FILED
JAN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

OAKLAND REDI-MIX, INC. and GAYLE S. TATE,

Plaintiffs-Appellees,

vs.

CITIZENS STATE BANK, OAKLAND, IOWA, and L. W. ROSS, JR., PRESIDENT,

Defendants-Appellants.

Filed January 30, 1981

0-263
2-64151

Appeal from Pottawattamie District Court - Leo Connolly, Judge.

Defendants appeal from judgment against them in plaintiffs' suit for fraud. Defendants contend on appeal 1) that several of the trial court's findings are not supported by substantial evidence, 2) that there was insufficient foundation for the admission of an exhibit, 3) that the trial court erred in awarding damages for lost profits and in awarding punitive damages, and 4) that plaintiff Tate should only be able to recover for his personal losses and not for those of the corporation. AFFIRMED.

Jack W. Peters of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, for defendants-appellants.

Peter J. Peters of Peter J. Peters, P.C., Council Bluffs, for plaintiffs-appellees.

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

DONIELSON, J.

Defendants, the Citizens State Bank and the Bank's president, L. W. Ross, appeal from the judgment against them in a suit for fraudulent misrepresentations allegedly made by defendant Ross to plaintiff Gayle Tate. On appeal defendants contend 1) that several of the trial court's findings are not supported by substantial evidence, 2) that there was insufficient foundation to admit into evidence a certified public accountant's compilation of plaintiffs' income and expenses for the job defendants allegedly induced plaintiffs to bid on, 3) that the trial court erred in awarding damages for lost profits; 4) that the trial court erred in granting punitive damages because such damages are not available where actual damages are inappropriate; and 5) that plaintiff Tate can only recover for his personal losses and cannot recover for the losses of the corporation. We affirm the trial court's judgment for the plaintiffs.

Our review of this appeal is limited to correction of errors at law. Iowa R. App. P. 4.

I.

Plaintiff Tate is president and sole stockholder of plaintiff Oakland Redi-Mix; defendant Ross is president of defendant Citizens State Bank of Oakland. Jack Casperson is a paving contractor who owed defendant Bank $186,365 at the time the allegedly fraudulent misrepresentations were made to plaintiff Tate. Plaintiffs' petition, filed in June of 1977, contained the following allegations: 1) that defendant Ross, on behalf of the Bank, had induced plaintiffs to enter into a paving contract with Jack Casperson and that the contract was suggested to plaintiffs because Ross was trying to get business for Casperson, who was deeply in debt to the Bank; 2) that Ross misrepresented Casperson's ability as a paving contractor and failed to reveal Casperson's serious financial difficulties; 3) that some of the money plaintiffs borrowed to finance the project was used to pay part of Casperson's debt to the Bank; 4) that the project resulted in a $250,000 loss and that plaintiffs were entitled to $250,463 in actual damages and $1,500,000 in punitive damages. Defendants counterclaimed for the amount still due on promissory notes plaintiffs had signed to obtain working capital for the paving project.

The trial court filed its judgment for the plaintiffs on September 4, 1979. The court granted actual damages of $179,442 and added $25,000 in damages for lost profits. Punitive damages of $50,000 were also awarded. Defendants' counterclaim on plaintiffs'

notes was considered at a separate hearing, with the defendants receiving a judgment for $225,000. Plaintiffs do not cross appeal from this judgment.

In August of 1975, Jack Casperson unsuccessfully attempted to persuade the local manager of Oakland Redi-Mix to enter a bid to supply the concrete for a paving project Casperson was interested in at Griswold. Shortly thereafter, Casperson and defendant Ross met with the manager and plaintiff Tate, at which time Ross proposed that Oakland Redi-Mix bid for the Griswold project, buy additional equipment, and subcontract the actual paving work to Casperson. In response to questioning by Tate, Ross said that Casperson could not bid on the project himself because he was having a cash flow problem and was not bondable. Ross assured Tate that Casperson was a capable contractor who had the equipment necessary to do the job; Ross did not tell Tate, however, that Casperson owed the Bank a large amount of money or that Casperson had been able to find very little work that summer. Oakland Redi-Mix successfully bid on the project and borrowed money from defendant Bank to finance the work. Most of the money was then turned over to Casperson, with the intention that he use it to begin the work; a good share of the funds, however, were used by Casperson for purposes not related to the project, including payment on his notes at the Bank and payment of past-due wages to a number of Casperson's employees. Casperson then began the work, but apparently did a very unsatisfactory job; in fact, after delays and cost over-runs, plaintiffs had to hire another contractor to finish the project.

Trial testimony revealed that plaintiffs had done business with the defendants for some time, maintaining a checking account at the defendant Bank and borrowing money for plaintiffs' business. Although plaintiff Tate testified that he made the important business decisions himself, he and others stated that the plaintiffs relied on general financial and business advice given them by defendant Ross. A certified public accountant testified that the plaintiffs had lost $179,442 on the paving project. When a financial statement was offered into evidence in support of the accountant's testimony, defendants objected that there was insufficient foundation because part of the statement was prepared using only the plaintiffs' books and the validity of those figures had not been shown. Finally, there was evidence that defendant Ross had twice before induced customers of the Bank to invest with Casperson and had then applied the money to debts Casperson owed to the Bank.

II.

Defendants first contend that the trial court erred in making the following findings: 1) that plaintiff Tate trusted defendant Ross as a business and financial advisor and that a confidential relationship existed between the two men; 2) that Tate relied entirely upon the representations made to him by Ross; 3) that Ross told Tate that the job would produce a $70,000 profit from which Redi-Mix would receive the first $25,000; and 4) that Ross represented to Tate that Casperson owned the necessary equipment for the job. While we agree with defendants that it was Casperson who mentioned a $70,000 profit figure and Tate himself who suggested that Redi-Mix receive the first $25,000 from the profits, we find that the trial court was justified in making the other challenged findings.

Because this is an action at law, the trial court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In determining whether the evidence is substantial, we view it in the light most favorable to sustaining the trial court's judgment and only evidence favorable to the judgment, whether or not it is contradicted, will be considered. Manson State Bank v. Tripp, 248 N.W.2d 105, 107 (Iowa 1976); Grefe v. Ross, 231 N.W.2d 863, 865 (Iowa 1975). A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence. Grefe, 231 N.W.2d at 865.

At least with respect to the paving project involving Casperson, it may reasonably be inferred from this record that Tate trusted Ross as a business and financial advisor, that a confidential relationship existed between them, and that Tate relied entirely on Ross' representations about Casperson. Ross had been Tate's banker for years, during which time Tate came to respect him as both a banker and a friend. Ross proposed the paving project to Tate and told him that it would be a good investment for Redi-Mix and that Casperson was an experienced and reliable contractor. Until this personal recommendation from Ross, Redi-Mix had refused to get involved with Casperson. That Tate relied entirely on Ross' statements about Casperson is illustrated by the fact that Tate made only minimal inquiries about Casperson's abilities and made no inquiries as to Casperson's financial stability.

Furthermore, we think Ross' statement that Casperson "had" the necessary equipment for the paving job might reasonably be construed to mean that Casperson owned the necessary equipment. We therefore conclude that the trial court's finding to

that effect is supported by substantial evidence.

III.

Defendants raise several other points, none of which we find persuasive. They first contend that there was not sufficient foundation to admit the CPA's written statement of plaintiffs' income and expenses for the paving project. We do not address defendants' argument, however, since admission of the written statement was harmless error if it was error at all. The essential purpose of this statement was to show that the plaintiffs suffered a loss of $179,442 on the project. This figure, as well as others contained in the statement, were made part of the record when the CPA discussed them, without objection from the defendants, during the course of his direct examination. It is well established that admission of evidence is not prejudicial error when substantially the same evidence has become part of the record without objection. Linge v. Iowa State Highway Commission, 260 Iowa 1226, 1236, 150 N.W.2d 642, 648 (1967); Reed v. Bunger, 255 Iowa 322, 334-35, 122 N.W.2d 290, 298 (1963).

With respect to damages, defendants contend that the award of $25,000 in lost profits was error and that an award of punitive damages cannot be made where actual damages have not been established. Defendants further argue that if a damage award is in fact appropriate in this case that Tate should only be allowed to recover for his personal losses and should not be able to recover for the losses of the corporation.

We note first that the amount of damages in cases of fraud is determined by application of the "benefit of the bargain" rule. Mills County State Bank v. Fisher, 282 N.W.2d 712, 716 (Iowa 1979); Syester v. Banta, 257 Iowa 613, 626, 133 N.W.2d 666, 674 (1965). Under this rule, the plaintiffs would receive as damages the value that the paving contract would have had if defendants' representations had been true, minus the actual value of the contract at the time of the transaction. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976). Plaintiffs are thus entitled to $25,000, the amount of profit that defendant Ross told Tate would be a fair figure, and to $179,442, the amount of money plaintiffs spent on the project and which is now necessary to make them whole. See id. Defendants maintain that the plaintiffs are not entitled to the $25,000, because that figure represents potential profits and is therefore too speculative to constitute an award. In response to this point, we note that however speculative a figure representing potential profits may be in the abstract, the prospect of a $25,000 profit was made real enough to the plaintiffs that they decided to invest in

the project and we will not now disappoint those expectations.

Furthermore, we do not think that an award of punitive damages is precluded in this case. A trial court may award exemplary damages where the evidence shows that the claimant has suffered actual damages, even though those damages may not yet have been assessed. Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151, 153 (Iowa 1979). If uncertainty exists only as to the amount of actual damages, exemplary damages may be recovered if there is a reasonable basis in the evidence from which the amount of actual damages can be inferred or approximated. Id. We find that these conditions have been satisfied in the instant case and that the trial court was therefore free to award punitive damages should it so choose.

Finally, we do not address defendants' argument that Tate should be permitted to recover only to the extent of his personal losses, since defendants have failed to cite authority for their position. State v. Wright, 274 N.W.2d 307, 315 (Iowa 1979); Iowa R. App. P. 14(a)(3).

For all of the above reasons, we affirm the trial court's judgment for the plaintiffs.

AFFIRMED.

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

CARTER, J. (concurring specially)

I concur in the majority decision except for the determination that defendants enjoyed a confidential relationship vis a vis plaintiffs in advising them of the merits of entering into this transaction. Because I believe that even absent such relationship the defendants were under a duty to disclose more than they did, I concur in the result reached.

Oxberger, C.J., joins in this special concurrence.