IN THE COURT OF APPEALS OF IOWA

No. 0-022 / 99-0248
Filed July 26, 2000

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CLERK SUPREME COURT

SYLVIA GUTIERREZ,
Plaintiff-Appellee,

vs.

WAL-MART STORES, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, District Judge.

Defendant appeals following a bench trial in which the court awarded the plaintiff damages for injuries incurred in an accident in the defendant's store. **CONDITIONALLY AFFIRMED, AND REMANDED WITH INSTRUCTIONS.**

Gregory M. Lederer and Paul P. Morf of Simmons, Perrine, Albright & Elwood, P.L.C., Cedar Rapids, for appellant.

Patricia Zamora of Zamora, Taylor, Clark, Alexander, and Woods, Davenport, for appellee.

Heard by Sackett, C.J., and Miller and Hecht, JJ.

MILLER, J.

Defendant Wal-Mart Stores, Inc. appeals the judgment entered against it, following trial to the court, contending the district court erred in granting plaintiff Sylvia Gutierrez's post-trial "Motion for Amendment to Pleadings to Cure." Wal-Mart Stores, Inc. further contends the award of damages was excessive and without substantial supporting evidence. We conditionally affirm the judgment of the district court, and remand with directions.

I. Factual and Procedural Background.

On July 25, 1997, plaintiff Sylvia Gutierrez filed a petition at law, alleging on August 18, 1995, she was injured when a box containing Oriental rugs standing on the floor behind her tipped over and fell on her back at the "Davenport, Iowa, Walmart store located at 3785 Elmore Street." The caption of the petition identified "WALMART" as the defendant. The return of service indicated the petition and original notice were served on Dan Ellis (Asst. Mgr.) at Davenport, Iowa, on July 30, 1997.[1]

On August 21, 1997, Wal-Mart Stores, Inc. (hereinafter "WMSI") filed an answer. In the answer, WMSI asserted the affirmative defense that the statute of limitations had expired, barring Gutierrez's action, because Gutierrez did not name WMSI as the defendant and did not serve WMSI's registered agent within the statute of limitations. WMSI also affirmatively denied the correct name of the defendant is "Walmart" or "WALMART." Gutierrez did nothing to amend her petition to name WMSI as a defendant.

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[1] Our rules of civil procedure provide a corporation may be served by serving "any present or acting or last known officer thereof, or *any general or managing agent*, or any agent or person now authorized by appointment or by law to receive service of original notice. . . ." Iowa R. Civ. P. 56(1)(f) (emphasis added).

Non-jury trial was scheduled for May 13, 1998. In WMSI's settlement conference statement, it again stated "Walmart" was not the correct name of WMSI and again asserted Gutierrez had not served WMSI before the expiration of the statute of limitations on August 18, 1997. Gutierrez did nothing to amend her petition to name WMSI as a defendant. Trial was continued until August 31, 1998. Still, Gutierrez did nothing to amend her petition to name WMSI as the defendant. At the close of plaintiff's evidence, WMSI moved for judgment of dismissal on the ground Gutierrez never moved for leave to amend the petition to correctly identify the defendant. WMSI noted it had pointed out the mistake in the defendant's name in both its answer and settlement conference statement, and that by previous order pleadings had been closed since before the May trial date. In addressing the motion the trial court stated:

> Well, my gut reaction is he's right and that you had a responsibility to amend and a responsibility to find out—I mean, you—you never amended this. You never, ever served the—the—the entity that owned the store. I'm not going to grant the dismissal at this point in time, but I want briefs on this.
> * * *
> And I want you to show me why I shouldn't dismiss the lawsuit at this time.

Gutierrez's counsel then thanked the court for the opportunity to present a brief, and requested fourteen days to file the brief, which the court granted. Twenty days later, instead of filing a brief as directed by the trial court, Gutierrez filed a "Motion for Amendment to Pleadings to Cure." In this motion, she asked the district court to "allow her, under the case of *Thune v. Hokah Cheese Company*, 260 Iowa 347, 149 N.W. 2d 176, to conform to the proofs presented at trial wherein she wishes to change the name of the defendant from 'Walmart' to 'Wal-Mart Stores, Inc. (WMSI).'" In her response to WMSI's resistance to the motion,

Gutierrez "renew[ed] her request asking this Court to amend the pleading to conform to proof which is that 'WalMart Stores, Inc.' and 'Walmart' are one and the same. . . ."

In its ruling on the merits the trial court also addressed and granted plaintiff's motion to amend to conform to proof. In doing so the trial court ruled the amendment, to change the name of the defendant from "Walmart" to "Wal-Mart Stores, Inc.", would relate back to the date of the original pleading. The court found for Gutierrez on the underlying negligence claim, and awarded damages in the amount of $38,678.56. WMSI filed a rule 179(b) motion, asking the court to reverse its ruling on Gutierrez's motion for amendment and asking the court to reduce the damages awarded. In requesting the court to reverse its ruling allowing amendment, WMSI again challenged, as it had in its answer and in its settlement conference statement, the validity of the purported service of original notice and the propriety of allowing the amendment to "relate back." The trial court summarily denied the motion. WMSI appeals.

II. Amendments to Pleadings to Correct a Misnomer.

A. The Law

Iowa Rule of Civil Procedure 69(d) (formerly rule 88) states, "Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires." Our supreme court has stated amendments are the rule and denials the exception. *Davis v. Ottumwa Young Men's Christian Ass'n*, 438 N.W.2d 10, 14 (Iowa 1989). We accord considerable discretion to trial court rulings on such motions, and will reverse the court only when a clear abuse of discretion has been shown. *Id.* Moreover, an amendment which substantially

changes the issues should not be allowed, nor should amendments be allowed if it is found that the movants were negligent in asserting their cause. *Id.* However, the timing of an attempt to amend is not the determinative factor; instead, the critical determination is whether the proposed amendment substantially changes the issues before the court. *Allison-Kesley Ag Ctr. v. Hildebrand*, 485 N.W.2d 841, 845-46 (Iowa 1992).

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Davis, 438 N.W.2d at 15 (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962)).

Under our rules an original notice must name the parties, and be "directed to the defendant." Iowa R. Civ. P. 49(a). Where the real defendant has been served, some variation in the name or error in an initial is not fatal. *Hickman v. Hygrade Packing Co.*, 185 N.W.2d 801, 802 (Iowa 1971). This rule is especially applicable as to corporations. *Id.* at 802-03 and cases cited therein. However, where the misnomer is more substantial, the name variation is fatal. *Id.* at 803 and cases cited therein.

It has long been the law of Iowa a person may sue or be sued under a trade name. *Thune v. Hokah Cheese Co.*, 260 Iowa 347, 351, 149 N.W.2d 176, 178 (1967). In *Thune*, the court stated "[a]s long as the real party receives proper notice of the action, we are unable to see any prejudice in permitting him to be sued in a trade or fictitious name alone." *Thune*, 260 Iowa at 353, 149 N.W.2d at 179. The court quoted this passage from the American Law Reports:

> Generally, it may be stated that under the statutes, where the proper party is before the court, although there under a wrong name, and * * * if the defendant, he is the party the plaintiff intended to sue and did sue, and the court considers such defendant within its jurisdiction, an amendment of process of pleading will be allowed to change or correct the name of * * * defendant to cure the misnomer. In other words, if the right party is before the court, although under a wrong name, an amendment to cure the misnomer will be allowed.

Thune, 260 Iowa at 350, 149 N.W.2d at 178.

B. Application of the Law to the Facts.

WMSI argues the trial court abused its discretion in allowing the amendment to correctly identify the defendant, filed twenty days after the matter was deemed submitted. We find there is adequate proof in the record that "Wal-Mart" is the trade name used by Wal-Mart Stores, Inc. During trial, four employees of the store referred to their employer as "Wal-Mart." The correct party was before the court. An amendment to conform to the proof must, by its very nature, be made after the presentation of the evidence. The motion was made twenty days after trial and before any ruling on the merits. Under such circumstances we conclude the trial court's implicit finding the motion was made without undue delay is supported by substantial evidence. The amendment did not change the substantive issues, liability and damages. The trial court did not abuse its considerable discretion in allowing the amendment.

III. Rule 89 Relation-Back.

WMSI contends even if the district court did not abuse its discretion in allowing the post-trial amendment, the amendment was futile because it did not relate back to the filing of the petition. WMSI thus contends because the

amendment did not relate back, the petition must be dismissed as barred by the statute of limitations.

A. The Law.

Iowa Rule of Civil Procedure 69(c) (formerly rule 89) allows an amendment that changes or adds a party to a pending lawsuit to relate back to the date of the original pleading if four requirements are met: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period. *See Porter v. Good Eavespouting*, 505 N.W.2d 178, 181 (Iowa 1993) (quoting *Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S. Ct. 2379, 2384, 91 L. Ed. 2d 18, 27 (1986)). The statute of limitations expired on Gutierrez's claim on August 18, 1997. *See* Iowa Code § 614.1(2) (1997) (providing for a two-year statute of limitations for actions in tort).

This rule applies not only to amendments changing parties, but also to amendments correcting names. *Grant v. Cedar Falls Oil Co.*, 480 N.W.2d 863, 866 (Iowa 1992). Gutierrez bears the burden of proving the facts necessary to support relation-back. *Porter*, 505 N.W.2d at 181-82.

B. Application of the Law to the Facts.

Determining whether an amendment to a petition relates back to the date of the original petition requires resolution of any underlying fact issues. *See Jacobsen v. Union Story Trust and Sav. Bank*, 338 N.W.2d 161, 164 (Iowa 1983)

(holding trial court correctly granted defendant summary judgment on ground suit was barred by statute of limitations, where plaintiffs failed to support their relation-back claim with any facts to bring them within the criteria of rule 89). WMSI's answer, settlement conference statement, motion made at the conclusion of evidence, resistance to Gutierrez's post-trial motion, and rule 179(b) motion raised issues of fact concerning the second, third and fourth requirements for relation-back as set forth in *Porter*. In its settlement conference materials WMSI phrased an issue to be determined as, "Does improper service on a local employee of an out-of-state corporation trigger the relation-back provisions of I.R.Civ.P. 89?" WMSI thus made it clear its position was at least in part based on a claim an amendment to name WMSI as a defendant and have the amendment relate back could not occur because service of original notice on Dan Ellis, and notice to him, was not sufficient notice to WMSI.

In the part of its ruling that deals with the question of whether Gutierrez's amendment relates back, the trial court found "the Defendant received such notice of the action that it will not be prejudiced, and knew or should have known, but for the mistake concerning identity the action would have been brought against Defendant." The trial court thus found the second and third *Porter* requirements satisfied. However, the only evidence in the record supporting these findings is that original notice was served on Dan Ellis (Asst. Mgr.). The trial court made no specific findings concerning an issue raised by WMSI's various filings, whether Ellis's position with WMSI was such that service on him met the second and third *Porter* requirements. Further, the trial court made no findings concerning whether the fourth *Porter* requirement was met. It is unclear

whether the trial court did not make a finding on that fourth requirement because it assumed service on Ellis was sufficient to meet the second and third requirements, or because of oversight.

Two matters are of substantial significance in addressing the issue before us. First, WMSI does not challenge jurisdiction of its person. Its argument is that Dan Ellis's position as a "local employee of an out-of-state corporation" cannot "trigger the relation-back provisions of I. R. Civ. P. 89." Second, Gutierrez has at no time claimed or attempted to show Ellis was, within Iowa R. Civ. P. 56(1)(f), a present, acting or last known officer of WMSI, or an agent or person authorized by appointment or law to receive original notice on behalf of WMSI. Therefore, to the extent Gutierrez relies on service of original notice on Ellis to satisfy the relation-back requirements of rule 69(e) and *Porter*, she must of necessity be relying on a claim Ellis was a "general or managing agent" of WMSI.

If Dan Ellis was a "general or managing agent" of WMSI, service of original notice of this lawsuit on him (1) satisfied the second *Porter* requirement because it was proper service under rule 56(1)(f), (2) satisfied the third *Porter* requirement because "Walmart" was a trade name used by WMSI, and (3) satisfied the fourth *Porter* requirement because the service on Ellis occurred within the statute of limitations. We do not suggest the second, third and fourth *Porter* requirements would not be met if Ellis, although not a "general or managing agent," held a position in which he had authority or responsibility to act on behalf of WMSI toward defending this lawsuit. Neither do we suggest those three *Porter* requirements would not be met if Ellis, although not a "general or managing agent," had within the statute of limitations conveyed the original

notice, or other substantial information concerning the lawsuit, to a WMSI director, officer, agent for service of process, or other employee who had authority to act on behalf of WMSI toward defending the lawsuit, or any one or more of such persons had otherwise received substantial information concerning the lawsuit within the statute of limitations. However, Gutierrez had the burden to prove the facts necessary to support relation-back, *Porter*, 505 N.W.2d at 181-82, and presented no facts that would support relation-back on the basis Ellis had such authority or responsibility, or on the basis the original notice or substantial information concerning the lawsuit was conveyed to another within the statute of limitations. Otherwise stated, Gutierrez's claim for relation-back rests entirely on the service of original notice on Ellis.

We conclude resolution of the issue of whether Gutierrez's amendment to name WMSI relates back to the date her petition was filed turns on whether Dan Ellis was a WMSI "general or managing agent" as that term is used in Iowa R. Civ. P. 56(1)(f). Whether Ellis was, or was not, is a fact issue. *See, e.g., Life v. Best Refrigerated Express, Inc.*, 443 N.W.2d 334, 336-37 (Iowa 1989) (stating whether someone is a corporation's general or managing agent is ordinarily a fact question). However, the trial court made no finding as to whether Ellis was, or was not, a general or managing agent.

We have below addressed the remaining issues, concerning damages. Based on our resolution of all other issues in this case, we conclude the appropriate disposition is to conditionally affirm the trial court's judgment and remand to the trial court to make findings, on the basis of the existing record

together with any briefs or argument the trial court deems appropriate, concerning whether Dan Ellis was a "general or managing agent" of WMSI.

IV. Damages.

A. Scope and Standards of Review

Because we conditionally affirm the judgment, we next address WMSI's two arguments the district court erred in awarding damages. The trial court's findings of fact have the effect of a special verdict, Iowa R. App. P. 4, and are binding on us if supported by substantial evidence, Iowa R. App. P. 14(f)(1), *Claus v. Whyle*, 526 N.W.2d 519, 523 (Iowa 1994). We view the evidence in its light most favorable to the judgment, and we construe the findings of the trial court liberally to uphold, rather than defeat, the result reached. *Id.*

The determination of the amount of damages in a bench trial ordinarily lies within the sound discretion of the trial court. *Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 917 (Iowa App. 1995) (citing *Woode v. Kabela*, 256 Iowa 622, 633, 128 N.W.2d 241, 247 (1964)). We will not set aside or alter a judgment regarding damages unless it is (1) flagrantly excessive or inadequate, or (2) shocks the conscience or sense of justice, or (3) raises a presumption it is the result of passion, prejudice or other ulterior motive, or (4) lacks evidential support. *Claus*, 526 N.W.2d at 525. In reviewing damage awards (challenged by a defendant) we consider the evidence in the light most favorable to the plaintiff. *Id.*

B. The Merits.

On December 12, 1995, Gutierrez's treating physician released her from restrictions on activity. She returned to full-time work, but evidence shows by

later in December she and her supervisor decided she could not do her job because of residual effects from her accident. In March 1996, Gutierrez was diagnosed with fibromyalgia. The medical testimony established the fibromyalgia was not causally related to WMSI's negligence. As a result of the March 1996 diagnosis, Gutierrez incurred approximately $14,000 in medical expenses at the University of Iowa Pain Clinic and Spine Clinic in 1996. After her stay at the University Hospital, she decided to return to school to train for a less physically demanding career, and as a result incurred educational expenses of $12,500. The district court disallowed these medical and educational expenses, claimed as damages by Gutierrez, because they were incurred due to the unrelated March 1996 diagnosis of fibromyalgia.

Nonetheless, the district court awarded Gutierrez lost wages and pain and suffering damages from the date the accident occurred through May 1998, when Gutierrez completed her associate's degree. For the period of time Gutierrez was not attending school, the district court limited her lost wages to hours she actually could not and did not work. For the time Gutierrez was in school, the district court limited her lost wages to a part time schedule of twenty hours per week, as Gutierrez testified that is what she would have worked had she gone back to school without the injury occurring. The district court awarded Gutierrez $12,000 for pain and suffering from the date of the injury to trial.

WMSI contends the district court's award of lost wages and pain and suffering damages after she was released from restricted activity in December 1995 was in error because, like the medical and educational expenses incurred as a result of her unrelated fibromyalgia, there was no causal link between her

loss of wages and the negligence of WMSI. Because we find evidence in the record to support the awards, we reject WMSI's contentions.

Immediately following her injury, Gutierrez first attempted to work only four to eight hour shifts, instead of her normal twelve hour shifts. By late December 1995 she was able to work very little, despite physical therapy she began about a month earlier. In 1996 Gutierrez was able to work only one day per week, due to the pain. The evidence therefore suggests that had the unrelated fibromyalgia never occurred, Gutierrez nevertheless would have been unable to work as she did prior to the injury. Further, Gutierrez testified she has been in pain since the injury occurred, such that she is no longer able to enjoy many of the life activities she previously enjoyed. Therefore, although the unrelated fibromyalgia did cause Gutierrez to incur some medical and educational expenses and additional pain and suffering, there is evidence in the record from which the district court could conclude WMSI's negligence was the proximate cause of both Gutierrez's inability to work and pain and suffering. *See* I Iowa Civ. Jury Instructions 700.3 (1996) (stating conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct).

WMSI's final contention is the damage award was excessive in relation to the injury sustained. The district court carefully detailed each component of the award and carefully considered each of Gutierrez's claims for damages, accepting some and rejecting others. There was evidentiary support for the award, and it was not the result of passion or prejudice, was not flagrantly excessive and does not shock our conscience or sense of justice.

V. Disposition.

We therefore conditionally affirm the judgment of the district court and remand for that court to find whether the plaintiff proved Dan Ellis was a "general or managing agent" of WMSI. If the district court finds the plaintiff proved he was, the existing judgment shall stand. If the district court finds the plaintiff did not prove he was, the existing judgment against WMSI shall be vacated. Costs on appeal are taxed one-fourth against Gutierrez and three-fourths against WMSI.

CONDITIONALLY AFFIRMED AND REMANDED WITH INSTRUCTIONS.

SACKETT, C.J. (dissenting in part).

I agree with the well-written majority opinion in most respects. I dissent because I disagree with the majority's decision to remand the case to the district court with instructions to decide whether the plaintiff proved Dan Ellis was a "general or managing agent" of WMSI. Substantial evidence does not exist in the record to support a finding that Dan Ellis at the time he was served with an original notice of suit was a "general or managing agent" of WMSI. Evidence is "substantial if reasonable minds would accept it as adequate to reach the same finding." *Sherman v. Pella Corp.*, 576 N.W.2d 312, 316 (Iowa 1998). The question of whether plaintiff's amendment to name WMSI as the defendant relates back to the date her petition was filed turns on whether Dan Ellis was a WMSI "general or managing agent" as that term is used in Iowa R. Civ. P. 56(1)(f). With the absence from the record of substantial evidence to support a finding Ellis was then a "general or managing agent" of WMSI plaintiff has failed to make the necessary showing to trigger the relation-back provisions of Iowa R. Civ. P. 89. Such showing as the majority correctly sets out is plaintiff's burden to show. *See Porter*, 505 N.W.2d at 181-82. Consequently I would reverse the district court's decision entering judgment against WMSI and dismiss it from this suit.