately removed from his position as manager and president of the corporation and submitted the other issues to the jury. A verdict was returned in favor of Delancey with an award of $62,300 in compensatory and $55,000 in exemplary damages.

Hahn asserts that the trial court committed reversible error in failing to instruct upon the following legal issues: 1) on Hahn's corporate authority to use and control the property in question, which is the gravamen of his defense; 2) on the meaning of "conversion;" and 3) on the ownership interests of each party in the property. He cites Elkader Coop. Co. v. Matt, 204 N.W.2d 873, 876 (Iowa 1973), for the proposition that the trial court must fully instruct the jury upon the issues which it must decide, whether requested to do so or not.

Although we agree the trial court has this duty, it is counsel's responsibility to alert the court, whether by objection or by request for instruction, to the problem while there is still time to properly instruct the jury. Id. Iowa Rule of Civil Procedure 196 in relevant part provides:

> Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the records, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

Claims of erroneous instructions cannot be raised for the first time on appeal. Poulson v. Russell, 300 N.W.2d 289, 294 (Iowa 1981).

We have reviewed the objections to the court's instructions which Hahn's attorney made at trial, and we find that no objection was then made to the trial court's failure to instruct the jury on the meaning of conversion, nor its failure to inform the jury on the parties' respective ownership interests in the various items of property disputed in this case. Consequently, Hahn is barred from raising these objections on appeal. Iowa R. Civ. P. 196; Poulson, 300 N.W.2d at 294.

Regarding the existence or nonexistence of Hahn's corporate authority, the record reveals that in instruction 6 Hahn's attorney requested that the court instruct the jury that the alleged acts must be found to be committed personally and not with corporate authority. We find the trial court was sufficiently alerted to the problem, Elkader Coop. Co., 204 N.W.2d at 876, and its failure to include the requested instructions, if crucial to the jury's decision, would be reversible error. Accordingly, we must determine whether instructions on corporate authority were necessary.

A corporation is liable for any torts which it has committed through the authorized actions of its directors, officers, and employees. Ashland v. Lapiner Motor Co., 247 Iowa 596, 601, 75 N.W.2d 357, 360 (1956). However, "the exemption from personal liability of corporate directors and officers is subject to the qualification of good faith, and honesty of intent and purpose. Where there is ulterior motive, the immunity is withdrawn." Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808-09 (Iowa 1978). Therefore, "[a] corporate officer is individually liable for fraudulent corporate acts which he or she participated in or committed." Id. at 808.

It is not enough to instruct the jury that Hahn could not be held personally liable for acts committed within the scope of his corporate authority because, if those acts were fraudulent, he would be individually liable. Briggs Transp. Co., 262 N.W.2d at 808-09. Since the jury could be misled into believing that Hahn could not be held personally responsible for corporate acts, even if they were fraudulent, the trial court properly refused to add requested instructions. A court is not bound to submit a requested instruction, though abstractly correct, where it might tend to mislead or confuse the jury. Gray v. Chicago, R.I. & P. Ry. Co., 160 Iowa 1, 7, 139 N.W. 934, 937 (1913).

B. Sufficiency of the Evidence. Hahn's next complaint essentially is that the jury's verdict is not supported by substantial evidence. The record in this case

is quite voluminous and the evidence is conflicting. However, in an action at law, we do not "weigh the evidence or pass on the credibility of witnesses." Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983). Rather, we are bound by the findings of fact below if they are supported by substantial evidence, Iowa R. App. P. 14(f)(1), meaning that they are reasonably inferable from the evidence. Hubby, 331 N.W.2d at 694; Briggs Transp. Co., 262 N.W.2d at 808. In evaluating the sufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the trial court's judgment, Hubby, 331 N.W.2d at 694; Briggs Transp. Co., 262 N.W.2d at 808, and "[w]e need only consider evidence favorable to the judgment, whether or not it is contradicted." Briggs Transp. Co., 262 N.W.2d at 808.

Regarding the 1981 International Harvestor Eagle Semi Tractor, Delancey claimed that Hahn forged title away from Delancey to the corporation whereas Hahn claimed that the I/H Eagle was purchased in anticipation of forming Wings and that Delancey no longer had any interest in it. Delancey also asserted an ownership interest in the 1974 Kenworth Semi Tractor which Hahn claimed he took by a legitimate exercise of his corporate authority. We will refrain from any further recitation of the parties' competing arguments regarding the Division III claims because the instructions to the jury directed that it should find for Delancey if it concluded that one or more of enumerated acts were commited by Hahn or Merritt; no interrogatories were submitted by which the jury could report its findings item by item.

There is indeed evidence supporting the jury's finding that one or more of the enumerated acts charged were committed by Hahn or Merritt. Under the aforementioned authorities, this is sufficient to sustain the verdict and the fact there is contradictory evidence in the record need not concern us. Briggs Transp. Co., 262 N.W.2d at 808.

C. Damages. Hahn also asserts that the verdict for Delancey in the amount of $62,300 compensatory and $55,000 punitive was excessive as influenced

by passion and prejudice, and not supported by the evidence. He cites 18 Am. Jur. 2d Conversion § 110 (1965) for the proposition that one maintaining a conversion action against a party who has an interest in the property can only recover the value of his interest therein rather than the entire value of the property, and that the defendant may interpose his interest in the property in mitigation of damages. Hahn argues that the trial court failed to apply these principles even though the evidence showed that Delancey, who had control of all the property as Wings' manager from its inception through approximately December of 1981, thereafter voluntarily turned the management of the property over to Hahn.

The evidence in this case, however, is disputed and the jury found contrary to Hahn's assertions. Our earlier discussion of substantial evidence in support of findings of fact is again applicable. See Iowa R. App. P. 14(f)(1); Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983); Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

Regarding the compensatory damages, Delancey's attorney asked for $62,000 and documented his request with the evidence. Quite contrary to Hahn's argument of an excessive verdict, we find the jury's award of $62,300 in actual damages is commensurate with the amount prayed for and the evidence as they found it.

Regarding exemplary damages, Hahn appropriately cites Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 399 (Iowa 1977), for the rule that such damages may be awarded for conversion if characterized by malice or willful disregard of the plaintiff's rights.

> The "malice" required to permit an award of exemplary damages is something less than actual ill will or hatred toward another. When that state of mind is present there is actual malice. Legal malice is a fact to be found by the jury from the evidence in the case and may be established by showing wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights.

Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974), quoted in Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d at 399.

Hahn argues that there was no showing of malicious conduct and, accordingly, the trial court erred in submitting the issue of exemplary damages to the jury. However, we shall not disturb the court's giving of the instructions if there is some evidence bearing on the issue of willful or malicious conduct. Sandhorst, 252 N.W.2d at 399. "In considering whether there was evidentiary support for an instruction, we must give the evidence the most favorable construction it will reasonably bear." Id.

There is evidence that Hahn removed Delancey's name from the Wings' bank account, stopped payment on past checks making Delancey liable, executed a U.S. post office change of address, took Delancey's personal mail, called the phone company in an attempt to disconnect Mrs. Delancey's phone, and more. Such conduct indicates malice and therefore justifies both the instructions and the award of punitive damages.

We affirm the trial court's decision in Division III.

IV.

The fourth cause of action against defendants Hahn and Merritt involves the claim of the truck drivers, Ritchie, Gappa, and Huntley, for lost wages and damages for breach of contract and intentional interference with contract rights. The plaintiff drivers were formerly employed at good paying jobs at Silver Trucking when approached by Wings to work for it. The drivers were told they were going to take two loads of meat supplied by Nebraska Coast to Jacksonville, Florida, for which trip lease contracts had been executed in their names.

Yet, around January 4, 1982, at the time Delancey was hospitalized, a meeting was held between the drivers and Hahn, who was acting as manager for Wings. Hahn wanted to ensure that the leases for loads previously negotiated by Delancey, for Wings, would be honored. Arguments arose over the driving of the trucks and the management of Wings. Initially, some of the drivers were refusing to drive for Wings unless Delancey remained manager. Although these

disagreements later seemed resolved, Hahn executed or caused to be executed new trip leases which substituted new drivers. Ritchie, Gappa, and Huntley were never officially fired; they just were not given trucks or loads.

The plaintiff drivers' theory was two-fold: (1) that Hahn breached the employment contract between them and Wings by not letting them drive anymore; and (2) that Hahn intentionally interferred with the contract between the plaintiff drivers and Nebraska Coast for the two Jacksonville meat runs.

The trial court found that no contract existed between the drivers and Nebraska Coast, but rather was between Wings and Nebraska Coast. Regarding the driver's employment contract with Wings, the court found it was at will and therefore terminable-at-will. A directed verdict was entered in favor of the defendants at the close of all the evidence, but nevertheless the court submitted the truck drivers' claim to the jury to avoid a retrial in the event that the court is reversed for incorrectly granting a directed verdict. We repeat here the trial court's ruling:

> [T]he Court has already dismissed Division IV of the Petition, and is submitting the issues under Division IV solely in response to Mr. Rodenburg's appropriate comment that in the event the Court is incorrect in its ruling it would require a retrial of those claims and the Court does intend to strike any such verdicts rendered in favor of the drivers under Division IV in the Petition and is submitting those only for the record in order that the determination be made on those claims in the event the Court is wrong or incorrect in directing a verdict.

The jury returned verdicts in the truck drivers' favor and awarded each driver $2,000 in actual and $20,000 in punitive damages. The trial court set aside these verdicts in accordance with its previous ruling. Both the plaintiffs and the defendants in Division IV appeal.

Defendant Hahn asserts that the court had no authority to submit the issue to the jury after its definitive ruling that there was no claim against him. To the contrary, we find that the trial court complied in substance, although not in form, with the preferred procedure of delaying the sustention of a motion for directed

verdict in close cases until after a jury trial to avoid retrial if there is a reversal. Brown v. Ellison, 304 N.W.2d 197, 203 (Iowa 1981); Larkin v. Bierman, 213 N.W.2d 487, 490 (Iowa 1973). Admittedly, it would have been more appropriate for the trial judge to actually reserve ruling on the motion, but the objective of preventing a retrial upon reversal was sufficiently achieved by submitting the Division IV claims to the jury and then issuing a judgment notwithstanding the verdict.

The truck drivers, in their appeal, assert that the trial court erred in granting a judgment notwithstanding the verdict because they were not dischargeable-at-will under the circumstances of this case. We agree.

Unless otherwise agreed, contracts of employment are terminable at the will of either party upon giving notice. Kitchen v. Stockman Nat'l. Life Ins. Co., 192 N.W.2d 796, 801 (Iowa 1971) (citing Restatement (Second) of Agency § 442 (1957)). Yet, there is an important factor which renders an employment contract not at will:

> or if, as the principal has notice, the employee has made an important change in his general relations in order to accept the position, . . . or if he has given up a position of some value in order to enter the employment.

Restatement (Second) of Agency § 442 comment b (1957), quoted in Kitchen, 192 N.W.2d at 802. The plaintiff drivers relinquished good paying jobs at Silver Trucking in order to work for Wings and Hahn knew it. Accordingly, their employment with Wings was not at will and could not be terminated at will. Granting judgment notwithstanding the verdict was error and, therefore, we reverse and remand with directions to reinstate the verdicts in favor of the truck drivers.

V.

Plaintiff Wings complains that the court erred in its accounting decision in #52117 in failing to order an accounting to ascertain the amounts due from

Delancey after it had found the plaintiff was entitled to one, in failing to enter judgment for the total amount shown due in the evidence and reports, and in failing to make findings on the ownership interests of the parties in the property in question. Hahn argues that the first two omissions above were in violation of the rule set forth in Ontjes v. McNider, 224 Iowa 115, 123, 275 N.W. 328, 332 (1937), which states that there are two judgments in an accounting action: (1) the right to receive an accounting from the defendant; and (2) the final judgment upon the balance found due.

Contrary to Hahn's claim, the trial court complied with both requirements. In its September 2, 1982, order, it found that an accounting was essential or at least would assist in the presentation of the plaintiffs' and defendants' evidence in the law action, #52119, and directed that an appointed special master report his findings to the court within 90 days of the order. The appointment of the special master was withdrawn January 4, 1983, for the sole reason that Hahn withdrew his request for a special master.

Secondly, the court rendered judgment in favor of plaintiff Hahn for $1,200 after Delancey admitted selling a "Brown" trailer and retaining the proceeds. Regarding checks and other funds for which accounting was sought, Wings (by Hahn) wholesaled into evidence, without any supporting or explanatory testimony, a voluminous set of incomprehensible records comprising Exhibits 80 through 130. We agree with the trial court that, except for the $1,200 Delancey retained from selling the Brown trailer, the evidence is insufficient to permit a finding that Delancey failed to account for the funds of the plaintiff coming into his hands or that he retained any cash or other intangible assets of Wings.

Finally, regarding Wing's complaint that the trial court did not resolve the ownership issue as to the corporate equipment, Wings did not pray for it in its petition nor prove it; furthermore, the trial court made an earlier interlocutory ruling giving Hahn status quo control of all Wings' property. Hahn even admitted

during his testimony that Wings had all of the equipment and that Hahn never said Delancey took any of it. Based on the foregoing, we need not give any further consideration to this issue. We affirm the trial court's ruling in the accounting action.

Division I and Division III of the law action, #52119, are affirmed and Division IV is reversed and remanded with direction to reinstate the verdicts for the plaintiff truck drivers.

The accounting action, #52117, is affirmed.

AFFIRMED IN PART; REVERSED IN PART: AND REMANDED.