



IN THE COURT OF APPEALS OF IOWA

FRANK H. WELTE II,)

Plaintiff-Appellee/)
Cross-Appellant,)

vs.)

JOYCE CORRIE PHILLIPS,)

Defendant-Appellant,)
Cross-Appellee.)

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8-372
87-1468

Appeal from the Iowa District Court for Woodbury County
(No. Eq. 95012C), Michael S. Walsh, Judge.

Defendant appeals the \$10,000 judgment against her for
conversion of plaintiff's grain bin. Plaintiff
cross-appeals the denial of incidental and consequential
damages. **AFFIRMED.**

Glenn A. Metcalf of Metcalf, Thompson & Phipps,
Merville, for defendant-appellant/cross-appellee.

Maurice B. Nieland of Kindig, Beebe, Rawlings, Nieland
& Probasco, Sioux City, for plaintiff-appellee/cross-
appellant.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.
Sackett, J., takes no part.

DONIELSON, P.J.

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The district court found that defendant had converted the plaintiff's grain bin and awarded plaintiff \$10,000 as the fair market value of the grain bin. Plaintiff was required to pay off a loan on the grain bin and was denied any incidental damages arising out of the conversion. Defendant appeals claiming that plaintiff failed to establish that a conversion occurred and contending that the damages are excessive. Plaintiff cross-appeals arguing that he is entitled to incidental and consequential damages.

Plaintiff was the tenant of the defendant for a number of years prior to the dispute giving rise to this action. In 1984, plaintiff poured a concrete foundation on defendant's property and moved his grain bin on it. On March 1, 1986, plaintiff's tenancy with the defendant was terminated. Defendant claimed she was entitled to keep the grain bin. Plaintiff disagreed and brought this action.

The district court determined that no agreement existed to permit defendant to retain the grain bin. As plaintiff did not intend for the grain bin to become defendant's property, plaintiff had a right to move the grain bin. The district court found that a conversion had occurred entitling plaintiff to \$10,000 in damages as the fair market value of the grain bin (\$5,000 for the bin and \$5,000 to move and reassemble it). The district court rejected

defendant's claim for any incidental expenses he may have incurred because of his loss of use of the grain bin. Both parties have appealed.

Our scope of review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of the witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

Plaintiff Welte contends that defendant Mrs. Phillips waived the issue of error in the finding that the grain bin was personalty. Phillips did not include this issue in the statement of issues served on Welte October 21, 1987 pursuant to Iowa Rule of Appellate Procedure 10(b). Only the issue of damages was listed. Therefore, every other issue was waived.

Our rules of appellate procedure provide that a notice of appeal "shall specify the parties taking the appeal and the decree, judgment, order or part thereof appealed from." Iowa R. App. P. 6(a). As long as "the intent of the appellant to appeal from a judgment may be inferred from the text of the notice and if the appellee has not been misled by the defect the appeal will be entertained." Miller v. Wellman Dynamics Corp., 419 N.W.2d 380, 382 (Iowa 1988) (quoting and applying the analysis from Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972), to the current rules). This liberal interpretation

of the rules is consistent with our preference for disposing of cases on the merits and not on mere technicalities. Id.

Phillips' notice of appeal satisfies Iowa Rule of Appellate Procedure 6(a) and Welte was not misled. The issue statement is meant to give guidance on which portions of the transcript need to be ordered. Iowa R. App. P. 10(b). All of Welte's testimony was ordered. No other detriment has been claimed. Consistent with our preference to dispose of cases on the merits, we find no waiver of the issue of personalty based on the issue statement.

I. Phillips claims the trial court erred in impliedly finding a grain bin personalty, not a fixture when a permanent foundation was poured to receive the bin, the bin was appropriately used for the storage of grain raised on the appurtenant acres, and the bin could not be removed without destruction of a substantial part of its value. Defendant urges a finding that the grain bin is a fixture.

Personalty becomes a fixture when:

- (1) it is actually annexed to the realty, or to something appurtenant thereto;
- (2) it is put to the same use as the realty with which it is connected; and
- (3) the party making the annexation intends to make a permanent accession to the freehold.

Ford v. Venard, 340 N.W.2d 270, 271 (Iowa 1983). The intention of the party annexing the improvement is the "paramount factor" in determining whether the improvement

is a fixture. Id. at 272. It is not essential that there be physical attachment of the structure to the soil or to an appurtenance. Id. However, when a structure cannot be removed without destruction of a substantial part of its value it becomes "almost unavoidably an integral part of the real estate." Id. quoting Crawford-Fayram Lumber Co. v. Mann, 203 Iowa 748, 753, 211 N.W. 225, 227 (1926).

In its findings of fact, the trial court said "there was no question but that the parties knew and understood that the Plaintiff had the right to the possession of the grain bin." The bin was placed on defendant's property for Welte's use and he did not intend that the bin become part of defendant's property. No agreement to the contrary existed between the parties.

Our review of the evidence reveals that plaintiff did not intend to make a permanent annexation to the property. This position is supported by the costs involved in moving the bin versus buying a new one. Originally, the bin cost \$15,000 including installation. Welte claims he could move the bin for between \$1,700 and \$2,300, which is only a fraction of the total cost of purchasing a new bin.

Furthermore, the bin itself can be removed without destroying a substantial part of its value. Removing the bin leaves behind the concrete slab valued at between \$800 and \$1,200, which is not a substantial part of the total value of the bin. Also, leaving the concrete slab does not injure defendant's property.

The evidence does not support a finding that the bin is a fixture. The bin is personalty. There was no agreement requiring the plaintiff to leave the bin on defendant's property. Therefore, the trial court was correct in holding that the plaintiff had the right to remove the bin at any time.

II. Phillips is also challenging the trial court's determination of market value. She asserts the market value should be the value of the bin to the plaintiff where it sits on defendant's property. One-third of the original price is the market value of a used grain bin.

The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he or she would have been in had the wrong not occurred. Ontario Livestock Comm'n Co. v. Flynn, 256 Iowa 116, 128, 126 N.W.2d 362, 369 (1964). In an action for conversion, the measure of damages ordinarily is the fair and reasonable market value at the time and place of taking. F.S. Credit Corp. v. Shear Elevator Inc., 377 N.W.2d 227, 234-35 (1985). However, the "value" recoverable may be the plaintiff's interest in the bin at the time of the conversion if this special value is greater than its market value. Restatement (Second) of Torts § 927 Comment C (1979).

The trial court found the market value of the grain bin at the time of the conversion to be \$10,000. The evidence presented at trial by Mr. Welte placed the value at

\$15,000. Making an allowance for depreciation, Welte said the bin had a value of \$12,000 with a useful life of thirty to forty years. A witness for Mrs. Phillips placed the value at \$11,000, which represented \$5,500 for the bin on Phillips' property and \$5,500 to move it. Defendant urges the court to place the value at \$5,000, which is one-third of the original purchase price and the value of the bin as it sits on defendant's property.

Giving weight to the fact findings of the trial court, we agree that the appropriate measure of damages is \$10,000. The special circumstances surrounding the installation of the bin require that we consider more than just the market value of the bin itself. See 18 Am. Jur. 2d Conversion § 105, at 220 (1985). To allow only \$5,000 would give the defendant a windfall in the amount of the cost to install the bin. Awarding any more than \$10,000 would relieve plaintiff of the burden of the cost of moving the bin, which he would have had to pay had no wrong occurred. Therefore, we find that \$10,000 is an equitable price for conversion of the bin.

III. On cross-appeal, Welte contends the trial court should have awarded incidental and consequential damages to him. These damages are primarily related to the loss of use of the bin and include additional storage costs and trucking expenses incurred by Mr. Welte. The trial court denied incidental and consequential damages because the

plaintiff failed to establish the damages for loss of use or that he ever in fact lost the use of the grain bin until defendant stored her own grain in the bin.

Finding no Iowa authority on incidental and consequential damages, we must first ascertain the law to be applied to the facts of this case. According to the Restatement (Second) of Torts § 927 (1979), damages recoverable for conversion include the value of the subject matter or of plaintiff's interest at the time and place of the conversation and:

- (a) the additional value of a chattel due to additions or improvements made by a converter not in good faith;
- (b) the amount of any further pecuniary loss of which the deprivation has been a legal cause;
- (c) interest from the time at which the value is fixed; and
- (d) compensation for the loss of use not otherwise compensated.

Id.

Loss of use ordinarily is not recoverable where the property is not returned to the plaintiff who instead recovers the value of the property at the time of the conversion. 18 Am. Jur. 2d Conversion § 118, at 231 (1985). Generally, the award of interest which is allowed from the date of conversion adequately compensates the plaintiff for the total damages suffered. Restatement (Second) of Torts § 927 Comment O (1979).

Ten percent interest from September 17, 1986, has been awarded on the \$10,000 to the plaintiff in this case. This adequately compensates plaintiff for the loss of his grain bin. Therefore, the decision of the trial court is affirmed.

AFFIRMED.