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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LARRY E. NANCE and ELLY NANCE,)
Plaintiffs-Appellants,)
vs.)
LARRY R. LEWIS and JEAN R. LEWIS,)
Defendants-Appellees.)

Filed March 23, 1982

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Appeal from Polk District Court - Richard A. Strickler, Judge.

Plaintiffs-sellers of a house appeal from judgment entered on a jury verdict for defendants-buyers on plaintiffs' petition to recover past due rent and damages to the house and on defendants' counterclaim for fraud in the sale of the house due to plaintiffs' failure to disclose termite damage. AFFIRMED.

Ronald L. Anderson of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, Iowa, for plaintiffs-appellants.

Jerry R. Foxhoven of Critelli & Foxhoven, Des Moines, Iowa, for defendants-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiffs-sellers of a house appeal from judgment entered on a jury verdict for defendants-buyers on plaintiffs' petition to recover past due rent and damages to the house and on defendants' counterclaim for fraud in the sale of the house due to plaintiffs' failure to disclose termite damage. The appellants argue here that the damage portion of the award was so great as to shock the conscience and not based on the evidence, that the exemplary damages were shocking and should either be set aside or the court's position on altering punitive damages and ordering remittitur should be changed, and that the jury verdict should be set aside and a new trial granted because of irregularity in the jury proceedings. This action is at law and our scope of review is for correction of errors preserved. Iowa R. App. P. 4. Findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). In ruling on motions for a new trial, the trial court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties, Iowa R. App. P. 14(f)(3), and, absent an abuse of discretion, such determination will not be interfered with by us. See, e.g., Harris v. Deere & Co., 263 N.W.2d 727, 733 (Iowa 1978). We affirm the trial court.

In June 1977 plaintiffs-appellants Larry and Elly Nance (sellers) were in the process of remodeling a house they owned when termites were discovered. Termite damage was repaired, the termites professionally eradicated, and the house put up for sale. Defendants-respondents, Larry and Jean Lewis (buyers), contacted Mrs. Nance in her capacity as realtor about buying this house in September 1977. The parties entered into a contract of sale for the property for $28,000, subject to the buyers obtaining a mortgage, and the buyers moved in immediately, agreeing to pay rent until the sale was closed. The buyers lived in the house, paid rent, and began some repair or remodeling work of their own. Upon installation of a shower, the buyers discovered termite damage in the joists

under the bathroom floor. They contacted the sellers and demanded a decrease in the selling price of $5,000. The sellers were unwilling to agree to a price change, and insisted that the buyers either complete the purchase of the house or move out. The sellers then served the buyers with a Notice to Quit and a Petition of Forceable Entry and Detainer. The buyers moved out December 1 and subsequently purchased another house in the same vicinity.

At trial evidence was presented that, upon being shown through the house, the buyers questioned the smell caused by the exterminator. The buyers maintained they were told the extermination was due to ants in the house; the sellers contended they informed the buyers about termite damage to the porch of the house. The sellers did give the buyers the guarantee provided by the exterminator. The man from the extermination company testified that he had informed the sellers about termite damage to the joists and subflooring in the bathroom area as well as the porch area. He also demonstrated his testimony with a graph of the house drawn to scale upon which he had marked the area of damage, a copy of which, he said, had been given to Mrs. Nance before he ever treated the house. His testimony as to the location of the damage and receipt of such a graph was disputed by Mrs. Nance and two friends who were allegedly with her when the exterminator gave his report to her. Evidence was also admitted that showed the sellers advertised the house as being "like new" after the buyers moved out, that the termite damage to the bathroom subflooring was visible only through a crawl space but that the exterminator had crawled into such spaces, and that the Des Moines city housing inspector had found substantial termite damage in the subflooring and wall structures on a November 16 inspection. One of the sellers also testified that the sellers had spent $8,000 on repairs and improvements before the house was re-sold.

The sellers had originally filed suit to recover money for past due rent and damages they had suffered. The buyers counterclaimed, alleging that the sellers

had actual knowledge of the termite damage and failed to advise them of it as well as actively concealing the damage from them. The case was tried on a fraud theory; the jury returned a verdict in the buyers' favor and awarded them $1,367.50 in actual damages and $8,000 in exemplary damages.

I. Actual Damages. The sellers argue on this appeal that the only evidence of actual damage to the buyers was $667.50 as testified to by the buyers. This figure represented out-of-pocket expenses caused by the beginning of remodeling, the loan acquisition, and the buyers' subsequent move. Therefore, according to the sellers, the jury's award of $1,367.50 in actual damages must be the result of passion or prejudice and was not based on substantial evidence. See Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975).

Sellers' position seems to be that the only kind of damage for which the jury should have compensated the buyers was for actual expenditures of money. In fact, instruction number 30, given without objection by the sellers, lists inconvenience and hardship as types of compensatory damages the jury could consider. Instruction number 23 mentions "expenditure of time and effort in renovating the premises and removing themselves and their belongings therefrom, inconvenience caused by the relocation, and hardship caused by separation from their children." (When the buyers were forced to move, they were unable to immediately locate a residence large enough for them and their four children, so two of the children had to stay elsewhere for a period of time.)

The jury's award of $1,357.50 may include the $667.50 in out-of-pocket expense, leaving an amount of $690 to compensate the buyers for the other kinds of damage claimed by them. When viewed in this light, we think substantial evidence supports the jury's award of actual damages, and the sellers are entitled to neither a new trial nor remittitur on the figure determined by the jury.

II. Exemplary Damages. The sellers also argue that the $8,000 awarded in punitive damages is too high and should be set aside. Alternatively, they ask that the court should overrule prior decisions and remit the amount of the award.

Under Iowa law, the amount of exemplary or punitive damages is peculiarly within the jury's discretion, and there is no mathematical ratio between actual and exemplary damages. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (1973). Apparently, sellers do not question the fact of submission of exemplary damages to the jury, only the amount of the award. See Holcomb v. Hoffschneider, 297 N.W.2d 210, 213-14 (Iowa 1980). Exemplary damages are awarded as punishment and as a deterrent to the wrongdoer and others, Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979), but these damages are to be reasonably proportionate to the actual damages as shown, not necessarily as assessed. Id. (cites omitted).

Applying these principles to the jury's award of punitive damages in the present action, we find that the amount of the award, while large, is not so out of proportion to the nature and extent of the potential harm to defendants that we should interfere.

III. New Trial. The sellers moved for a new trial after the jury returned its verdict, in part because of alleged irregularities occurring within the jury room. Apparently defense counsel's notes for his closing argument inadvertently were taken with the exhibits into the jury room. Within five minutes the jury noted the unmarked papers and gave them to the bailiff. After the verdict was given and the new trial motion had been made, the trial court questioned each juror and determined that none had read the notes.

The sellers assert that the mere presence of the papers in the jury room should require a new trial. The buyers point out, more correctly, we believe, that a new trial for an irregularity in the proceedings should be granted under Iowa R. Civ. P. 244(a) only if such irregularity materially affected substantial rights of the party aggrieved. To prove such an irregularity relating to jury conduct so as to warrant a new trial, the sellers need to establish that juror misconduct occurred and that there was a reasonable probability that the misconduct resulted in prejudice to them. State v. Cuevas, 281 N.W.2d 627, 732 (Iowa 1979).

The facts in the present case do not support such a finding. First, there is no showing that the notes contained anything detrimental to the sellers. Second, even if they had, such content is immaterial here since not one of the jurors read the papers. Third, the jury was properly instructed by the court as to what they were to consider in reaching their verdict, and unmarked, unadmitted papers were not part of the evidence, a mistake the jury quickly discovered and quickly remedied by removing the offending papers and giving them to the bailiff. In the absence of a showing to the contrary, we presume that the jury has followed the court's instructions. In re Estate of Cory, 169 N.W.2d 837, 846 (Iowa 1969).

The trial court has wide discretion in deciding whether such conduct mandates a new trial and, unless it is clearly shown that such discretion has been abused, we will not reverse. Harris v. Deere & Co., 263 N.W.2d at 733; Rasmussen v. Thilges, 174 N.W.2d 384, 389 (Iowa 1970). We see no juror misconduct, no showing of resulting prejudice to the sellers, and consequently, no abuse of discretion on the part of the trial court in denying the sellers' motion for a new trial on this basis.

We have considered all of the sellers' arguments and find no basis for changing the amount in damages awarded by the jury or granting a new trial.

AFFIRMED.