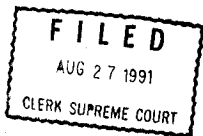


IN THE COURT OF APPEALS OF IOWA

No. 1-004 / 89-1934



MERCHANTS WHOLESALE COMPANY, INC.,

Appellee

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vs.

ROBERT E. THRASHER,

Appellant.

Appeal from the Iowa District Court for Des Moines
County, John C. Miller, Judge.

Former president appeals an adverse jury verdict for
conversion of company funds. **AFFIRMED.**

Thomas J. Shields and Carole J. Anderson of Lane &
Waterman, Davenport, for appellant.

John D. Stonebraker of McDonald, Stonebraker & Cepican,
P.C., Davenport, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

HABHAB, J.

Merchants Wholesale Company, Inc. (Merchants) is a small wholesale and warehouse company whose stock is owned by two shareholders. Robert Thrasher began working for the company in 1950 as a warehouse foreman. He ultimately became a minority stockholder owning 42% of the company. During the time relevant to this action, the remainder of the stock was owned by John Champagne, who inherited his stock from his father, Keith Champagne. Following the death of Keith Champagne in 1979, Thrasher became company president. John Champagne became vice-president.

The historical facts giving rise to these proceedings are detailed by the respective parties' briefs. In short, there were many disagreements between John Champagne and Thrasher. John Champagne became company president on November 19, 1986, which removed Thrasher from that office. Friction developed. In January 1987, Thrasher was involved in a serious auto accident and remained off work for several months. Champagne and Thrasher had explored the possibility of Thrasher selling out his interest in the company but the two never agreed on terms. Ultimately, in the spring of 1987, Champagne terminated Thrasher's employment.

After Thrasher's termination, the company bookkeeper revealed to Champagne Thrasher's practice of cashing certain "promotional monies" checks sent to the company president. Fearing for her job, the bookkeeper had made

copies of the checks, but did not reveal the practice until after Thrasher had left. These checks had been issued by various manufacturers to promote their products. Promotional monies had been sent to the company's three respective presidents since the 1950s. Thrasher, as well as his two predecessors, had cashed these checks, and had used the monies for company business. Unlike his two predecessors however, Thrasher did not account for the monies on company books.

Champagne hired the company's CPA to investigate. The investigation revealed that between 1981 and 1987 Thrasher had cashed checks in the amount of \$91,662. Champagne confronted Thrasher about the matter in a May 1987 meeting, accused Thrasher of embezzlement, and demanded repayment of the money. Thrasher admitted cashing the checks, but stated that the checks were small and that the funds were used following the practices of his predecessors.

This litigation followed. The petition alleged that Thrasher had "embezzled funds". Shortly before trial Thrasher attempted to file a counterclaim for wrongful termination and a claim for indemnification for defending against the present action. The district court refused to allow the counterclaim because it would delay the trial. The matter proceeded to the jury which found against Thrasher in the amount of \$50,000. Thrasher filed a motion for judgment n.o.v. and for new trial which the district

court denied. Thrasher then appealed and Merchants cross-appealed.¹ We affirm.

Our scope of review is for errors of law. Iowa R. App. P. 4.

I.

Thrasher first alleges the trial court erred by instructing the jury on a cause of action which had not been pled. He claims the trial court had instructed the jury on conversion, when the plaintiff's petition had been for embezzlement.

Thrasher failed to raise this objection at the trial court level. As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). Thrasher did not preserve error for appeal as he failed to object to the instruction when it was submitted. See State v. LeCompte, 327 N.W.2d 221 (Iowa 1982). We affirm the trial court on this issue.

II.

Thrasher next contends the verdict against him on the conversion theory was against the weight of the evidence. We are bound by the jury's findings if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We review the facts in the light most favorable to upholding the judgment. Blunt Ellis. & Loewi, Inc. v. Igram, 319 N.W.2d

1. Merchants later waived its cross-appeal.

189, 192 (Iowa 1982). We construe the trial court's findings broadly and liberally. Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988). In case of doubt or ambiguity we construe the findings to uphold, rather than defeat, the trial court's judgment. Id. We are prohibited from weighing the evidence or the credibility of the witnesses. Id.

A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted.

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

Evidence is substantial or sufficient when a reasonable mind would accept it as adequate to reach the same findings. Waukon Auto v. Farmers & Merchants Sav. Bank, 440 N.W.2d 844, 846 (Iowa 1989). Evidence is not insubstantial merely because it could support contrary inferences. Grinnell Mut. Reinsurance Co., 431 N.W.2d at 785.

With these principles in mind, we determine the jury's verdict was supported by substantial evidence. There was testimony Thrasher's method of dealing with promotional monies was different from his predecessors'. A reasonable juror could have determined, from the evidence presented, Thrasher's use of the promotional monies amounted to a conversion. We affirm the trial court on this issue.

III.

Thrasher next claims the trial court abused its discretion in refusing to allow him to amend his answer. Thrasher desired to add a belated counterclaim for indemnification and wrongful discharge. The trial court refused to allow the amendment, as the case was scheduled to go to trial in just fifteen days. Alternatively, Thrasher asks we rule whether his counterclaims are permissive or compulsory. The trial court made no decision on this issue.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

We determine the trial court did not abuse its discretion in denying the amendment. Thrasher knew of the grounds for the counterclaims for years before he moved to amend. We affirm the trial court on this issue.

We refuse to decide whether Thrasher's counterclaims are permissive or compulsory. The trial court has not yet considered this issue. Perhaps its decision will adequately satisfy Thrasher's demands. Regardless, we generally do not consider such issues until the trial court

has had an opportunity to hear evidence and make a final decision. We decline to rule on this issue.

IV.

Thrasher contends the trial court erred in admitting certain documents into evidence. The objected-to documents were letters, signed by Thrasher as company president. The letters were prepared by an auditing firm at the close of each of Merchants' annual audits. The letters represent there were no irregularities in the company's bookkeeping procedures.

Thrasher first objected to the letters on the grounds of unfair surprise, as the letters had not been produced during discovery. The letters were arguably covered by Thrasher's discovery requests. The trial court excluded the letters at that time. Later, trial counsel for Merchants reintroduced the letters during his cross-examination of Thrasher. The trial court then admitted the letters into evidence. The balancing of probative value versus prejudicial effect is at the trial court's discretion. State v. Harmon, 238 N.W.2d 139, 145 (Iowa 1976), cert. denied, 101 S. Ct. 138 (1981). We will reverse only upon a showing of abuse of that discretion.

We determine the letters were properly admitted. According to the Advisory Committee comment to Iowa Rule of Evidence 403, surprise is not considered an appropriate ground for exclusion of evidence. See C. Wright and K. Graham, 22 Federal Practice and Procedure, Advisory

Committee's Note to Rule 403, p. 243-44 (1978); see Committee Comment - 1983, Iowa Rules of Court, p. 351-355 (West 1990). Rather, the proper procedure is to grant a continuance. Id. In this case, Thrasher did not request a continuance. Adopting the Advisory Committee's rationale, the trial court did not err in admitting the letters.

We also note Thrasher could have requested a limiting jury instruction on the letters. Such an instruction might have gone far to mitigate any perceived unfair prejudice from the introduction of the letters into evidence.

For all these reasons, we affirm the trial court on the admission of the letters into evidence.

We affirm the trial court on all issues.

AFFIRMED.