FILED
MAY 22 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

21

TONY BAXTER,)

Plaintiff-Appellant,) Filed May 22, 1984

vs.)

AMF, INC.,) 4-148
83-893

Defendant-Appellee)

Appeal from the Iowa District Court for Lee County - J. L. Burns, Judge.

Plaintiff appeals from a judgment in his favor alleging that the award of punitive damages was inadequate AFFIRMED.

Richard L Fehseke, Jr., of Fehseke & Kamp, Fort Madison, Iowa, for plaintiff-appellant

George E Wright of Napier, Wright & Wolf, Fort Madison, Iowa, for defendant-appellee

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

Plaintiff appeals from a judgment in his favor alleging that the award of punitve damages was inadequate. Defendant's cross-appeal asserts that the record did not justify any award of punitive damages.

Plaintiff purchased a boat from defendant who stated to plaintiff that the boat was a "photo boat" pictured in the 1980 sales brochure, that it only had a few running hours on it at the photo session, and that it was in good condition Defendant did not inform plaintiff that the boat had been submerged in salt water for three days. After experiencing numerous difficulties with the boat's performance, plaintiff instituted the present suit alleging fraudulent concealment of the boat's submersion and fraudulent misrepresentation of its condition. The suit was tried to the court which awarded plaintiff $7,993.37 in actual damages and $7,000 in punitive damages.

This is an action at law and therefore our review is on assigned error. Iowa R. App. P. 4. The trial court's findings of fact have the force and effect of a special jury verdict and are binding on us if supported by substantial evidence Iowa R. App. P. 14(f)(1). We view the evidence in the light most consistent with the judgment. R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W.2d 416, 419 (Iowa 1983).

I. Liability for Punitive Damages. Defendant claims that no punitive damages should have been allowed because if fraud was proved it was "ordinary" or "simple" fraud. In Holcomb v. Hoffschneider, 297 N.W.2d 210, 214 (Iowa 1980), the supreme court stated that exemplary damages are not justified in every fraud case. There must be some aggravating factor such as malice or outrageous conduct. More recently in Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d 374, 384 (Iowa 1983), the court observed that the rule of Holcomb must be read in conjunction with the rule that malice sufficient to justify exemplary damages may be either actual or legal malice. The court stated: "To establish legal malice, it

need only be shown that wrongful or illegal conduct was committed or continued with a reckless disregard of another's rights." Id. See also Muehmore Equipment, Inc. v. Grover, 315 N.W.2d 92, 100 (Iowa 1982); McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362, 369 (Iowa 1972); Syester v. Banta, 257 Iowa 613, 628-29, 133 N.W.2d 666, 675-76 (1965). The court in Kimmel held that a realty company was not liable for exemplary damages for failing to protect plaintiffs against a buyer's insolvency where there was no evidence that the realtor knew the buyer would be unable to complete the transaction. Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d at 384. It is for the trier of fact to determine whether a defendant's improper acts were done willfully or in reckless disregard of the plaintiff's rights. Poulsen v Russell, 300 N.W.2d 289, 296 (Iowa 1981).

In the present case we cannot say that the trial court as the trier of fact erred in awarding punitive damages to the plaintiff. There was evidence that defendant's representative knew that the boat had been submerged in salt water and that he deliberately concealed this information in disregard of plaintiff's rights. The evidence also showed that plaintiff was told the boat was in good condition and would be accompanied by new boat warranties whereas the boat was actually being sold "as is." This evidence supports a finding of legal malice sufficient to justify punitive damages.

II. Amount of Punitive Damages. Plaintiff contends that the trial court should have awarded him substantially more than $7,000 in punitive damages. He argues that since defendant's net worth exceeds $400,000,000, a $7,000 award of punitive damages is ineffective to accomplish the purpose of exemplary damages, namely to punish the defendant and deter others from similar wrongdoing.

In its conclusions of law the trial court stated the following propositions:

> Exemplary damages are not intended to be compensatory; they are intended to punish the party against whom they are awarded and to deter others from similar wrongdoing; to be effective for this purpose, the award must be relatively large; the amount is peculiarly within the

> discretion of the trier of fact. Grefe v. Ross, 231 N.W.2d 863 (868).
>
> The amount of exemplary damages must generally be reasonably proportionate to the actual damages. Pringle v. Knoblauch, 282 N.W.2d 151 (153).

Plaintiff maintains that these two propositions are inconsistent and that the trial court was confused by the phrase "reasonably proportionate" into thinking that the exemplary damages could not exceed the actual damages. This contention is pure speculation. The amount of punitive damages is peculiarly within the discretion of the trier of fact. Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975); Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973). Plaintiff has cited no case, nor have we found any, where an appellate court in this state has reversed an award of punitive damages as being inadequate. We will not interfere with the award even if we would have arrived at a different amount.

AFFIRMED.