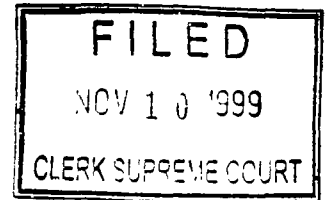


IN THE COURT OF APPEALS OF IOWA

No. 1999-291 (9-521) / 98-2279
Filed November 10, 1999



AMERICAN TRUST & SAVINGS BANK,
Plaintiff-Appellee,

vs.

NICOLE ANNE WEBER,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Richard R. Gleason,
District Associate Judge (appeal) and Francis J. Lange, Judicial Magistrate (trial).

Weber seeks discretionary review of a small claims appeal ruling that she was
liable for sheriff's towing and storage charges incurred in an execution proceeding.

AFFIRMED.

William C. Fuerste of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C.,
Dubuque, for appellant.

Chad C. Leitch of O'Connor & Thomas, P.C., Dubuque, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUITINK, P.J.***I. Background Facts and Proceedings.***

In a separate small claims case Nicole Weber obtained a judgment against Larry Oyen Motors, Inc. for \$2995, court costs, and interest. On October 24, 1997, at Weber's request, the clerk of court issued a general execution directing the sheriff to levy on unspecified goods belonging to Larry Oyen Motors, Inc. (Oyen). On November 8, 1997, the sheriff seized two automobiles and a boat trailer belonging to Oyen, all of which were towed by Wentzel Towing (Wentzel) to its storage facilities pending sheriff's sale.

The property seized was subject to a security interest held by American Trust and Savings Bank (American Trust). American Trust learned of the levy on November 13, 1997, and on December 9, 1997, notified the sheriff and Weber's attorney of its statutory right to payment of the amount of the loan secured by the seized property. *See Iowa Code § 626.34* (execution creditor has ten days from levy to pay secured creditor or deposit secured amount with the clerk of court). Weber chose not to pay or deposit the secured amount and released the levy on December 15, 1997. The sheriff's office notified American Trust of the release and location of its collateral on the same date. No effort was made to restore possession of the seized property to Oyen, and the property was left in storage with Wentzel.

Wentzel refused to surrender possession of the seized property to American Trust until payment for accrued towing and storage charges was received. After

Weber refused American Trust's demands to pay Wentzel, American Trust paid Wentzel \$1831 for towing and storage charges accrued from November 9, 1997, through February 2, 1998, and took possession of its collateral.

In this case, American Trust sued Weber in small claims court to recover damages they sustained as a result of the levy.¹ The presiding magistrate determined Wentzel's towing and storage charges were damages for which Weber was liable as a result of the aborted levy on Oyen's property subject to American Trust's security interest. The magistrate also determined American Trust breached its duty to mitigate these damages by failing to timely secure release of its collateral from Wentzel following release of the levy and limited Weber's liability to initial towing expenses and accrued storage from November 9, 1997, through December 16, 1997. American Trust was accordingly awarded judgment for \$905.04 against Weber (\$180 towing charges and thirty-eight days of storage costs at \$9 per day plus six percent sales tax per vehicle).

Both parties appealed the magistrate's judgment to the district court. The district court, like the magistrate, concluded American Trust was entitled to recover damages from Weber. The district court, however, determined American Trust's duty

¹Iowa Code section 626.36 states:

If within ten days after such levy the attachment or execution creditor does not pay the amount, make the deposit, or give the security required, the levy shall be discharged, and the property restored to the possession of the person from whom it was taken and the creditor shall be liable to the secured party for any damages sustained by reason of such levy.

to mitigate damages allowed a reasonable time to determine Weber's intentions concerning payment of these expenses. The judgment was accordingly modified by extending Weber's liability for storage charges through December 31, 1997, resulting in an increase of American Trust's judgment to \$1202.04.

On appeal Weber contends she should not be liable to American Trust for payments it voluntarily made to Wentzel. She argues American Trust's security interest was superior to Wentzel's possessory lien and payment of accrued towing and storage charges was an unnecessary predicate to recover possession of the seized property. American Trust has not cross-appealed and requests that the district court's judgment be affirmed.

II. Standard of Review.

On discretionary review of a small claims action, our standard of review depends on the nature of the case. *Hyde v. Anania*, 578 N.W.2d 647, 648 (Iowa 1998). If the action is a law case, we review the district judge's ruling on error. Our review is therefore on assigned errors. *Id.*

III. The Merits.

The gist of Weber's argument is that the amounts American Trust voluntarily paid Wentzel are not "damages sustained by reason of such levy" as contemplated in section 626.36. We disagree.

In *Giese Construction Co. v. Randa*, 524 N.W.2d 427 (Iowa App. 1994), we said:

The purpose of a damage suit is compensation; the goal is to place the injured party in as favorable position as though no wrong had occurred. Damages are limited to a party's actual loss. "[N]o injured party should receive more than has been lost as a result of another's wrongdoing. Rather, damages are awarded to place the injured party in the same position as he would have been in had there been no injury."

Id. at 432 (citations omitted). We have been unable to find more specific case law guiding our construction of the statute's reference to "damages sustained as a result of the levy." In the similar context of a wrongful attachment claim,² the executing creditor's liability "is limited to such damages as results from the particular act or acts which he directed or authorized." *Carrit v. Penny*, 197 Iowa 1157, 196 N.W. 285, 286 (1923). We conclude use of this standard in the context of a secured creditor's section 626.36 claim advances the generally understood purposes of awarding damages.

In the absence of contrary written directions, the general execution issued at Weber's request required the sheriff take possession of the property subject to the levy. Iowa R. Civ. P. 260(a) and (b). Any resulting expenses reasonably incurred in the sale and keeping of the property seized are costs for which Weber is responsible if the sheriff's sale proceeds are insufficient to pay them. *See* Iowa Code §§ 626.14 and 626.37; *see also Shaw v. Roberts*, 144 Iowa 215, 122 N.W. 932, 932-34 (1909) (expenses of sale and keeping of livestock prior to sheriff sale allowed as an expense.) Because the disputed expenses were incurred at Weber's authorization or direction,

² Iowa Code section 639.11 provides for an attachment bond or other security conditioned on plaintiff's payment of "all damages which the defendant may sustain by reason of the wrongful suing out of the attachment." Iowa Code § 639.11 (1999).

we hold such costs fall within the scope of damages recoverable by a secured creditor who pays them in an effort to recover possession of collateral. We also hold a secured creditor's voluntary payment of such expenses is a fact relevant to the reasonableness of the damages claimed and is not necessarily preclusive of its right to recovery of such expenses. Whether these expenses were reasonable or should have been allocated in different proportion are factual determinations by which we are bound on appeal and, in any event, are not issues on appeal.

The judgment of the district court is affirmed.

AFFIRMED.