FILED
DEC 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JUDITH A. POLSON,

Plaintiff-Appellant,

vs.

IOWA METHODIST MEDICAL CENTER,

Defendant-Appellee.

Filed December 26, 1984

479

4-421
84-16

Appeal from the Iowa District Court for Polk County - James P. Denato, Judge.

Plaintiff appeals from trial court order reducing the amount of damages awarded to her by a jury in an action for malicious termination of employment. REVERSED.

Gary S. Gill, Des Moines, for plaintiff-appellant.

Michael D. Huppert of Patterson, Lorentzen, Duffield, Timmons, Irish, Becker & Ordway, Des Moines, for defendant-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ., but considered en banc.

SNELL, J.

The plaintiff, Judy Polson, brought this action for damages alleging that she was wrongfully and maliciously discharged from her job at defendant hospital, Iowa Methodist Medical Center.

Polson had worked at the hospital from January 11, 1979, through December 4, 1980. On October 9, 1980, she twisted her neck and shoulder while lifting a patient at work. At the time of her injury, she was a transporter and was required to take patients from their rooms to radiology. Following her injury her supervisors sent her to the emergency room, and she was then sent home. Polson saw two doctors during her period of incapacity, Dr. Andre from the hospital, and her own physician, Dr. Eidbo. Sometime in November, Dr. Andre informed Polson and her supervisors that she could return to work full time. Polson told him and her supervisors that she still was unable to move her arm. The supervisors suggested that she begin working again, performing light duty jobs such as passing out coffee and filing. She spoke with Dr. Eidbo, who gave her medical clearance to perform light duty work. Plaintiff returned to work on December 4, 1980, and met with her two supervisors, Steve House and Jim Swift, and the head of the department, John Theil. There is conflicting testimony on what actually occurred at the meeting. Polson claims that her sister-in-law went with her and that the supervisors refused to allow her to sit in on the meeting. Initially, the group discussed work schedules and Polson's poor attendance, but then the subject turned to accrued wages owed Polson. Polson claims she was then given a paper which was partially covered and told to sign and date it. She did as instructed, without questioning the paper's content. John Theil took the paper, placed it in his desk drawer, and informed Polson she had just signed her resignation. Polson left, in shock, hurt, and near tears. On December 10, a second meeting was held with Polson, Swift, House, Theil, and Rob Reynolds, the employee relations manager at

Iowa Methodist. Reynolds allegedly offered Polson a leave of absence but neither Swift nor House would agree to it.

Swift and House testified that at the meeting on December 4, they offered Polson three alternatives: to return to work full time, to take a leave of absence, or to quit. Their testimony was that, although she was offered a medical leave of absence, she chose to quit.

The jury returned a verdict in favor of the plaintiff awarding $4,000 in compensatory damages and $4,000 punitive damages. Defendant then filed a motion for judgment n.o.v. asserting that plaintiff had failed to sustain her burden of proof on the issue of fraud and punitive damages. The trial court sustained defendant's motion with respect to the issue of punitive damages and eliminated the punitive damage award. Plaintiff has appealed.

On appeal, plaintiff asserts that the trial court erred by: (1) restricting the amount of punitive damages that it would allow plaintiff to request by amended petition; (2) limiting the amount of any award of punitive damages in its instructions to the jury; (3) failing to include loss of employee benefits, mental anguish, and pain and suffering in its instructions to the jury on compensatory damages; and (4) sustaining defendant's motion for judgment n.o.v. by eliminating plaintiff's punitive award on the ground that plaintiff had failed to sustain her burden of proof.

In her petition, Polson sought relief which was "just and equitable with respect to her injuries." She had alleged in the petition that she was "wrongfully, willfully and maliciously discharged by the defendant" and that the defendant did knowingly mislead the plaintiff into signing the resignation notice." Before jury selection began, plaintiff sought to amend the petition to specifically ask for $500,000 in punitive damages. The court denied her motion on the grounds that it would "change the nature of the case substantially." She then made a motion to amend the prayer to include punitive damages without specifying an amount. The

court denied this motion on the same grounds. Plaintiff made a motion to amend the prayer and ask for $5,000 in punitive damages. This motion was granted. At trial, the court instructed the jury that: "In no case may this amount [of punitive damages] exceed $5,000 . . . ."

On appeal, plaintiff claims that the court erred in not allowing her to amend the petition and in limiting her prayer for punitive damages to $5,000.

The trial court has broad discretion in permitting or denying amendments to pleadings and unless that discretion is abused the reviewing court will not interfere. City of Des Moines v. Ruble, 193 N.W.2d 497, 507 (1971). However, the Iowa Supreme Court has consistently held that amendments to pleadings should not be allowed on the eve of trial or later if they substantially change the defense or any issue involved in the case. Parker v. Tuttle, 260 N.W.2d 843, 846 (1977).

In this case, the motion to amend the pleadings to ask for $500,000 in punitive damages was made on the morning of the trial before jury selection. Following jury selection, counsel for the plaintiff then made the motion asking for unlimited punitive damages. No mention of punitive damages had been made before the day of trial. A pre-trial conference was held in this case, but no motion to amend was made at that time.

We find that the trial court did not abuse its discretion in denying plaintiff's motions to amend at this late date. When the original petition contained no claim for punitive damages, an amendment asking for $500,000 in punitive damages or an unlimited amount of punitive damages on the day of the trial does represent a substantial change in the case.

Plaintiff also argues that the court erred in limiting the instruction on punitive damages to $5,000. However, at the time that the proposed jury instructions were being discussed, the plaintiff raised no objection:

> THE COURT: The instructions are now in their final form. Counsel indicate they have had sufficient time to look them over and are prepared to make a record. The Court calls on the plaintiff.
>
> MS. ERICKSON: The plaintiff has no proposed instructions to offer the Court. We have no objections or exceptions to the instructions that are proposed.

It has been consistently held that when no objection to proposed jury instructions is made prior to submission, the propriety of the instructions will not be reviewed on appeal. Farmers Trust & Sav. Bank v. Manning, 311 N.W.2d 285, 288 (Iowa 1981), Iowa R. Civ. P. 196. Because plaintiff raises the issue of the punitive damage instruction for the first time on appeal, we decline to consider it.

Plaintiff also alleges that the trial court erred in failing to include mental anguish, pain and suffering in the instruction on compensatory damages. This issue is also raised for the first time on appeal and will not be considered.

The final ground of error set forth by the plaintiff is that trial court erred in sustaining the defendant's motion for a judgment notwithstanding the verdict eliminating the $4,000 award for punitive damages.

A motion for judgment notwithstanding the verdict must stand on the grounds raised in the directed verdict motion and on appeal from such judgment, the review by the appellate court is limited to those grounds raised in the directed verdict motion. Watson v. Lewis, 272 N.W.2d 459, 461 (Iowa 1978). The court must view the evidence in the light most favorable to the party against whom the motion is directed. Id.

Fraud is one of the recognized grounds for exemplary damages. Holcomb v. Hoffschneider, 297 N.W.2d 210, 213 (Iowa 1980). In order to recover punitive damages for fraudulent acts, more than "ordinary" or "simple" fraud must be shown. Id. at 214.

> In ordinary cases a recovery of exemplary, punitive, or vindictive damages will not be allowed in an action of deceit, but in certain cases such damage may be allowed, as where the wrong involves some violation of duty

> springing from a relation of trust or confidence, or where the fraud is gross or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness, as where it appears that defendant acted with a deliberate intent to injure plaintiff. The rule allowing exemplary damages has been extended to include a case where there was no actual fraudulent intent, but where there was such a reckless disregard of the truth as to justify the legal inference of a fraudulent intent.

Id. at 214.

Under this standard, we find that there was sufficient evidence to submit the issue of punitive damages to the jury and conclude that the trial court acted improperly in granting the judgment n.o.v.

The trial court order granting the motion for judgment n.o.v. is reversed and the jury award of $4,000 punitive damages is reinstated.

REVERSED.

All judges concur except Schlegel, J., Oxberger, C.J., and Hayden, J., who specially concur.

SCHLEGEL, J. (specially concurring)

I believe this case comes close to representing that rare occasion when the trial court has abused its very broad discretion in the allowance of amendments. See Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 503 (Iowa 1975). It seems that the court did not find it improper to allow the inclusion of a claim for punitive damages, but determined only the amount it would allow to be claimed by Polson. The court refused to allow an amendment of the petition to specifically ask for $500,000 in punitive damages. That proposed amendment, together with a second proposed amendment, which sought to amend the prayer to include punitive damages in an unspecified amount, were denied on the grounds that such amendment would "change the nature of the case substantially." The court did, however, then permit an amendment which asked for $5,000 in punitive damages.

The majority's reliance upon Parker v. Tuttle, 260 N.W.2d 843, 846 (Iowa 1977), is misplaced. Tuttle was a case involving a suit for a real estate commission, and the amendment offered in that case sought to add provisions to the alleged oral contract, by adding a condition that had not been previously pleaded. That amendment did not address the question of damages, in any respect.

I cannot agree that Polson's effort to add a prayer for puntive damages so substantially changed the issues involved that it constituted any grounds for denial of the amendment. It is obvious that the court, in its discretion and in the interest of justice, determined that a prayer for damages, either for $500,000 or for some unlimited amount, should not be permitted. On the other hand, the court was willing to allow the issue of punitive damages to be a part of the case, but only to the extent of not in excess of $5,000. Such amendment having been allowed, Polson did not preserve any error at the time of its allowance. Likewise, Polson did not preserve any objection to its submission to the jury. For this reason, I believe the majority correctly rules that we cannot now consider the

claimed error. We should not, however, upon this record, establish the principle that an effort to add to a prayer the issue of puntive damages so substantially changes the issues or defenses of the case that such an amendment cannot be allowed.

In this case the amendments proposed did not present any substantially different issues than those defendant was already prepared to meet to defeat plaintiff's claim for damages. Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). The very issues of wrongful and malicious discharge are the same issues that permit an award of punitive damages in an appropriate case. See Feeney v. Scott County, 290 N.W.2d 885, 892 (Iowa 1980). Polson's claim for punitive damages required only the very same proof that was required to sustain her cause of action for malicious termination of employment.

I reluctantly agree that the refusal to allow the two amendments was not an abuse of the trial court's discretion, but that refusal cannot be held to stand upon the court's determination that its allowance would substantially change the issues of the case.

Oxberger, C.J., and Hayden, J., join this special concurrence.