

IN THE COURT OF APPEALS OF IOWA 433

No. 0-727 / 90-784

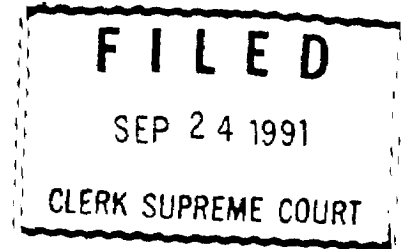
ARNOLD SRP,

Plaintiff-Appellee/Cross-Appellant,

vs.

DEAN STECHER,

Defendant-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Muscatine County, R.K. Stohr, Judge.

Stecher appeals a jury award to plaintiff on defendant's breach of express warranty and fraudulent misrepresentations. **AFFIRMED.**

William B. Norton of Norton & Norton, Lowden, for appellant.

Gary L. Sissel of Bozeman, Neighbour, Patton & Noe, Moline, Illinois, for appellee.

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

OXBERGER, C.J.

This case involves a claim of fraudulent misrepresentation concerning the condition of a tractor sold by defendant Dean Stecher to plaintiff Arnold Srp. A jury awarded Srp \$14,420.08. Stecher appealed and Srp cross appealed. We affirm.

Stecher is a farmer in Stockton, Iowa. On September 11, 1984, Stecher purchased a used White 2-135 tractor at an implement dealer in Kalona. The tractor had a cab with air conditioning, heater, and a radio. At that time the tractor had been used for 1,632 hours. Stecher paid \$22,261.54 for the tractor.

Stecher used the tractor for about another 700 to 900 hours. Stecher had the tractor overhauled in August 1986 at Sajak's Implement in Columbus Junction.

About two weeks later Stecher noticed two hairline cracks on the exterior of the engine block. Steve Sajak came to Stecher's farm and examined the cracks. Sajak informed Stecher that the engine would have to be taken to a special machine shop to be welded back together. Sajak also told Stecher that he could use a compound called J-B Weld to temporarily patch the cracks.

Stecher decided to try to repair the engine himself. He used an arc welder to fix the cracks. However, the engine block still leaked oil. Stecher then applied J-B Weld. He painted over his repair work. Stecher testified

he used the tractor for another year and it worked without problems.

Stecher decided to sell the tractor at an auction held at Harmel Implement in Bennett on September 21, 1987. Stecher informed the auctioneers the engine block had leaked oil, he had repaired the problem, and the tractor had worked fine later. This information was announced at the auction. Srp, a farmer in Camanche, purchased the tractor at the auction for \$6,700. At that time the tractor had a book value of about \$17,829.

Srp took the tractor out to his fields to chisel plow the land to prepare it for next year's crops. The tractor would not work properly. The tractor was picked up and taken to Hunwardsen Implement in Clarence for repairs.

When the tractor was taken apart there were several large cracks in the interior of the engine block and a piece had broken off near the crankshaft. A longer type of bolt had then been used to attach the crankshaft more securely. Donald Hunwardsen of Hunwardsen Implement informed Srp the engine was inoperable and the tractor had a salvage value of about \$3,000 to \$4,000.

Srp decided to have the tractor repaired. Hunwardsen was unable to find any appropriate used parts and so installed a new short engine block. The total repair bill was \$11,338.48. The repairs were completed on approximately November 19, 1987.

While the tractor was being repaired Srp was unable to chisel plow his land. He hired Jim Petersen of Calamus to do the work. Petersen charged \$3,081.60 for tractor rental, \$707.58 for fuel, and \$749.00 for labor; a total of \$4,538.18.

Srp brought this suit against Stecher claiming fraudulent misrepresentation concerning the condition of the tractor. A jury awarded Srp \$14,420.08. The jury's award equals the cost of engine repairs plus the cost of renting Petersen's tractor. Apparently the jury did not award Srp any damages for Petersen's fuel or labor. Stecher appealed and Srp cross-appealed.

I. In this law action our scope of review is on assigned error only. Iowa R. App. P. 4.

II. Stecher first claims his motion for directed verdict should have been granted by the district court because there was a lack of clear, satisfactory, and convincing evidence to support a jury verdict for Srp. He points out that all sales at the auction were "as is." He also states that there was no evidence he knew of the engine's more serious problems.

In ruling on a motion for a directed verdict, a trial court must view the evidence in a light most favorable to the adverse party. B & B. Asphalt Co., Inc. v. T. S. McShane Co., Inc., 242 N.W.2d 279, 284 (Iowa 1976). The movant is considered to have admitted the truth of all

evidence offered by his adversary and every favorable inference which may fairly and reasonably be deduced from it. Id. When a plaintiff has adduced substantial evidence in support of each element of his cause of action, the motion should be overruled. Id.

The elements of a claim for false representation are: (1) a material misrepresentation; (2) made knowingly; (3) with intent to induce the plaintiff to act or refrain from acting; (4) upon which the plaintiff justifiably relies; and (5) damages. Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450, 453 (Iowa 1990). A plaintiff must establish each of these elements by a preponderance of evidence which is clear, satisfactory, and convincing. Robinson v. Perpetual Services Corp., 412 N.W.2d 562, 565 (Iowa 1987). The elements of fraud are seldom susceptible to direct proof and may be proven by circumstantial evidence. Kunkle Water & Electric, Inc. v. City of Prescott, 374 N.W.2d 648 (Iowa 1984).

Stecher is primarily arguing Srp did not establish that he knowingly made false representations, otherwise known as the element of scienter. A mechanic testified that a person who did not have training as a mechanic, such as Stecher, would not have the mechanical expertise to know about the internal cracks in the engine block. However, there was other evidence to show Stecher knew there were

serious problems with the engine. Primarily, there is the evidence of Sajak's statement he told Stecher the engine needed special repairs and the J-B Weld would only be a temporary solution to the problem.

We believe the district court did not err in denying Stecher's motion for directed verdict. We believe there was sufficient evidence to submit the issue of fraudulent misrepresentation to the jury.

III. Stecher also claims the district court should have granted his motion for judgment notwithstanding the verdict and motion for new trial because the award of damages was excessive and not commensurate with Srp's actual damages. He asserts that Srp should only be able to recover damages of \$3,700, which is the market value of the tractor at the time of the sale (\$6,700), less its salvage value (\$3,000). He also contends that Srp could have rented Petersen's tractor and done the work himself for a cost of \$1,700.

The measure of damages in false representation claims is under the benefit of the bargain rule. Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Commission, 464 N.W.2d 450, 454 (Iowa 1990). In cases involving contracts for the sale or transfer of property, additional out-of-pocket losses may be used to determine damages. Robinson v. Perpetual Services Corp., 412 N.W.2d 562, 567 (Iowa 1987). A successful plaintiff in a fraud case is entitled to

recover for his actual pecuniary loss sustained as a direct result of the wrong. B & B Asphalt Co., Inc. v. T. S. McShane Co., Inc., 242 N.W.2d 279, 285 (Iowa 1976).

We do not believe the district court erred in denying Stecher's motions for judgment notwithstanding the verdict or for new trial. We do not believe the jury's award of damages was excessive in this case. There is substantial evidence to support the jury's determination of Srp's out-of-pocket expenses.

IV. In his cross appeal, Srp contends the issue of punitive damages should have been submitted to the jury. He states there was sufficient evidence on the issue of fraud to allow the jury to decide whether or not he was entitled to punitive damages.

When a party acts with legal malice, an award of punitive damages is appropriate. Smith v. Peterson, 282 N.W.2d 761, 767 (Iowa App. 1979). Legal malice may be established by showing wrongful or illegal conduct committed with a willful or reckless disregard of another's rights, or the intentional commission of a wrongful act without just cause or excuse. Id. Punitive damages are awarded to punish the offender and to deter others from committing similar wrongs. Id. Punitive damages are always discretionary, and are not a matter of right. Berryhill v. Hatt, 428 N.W.2d 647, 656 (Iowa 1988).

We do not believe the district court erred in refusing to submit the issue of punitive damages to the jury. We find there was not substantial evidence Stecher acted with legal malice, that is, with willful or reckless disregard for another's rights.

V. We affirm the district court on all issues. Costs are assessed one-half to each party.

AFFIRMED.