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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM LUECK and MARY MAE LUECK,

Plaintiffs-Appellants,

vs.

BROADWAY HOMES, INC., PRINCESS HOMES, INC., and ZIMMER HOMES, CORP.,

Defendants-Appellees.

Filed September 23, 1980

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2-63333

Appeal from Pottawattamie District Court - Leo Connolly, Judge.

Plaintiffs appeal and defendants cross-appeal from judgment entered for plaintiffs on a claim that a mobile home manufactured and sold by the defendants was defective. REVERSED AND REMANDED.

Lyle A. Rodenburg of Council Bluffs, Iowa, for plaintiffs-appellants.

Gene Commander of Smith, Peterson, Beckman & Willson, Council Bluffs, Iowa; and Noran L. Davis of Council Bluffs, Iowa; for defendants-appellees.

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

Plaintiffs appeal and defendants cross-appeal from judgment entered for plaintiffs following jury trial.

The action involves a claim by plaintiffs that a mobile home manufactured and sold by the defendants was defective. The jury returned a verdict in favor of plaintiffs against all defendants in the amount of $10,000. Following a motion for new trial on defendants' behalf, the trial court found that there was no evidence in the record which would support a recovery of damages in excess of $1,002.45. It further concluded that "only part of the verdict is against the evidence and that portion of the verdict which is excessive is a certain and definite sum which can be ascertained by this court." As a result of these findings and conclusions, the trial court, instead of ordering a new trial, entered final judgment for plaintiffs in the amount of $1,002.45.

On appeal, plaintiffs assert that this reduction of the verdict was improper and that they should have judgment for the full $10,000. Defendants contend that the post-verdict action taken by the trial court was proper and, in the alternative, urges several reasons why their motion for new trial should have been granted. We consider these issues, but not necessarily in the order raised by the parties.

I. We first consider the arguments advanced on plaintiffs' appeal with respect to the trial court's action in entering judgment for an amount less than that fixed by the verdict of the jury. For several reasons, we conclude that the action thus taken cannot be sustained. The most obvious reason this is so is because defendants never requested the relief which was granted by the trial court. The action of the trial court amounted to the pro tanto granting of a judgment notwithstanding the verdict. Defendants had only asked for a new trial under Iowa R. Civ. P. 244. No motion under Iowa R. Civ. P. 243 was filed, nor was the equivalent relief requested in any of defendants' motion papers. It thus was error to enter judgment for the reduced amount.

In addition, we find that the trial court's action was unwarranted for other reasons. Hester v. Meewes, 256 Iowa 633, 636, 126 N.W.2d 308, 310 (1964), indicates the challenged action is in no event permitted. Nor is defendants' theory for reduction of the verdict sustained on the facts by the record evidence. It is defendants' theory that $1,002.45 is the maximum amount recoverable under the evidence because this was the uncontroverted evidence of the cost of repairing plaintiffs' mobile home or, in the alternative, that it was the highest figure sustainable under the evidence. Our examination of the record indicates that neither contention is sustained by the evidence.

The evidence of the cost of repair relied upon by defendants to sustain their claim did not include the total cost of repairing all that was claimed by plaintiffs to be wrong with the mobile home. It admittedly did not include the cost of adding insulation to which the jury might have found plaintiffs were entitled under their agreement of purchase. Even as to the cost of these repairs which were included in defendants' $1,002.45 figure, there is a substantial factual issue as to whether this would include the entire labor cost to complete the job. There was ample evidence from which the jury could have found that the cost of repairs would have exceeded this amount because of additional labor costs.[1] And finally, we must conclude that the action of the trial court was improperly taken because, as discussed in the following division of this opinion, there was no reason why plaintiffs could not have established their damages of $10,000 under a theory of diminution of value as shown by the evidence.

The determination which we make in this division also disposes of defendants' arguments on cross-appeal that the trial court should have sustained their motion, prior to the verdict, to withdraw all damage claims in excess of $1,002.45.

II. We next consider whether the verdict of the jury may be sustained as against defendants' contentions and the trial court's finding that it is not supported by sufficient evidence. On this point, we must conclude that both defendants and the trial court ignore plaintiffs' evidence which would support the verdict on a theory of diminution of value. Such measure of damages was clearly presented to the jury by the trial court's instruction 25, which provided:

> You are instructed that under the laws of the State of Iowa the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of goods as they were and the value they would have had if as warranted. To establish the value of the goods as they were, the law of Iowa provides that the price paid at a bona fide sale may be established as the value at that time.
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> However, in the event it is possible to repair said mobile home and place it in a fit condition for a lesser figure, the proper measure of damages would be the lesser figure.
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> The measure of damages has been set forth above but cannot exceed the amount of $24,362.40, which is the amount prayed for in the plaintiffs' petition.

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[1] We conclude that neither (a) the evidence that the cost of repairs testified to did not include necessary insulation, or (b) the evidence that these figures fail to include all labor costs, constitute a violation of the trial court's ruling on defendants' motion in limine.

In this regard, the plaintiff, William Lueck, owner of the mobile home, testified as follows:

MR. RODENBURG: Mr. Lueck, I want to reask a question I asked previously. Based upon your knowledge of the individual mobile home, Princess Western or whatever you got, serial number K7938, manufactured by Zimmer Homes, sold to you by Broadway Mobile Homes, Inc., in July 1974, based upon your observations and knowledge of the defects that were inherent in that trailer at that time, do you have an opinion based upon the defects and the assumed facts about which you have testified to, that the roof leaks to the point you've demonstrated in the photographs, the insulation is defective in that the wind blows through the trailer and will cause a draft, the other defects, the water freezing around the pipes for lack of insulation, the glue on the paneling, the defects in the flooring that you described, the paneling, the way it's affixed, you described popping off, the other defects such as contained in Exhibit A-1 through 105, do you have an opinion based upon a reasonable degree of your observations and certainty as to the value of that home in its defective condition in 1974 at or about the time you received it — more specifically, when you received it?

MR. WILLSON: Same objection.

THE COURT: Overruled.

THE WITNESS: Yes, sir, I do.

Q. What is your opinion?

MR. WILLSON: Same objection.

THE COURT: Overruled.

THE WITNESS: My opinion as the house was delivered in its defective state to me the thing is absolutely worthless. It has no value at all. It's a fraud.

Q. What would you do — strike that. Could you sell it?

MR. WILLSON: Same objection.

THE COURT: Sustained.

Q. Why couldn't you sell it?

MR. WILLSON: Same objection.

THE COURT: Sustained.

Q. What, if anything, could you do with the mobile home in its condition as you described?

MR. WILLSON: Same objection.

THE COURT: Overruled.

THE WITNESS: Absolutely nothing. I couldn't sell it. I couldn't give it away, not legally or morally. The thing is worthless.

Under Iowa law, an owner is qualified to testify as to the value of his property. See, e.g., Beneficial Finance Co. of Blackhawk County v. Reed, 212 N.W.2d 454, 459 (Iowa 1973).[2] Given this testimony on behalf of the plaintiff-owner and the evidence of the price paid for the mobile home as a presumptive showing of value under instruction 25, the verdict was sustained by sufficient evidence, and the trial court erred in concluding that it was not.

The trial court also concluded that the verdict was the result of passion and prejudice on the part of the jury. We conclude this finding was premised upon its determination, which we reject, that the verdict was excessive. We can find no indication in the record that such was the case and must conclude that there is no basis for setting aside the verdict on that ground either. See Guinn v. Millard Truck Lines, 257 Iowa 671, 685, 134 N.W.2d 549, 558 (1965) ("passion and prejudice arise only when the award is not sustained by the evidence").

III. We must next consider whether there is merit in any of defendants' contentions on cross-appeal that they are entitled to a new trial. Defendants contend the trial court erred in giving instruction 17 relating to an implied warranty of fitness on their part under section 554.2315, The Code. Plaintiffs contend that they were entitled to such an instruction on their claim of insufficient insulation. The merits of this claim present a very close question on whether making the seller aware of the vicissitudes of seasonal temperature conditions can give rise to an implied warranty of fitness in this regard. Plaintiffs argue that they communicated to the defendants their desire to insulate their home against the extremities of Iowa weather and that this was a "particular purpose" such that an implied warranty of fitness arose under section 554.2315.

Official Comment 2, section 554.2315 (35 Iowa Code Ann. at 333-34) states in part as follows:

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

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[2] We conclude that the trial court's ruling on defendants' motion in limine does not preclude the consideration of this evidence. In addition, we believe that plaintiffs' answers to interrogatories revealed, prior to trial, that they would rely, at least to some extent, on a measure of damages based on diminution of value.

Defendants urge that plaintiffs' wish to have their home well-insulated is only directed to uses which are customarily made of the goods in question. We agree that plaintiffs have not shown a purpose which is unique to them, nor can they show any specific or peculiar reason why they need such insulation more than anyone else.

While we believe that instruction 17 should not have been given, we must also conclude that it was harmless error to do so in the present case. This is true because defendants concede that they agreed to provide plaintiffs the extra layer of insulation which they ordered. The fighting issue in the case is whether defendants did what they agreed to do. They claim they did. Plaintiffs claim that the extra layer of insulation was missing. In this context, the giving of instruction 17 has not been demonstrated to have been prejudicial to defendants' case.

Nor can we determine as to any of the other claimed defects, most of which related to water leaking into the mobile home, that plaintiffs were given any additional rights under section 554.2315, The Code, under the trial court's instructions which would not have been available to them under section 554.2314, which was instructed upon without objection in instruction 21.

We also reject defendant's contention that the giving of instruction 25 was error. In this regard, we consider only those objections timely made in accordance with Iowa R. Civ. P. 196. Defendants urge that because the mobile home was repairable, there was no basis for permitting a measure of damages based on diminution in value. The problem with this argument is that under section 554.2714, The Code, the plaintiffs were free to employ the statutory measure of damages based upon diminution in value and to have their witnesses testify accordingly. It was up to defendants to show, if they could, that the goods could be made to conform to that which was warranted by the expenditure of a sum of money less than plaintiffs' valuation testimony. For the reasons discussed in division I, the jury was not bound to accept defendants' contentions in this regard.

Defendants also objected to instruction 25 on the ground that it permitted the jury to consider finance charges in determining the value of plaintiffs' mobile home. We do not so read the instruction. It only states that "the price paid at a bona fide sale may be established as the value at that time." We do not believe this entreated the jury to include finance charges in its determination of a bona fide sale price. The jury's verdict is sustainable using the cash price of the mobile home as the value of the goods as warranted and plaintiffs' testimony of the value of the goods received.

Plaintiff's answers to interrogatories do indicate that the $24,362.40 figure, which was the prayer of their petition, was arrived at by consideration of finance charges contained in the contract of purchase. But the use of the figure $24,362.40 in the instruction is best explained, not as a measure of the sale price of the mobile home, but rather as a limitation on the amount of recovery based upon the amount prayed for in plaintiff's petition. As such, it is not objectionable. To prevail on their theory that the use of this figure in the trial court's instruction was error, defendants must show that the court was required to place a maximum limitation on the amount of the unliquidated damages to be assessed by the jury. They have cited no authority to support such claim. Moreover, defendants have not preserved error on this argument because the maximum limitation which they asked the trial court to place on the verdict was, for the reasons discussed in division I, too low.

Lastly, we consider defendants' claim that the trial court erred in excluding valuation testimony by the witness Richard Roughton. We note the absence of an offer of proof at trial as to the nature of the expected valuation testimony of Mr. Roughton. We therefore conclude that error has not been preserved on this issue. See, e.g., Nizzi v. Laverty Sprayers, Inc., 259 Iowa 112, 119, 143 N.W.2d 312, 316 (1966).

For the reasons stated in division II, the case is reversed and remanded for entry of judgment on the jury's verdict with statutory interest from the date such verdict was returned by the jury.

REVERSED AND REMANDED.