

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1987

CLERK SUPREME COURT

RUBEN LUNDBERG and THE ESTATE OF)
CLARENCE LUNDBERG, Deceased, d/b/a)
LUNDBERG SEED FARMS,)

Plaintiffs-Appellees,)

vs)

HAROLD M DUNKELBERGER,)

Defendant-Appellant.)

Filed May 28, 1987

191

7-01
85-523

Appeal from the Iowa District Court for Boone County (No. 30536) - Carl
D Baker, Judge

Defendant appeals from judgment against him for breach of contract
and fraud **AFFIRMED.**

Scott H Hughes and Robert N. Calbi, of the Hughes Law Firm, Council
Bluffs, for the defendant-appellant.

Jim P Robbins and James H. Donelson, of Donelson & Robbins, Boone,
for plaintiffs-appellees.

Heard by Snell, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

Defendant Harold Dunkelberger appeals from a judgment entered against him for breach of contract and fraud and the trial court's award to Plaintiffs Reuben Lundberg and the Estate of Clarence Lundberg, of Lundberg Seed Farms, actual and punitive damages totaling \$146,489.62. Defendant contends (1) the trial court erred by permitting one of plaintiffs' witnesses, a bookkeeper, to alter a business record document while she was on the stand, (2) there is insufficient evidence to support a finding of fraud, (3) there is insufficient evidence to support the award of punitive damages, and (4) the trial court erred by awarding punitive damages to the estate of one of the operators of Lundberg Seed Farms. We affirm.

This case involves a series of business transactions between a soybean seed processor, Lundberg Seed Farms, and a farmer, Dunkelberger, from 1979 through 1981. Lundberg is an approved seed processor of a variety of soybeans operating under the supervision and requirements of Iowa Crop Improvement Association. Lundberg obtains soybeans to process (i.e., clean and bag). If the soybeans meet ICIA standards, they are then sold as certified seed. If the soybeans do not meet ICIA certification standards they are sold at market price on local grain markets.

Lundberg obtains soybeans primarily from Reuben Lundberg's farming operation. Lundberg also obtains soybeans by purchasing them from farmers who grow soybeans for Lundberg under contract. Defendant grew soybeans for Lundberg during the 1979 and 1980 growing season. The agreement between Lundberg and defendant provided Lundberg would furnish defendant with registered seed for the number of acres Lundberg wanted planted with a specific variety of soybeans. Lundberg would then purchase the soybeans from defendant.

If defendant's crop met ICIA certification standards Lundberg paid defendant an additional 30 cents per bushel.

In 1979, by agreement defendant grew five different varieties of soybeans for Lundberg:

Amsoy Variety	115 acres
Sloan Variety	150 acres
Wayne Variety	180 acres
Oakland Variety	160 acres
Harcor Variety	115 acres

In 1980, the varieties and acres defendant planted for Lundberg were:

Amsoy Variety	195 acres
Sloan Variety	80 acres
Wayne Variety	59 acres
Oakland Variety	156 acres
Harcor Variety	78 acres

When Lundberg and defendant first started doing business in the late 1960s, all harvested soybeans were stored for processing at Lundberg's own storage facilities. Over the years, Lundberg's seed processing business expanded to an extent that there was not sufficient storage capacity on the seed farm to keep pace with the soybeans being grown and processed. Lundberg and farmers from whom soybeans were purchased agreed the soybeans would be stored in the growers' storage facilities until Lundberg wanted to process that particular variety. In 1979 and 1980, beans defendant grew for Lundberg were stored in defendant's storage facilities and at the Tom and Vicky Miller farm. None were stored at Lundberg.

After harvesting their soybeans each grower would take the soybeans to the elevator to be weighed. Payment for the soybeans was based on elevator weigh tickets. Lundberg kept a file on each grower, recording the weigh tickets and deliveries of soybeans each grower made to Lundberg.

The normal practice for weighing soybeans was to have each grower haul the soybeans to the elevator where the truck would be weighed fully loaded. After the load was emptied the truck would be weighed empty to determine the truck's tare weight. Defendant did not follow that practice of determining tare weight after each load. Defendant would wait until after he had completed all hauling for the day to determine his tare weight. One of plaintiffs' allegations is that defendant deviated from the standard practice so he could haul the beans with a heavy truck and then substitute a vehicle with a smaller tare weight at the end of the day, thus artificially inflating weigh tickets on the amount of soybeans he actually delivered. Defendant would then take those inflated weight tickets to Reuben Lundberg in Dayton, Iowa, to obtain payment.

In addition, documenting deliveries and payments pursuant to weigh tickets, the delivery of soybeans of a certain variety could be determined through ICIA documents. According to Dee Spaulding, the bookkeeper for Lundberg, soybeans stored elsewhere were immediately processed when delivered to Lundberg. ICIA documents specifically indicate the variety and amount of soybeans being processed, and identify the grower for all seeds processed by Lundberg. Lundberg contends that if corresponding processing documents do not exist for weigh tickets received by a grower then the soybeans in question were not delivered and processed.

After the 1979 and 1980 growing seasons, plaintiffs became convinced defendant was cheating them on the amounts of soybeans he delivered. Plaintiffs initiated action for breach of contract and fraud based on the following transactions:

Transaction 1. On January 31, 1980, defendant received \$36,846.95 for 5,210 bushels of soybeans. This payment was based on a compilation of weigh

tickets from the Boxholm, Iowa, elevator. Lundberg contends the 5,210 bushels were of the Amsoy variety and had been weighed and credited to defendant in October, 1979, before being stored on the Miller farm.

Later, 529 bushels of that total were delivered to the Anderson Seed Farm and another 1,402 bushels were taken for processing by Lundberg. Between May 17 and 19, 1980, defendant delivered 2,547.32 bushels of the 5,210 total to Lundberg for processing. Plaintiffs' contend ICIA documents establish Lundberg was processing Amsoys at that time. In their petition, plaintiffs allege both the 529 and 2,547, totaling 3,076 bushels, had already been credited to defendant in Transaction 3.

Defendant alleges he was not previously credited for the 5,210 bushels and was entitled to payment based on a May 17, 1979, contract. Defendant also alleges the 2,547 bushels he delivered to Lundberg between May 17 and 19, 1980, were of the Sloan Variety and not Amsoys. However, there are no ICIA documents indicating Sloans were being processed at the time. In addition, defendant contends he was entitled to payment for an additional 1,215 bushels taken from a side storage bin on the Miller farm and delivered to the Cargill Elevator in Beaver, Iowa.

Transaction 2. This transaction is no longer in dispute. On March 12 and 24, 1980, defendant received payments totaling \$52,537.54 for 8,021 bushels. Those payments were based on weigh tickets from February 14 to 16, 1980, for 3,663.4 bushels of Sloan variety soybeans and from March 5 to 11, 1980, for 4,370.35 bushels of Wayne variety soybeans. The parties agree as to these payments. In addition, the parties agree defendant should be credited for an additional 492 bushels of Wayne soybeans weighed on March 10 and 11, 1980.

Transaction 3. On May 31, 1980, defendant received \$20,141.25 and \$26,081.25 for 3,075 and 4,173 bushels respectively of Amsoy soybeans. Plaintiffs allege these payments included weigh tickets from 529 bushels of Amsoys weighed on May 2 and 3, 1980, and delivered to the Anderson Seed Farm. The payments also include the 2,547 bushels of Amsoys weighed at Boxholm. Both the 529 and 2,547 bushels were also paid in Transaction 1. Plaintiffs allege the double payment occurred on those bushels because after defendant initially weighed the 5,210 bushels in October 1979, he put those soybeans back into his own storage facility. When defendant took those soybeans out in May, 1980, he weighed them a second time to obtain a double payment. Plaintiffs contend ICIA pre-tagging certificates and processing reports from May 21, 1980, supports their allegation the disputed soybeans in transactions 1 and 3 were both Amsoys. Defendant contends there is no pre-tagging certificate for Amsoys on that date and therefore the soybeans must be uncredited Sloans.

Transactions 4 and 5. On July 7, 1980, defendant received \$17,154.55 for 2,539 bushels of soybeans. On August 9, 1980, defendant received \$18,676.84 for 2,548 bushels. However, during July and August, 1980, plaintiffs allege they received no deliveries from defendant. Plaintiffs contend there are no weigh tickets or ICIA records to show any delivery occurred. As such, plaintiffs allege the payments to defendant were actually for soybeans grown by another farmer.

Defendant contends part of these soybeans had been removed from his storage facilities in January or February, 1980, by Lundberg. Defendant also alleges part of the soybeans were Wayne soybeans taken prior to March 1980, from his storage facility in Bayard, Iowa. However, there are no weigh tickets to support these deliveries to Lundberg.

Transactions 6 and 7. On August 9, 1980, Lundberg agreed to pay defendant \$7 31 per bushel for 4,000 bushels of soybeans to be delivered in January, 1981. On October 28, 1980, Lundberg agreed to pay defendant \$9.30 per bushel of certified soybeans for an additional 7,500 bushels to be delivered in January, 1981. On October 28, 1980, Lundberg agreed to pay defendant \$9.30 per bushel of certified soybeans for an additional 7,500 bushels to be delivered in January, 1981.

On October 28, 1981, defendant delivered 5,977 bushels for processing. The soybeans were not certifiable and the price was decreased to a market price of \$5.86 per bushel. Defendant delivered 2,139 of the bushels on January 12 and 13, 1981. The soybeans were not certifiable and the price was decreased to \$7.02 per bushel. However, on January 31, 1981, defendant received \$64,191.50 for 7,755 bushels at the full certified seed price.

In addition to the seven transactions in question, Lundberg contends defendant never paid for the registered soybean seed he received for the 1979 and 1980 growing seasons. Defendant received 517 bushels and 1,192 bushels in 1979 and 1980 respectively totaling \$10,957.98. Plaintiffs also contend defendant substituted a smaller tare weight vehicle to artificially inflate the amount of soybeans he delivered in both February, 1980, and in February, 1981.

After trial to the bench, the trial court entered judgment for Lundberg finding:

1. Defendant did not deliver the 5,210 bushels of soybeans referred to in Transaction 1,
2. In Transaction 1, the 529 bushels delivered to Anderson and 2,547 bushels delivered to Lundberg had been previously paid by Lundberg,
3. The 2,539 bushels and 2,548 bushels referred to in Transactions 4 and 5 were not delivered by defendant to Lundberg, and
4. In Transactions 6 and 7 defendant collected a certified price for uncertified soybeans.

The trial court determined defendant had received the following overpayments for crop year 1979:

Soybeans	\$60,270.48
Registered planting seed	3,877.50
Weighing of wrong truck	<u>2,292.50</u>
	\$66,440.48

For crop year 1980 the trial court determined the following overpayments were made to defendant:

Uncertified soybeans	\$21,265.69
Registered planting seed	7,080.48
Weighing wrong truck	2,604.00
Storage costs	<u>268.97</u>
	\$31,219.14

The trial court awarded Lundberg \$97,659.62 in actual damages and assessed defendant \$48,830 in punitive damages, one-half the amount of actual damages. This appeal followed.

I.

Our scope of review on actions at law is on assigned error only. Iowa R. App. P. 4. Findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The trial court is vested with wide discretion and its findings are entitled to the same weight as a jury verdict. H. & S. Ltd. v. Andreola, 363 N.W.2d 592, 595 (Iowa App. 1984). The trial court decision will be upheld if any proper ground appears in the record. Id.; Williamsen v. Casey, 220 N.W.2d 638, 639 (Iowa 1974).

II.

Defendant first contends the trial court erred in allowing Dee Spaulding, bookkeeper for Lundberg during the time in question, to testify over objection that an exhibit consisting of a pre-tagging certificate for Amsoy soybeans dated February 21, 1980, was incorrect and the correct date was May 21, 1980. Defendant alleges that prior to trial both parties stipulated that all exhibits were

proper and therefore the certificate would be allowed in at trial. Defendant contends the certificate came in as an official business record and no oral testimony could be given to change the document. Defendant argues the date on the pre-tagging certificate was critical because it would establish that Lundberg had been processing Amsoy soybeans in February, 1980. As such, defendant alleges the certificate would support that he delivered Sloan soybeans in May, 1980, and would prove defendant had not been paid twice for the delivery of soybeans. Defendant also argues the February, 1980, date would show record keeping by Lundberg was inaccurate and would prove plaintiffs' claims against defendant were highly questionable. Thus, defendant contends permitting Spaulding's testimony *changing* the date of the certificate was unfairly prejudicial.

The purpose of permitting parties to stipulate to admission of business records is that such stipulation satisfies the necessary foundation requirement for the business record exception to the hearsay rule and obviates the necessity of calling witnesses to provide the foundation for admissibility. Iowa R. of Evid. 803(6); Miller v. Bonar, 337 N.W.2d 523, 527-28 (Iowa 1983) (Regardless of whether the parties stipulate to admission of business records, the trial court must still approve that the stipulation satisfied the foundation for the business record exception has been laid).

On appeal defendant asserts the parties' stipulation on exhibits was both as to their admissibility and factual content. However, defendant provides no authority nor cites anything in the record which would give such a broad reading to the parties' evidentiary stipulations. See Iowa R. App. P. 14(a)(3). In addition, in a motion for continuance filed by defendant on February 22, 1984, defendant asserted in its reasons:

That counsel for plaintiffs and defendant are preparing stipulations of fact and stipulations of admissibility of the numerous documents

expected to be introduced into evidence at trial of this matter to permit a simpler, more efficient trial. (Emphasis added.)

This suggests defendant believed the evidentiary stipulation went only to issues of foundation and was not tantamount to a stipulation of fact. If the parties wanted to establish February 21, 1980, was in fact the true date of the pre-process tagging, the parties could have mutually agreed or stipulated to that certain fact. See 73 Am. Jur.2d Stipulations §18, at 557-58 (1974). However, without further support by defendant we will not give this evidentiary stipulation the expansive interpretation which defendant advocates on appeal.

Moreover, we reject defendant's argument the evidentiary stipulation as to the pre-tagging certificate renders Spaulding's testimony a violation of the parole evidence rule. The parole evidence rule governs only written agreements between the parties. Terrell v. Star Coal Co., 327 N.W.2d 771, 773 (Iowa App. 1982). The rule is not violated when *extrinsic evidence* is received to assist the trial court in determining the meaning of the contract or contractual language. Id.

In the instant case Spaulding's testimony was no more than extrinsic evidence on the issue of performance in plaintiffs' breach of contract claim with regard to the fraud claim. Spaulding's testimony was outside the parole evidence rule and fully admissible. The trial court has considerable discretion in admission of evidence regarding business records and has no abuse of discretion has been demonstrated here. Miller, 337 N.W.2d at 528.

III.

Defendant next contends there was not sufficient evidence to prove he had engaged in fraud. Specifically, defendant claims he did not have knowledge of the falsity of his misrepresentations.

A plaintiff establishes fraud by showing the following:

1. Material misrepresentation,
2. Made knowingly,
3. With intent to induce plaintiff to act or refrain from acting,
4. Upon which plaintiff justifiably relies,
5. With damages.

Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984). The requirement of scienter or guilty knowledge is met by showing that false representations were made in reckless disregard of their truth or falsity. Limited Flying Club, Inc. v. Wood, 632 F.2d 51, 54-55 (8th Cir. 1980); Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d at 115 ("A false statement innocently but mistakenly made will not establish intent but, when recklessly asserted, it will imply an intent to defraud"). Elements of fraud are seldom susceptible to direct proof and may be proven by circumstantial evidence. Kunkle Water & Electric, Inc. v. City of Prescott, 347 N.W.2d 648, 653 (Iowa 1984); Haack v. Burlington Northern, Inc., 309 N.W.2d 147, 150 (Iowa App. 1981). The plaintiff has the burden of proof to establish the elements of fraud by a preponderance of clear, satisfactory and convincing evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d at 155.

On appeal, defendant asserts only that there was insufficient evidence he knowingly made false representations. Defendant argues the discrepancy in deliveries and payments for soybeans was due to Lundberg's faulty bookkeeping and not any false representation on his part. Defendant also apparently asserts that the very technical nature of the instant action shows that he *did not* have knowledge of the falsity of the representations at the time he made them. We find defendant's contentions to be without merit.

First, any question as to the accuracy of bookkeeping by Lundberg goes to falsity of representation and not to knowledge of one's misrepresentation. Second, the fact that subsequent litigation for fraudulent misrepresentation is complex does not negate the trial court's finding of clear and convincing

evidence to support plaintiffs' allegations. Rather, we agree with the trial court defendant was in a position to know the truth or falsity of his representations to Lundberg and his subsequent actions in light of that provide adequate evidence to establish scienter. First, defendant knew he weighed 5,210 bushels of soybeans, and put them back in his own storage facility in October, 1979. Defendant knew payment was based on the weigh tickets he received at that time. The fact defendant weighed the soybeans a second time in May, 1980, and used those second weigh tickets to obtain additional payment from Lundberg is sufficient to establish defendant was representing to Lundberg that these soybeans were new and unpaid.

In July, 1980, and August, 1980, Lundberg paid defendant \$17,154.55 and \$18,676.84 respectively for soybeans. However, plaintiffs alleged the beans were never delivered by defendant. Defendant had no weigh tickets to show delivery of the soybeans to Lundberg and his entitlement to the over \$35,000 in payments which Lundberg had made. We determine the trial court could conclude from this evidence that defendant knew he was obtaining payment for soybeans he never delivered and which were grown by another farmer.

In addition, defendant substituted a smaller tare weight truck at the end of hauling soybeans to receive payment for more soybeans than he delivered. Defendant weighed a truckload of soybeans, drove around and reweighed the same load only 21 minutes later. Defendant also would remain on the truck during the weighing of the soybeans but would get off the truck when the tare weight was being determined in order to artificially raise the amount of soybeans he had delivered. We determine this circumstantial evidence also supports the trial court's finding of scienter.

IV.

Defendant next contends that even if the trial court's finding of fraud is sustained that defendant is only guilty of ordinary or simple fraud. Therefore, defendant asserts there is not sufficient evidence to uphold the trial court's award of punitive damages.

Fraud is a recognized ground for punitive damages. See Sedco International, S.A. v. Cory, 522 F. Supp. 254, 324 (S.D. Iowa 1981), aff'd 683 F.2d 1201 (8th Cir.), cert. denied 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982); Freeman v. Bonnes Trucking, Inc., 337 N.W.2d 871, 879-80 (Iowa 1983). Punitive damages are justified where a defendant acts maliciously. Klooster v. North Iowa State Bank, No. 37/84-985, slip op. at 19 (Iowa April 15, 1987). Malice may be actual, such as personal spite or hatred, or implied, as where defendant acts illegally or improperly with willful and reckless disregard for another's rights. Id.; Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d at 167; Restatement (Second) of Torts §908 (1979).

The amount of punitive damages is peculiarly within the discretion of the trial court. Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975). Punitive damages must bear some relationship to actual damages, but there is no formula by which such relationship must be determined. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973); McCarthy v. J. P. Cullen & Son Corp., 199 N.W.2d 362, 369 (Iowa 1972). See Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979).

In the instant case the trial court could have found that defendant acted improperly with willful disregard for Lundberg in weighing a truckload of soybeans, driving around for 21 minutes and then reweighing the truckload to get double payment. Malice can be implied in defendant's hauling soybeans in a heavy truck throughout a day and improper substituting a lighter truck to figure

the truck tare weight in order to receive payment for more soybeans than defendant actually delivered. Reckless disregard supporting an award of punitive damages is also implied from defendant's practice of remaining in the truck when weighing soybeans and his attempts to get off the truck when the tare weight was being determined.

These actions all support the trial court's finding there was sufficient evidence defendant acted willfully and maliciously in obtaining double payment on over 3,000 bushels of soybeans through double weighing, in obtaining \$35,831.39 in payments for over 5,000 bushels of soybeans which defendant never delivered to Lundberg and for which he had no weigh tickets, and in receiving certified price on over 8,000 bushels of soybeans for which defendant was entitled to receive only market price. These series of misrepresentations and other improper actions are intertwined into a pattern of reckless disregard and malicious conduct. The trial court awarded \$48,830 in punitive damages, or one-half the amount of actual damages, to punish defendant for his malicious conduct. We cannot say the trial court abused its discretion in awarding punitive damages and affirm the trial court's judgment on this issue.

V.

Finally, defendant contends the trial court erred in allowing plaintiff Estate of Clarence Lundberg to recover punitive damages. Defendant argues punitive damages are not recoverable where the victim dies before commencing action and cites Boyle v. Bornholtz, 275 N.W. 479 (1937) as supporting his position. We initially note the Boyle rule which defendant cites was expressly overruled by the Iowa Supreme Court in Berenger v. Frink, 314 N.W.2d 388, 391-93 (Iowa 1982):

Because punitive damages serve to punish and deter, we find they are properly included elements of recovery whether or not the injured party seeks them in an action before his death.

Given the purposes of punitive damages, we find it is not logical to allow punitive damage claims to survive only where decedent brought an action for them prior to his death. Thus, we hold that *claims for punitive damages survive the death of the injured party.*

In addition to the fact that the substance of defendant's argument is without merit, defendant raises this argument for the first time on appeal. Defendant did not raise his objection in his answer and affirmative defenses, at trial or in his motion to enlarge or amend the findings of fact and conclusions of law. Since this issue was not preserved for appeal, we have nothing to review in that regard. See Semler v. Knowling, 325 N.W.2d 395, 399 (Iowa 1982).

AFFIRMED.