

IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA

LEOLA RIESSELMAN,
Plaintiff,

vs.

**BOYD COUNTY SCHOOL DISTRICT NO.
5 a/k/a BUTTE PUBLIC SCHOOL,**
Defendant.

Case No. CI00-11

**ORDER ON POST-TRIAL
MOTIONS AND JUDGMENT**

DATE OF HEARING: August 6, 2001.
DATE OF RENDITION: September 5, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: In chambers at District Courtroom, Holt County Courthouse,
O'Neill, Nebraska.

APPEARANCES:

For plaintiff: John P. Heitz with plaintiff.

For defendant: Steve Williams with Larry Hiatt, Superintendent of defendant.

SUBJECT OF ORDER: (1) entry of judgment upon jury verdict, (2) defendant's motion to set aside verdict and judgment and to have judgment entered in accordance with defendant's motion for directed verdict, and motion in the alternative for a new trial, and, (3) plaintiff's motion to assess attorneys' fees.

PROCEEDINGS: See journal entry entered on August 16, 2001.

FINDINGS: The court finds and concludes that:

1. Following receipt of a jury verdict for plaintiff of \$8,000.00, the court deferred entry of judgment thereon pending post-trial motions, and after consulting counsel, set a date and time for hearing such motions in chambers at O'Neill. The hearing subsequently followed and the various matters were taken under advisement. The decisions thereon follow.

2. The court first considers the defendant's alternative motion for a new trial. Section 25-1142 authorizes a motion for new trial for

(4) excessive damages, appearing to have been given under the influence of passion or prejudice; (5) error in the assessment of the amount of recovery, whether too large or too small, if the action is upon a contract . . . ; (6) that the verdict . . . is not sustained by sufficient evidence or is contrary to law; . . . and (8) error of law occurring at trial and excepted to by the party making the application.

NEB. REV. STAT. § 25-1142 (Cum. Supp. 2000). A motion for new trial is addressed to the discretion of the trial court, and subject to review for abuse of discretion. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, ___ N.W.2d ___ (2001).

3. In *Holmes*, the Nebraska Supreme Court reexamined the standards applicable to such motions and the principles underlying their consideration. The court stated:

The trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record. *Reeves v. Markle*, 119 Ariz. 159, 579 P.2d 1382 (1978) (en banc). For this reason, the trial judge is accorded significant discretion in granting a new trial. Due to his or her unique position, the trial judge becomes the primary buffer against verdicts not supported by the evidence. This is particularly true when the elements of damage are intangibles and the appraisal depends a great deal on an observation of the plaintiff and the evaluation of his or her testimony. See *Daniel v. Sharpe Const. Co., Inc.*, 270 S.C. 687, 244 S.E.2d 312 (1978).

In considering the judicial examination of jury awards in the federal system, the U.S. Supreme Court has noted that primary responsibility for application of an excessiveness standard is lodged in the district court, not the court of appeals, because trial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), citing *Taylor v. Washington Terminal Company*, 409 F.2d 145 (D.C. Cir. 1969). “ ‘If we reverse, it must be because of an abuse of discretion. . . . The very nature of the problem counsels restraint. . . . We must give the benefit of every doubt to the judgment of the trial judge.’ ” 518 U.S. at 438-39.

The necessity of this unique power to grant a new trial is a long-established principle. The exercise of the trial court’s power to set aside the jury’s verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. *Gasperini v. Center for Humanities, Inc.*, *supra*. If it appears that the jury has committed a gross error, or has given damages excessive in relation to the person or the injury, the U.S. Supreme Court stated it is as much the duty of the court to interfere, to prevent the wrong, as in any other case. See *id.*, citing *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578). As stated by Lord Mansfield over two centuries ago:

Trials by jury, in civil causes, could not subsist now, without a power, somewhere, to grant new trials.

. . . .

Most general verdicts include legal consequences, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.

. . . .

If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should . . . be opportunities of reconsidering the cause by a new trial.

Bright v. Eynon, 1 Burr. 390, 393, 97 Eng. Rep. 365, 366 (1757).

It is important to note that the order of a new trial does not terminate a case, instead, it simply grants a new trial, and its purpose is to prevent miscarriages of justice, which, on occasion, occur at the hands of juries, by presenting the same matter to a new jury. See *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440, 659 N.E.2d 1242 (1996).

Holmes v. Crossroads Joint Venture, *supra* at 108-09, ___ N.W.2d at ___.

4. The plaintiff claimed that she had a contract for a definite term at a definite price, specifically \$8,000.00. The evidence was absolutely clear and undisputed that the defendant school district paid part of the \$8,000.00 prior to the date that it terminated the plaintiff's employment. In addition, without any dispute the evidence showed other actual earnings during the period for which the plaintiff claimed her damages. There is simply no rational way of viewing the evidence to support the amount of the verdict. At the hearing on the present motion, the plaintiff's counsel in responding to this court's direct question failed to articulate any rational basis to support the amount of the verdict. The plaintiff's counsel cannot be criticized (and this discussion should not be construed as such) for that response; no attorney can justify an insupportable conclusion. The return of a verdict for \$8,000.00 so conflicts with the evidence as to definitively show that the verdict was the result of passion, prejudice, mistake, or some means not apparent on the record. The verdict is not supported by the evidence and cannot stand.

5. Under certain circumstances, a new trial may be limited to damages. *Holmes v. Crossroads Joint Venture*, *supra*. However, that occurs where the issue of liability has been properly

determined. As will appear below, this court concludes that it has not. As to the motion for new trial, this court also finds error in the jury's determination of liability of the defendant. If this court had concluded that the issue of liability was properly submitted to the jury, under the present circumstances the irrational and insupportable determination of damages would cast considerable doubt upon the validity of the jury's verdict on liability. This court's finding of passion, prejudice, mistake, or other means not apparent on the record would equally apply to the issue of liability. Under such circumstances, this court would conclude that the new trial could not be limited to damages.

6. The court now considers the defendant's motion for judgment notwithstanding the verdict. NEB. REV. STAT. § 25-1315.02 (Cum. Supp. 2000). Of course, on a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Holmes v. Crossroads Joint Venture, supra*.

7. The defendant's motion appears to address both the trial motion for directed verdict at the close of the plaintiff's case and the renewed trial motion for directed verdict at the close of all of the evidence. Of course, as to the former, a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion. *Spulak v. Tower Ins. Co.*, 251 Neb. 784, 559 N.W.2d 197 (1997). But the defendant renewed the motion at the close of all of the evidence. A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for a directed verdict made at the close of all the evidence, which motion should have been sustained because of a want of evidence. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994). Therefore, the defendant properly preserved the issue of sufficiency of the evidence by the motion for directed verdict renewed at the close of all of the evidence. The defendant also satisfied the prerequisite for a motion for judgment notwithstanding the verdict.

8. This court erred in failing to sustain the motion for directed verdict renewed at the close of all of the evidence. Accepting as true all evidence favorable to the plaintiff, and giving the plaintiff the benefit of all proper inferences deducible from the relevant evidence, there simply is no evidence to support

the formation of a contract of employment for a definite term. This court should have determined that, as a matter of law, the plaintiff was an at-will employee. Nebraska is an employment-at-will state, where, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason, without incurring liability. *Dossett v. First State Bank*, 261 Neb. 959, ___ N.W.2d ___ (2001). The amended petition alleged no constitutional or statutory grounds prohibiting termination. The plaintiff based her claim strictly upon a contractual allegation. Because the evidence failed, as a matter of law, to raise any contractual prohibition, the defendant was free to terminate that employment without incurring liability. This court should have so ruled.

9. In addition, the evidence shows without dispute that the defendant fully compensated the plaintiff to the date of termination of the employment. This court should have granted the defendant's motion for directed verdict at the close of all of the evidence and dismissed the plaintiff's amended petition with prejudice.

10. The erroneous submission of the case to the jury should not affect this court's fortitude to properly apply the law, notwithstanding the jury's verdict. The motion for judgment notwithstanding the verdict must be granted.

11. Obviously, in view of the determination that the motion for judgment notwithstanding the verdict must be granted, judgment cannot be entered on the verdict of the jury and the jury verdict must be set aside. Because the motion for directed verdict should have been granted, the appropriate order cannot be for a new trial, and must be for dismissal of the amended petition with prejudice.

12. For the same reason, the plaintiff's motion for assessment of attorneys' fees must be denied.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The verdict of the jury is set aside.
2. The defendant's motion for judgment notwithstanding the verdict is granted.
3. JUDGMENT of dismissal is hereby entered in favor of the defendant and against the plaintiff, thereby dismissing the plaintiff's amended petition with prejudice to future action at plaintiff's cost.
4. The defendant's alternative motion for new trial is denied as moot.
5. The plaintiff's motion for assessment of attorneys' fees is denied.

Signed in chambers at Ainsworth, Nebraska, on September 5, 2001.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20____ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20____ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days (“Amended petition dismissed with prejudice at plaintiff’s cost”).
Done on _____, 20____ by ____.
- Note the decision on the trial docket as: [date of filing] Signed “Order on Post-trial Motions and Judgment” entered.
Done on _____, 20____ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge