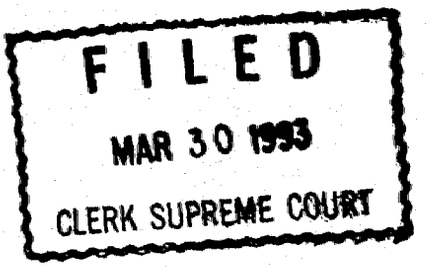
IN THE COURT OF APPEALS OF IOWA

No. 2-493 / 91-1771



JUDITH C. SCHNEIDER,

Appellant,

vs.

MARVIN J. SPILLMAN and ERMEL JEAN SPILLMAN,

Appellees.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

The plaintiff appeals from the district court's judgment offsetting her award for rescission of the parties' real estate contract with damages awarded on the defendants' counterclaim for conversion and dismissing the plaintiff's slander claim. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Ronald M. Rankin and Michael F. Lacey, Jr. of Patterson, Lorentzen, Duffield, Timmins, Irish, Becker & Ordway, Des Moines, for appellant.

Gary K. Koos, Davenport, for appellees.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ., but decided en banc.

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OXBERGER, C.J.

In May 1990, the parties entered into a real estate contract for the sale of the defendants' house. The plaintiff, Jean Schneider, ultimately sought rescission of the real estate contract on the basis of material misrepresentations made by defendants, the Spillmans. In addition, she had the items left in the house, including antiques, sold at auction. The Spillmans later told the auctioneers Schneider had stolen these items. The items were sold at the auction for $6293. The Spillmans claim these items were worth $57,000.

In July 1990, Schneider filed a petition seeking rescission of the real estate contract and damages based upon misrepresentations made by the Spillmans in connection with the contract. The Spillmans filed an answer and counterclaim denying the allegations of misrepresentation and seeking damages in an amount "not less than $14,125" for conversion. Schneider amended her petition to assert Spillmans' statements regarding the stealing of property were slander per se.

Following trial, the district court determined the real estate contract should be rescinded because the Spillmans made material misrepresentations regarding the electrical service at the house. However, the district court also found there was no oral agreement for Schneider to sell the Spillmans' remaining items at the house, including antiques

valued at $57,000. The court awarded the Spillmans damages for wrongful conversion of their property in the amount of $45,600 with interest. The amount reflected a twenty percent discount to cover selling expenses. The district court also determined Schneider was entitled to $71,202.12 for the rescission of the real estate contract. This amount was to be offset by Spillman's conversion damages, leaving Schneider with a judgment against the Spillmans for $23,456.44 with interest from the date of the decree.

Schneider filed a Iowa Rule of Civil Procedure 179(b) motion, which was denied. Schneider appeals.

Scope of Review

Our scope of review is for correction of errors at law. Iowa R. App. P. 4.

Discussion

Schneider contends the district court erred in awarding Spillman's judgment for conversion. Specifically, she alleges the evidence is insufficient to sustain the damage award granted by the trial court. She contends the evidence does not support either the number of items nor the value of items awarded by the district court.

The measure of damages in an action for conversion is the fair and reasonable market value of the converted item at the time and place of taking. F.S. Credit Corp. v. Shear Elevator, Inc., 377 N.W. 2d 227,234.35 (Iowa 1985).

An owner may give an opinion as to the fair market value of his or her personalty. Johnson v. Scott, 258 Iowa 1267, 1270, 142 N.W.2d 460, 463 (1966). However, a claimant's testimony as to a purchase price which includes other costs, expenses and charges gives the trier of fact nothing of substance upon which to reasonably determine the foundational pre-loss value. Id. at 1271, 142 N.W.2d at 463. The district court awarded damages solely on the basis of the testimony of Marvin Spillman. In so doing, it rejected finding the value to be the amount the items sold for at auction.

In its findings, the district court stated:

> The Court finds the the only competent evidence concerning the value of these admitted by outstanding antiques is from one defendant, Marvin J. Spillman. There is no way the advertising on this case could have produced the real value of any of these antiques. The real value is what a willing buyer would pay to a willing seller on an item by item basis, and not as part of an auction of not only these items but many other items of another owner as well. The court finds the actual value of the antiques sold was $57,000.

Spillman testified he based the value of the items on "(t)he time I had put in these, to restore them and rebuild them, and what it would cost me for the -- the piece to start with."

Based on the district court's express reliance on Spillman's testimony indicating his valuation was not based on fair market value, we conclude the district court incorrectly applied the law. Absent expert testimony, we

are inclined to adopt the auction sale price as the fair market value. However, the record before us is insufficient to determine fair market value. Accordingly, we remand this case to the district court for a determination of both the number of antiques converted and their respective fair market value.

Schneider also contends the district court erred in dismissing her action for slander. She claims the district court dismissed the slander claim based on a finding that the alleged slanderous statements were true.

The truth of a statement is a defense which must be specifically pleaded in order to be raised. Conman v. LaVine, 234 N.W. 2d 114, 125 (Iowa 1975).

Schneider amended her pleadings to include the slander claim one month prior to trial. Spillmans did not resist and the district court permitted the amendment The district court notified the Spillmans affirmative defenses were to be filed within ten days. The Spillmans did not file any affirmative defenses. Following trial, the district court dismissed the slander claim based on a finding that the slanderous statements were true. To do so without Spillmans first filing an affirmative defense is impermissible.

We reverse the district court's dismissal of the slander claim and remand the cause for hearing on damages.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

All judges concur, except Sackett, J., and Habhab, J., who dissent.

SACKETT, J (concurring in part and dissenting in part)

I concur in part. I dissent in part. I would affirm the trial court in its entirety.

HABHAB, J. (dissenting)

I respectfully dissent. 335

As it relates to plaintiff's slander claim, where slander is alleged, it is for the plaintiff to prove: (1) the defendant made oral statements, (2) the oral statements were slanderous, and (3) the words spoken were heard by someone other than the plaintiff. If the plaintiff fails to prove any of these propositions, the plaintiff cannot recover damages. The court found the plaintiff had failed to prove her claim and dismissed that part of her action.

I agree with the majority the trial court also found that the statements made by the defendant which the plaintiff claimed were slanderous were true. Ordinarily, the truth of a statement is a defense which must be specially pleaded.

However, the effect of that part of the trial court's ruling does not bear on the result reached. This is so because the trial court first found that the plaintiff failed to prove her case. Under the facts of this case, the only time the defense of truth would come into play to defeat plaintiff's claim is if the plaintiff proved the elements of her case. If the plaintiff had proven the elements of slander, then the defense of truth is considered, but not until then.

The trial court's finding has the same effect as a jury verdict; therefore, I would affirm the trial court on the slander issue. In addition, I note that this specific

finding of slander by the trial court was not challenged by the plaintiff in her 179(b) motion.

As it relates to the majority's opinion concerning defendants' damages, my concern is the statement by the majority that our court is inclined to adopt the auction sale price as the fair market value. The trial court found that but $300 was spent in advertising the auction. I find nothing in this record that would warrant using the auction sale price as the fair market value of the property in dispute.