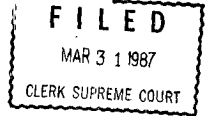


IN THE COURT OF APPEALS OF IOWA



RICHARD J. BUNDA, ANTHONY)
BUNDA, and R.J. BUNDA FARM, LTD.,)

29

Plaintiffs-Appellants,)

Filed March 31, 1987

vs)

FARMERS COOPERATIVE COMPANY,)
POCAHONTAS, IOWA,)

7-22
86-590

Defendant-Appellee.)

Appeal from the Iowa District Court for Pocahontas County (CL 312-1082)

- Albert C. Habhab, Judge.

Plaintiff farmers sued the defendant elevator company, alleging the defendant had underweighed their grain deliveries and had therefore paid them too little for their grain. **REVERSED AND REMANDED.**

David A. Opheim and Greg Knoploh of Kersten, Opheim & Carlson, Fort Dodge, Iowa, for plaintiffs-appellants.

William R. King of Davis, Hockenberg, Wine, Brown, Koehn & Shors, Des Moines, Iowa, and William D. Thomas of Shors & Thomas, Pocahontas, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

The plaintiff farmers sued the defendant elevator company, alleging that the defendant had underweighed their grain deliveries and had therefore paid them too little for their grain. The district court found that plaintiffs had suffered actual damages but that the evidence did not permit a determination of the amount of the damages. The court did award punitive damages. We reverse and remand for entry of a judgment for actual damages and proportionate punitive damages.

The plaintiffs, who are farmers, alleged that a grain elevator underweighed their grain deliveries and therefore paid them too little for their grain. The plaintiffs filed the present suit against the elevator company, alleging conversion, fraud, breach of contract, and negligence. The suit was tried to the court.

In its ruling, the district court concluded that the elevator had misweighed grain, that the elevator's employees had acted recklessly in this regard, and that the plaintiffs had suffered a loss as a result of the elevator's actions. However, the district court concluded that the evidence did not permit a determination of the amount of the plaintiffs' actual damages. The court therefore awarded no actual damages, even though it concluded that actual damages had been suffered. Instead, the court awarded each of the two individual plaintiffs \$1,500 in punitive damages. The court expressed the view that the punitive damage awards were proportional in amount to the general magnitude of the actual damages, even though no precise amount could be determined for the actual damages.

The plaintiffs have appealed from the awards of punitive damages in their favor. The plaintiffs contend the district court erred by holding that the evidence was not sufficient to establish a basis for the computation of actual damages. The plaintiffs contend the district court applied an erroneous rule of law by

requiring certainty of proof of an exact figure as a prerequisite to an award of actual damages. In addition to their argument that they should have been awarded actual damages, the plaintiffs argue that the award of punitive damages should have been larger.

Our scope of review is for correction of errors at law. Iowa R. App. P. 4. Findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Our courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those damages. Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220, 223 (Iowa 1977); Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973); Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971). If it is speculative and uncertain whether damages have been sustained, recovery is denied; but, if the uncertainty lies only in the amount of damages, recovery may be had provided there is a reasonable basis from which the amount can be inferred or approximated. Basic Chemicals, Inc. v. Benson, 251 N.W.2d at 223; Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d at 857; Patterson v. Patterson, 189 N.W.2d at 605.

In the present case, the trial court decided that there was sufficient competent evidence in the record that each of the plaintiffs was damaged. The trial court went on to say, however, that the measures of damage suggested by the plaintiffs were relevant "but nonetheless, by their very nature, they contribute to making the amount of damages uncertain."

We recognize the difficult task faced by the trial court in sorting out a very complex set of data in order to arrive at a figure for actual damages suffered by the plaintiffs. Of course, damages must be susceptible to ascertainment by methods other than by mere speculation, conjecture or surmise. Morris v. Getscher, 708 F.2d 1306, 1309 (8th Cir. 1983). However, mathematical exact-

ness is not required. Lakota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc., 519 F.2d 634, 641 (8th Cir. 1975). Mere difficulty in ascertaining the amount should not constitute cause for denial of recovery. Palmer v. Albert, 310 N.W.2d 169, 174 (Iowa 1981); Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 286 (Iowa 1979); Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 538 (Iowa Ct. App. 1982).

We think there were reasonable criteria provided from which the court could have inferred or approximated the amount of actual damages suffered by the plaintiffs. The plaintiffs introduced evidence that the defendant Co-op was weighing their grain 9.52% light by comparing one of the plaintiff's share of grain with his landlord's, by ASCS measurements, by comparison with test-plots and by combine bin comparisons. Defendant introduced evidence to dispute these measures of damage to plaintiffs. The trial court said there were too many variables to apply the plaintiffs' measures of damage. The court observed:

There are a number of reasons for reaching this (uncertainty as to amount) conclusion. The noticeable variables, i.e., moisture content, shrinkage, type of vehicle used in delivery, improvements or weight additions made to the delivery units, the method used in harvesting and dividing the grain, variety of seeds, difference in soil content and variances in tare weight lend a great deal to making proof of the amount of damages uncertain. In addition, there is the difficulty in determining the amount of loss resulting from the striking of the button while the dial was yet swinging. Also, by the Plaintiffs own testimony, certain of the weigh masters (Virginia and others) did not short weigh them; but even so, a claim for loss is made for grain weighed by them.

Instead of providing a basis for not being able to calculate damages, these variables should be taken into account with all the other factors presented, including the accountant's testimony, the test-plot figures, the ASCS measurements, the times that plaintiffs were not short-weighed, and so on. A reasonable basis

has been provided by the evidence presented by both parties from which to infer or approximate actual damages.

Our cases which have not awarded actual damages but have awarded punitive damages do not suggest a contrary conclusion. In Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979), the records on which the court could have based a damage award had been destroyed by the defendant, hence leaving no reasonable basis for computing damages. In the present case, there were offered a profusion of documents and figures. The task was not hampered by destruction of evidence but by the sorting out and weighing of the proffered evidence. In Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398 (Iowa 1982), the proof of actual damages was merely possible past expenses which were never incurred. In the instant case, the evidence was not destroyed, as it is in Pringle, nor were only possible past expenses involved, as in Westway. A great deal of evidence on the issue of damages was offered by both sides. The court should sift through this relevant evidence and arrive at its best estimate of actual damages.

To find otherwise would suggest that parties, through the submission of large amounts of conflicting and confusing evidence, could assert that any damage award would only be uncertain and therefore not able to be awarded. As the court said in Lakota Girl Scout Council v. Havey Fund-Raising Management, Inc., 519 F.2d at 643:

A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. The wrongdoer should bear the right of uncertainty that his own conduct has created.

Therefore, though there is uncertainty in this case, there is also a reasonable basis on which to base a finding on damages. We ask the trial court to make

its best inference or approximation and arrive at an amount of plaintiffs' actual damages

Finally, we agree that punitive damages were appropriate. The trial court may either reaffirm or modify the award of punitive damages after making its determination on actual damages

REVERSED AND REMANDED