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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

WILBERT BURMEISTER and **BARBARA BURMEISTER**, Husband and Wife,

Plaintiffs-Appellees,

vs.

MOBILE HOME BROKERS, INC., d/b/a **HARVEST HOMES**,

Defendant,

and

GREEN TREE ACCEPTANCE, INC.,

Defendant-Appellant.

Filed October 28, 1987

7-262
86-666

Appeal from the Iowa District Court for Mills County (No. 20086), Glen M. McGee, Judge.

Defendant Green Tree Acceptance, Inc. appeals from a jury verdict awarding plaintiffs damages based on theories of breach of warranty and fraudulent misrepresentation as a result of a defective modular home which plaintiffs purchased from the defendants. **AFFIRMED.**

James A. Pratt of Heithoff, Pratt & Heithoff, Council Bluffs, for defendant-appellant Green Tree.

E. Terry Sibbernsen, Omaha, Nebraska, and Richard Maher of Maher & Aranza, Tabor, for defendant Harvest Homes.

Lyle A. Rodenburg, Council Bluffs, for plaintiffs-appellees.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ. Snell, J., takes no part.

DONIELSON, P.J.

Defendant Green Tree Acceptance, Inc. appeals from a jury verdict awarding plaintiffs damages based on theories of breach of warranty and fraudulent misrepresentation as a result of a defective modular home which plaintiffs purchased from the defendants. We affirm.

Wilbert and Barbara Burmeister purchased a modular home from Mobile Home Brokers, Inc., doing business as Harvest Homes, for approximately $39,000. The Burmeisters bought the modular home on an installment contract, and Harvest Homes assigned its rights under the contract to Green Tree Acceptance, Inc., a finance company specializing in the financing of mobile homes and modular homes.

When the modular home was delivered to the Burmeisters, it proved to have serious defects. After an initial installment payment, the Burmeisters refused to make any more payments. They later filed the present suit against both Harvest Homes and Green Tree, alleging breach of warranty and fraudulent representations in the sale, delivery, and installation of the modular home. The suit was tried to a jury, which awarded the Burmeisters the entire amount of their purchase price plus $6,800 for incidental and consequential damages. The district court entered judgment against Green Tree for $28,200, the amount owing on the finance contract Green Tree had assumed. The district court entered judgment against Harvest Homes for the rest of the damages, totalling approximately $18,000.

Both Green Tree and Harvest Homes appealed from the judgments against them. Green Tree has pursued its appeal, but Harvest Homes filed no brief and seemingly abandoned its appeal. Upon the Burmeisters' motion, Harvest Homes' appeal has been dismissed.

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

I. Green Tree first contends the district court erred by submitting to the jury an instruction referring to the Burmeisters' cause of action for implied warranty of fitness. Green Tree argues the installment sales contract included a disclaimer of any such implied warranty, based on the following provision: "THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION OF THE GOODS BELOW." Green Tree claims this provision comports with Iowa Code section 554.2316(2) that any provision excluding the implied warranty of fitness must be in writing and conspicuous and relies specifically on the following language in the same quoted section:

> (2) . . . language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof . . . ."

Burmeisters contend error was not preserved on this issue. They urge that, at best, the objection to the instruction was only that no such warranty was given. They additionally argue Green Tree did not claim an implied warranty of fitness disclaimer in their pleadings, objections during the trial, motions for directed verdict, and motion for new trial; nor did they request an instruction, present evidence on the issue, try the issue as a theory of their case, or argue disclaimer to the court or jury.

The record made by Green Tree with regard to this issue is set out in the colloquy during the exceptions to the instructions: "Green Tree objects to Instruction No. 15, again implied warranty of fitness, that warranty not being given."

Questions not presented to and not passed on by the trial court cannot be raised or reviewed upon appeal and the theory of the case as tried in the trial court will be the theory upon which an appeal is based. Shill v. Coreage

Corp., 353 N.W.2d 416, 420 (Iowa 1984). A party may not sit by and permit the court to commit inadvertent error without protest and then complain for the first time on appeal. State v. Jewett, 219 N.W.2d 559, 560 (Iowa 1974). General principles in Iowa involving preservation of error have been stated as follows:

> In determining the sufficiency of an objection to preserve error, "the test is whether the exception taken alerted the trial court to the error which is urged on appeal." Dutcher v. Lewis, 221 N.W.2d 755, 759 (Iowa 1974). The purpose is "to afford the trial judge an opportunity to catch exactly what is in counsel's mind and thereby determine whether the objection possesses merit to an extent the instruction should be recast." State v. Baskin, 220 N.W.2d 882, 886 (Iowa 1974).

Goetzman v. Wichern, 327 N.W.2d 742, 745 (Iowa 1982).

> As developed in the Iowa courts, the concepts of error preservation essentially encompass two related concerns. The prevalent theme of the various rules is that potentially reversible error must be brought to the attention of the trial court before the error can be considered on appeal; if the trial court is not alerted in a timely and sufficiently specific fashion, the error will not be reviewed by the appellate court. This aspect of error preservation obligates counsel to make certain motions or objections in the pre-trial, trial or post-trial phases of a proceeding. Secondly, preservation of error also contemplates the construction of an appropriate and sufficiently detailed record upon which the reviewing court can base its decision. In this sense, offers of proof or the utilization of procedural devices to secure a record of otherwise unreported matters become necessary prerequisites to appellate review.

Allbee & Kincaid, Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner, 35 Drake L. Rev. 1, 3 (1985-86).

It is recognized that:

> [A]ll objections to instructions must specify the objectionable matter, on what grounds and none other will thereafter be considered. It is incumbent on the objecting party to point out wherein he contends the instruction is wrong so the trial court may have opportunity to correct it.

Pose v. Roosevelt Hotel Co., 208 N.W.2d 19, 25 (Iowa 1973); see also Wagaman v. Ryan, 258 Iowa 1352, 1358, 142 N.W.2d 413, 417 (1966). Iowa Rule of Civil

Procedure 196 recites that no other grounds of objections shall be considered on appeal other than those objections made at the close of the trial.

Applying these principles to this case, we agree that the record on this issue is not sufficient to preserve error on the matters which Green Tree now asserts on appeal. The district court was never given an opportunity to consider the possibility of a disclaimer of implied warranty to correct any potential error in the jury instructions.

II. Green Tree also claims the district court erred by giving the jury a general instruction concerning the measure of damages for breach of warranty. Green Tree argues such instruction was erroneous because the sales contract included the following provision:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICE OBTAINED IN THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. (Emphasis supplied)

Green Tree argues this remedy may be substituted or in addition to those remedies outlined in the Uniform Commercial Code and urges that the specified written contract provision should be interpreted to be the exclusive remedy, pursuant to Iowa Code section 554.2719, even although the word "exclusive" is not employed in the quoted language.

Burmeisters contend this issue was not preserved for appeal because it was not raised by any pleading, objection, instruction, or new trial motion.

Instruction No. 30 recites:

> You are instructed that under the laws of the State of Iowa the measure of damages for breach of warranty is the difference between the value of the home at the time and place of delivery, and the value it would have had, if it would have been as warranted, together with any incidental and consequential damages.

> You are instructed that the "as warranted" value is the contract price. The "value of the home at the time and place of delivery" is the fair market value of the home in its defective condition.
>
> Fair market value is the price a willing buyer would pay for the home and the price a willing seller would accept for the home, neither being under any compulsion to buy or sell. Fair market value may be established by the owner of the home or you may consider the testimony of experts in that regard.
>
> However, in the event it is possible to repair said mobile home and place it in a fit condition for a lesser figure, proper measure of damages would be the lesser figure.
>
> "Incidental damages" resulting from the seller's breach include reasonable expenses incurred incident to the breach and proximately caused thereby.
>
> "Consequential damages" resulting from the seller's breach include injury to the person or property of the purchasers proximately resulting from any breach of warranty.

The record made by Green Tree with respect to this instruction is as follows:

> Green Tree objects to Instruction No. 30, in particular that part which deals with the fair market value. There is no evidence as to the fair market value of the property at the time it was delivered. The only evidence in the record is that, that the plaintiff Burmeister says it was of no value, of zero value to him, the test being whether a—there was a fair market price as to what a willing buyer would pay for the home at the time it was delivered, assuming you had a willing seller.
>
> The measure of damages has not been met. There has been complete failure of proof by plaintiffs in that particular. And for the further reason that Burmeister has disqualified himself from giving testimony in this particular point by constantly referring to the value of the property as to the value to him, which is improper measure of damages.

In addition, we note Green Tree submitted requested instructions referring to plaintiffs' damages as not exceeding the amount owed to Green Tree at the time Green Tree received notice. We additionally observe this particular language in the requested instructions specifically contradicts that contention which Green Tree now alleges on appeal.

We find the record made, albeit lacking in clarity, is sufficient to consider this issue on the merits.

It is generally held that resort to a remedy as provided in an agreement is optional unless the remedy is agreed to be exclusive, in which case it becomes a sole remedy. Iowa Code section 554.2719(1)(b); 67A Am. Jur. 2d Sales § 915. Comment (2) to Uniform Commercial Code section 2-719 states that if the parties intend the wording in the contract to describe the sole remedy, this must be clearly expressed. 67A Am. Jur. 2d Sales § 916.

It is clear our law requires any substituted or added remedy intended to be the exclusive remedy be clearly stated in the contract. A review of the sales contract discloses absolutely no such agreement by the parties that the expressly stated provision that recovery to the Burmeisters be limited to amounts paid by them be the exclusive and the sole remedy.

Iowa Code section 537.3404(2) (1981) provides in pertinent part:

> A claim or defense of a consumer specified in subsection 1 may be asserted against the assignee . . . only to the extent of the amount owing to the assignee with respect to the sale or lease of the property or services as to which the claim or defense arose, at the time the assignee has notice of the claim or defense . . .

Also, section 537.3404(4) provides:

> Except as provided in section 537.1107 [waiver, agreement or settlement], an agreement may not contain a provision to limit or waive the claims or defenses of a consumer under this section. A provision in violation of this subsection is unenforceable.

It is clear these sections allow recovery to the Burmeisters to exceed amounts paid by them under the contract. We find no error occurred with regard to this issue.

III. In addition, Green Tree argues the measure of damages was erroneous because damages for breach of warranty are limited to the loss actually suffered by the injured party. Green Tree makes no reference to any specific jury instruction nor to any place in the record where this argument was raised previously at trial. We find the record before us is inadequate to preserve error on this

issue. As such, the district court had no opportunity to correct any alleged error.

We find even if error had been preserved, Iowa Code section 554.2714(2) states that the buyer's damages for breach in regard to accepted goods is as follows:

> 2. The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The language of the above-quoted section was the law as given to the jury in the instructions. Green Tree's third argument is without merit.

IV. Lastly, Green Tree contends the district court erred by allowing Wilbert Burmeister to testify that the value of the modular home, as delivered, was zero. Although Burmeisters contend error was not preserved, a review of the record discloses that objection was made with respect to this issue. Green Tree concedes that as owner, Burmeister was qualified to give his opinion. Green Tree's argument is that Burmeister's opinion was based on an improper standard in that he testified that the property was worth nothing since he wanted a lifetime home and the house had defects in it and further testified that the value would "still be nothing if the home was removed from its foundation." Green Tree contends that the true test of value is the price that a willing buyer would pay and for which a willing seller would sell in an arms-length transaction.

A review of the transcript discloses the following record was made in this regard:

> BY MR. RODENBURG:
> Q. Wil, I guess I would like to know another question and have you give your opinion as regards to the fair market value if you took the house out and tried to sell it to somebody else other than yourself and your wife, another third party. Do you have an opinion as to what it's fair, reasonable market value would have been in the condition with the defects as you've alleged were in it and sell

it to somebody else? Do you have such an opinion; yes or no? A. Yes.

Q. What is that opinion?

MR. PRATT: Objected to, Your Honor. It's not the proper measure of damages. The proper measure of damages would be the fair and reasonable cost of what a willing buyer would pay and what a willing seller would sell it for, fair market value.

* * *

THE COURT: Overruled. You may answer.

THE WITNESS: Well, in my opinion, there would have been some salvage to the home with the defects, but to overcome—it would cost more to take it off the foundation to me that it would be worth on the market to anyone else, so to anyone else the value would still be nothing.

BY MR. RODENBURG:

Q. Mr. Pratt in his objection objected to the definition of fair market value. Do you understand in your answer that fair market value is what a willing buyer in the marketplace who knows of the defects that you've alleged would pay to a seller in the marketplace, being under no compunction to sell? Did you understand that to mean what the fair market value is? A. Yes.

A plaintiffs' witness, a contractor, testified that it was not economically feasible to repair the home so that it would be a good serviceable home, although temporary repairs could be made. A Harvest Homes' witness testified he repaired the home for a cost of $3,770.50. Another witness testified he purchased the Burmeister home and was still living in it.

Green Tree argues Burmeister was the only witness who testified at trial as to the value of the home at the time it was delivered. Certainly, Green Tree had the opportunity to call its own witness in this regard. We do not find Green Tree's fourth argument persuasive. The jury was allowed to consider all the evidence in reaching its conclusion that the value of the home at the time of delivery was zero; the jury's conclusion as factfinder was within the range of evidence. The district court did not err in allowing Burmeister, the homeowner, to testify as to his opinion of the value of the home upon delivery. Green Tree had an opportunity to rebut that testimony.

For all of the foregoing reasons, we affirm the district court in all respects.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur in the result only.