FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

127

RICHARD DEITRICK d/b/a EVANSDALE SANITATION,

Plaintiff-Appellee/ Cross-Appellant,

vs.

THE HEIL COMPANY,

Defendant-Appellant/ Cross-Appellee.

9-209
88-790

Appeal from the Iowa District Court for Black Hawk County (65873), William G. Klotzbach, Judge.

Defendant appeals and plaintiff cross-appeals from a judgment on a suit for breach of warranty. **AFFIRMED AS MODIFIED.**

James E. Walsh, Jr., and Patrick C. Galles, of Clark, Butler, Walsh & McGivern, Waterloo, for the defendant-appellant/cross-appellee.

John W. Pieters, of Pieters & Pieters, Waterloo, for the plaintiff-appellee/cross-appellant.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

SACKETT, J. 128

Plaintiff-appellee/cross-appellant Richard Deitrick, d/b/a Evansdale Sanitation, sued defendant-appellant/cross-appellee The Heil Company, contending defendant breached express and implied warranties on a trash compactor manufactured by defendant and purchased by plaintiff from New Method Equipment Co. After a jury trial a verdict was returned finding defendant breached express and implied warranties and fixing plaintiff's damages at $24,500. Fault was assessed 22.5 percent to plaintiff, 38.75 percent to defendant, and 38.75 percent to the retailer, New Method Equipment Co. New Method had settled with plaintiff prior to trial for $7,750. Based on the verdict, the trial court entered judgment for plaintiff and against defendant for $9,493.75 plus interest. Plaintiff appeals and defendant cross-appeals from the verdict.

I.

Defendant first argues there was not substantial evidence of a breach of an express or an implied warranty. Defendant's argument centers on its contention there was only a written warranty and it was not breached. At the time of the delivery of the truck plaintiff signed a warranty agreement which limited the time the vehicle was under warranty to six months. The warranty contained the following language: "WE MAKE NO OTHER WARRANTY, EXPRESS OR

IMPLIED, AND MAKE NO WARRANTY OR MERCHANTABILITY OF FITNESS FOR ANY PARTICULAR PURPOSE . . . ." None of plaintiff's claimed damages occurred within the six-month period.

Plaintiff contends the language of the disclaimer is not determinative but rather we should look at the entire transaction including statements made in the sales brochure and by the salesman selling the unit as well as factors present when the warranty was signed.

We agree with the trial court that a jury question on both express and implied warranties was generated. The effect and meaning of the waiver signed by plaintiff was a matter properly decided by a jury, not the court. See Vorthman v. Keith E. Myers Enters., 296 N.W.2d 772, 775-76 (Iowa 1980).

II.

Defendant next contends there was not substantial evidence of damages and the verdict was excessive. In considering these contentions we view the evidence in the light most favorable to plaintiff. DeBurkarte v. Louvar, 393 N.W.2d 131, 139 (Iowa 1986). We will only interfere with a damage award that is out of reason or lacking in evidentiary support. Salles v. Lamansky, 420 N.W.2d 795, 799 (Iowa 1988); Harsha v. State Sav. Bank, 346 N.W.2d 791, 799 (Iowa 1984). We find support in the record for the verdict. Rattenborg v. Montgomery Elevator Co., 438 N.W.2d 602, 608 (Iowa App. 1988). We find no error on this issue.

III. 130

Defendant had filed a petition for indemnity against the retailer, New Method Equipment Co. Defendant contends his indemnity claim against New Method Equipment Co. should not have been dismissed. The jury found damages of $24,500 and allocated fault 22.5 percent to plaintiff, 33.75 percent to defendant and 33.75 percent to New Method Equipment Co. Plaintiff was granted judgment against defendant for 33.75 percent of $24,500, or $9,493.75. Plaintiff had settled with New Method Equipment Co. for $7,750, less than the percentage of damages the jury apportioned to them. We find no basis for defendant's argument.

IV.

Plaintiff has cross-appealed contending he should have judgment for 100 percent of the damages and his recovery should not have been reduced by his fault and the fault of New Method Equipment Co., the selling party. Iowa Code section 668.1 provides:

> As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant would otherwise be liable, and unreasonable failure to avoid an injury or mitigate damages.

We reject plaintiff's argument.

V.

Plaintiff next contends the trial court erred in reducing interest on his judgment. Originally the court entered interest on the judgment from November 9, 1984, the date of the filing of plaintiff's petition. Later the court provided interest should run only from March 25, 1988, the date of judgment, and was conditioned on plaintiff's acceptance of said amount to avoid the granting of a new trial.

Iowa Code section 535.3 provides in applicable part:

> Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year. . . . The interest shall accrue from the date of the commencement of the action.

The use of the word "shall" in a statute is ordinarily persuasive evidence the statute is obligatory, thus excluding the idea of discretion. Sheer Constr., Inc. v. Hodgman & Sons, 326 N.W.2d 328, 334 (Iowa 1982). The language of Iowa Code section 535.3 (1981) stripped the court of any discretion to withhold interest on the judgment. Id. The trial court erred in changing the statutory interest. We modify the judgment to provide interest shall accrue from November 9, 1984, the date of the filing of the action.

We have considered the other issues raised by the parties and find them to be without merit. We affirm

plaintiff's judgment against defendant for $9,493.75. We modify it to provide interest shall run on the judgment from November 9, 1984, the date of the filing of the petition.

AFFIRMED AS MODIFIED.