

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1982

CLERK SUPREME COURT

DEAN WOOD, d/b/a DEAN WOOD CONSTRUCTION,)

Plaintiff-Appellee,)

vs.)

Filed January 26, 1982

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ERNIE McELMEEL, d/b/a ERNIE McELMEEL CONSTRUCTION,)

Defendant-Appellant.)

1-434

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ERNIE McELMEEL, d/b/a ERNIE McELMEEL CONSTRUCTION,)

Plaintiff,)

vs.)

DEAN WOOD, d/b/a WOOD CONSTRUCTION,)

DEAN WOOD,)

Defendant.)

Appeal from Jones District Court, August F. Honsell, Judge

Defendant-excavator appeals from judgment on a jury verdict for the plaintiff-contractor for negligence in backfilling a basement. Defendant concedes his negligence but appeals the amount of damages. AFFIRMED.

Gregory M. Lederer and Richard G. Hileman of Simmons, Perrine, Albright & Ellwood, and David M. Remley of Remey, Heiserman & Williams, for defendant-appellant McElmeel.

Timothy S. White and J. Richard Johnson of White & Warbasse, P.C., for plaintiff-appellee Wood.

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

Defendant-excavator appeals from judgment on a jury verdict for the plaintiff-contractor for negligence in backfilling a basement. Defendant concedes his negligence but appeals the amount of damages. We affirm.

Plaintiff Wood, a custom contractor, bought a tract of land in 1969 for \$1000. In November 1977 he sold the tract to the Thompsons for \$8000 and began construction for them on the lot in 1978. Plaintiff hired defendant McElmeel to dig and backfill the basement. The basement walls cracked because McElmeel performed the work negligently, and the walls had to be destroyed.

The Thompsons refused to continue with the project because of the problem, and plaintiff repurchased the lot for \$3000 and agreed to rescind the contract. Since plaintiff had building materials on the lot and a dangerous hole in the ground, he was forced to build a replacement home on the lot. He sold the house to the Nebergalls for \$59,000.

Wood built a house at a cost of \$55,087, exclusive of land costs. Wood calculated land costs to be \$8000, raising the total cost to \$63,087. Since he sold the house for \$59,000, he alleged a loss of \$4087 on the construction and sale of the house. In addition, Wood sought damages of \$6923 for the cost of restoring the basement and \$10,000 lost profits on the Thompson transaction. Dean set off \$4000 as a profit made on the sale and repurchase of the land. Thus the net damage figure Wood asked for was \$17,010. The jury returned a verdict of \$16,860.

Defendant concedes his negligence and appeals only the damage award. Defendant contends that Wood is not entitled to include any value for the land in the cost of building the house. He says that Wood owned the land at a base price of zero and that the \$63,087 figure should be reduced by \$8000. Thus Wood would have a profit on \$3913 on the house rather than a loss of \$4087. Defendant asserts the verdict should be reduced on appeal from \$16,860 to \$8860.

Our scope of review is on errors assigned at law. Iowa R. App. P. 4.

II. Damages.

The assessment of damages is traditionally a jury function, which should be reduced or set aside only if it "(1) is flagrantly excessive or inadequate; or (2) it is out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support." Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975).

Where the verdict is within a "reasonable" range and is supported by the evidence, we should not interfere. Thus the real question is whether the jury award of \$16,860 is supported by substantial evidence. The evidence shows us that plaintiff ostensibly lost \$10,000 in lost profits, lost at least \$4087 in the actual cost of building the house, and repaired the basement at a cost of \$6773, a total of \$20,860. The evidence also supports the \$4000 offset which plaintiff readily agrees should be subtracted. Thus, the jury verdict is supported by the evidence, and we will not disturb it upon appeal.

Furthermore, the jury award follows the basic principle underlying the measure of damages, which is compensation. We try, "...to place the injured party in as favorable a position as though no wrong had been committed." Dealers Hobby, Inc. v. Marie Ann Linn Realty Co., 255 N.W.2d 131, 134 (Iowa 1977).

Defendant argues that plaintiff is being placed in a better position because he is getting paid twice for his land. We do not agree. Plaintiff is merely being compensated for his costs, and the jury award is supported by substantial evidence. Remittitur is not appropriate here where the jury verdict is supported by substantial evidence.

Costs taxed to defendant.

AFFIRMED.