

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 25 1985

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CLERK SUPREME COURT

Filed June 25, 1985

VALLEY WEST DES MOINES SHOPPING)
CENTER, INC.,)

Plaintiff-Appellee/
Cross-Appellant,)

vs.)

HOUSE OF MICROWAVE OVENS,)
JOY MUELLER, and R. BEN MUELLER,)

Defendants-Appellants/
Cross-Appellees.)

5-117
83-1591

Appeal from the Iowa District Court for Polk County - A. M. Critelli, Judge.

Defendants appeal from adverse judgment in an action to recover unpaid rent and counterclaim for damages caused by a leaky roof. **AFFIRMED.**

J. R. McManus and Ray Sullins, Des Moines, for defendants-appellants/cross-appellees.

Susan L. Ekstrom of Ekstrom Law Office, Des Moines, for plaintiff-appellee/cross-appellant.

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

SNELL, P.J.

Plaintiff, Valley West Mall, filed a petition seeking to recover back rent from defendants, Joy and R. Ben Mueller. The Muellers filed a counterclaim alleging that the plaintiff refused to repair a leaky roof above the Muellers' business, causing them to suffer damage to their business and property and causing Joy Mueller to suffer great emotional distress.

After the case was submitted, the jury sent the following note to the trial court: "Judge: Can we choose Verdict No. 1 (total rent \$7,016.75) and still give defendant some exemplary damages? Having trouble interpreting jury instructions. Ruth M. Schultz." After receiving consent from both counsel, the trial court responded as follows:

Members of the Jury: You are not precluded from awarding plaintiff damages for back rent (using verdict form No. 1) and also awarding a defendant or defendants some damages. However, you cannot award either defendant any exemplary damages unless you first determine that such defendant is entitled to some amount of compensatory damages.

The jury returned a verdict for the plaintiff. No award was made to the defendants.

The defendants filed a timely motion for new trial on the ground that the supplemental instruction misstated the law. The motion was overruled.

Iowa Rule of Civil Procedure 197 states that any objection to additional instructions "shall be made in the motion for a new trial." Although the appellants raised their objection to the additional instruction in the motion for new trial, we find that error was not preserved. The judge contacted defendants' attorney and read him the proposed instruction before submitting it to the jury. The attorney consented to it. By consenting to the instruction, defendants waived their right to later object.

Even if error had been preserved, we also conclude that the additional instruction did not represent a misstatement of the law. In Pringle Tax Service,

Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979), the supreme court held: ". . . a failure to award actual damages will not bar exemplary damages when actual damage has in fact been shown." Pringle contemplates a situation where actual damages were sustained but could not be computed or assessed. Id. at 152-53. In this case, there was no claim that the actual damages were of a nature that they could not be computed or assessed. Therefore, we find that the additional instruction did not constitute a misstatement of the law.

The order denying the motion for a new trial is affirmed.

AFFIRMED.