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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THE FAIRFIELD ALUMINUM CASTINGS COMPANY, INC.,

Plaintiffs-Appellees,

vs.

LOCAL UNION NO. 159 of the INTERNATIONAL MOLDERS and ALLIED WORKERS UNION, AFL-CIO-CLC, et al.,

Defendants-Appellants.

Filed April 29, 1980

0-38
2-62835

Appeal from Jefferson District Court - Phillip R. Collett, Judge

Defendant-labor union appeals judgment on jury verdict for plaintiff-company for property damage suffered during union strike. - Affirmed.

Patrick J. Life, of Life Law Offices, Oskaloosa, for defendants-appellants.

Craig R. Foss, of Foss & Kuiken, Fairfield, for plaintiffs-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant-labor union appeals from a judgment entered on a jury verdict for plaintiff-company for property damage suffered during a union strike. Defendant contends exemplary damages were not available under section 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976) and thus, the trial court should not have instructed the jury that they could award exemplary damages. Defendant also asserts that to hold the union liable, 29 U.S.C. § 106 (1976) required plaintiff to show by clear proof that the union actually participated in, actually authorized, or ratified the acts that caused the damage, and, consequently, the trial court erred in instructing the jury that the union could be held liable for the acts of its members under the common law of agency. We affirm.

Plaintiff's petition sounded in tort and alleged that over a six-month period, a number of members of defendant-labor union trespassed on plaintiff's property and damaged various items of property through such acts as rock and paint throwing, tire flattening, nail scattering, and wire cutting. Plaintiff alleged that the acts were committed while defendant-labor union was on strike against plaintiff, and were willfully and maliciously committed. At trial, after plaintiff rested its case, defendant moved to dismiss the case against the union on the ground that plaintiff had not shown that the union had actually participated in, actually authorized, or ratified the alleged conduct of its members pursuant to 29 U.S.C. § 106 (1976). The trial court overruled the motion. Defendant also moved to discharge individual union members from liability. The trial court ruled that there was no need to grant the motion since the action was brought in the form of a class action against the union and that individual union members would not be held personally liable. At the close of all the evidence the trial court supplied copies of the instructions it intended to submit to the jury. Included in those instructions were the instructions at issue in this appeal, the instruction on exemplary damages and the instruction on the union's liability for the acts of its members. Defendant's only objection to the instructions prior to their submission to the jury was to those instructions referring to the action as a class action. The trial court overruled that objection and submitted the instructions to the jury. The jury returned a verdict for plaintiff in the amounts of $2500 for compensatory and $10,000 for

exemplary damages.

I. Defendant's brief is prefaced with the concession that this is a state claim brought under a trespass theory, and that this action was not brought under the Labor Management Relations Act, 29 U.S.C. §§ 141-166, 181-188 (1976) (hereinafter LMRA). However, defendant's arguments on the issues are all based on the application of that federal act. We recognize the potential jurisdictional problem of federal preemption and address that issue prior to addressing the merits of the case.

When the activity at issue arguably falls within the permitted or prohibited activity of sections 7 and 8 of the National Labor Relations Act (hereinafter NLRA), 29 U.S.C. §§ 157, 158 (1976), both state and federal courts must defer to the competence of the National Labor Relations Board. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S. Ct. 773, 780, 3 L. Ed. 2d 775, 783 (1959). Section 303 of the LMRA provides that an action for damages may be brought in federal or state court for conduct that constitutes an unfair labor practice under section 8(b)(4) of the NLRA. Section 8(b)(4) is directed toward specific union conduct directed to specific objectives, such as forcing the employer to join a prohibited labor or employer organization, forcing the employer to participate in a secondary boycott, forcing the employer to bargain with a union other than the union certified as the representative union, or forcing the employer to assign particular work to members of one union as opposed to members of another union. Consequently, if the activity is arguably within the activities addressed in the NLRA, then we must defer to the decision of the NLRB before we may exercise jurisdiction. Moreover, if an action could have been brought under section 303 of the LMRA, then federal law applies. Local 20, Teamsters Union v. Morton, 377 U.S. 252, 258-60, 84 S. Ct. 1253, 1257-58, 12 L. Ed. 2d 280, 285-86 (1964). However, if this activity is covered by an exception to the Garmon rule, and if section 303 could not apply, then this is properly a state claim to which state law is to be applied.

A well-recognized exception to the Garmon rule is tortious conduct marked by violence and imminent threats to public order. Farmer v. United Brotherhood of Carpenters & Joiners, 430 U.S. 290, 299-300, 97 S. Ct. 1056, 1063, 51 L. Ed. 2d 338, 349-50 (1977); Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 136, 96 S. Ct. 2548, 2551, 49

L. Ed. 2d 396, 401 (1976), quoted in Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 833 (Iowa 1978); Garmon, 359 U.S. at 247, 79 S. Ct. at 781, 3 L. Ed. 2d at 784; UAW v. Russell, 356 U.S. 634, 646, 78 S. Ct. 932, 939, 2 L. Ed. 2d 1030, 1039 (1958); Langrehr v. Carpenters & Joiners Local 772, 236 N.W.2d 339, 342 (Iowa 1975). The case at bar is clearly such an exception. Furthermore, this is not a claim that properly falls within the delineations of section 303 of the LMRA. This is not a claim for lost business due to an unfair labor practice listed under section 8(b)(4) of the NLRA. This is an action in tort to recover damages for property that was damaged or destroyed. Since there is no conflict between this state claim and the provisions, objectives, and purposes of the federal acts, we conclude that this is properly denoted a state claim to which we apply state law. Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809, 818 (N.D. Iowa 1960). With this conclusion, we proceed to the merits of the case at bar.

II. Defendant failed to object at trial to the instructions allowing the jury to award exemplary damages. Consequently, defendant has waived his right to raise this issue on appeal. Miller v. International Harvester Co., 246 N.W.2d 298, 304 (Iowa 1976). Regardless, defendant's claim of error is without merit. Defendant based his contention on the ground that exemplary damages are not allowed in an action brought under section 303 quoting Morton, 377 U.S. at 260-61, 84 S. Ct. at 1258-59, 12 L. Ed. 2d at 286-87. In light of our conclusion that section 303 does and could not apply to the case at bar, defendant's contention is without support. The pleading and proof of willful and malicious tortious conduct was sufficient to justify submission of an instruction on exemplary damages to the jury. See Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 859 (Iowa 1973). Exemplary damages may be recovered on state claims of this type. UMW v. Gibbs, 383 U.S. 715, 736, 86 S. Ct. 1130, 1144, 16 L. Ed. 2d 218, 234 (1966); Russell, 356 U.S. at 646, 78 S. Ct. at 939, 2 L. Ed. 2d at 1039. The trial court did not err in submitting the exemplary damage instruction to the jury.

III. Defendant's objection to the instructions that referred to the action as a class action did not specifically address the instruction on the union's liability for actions of its members. Nevertheless, even construing defendant's objection as specifically objecting to that instruction in light of defendant's prior contention in the motion to

dismiss, defendant's argument is without merit. Defendant's argument is grounded on the applicability of section 6 of the Norris-LaGuardia Act. 29 U.S.C. § 106 (1976). That section requires clear proof of actual participation, actual authorization, or ratification of the members' activities by the union before liability can attach to the union. However, as we have already concluded, state law and not federal law is the applicable law of this case. Regardless, it is clear that section 6 only applies to state claims adjudicated in federal courts. Gibbs, 383 U.S. at 737, 86 S. Ct. at 1144, 16 L. Ed. 2d at 234; see 29 U.S.C. § 113(d) (1976).

Consequently, applying Iowa law, the liability of an unincorporated association, such as the union here, for the acts of its members is deemed to be governed by the principles of agency law. See Lamm v. Stoen, 226 Iowa 622, 627, 284 N.W. 465, 467 (1939). Under tort law, the principles of agency law are no different from the principles applied to master-servant situations, in that the doctrine of respondeat superior applies, and the principal is liable for the tortious acts of the agent. Weider v. Chicago, Rock Island & Pacific Railway, 10 F.R.D. 263, 265 (1950); Restatement (Second) of Agency § 216 (1957). This was the gist of the instruction on the union's liability for the acts of its members. The trial court did not err in submitting the instruction.

AFFIRMED.