IN THE COURT OF APPEALS OF IOWA

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HUMPHREYS RANCHES, LTD., An Iowa Corporation, and LLOYD E. HUMPHREYS,

Plaintiffs-Appellants,

vs.

KELLY MAST, a/k/a MIRTELLA J. MAST, and JULIA ANN MAST,

Respondents-Appellees.

2-80
2-66343

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Appeal from Delaware District Court — Thomas H. Nelson, Judge.

Plaintiffs appeal from an adverse judgment against them in this action arising out of their contract to purchase land from defendants, primarily challenging the sufficiency of the evidence to support numerous factual findings by the trial court. AFFIRMED IN PART AND REVERSED IN PART.

Lloyd E. Humphreys of Humphreys & Associates, Cedar Rapids, for the plaintiffs-appellants.

J. Wilson M cCallister and Kim J. Keuter, of Cooney, McCallister & Zwack, Dubuque, for the defendants-appellees.

Heard en banc.

PER CURIAM

Plaintiffs, Humphreys Ranches, LTD., Inc., and Lloyd E. Humphreys, appeal from an adverse judgment in this action arising out of their contract to purchase land from defendants, Kelly and Julia Mast. On appeal, plaintiffs primarily challenge the sufficiency of the evidence to support numerous factual findings by the trial court. We affirm in part and reverse in part.

On January 18, 1972, defendants entered into a real estate contract, as buyers, with Mark and Della Rowe, and Marcia and Vernon Endersbe, as sellers. Thereafter, on December 18, 1976, defendants entered into a real estate contract, as sellers, with plaintiffs, as buyers. The contract, which was referred to as an "offer and acceptance agreement" by the parties, involved most of the real property which was the subject of the Mast/Rowe contract. Thereafter, certain performance problems ensued and the parties entered into a new agreement which substituted and superseded the original contract. This second agreement, referred to as their "memorandum of agreement," contained the following pertinent terms: "[b]uyer takes the property as is on the date of [the] 'memorandum of agreement'; "[buyer made] a downpayment of $5,000, receipt of which is. . . acknowledged;" "the balance of $185,000 by buyer assuming the May 27, 1977 balance on the real estate contract entered into between. . . [the Rowes/Endersbes] and. . . [the Masts]"; "the sum of $98,100 at date of closing. . . .;" "the sum of $29,365.20 in the form of a promissory note to sellers which shall be secured by a mortgage of buyers' interest in said real estate. . . ." Also, plaintiffs were entitled to possession with due performance on May 27, 1977; however, defendants retained "the right to occupy the residence, or homestead, located on said premises, until December 31, 1977. . . ." Defendants were specifically required to keep the premises insured. Plaintiffs agreed to make all principle and interest payments required under the Mast/Rowe contract directly to the Rowes and Endersbes. The "memorandum of agreement" further provided that certain fixtures including

kitchen cabinets, wall-to-wall carpeting, and an outside television antenna were not to be included in the sale. Other fixtures, whether attached or detached, were part of the sale.

Defendants lived in the residence until approximately late September 1977. Whether their vacation of the premises was announced is disputed, however, a letter written by defendants' attorney to plaintiffs on October 3, 1977, indicated that defendants had vacated the premises on or about September 15, 1977. On or about October 17, 1977, plaintiffs learned that the house had been substantially damaged. The parties disagreed on the extent to which this damage was occasioned by defendants' vacation of the premises or subsequently caused by vandals, but the total damage to the premises ultimately became the basis of plaintiffs' breach of contract and negligence actions.

During 1977, defendants decided to sell that portion of their property which they had not conveyed to plaintiffs and which was still subject to their obligation under their contract with the Rowes and Endersbes. The Rowes and Endersbes required defendants to pay them $5,000 before they would convey title to that land. Defendants maintained that they had paid enough money under the original land sale contract between them to warrant immediate conveyance of title to this parcel. However, the Masts, under protest, made the $5,000 payment. Prior to making this payment, the Masts obtained an additional promissory note in the amount of $5,000 from plaintiffs, payable in full on March 1, 1987. This promissory note is the basis for defendants' counterclaim.

On August 29, 1978, plaintiffs entered into a real estate contract with Robert L. Craig for the sale of the property they had purchased from defendants. Pursuant to this contract, Craig purchased the property for a total price of $241,000 under the following terms: a) a down payment of $30,000; b) $100,000 payable October 31, 1978; c) assumption of plaintiffs' remaining $50,000 contract obligation to the Rowes/Endersbes, which plaintiffs assumed when they purchased

the property from the Masts; d) assumption of the plaintiffs' remaining $20,000 mortgage obligation to the Masts; e) the balance payable in cash on February 28, 1979. On August 15, 1979, defendants released the mortgage they obtained from plaintiffs after receiving a payment from Craig in the amount of $25,000.

Plaintiffs filed a petition against defendants on January 2, 1979, setting forth two causes of action. The first for breach of contract and the second for negligence and willful misconduct. Both counts prayed for damages covering the aforementioned loss suffered by plaintiffs. Defendants counterclaimed alleging that plaintiffs had failed to make required interest payments on their $5,000 promissory note. Trial to the court resulted in a judgment denying plaintiffs' relief and awarding defendants judgment on the promissory note, together with attorney fees. Trial court overruled plaintiffs' motion for new trial and to expand, enlarge, and substitute the findings. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. The principles governing our review of trial court's findings are well settled. The findings have the effect of a special verdict and are equivalent to a jury verdict; if supported by substantial evidence they are binding upon us and the judgment will not be disturbed on appeal. Iowa R. App. P. 14(f)(1). A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence. Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978). The record is reviewed in a light most favorable to the judgment. Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977). We will not weigh the evidence or pass on the credibility of the witnesses. Thomas Truck and Caster Co. v. Buffalo Caster and Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973); Northrup v. Foster, 204 N.W.2d 889, 890-91 (Iowa 1973). When considering issues of substantial evidence to support trial court's findings, the question before this court is not whether there is sufficient evidence to warrant a decision the fact finder did not make,but whether there is sufficient evidence to warrant a

decision it did make. See Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 464 (Iowa 1976).

II. Risk of Loss. Plaintiffs argue that trial court erred in determining that "any damages to the premises resulting from vandalism while defendants were in possession, or prior to the acceptance of the surrender, cannot be charged to defendants because they did no less in protection of the premises from vandalism than plaintiffs did and were no less ineffective." Plaintiffs assert that by the terms of the May 27, 1977, "memorandum of agreement" defendants bore the risk of loss until December 31, 1977. We agree with this assertion. While the risk of loss generally falls upon the purchaser during the executory phase of a land sale contract, the risk of loss may be otherwise allocated by the express or implied terms of the contract. Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976). Such a specific allocation exists in this case. The "memorandum of agreement" gave defendants the right to occupy the residence, but it also required that they keep it insured. Since their vacation of the premises rendered insurance proceeds uncollectible, any damage by vandalism which would have been covered by insurance is properly charged to defendants.

Plaintiffs further contend that defendants breached the contract when they allegedly took fixtures reserved for plaintiffs under the contract. They also allege damage to the premises by removal of the fixtures. We agree with plaintiffs' assertion that the contract specifically delineated the parties' rights in this regard, and we thus turn to the record to consider whether plaintiffs have proven compensable loss on either basis.

III. Damages. Initially, we note that the burden of proof was upon plaintiffs to establish their contentions by a preponderance of the evidence. See Iowa R. App. P. 14(f)(5) and (6). Also, failure to state, argue or cite authority in support of an issue on appeal may be deemed a waiver of that issue. Iowa R. App. P. 14(a)(3).

Plaintiffs argue that they were damaged by defendants' removal and/or injury to the following items: gas heater; gas stove; gas supply; tubing and connection; kitchen cupboards; kitchen countertop; kitchen sink; water drainage pipe; visqueen insulation; cut logs; trailer home; 500 feet of fence; carpeting; partial siding insulation; submersible well pump; broken doors; broken bannister; overturned toilet; and damaged water heater. Trial court determined that plaintiffs had not sustained their burden in proving that these items were taken or damaged after May 27, 1977, or that defendants were the persons who caused removal or damage. We will review each of the items listed. a) Gas heater: There was evidence before the court to indicate that the gas heater was removed prior to the execution of the "memorandum of agreement", and discarded because of a leak. Since the "memorandum of agreement" specifically stated that the premises were taken "as is" on the date of the agreement, there can be no recovery for items removed prior to that date. b) Gas stove: Upon our examination of paragraph 5 of the "memorandum of agreement", we conclude that the gas stove does not fall within the type of "fixtures" delineated therein. It was not an intricate part of the premises. We thus regard the gas stove as defendants' personal property and not an item for which plaintiff may recover for removal. c) Gas supply, tubing and connection: We agree with trial court's conclusion that, since these items were not the property of either defendants or plaintiffs, plaintiffs cannot recover for their removal. d) Kitchen cupboards: Upon our review of paragraph 5 of the "memorandum of agreement", we conclude that the kitchen cupboards were specifically excluded from the sale to plaintiffs. e) Kitchen countertop: While the evidence may support plaintiffs' contention that the kitchen countertop was removed in violation of the parties' agreement, plaintiffs fail to argue the damages suffered by its removal. We thus consider this issue waived. Iowa R. App. P. 14(a)(3). f) Kitchen sink and cupboards: While the record supports plaintiffs' contention that the kitchen sink was taken in violation

of the agreement, plaintiffs have wholly failed to establish the damages suffered by its removal. Plaintiffs argue on appeal, and there is evidence to support the claim, that the kitchen sink and kitchen cupboards would cost at least $600 to replace. However, as we noted above, the kitchen cupboards were not included in the sale of the real property, and thus, we find no basis on which to value the removal of the sink. g) Water drainage pipe: Plaintiffs fail to argue the value of the drainage pipe which was removed with the sink. Therefore, we conclude that trial court correctly determined it had no basis upon which to award damages for that loss. h) Visqueen insulation: Again, plaintiffs fail to argue damages resulting from the removal of this item. We thus deem the issue waived. i) Cut logs, trailer home, and fence: Upon our review of the record, we find testimony supporting trial court's finding that these items were removed prior to May 27, 1977. Since there is substantial evidence to support trial court's findings, its conclusion that those items were not subject to the agreement, must be affirmed. j) Carpeting: The wall-to-wall carpeting was specifically excluded from the sale by paragraph 5 of the "memorandum of agreement." As a result, there is no basis for plaintiffs' recovery of damages for removal of that item. k) Siding and insulation: Upon our review of the record, we find evidence to support trial court's finding that any siding torn off was removed prior to May 27, 1977. l) Submersible well pump: Trial court made no specific finding with regard to the submersible well pump. Robert Craig testified that, after he had inspected the dwelling as a prospective purchaser, he learned the pump had been removed. Defendants testified that the pump was in the well when defendants vacated the premises and that defendants knew nothing about its removal. We believe this pump is a fixture within the meaning of paragraph 5 of the parties' "memorandum of agreement." See Cook v. Beerman, 271 N.W.2d 459, 462 (Neb. 1978). Accordingly, plaintiffs are entitled to recovery if they have proven their damages below. Plaintiffs presented testimony that the actual value of the pump was $350

and the replacement value was $375. We thus believe plaintiffs are entitled to recover $350 for the submersible well pump. m) Toilet, water heater, bannister, and doors: Plaintiffs have unquestionably substantiated their claim that these items were vandalized after defendants vacated the premises. As we stated above, defendants contractually obligated themselves to insure the premises, and their depature resulted in plaintiffs' loss of coverage at the time the premises were vandalized. Accordingly, plaintiffs are entitled to recovery if they proved their damages at trial. In this regard, trial court determined that there was insufficient evidence to assess damages in this case. Plaintiffs argue that they offered abundant evidence as to the replacement and restoration costs of these items. We agree with trial court's conclusion.

> The general rule in Iowa for repairs or for replacement is the fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage. . . [I] f the property is reparable and the cost of repairs exceed the market value, [or in the event no market value can be established, the real or actual value] recovery is limited to such before accident value.

State v. Urbanek, 177 N.W.2d 14, 16-17 (Iowa 1970). "[A] plaintiff who is unable to prove either market value or actual value is required to show that the repairs did not restore the property to a better condition before the damage." Iowa Power and Light Co. v. Board of Water Works, 281 N.W.2d 827, 832 (Iowa App. 1979), citing Urbanek, 281 N.W.2d at 16. This rule is based upon the principle that no injured party should receive more than has been lost as a result of another's wrong doing. Iowa Power and Light Co. , 281 N.W.2d at 832, citing Adams v. Deur, 173 N.W.2d 100, 105 (Iowa 1969). Damages are awarded to place an injured party in the same position as he or she would have been had there been no injury. In this case, no market value was established for these items. In proving actual value, we must consider the cost of the replacement with proper allowances made for depreciation, usage and age. See Iowa Power & Light Co., 281 N.W.2d at 832. While plaintiffs offered evidence as to the replacement value of these items, they

provided the court with no basis on which to adjust those values so that plaintiffs would not be unjustly enriched. We thus affirm trial court's determination that damages cannot be assessed as to all items except the submersible well pump.

III. Promissory Note. Plaintiffs argue that trial court erred in awarding defendants judgment on their promissory note, together with attorney fees. We agree with plaintiffs contention. The record clearly reflects the transaction under which the promissory note was made. Defendants were required to make advance payment on their real estate contract with the Rowes and Endersbes before the Rowes and Endersbes would convey title to the parcel defendants wanted to sell. Under the real estate contract between defendants and plaintiffs, plaintiffs were directed to assume the Rowe/Mast contract and make payments directly to the Rowes and Endersbes. Defendants' payment effectively extinguished plaintiffs' obligation to the Rowes and Enderspes in the amount of $5,000. Apparently, rather than taking an assignment of the Rowes and Endersbes contract rights,[1] defendants chose to receive a promissory note made payable directly to them. Thus, contrary to plaintiffs' allegation, we believe the note was supported by sufficient consideration. The note was not part of the real estate transaction but merely further evidence of plaintiffs' obligation. It was a promise of future payment in exchange for present satisfaction of plaintiffs' liability.

Further, contrary to plaintiffs' other argument, the note was not satisfied when defendants released Craig, plaintiffs' vendee, from the mortgage Craig assumed. That mortgage was an additional obligation under the real estate sale between plaintiffs and defendants. The real estate contract, assumed by plaintiffs, was directly payable to the original vendors. The mortgage was made directly to defendants, and was based upon the new purchase price of the property. When defendants released Craig from this obligation under his assumption of their mortgage, this transaction did not affect Craig's obligations

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[1] A letter from the Rowe's attorney prior to the execution of the note supports this interpretation of the transaction and further indicates that the Rowes would satisfy plaintiffs' and defendants' obligation in the amount of the note. Thus, the Rowes would not receive more than what their contract called for.

under his assumption of their mortgage, this transaction did not affect Craig's obligations under his assumption of the original real estate contract. Nor did it affect plaintiffs' obligation under that contract. Thus, there was no satisfaction of that original obligation by the Craig/Mast transaction.

We conclude, however, from the record presented that the note was not yet due and payable. In pertinent part, the note read:

> . . .The undersigned each as principle jointly and severally promise(s) to pay to the order of [the Masts]. . .the sum of Five Thousand and 00/100 ($5,000.00) dollars with interest thereon from this date, payable March 1, 1978 at a rate of 6% per annum until payment hereof as follows: This note shall be due and payable in full on March 1, 1987. There shall be no prepayment penalty.

The face of this instrument creates an ambiguity due to use of two payable dates. Plaintiffs, during oral argument, asserted that the 1978 date was a typographical error and should have read 1987. Defendants did not appear for oral argument but assert in their brief that interest payments were payable as of March 1, 1978. There is no dispute that the note was finally payable on March 1, 1987. The sole issue, therefore, concerns the question of whether interest payments were to begin March 1, 1978. We believe defendants' assertion is unsupported by the evidence. First, the note does not state that interest installments are due annually. Under the provision detailing the method of payment, the note merely states that it is due and payable in full on March 1, 1987. Correspondence, prior to the time the dispute arose, supports plaintiffs' contention. A letter, dated October 3, 1977, from defendants' attorney to the Rowes' attorney states, in pertinent part:

> Kelly further agrees to your proposal that Lloyd Humphreys will execute a promissory note with interest at the contract rate to reimburse him at the time when the contract was to be fulfilled, that is, March 1, 1987.

We thus conclude trial court erred in determing that plaintiffs had breached their obligation under this note.

IV. Punitive Damages. Plaintiffs finally argue that trial court erred in refusing to assess punitive damages against defendants. We disagree. Punitive damages are never allowed as a matter of right, they are discretionary. Rowen v. Le Mars Mutual Ins. Co., 282 N.W.2d 639, 661 (Iowa 1979). While spite or wicked intent need not be shown to recover punitive damages, under the record presented, we cannot say trial court abused its discretion in determining that there was no malice warranting an award of exemplary damages. See Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974). Further, punitive damages can only be awarded when substantial actual damages are allowed. See McCarthy v. J.P. Cullen & Son Corp., 199 N.W.2d 362 (Iowa 1977). While determination of the specific amount of the actual damage award is not a condition precedent to an award of punitive damages, See Pringle Tax Serv. Inc. v. Knoblauch, 282 N.W.2d 151 (Iowa 1979), the record in this case reveals insufficient evidence to determine whether plaintiffs suffered a significant harm. As stated above, they failed to prove the value of their loss on individual items. Their evidence of their total loss also was insufficient. While they offered evidence as to before and after values of the premises as a whole, their evidence did not account for diminution in value due to the permissive removal of items under the contract or for items removed before the contract date. These items were considerable and, without evidence of their fair market value at the time of removal, there is no basis upon which to determine plaintiffs' loss. We thus affirm trial court's judgment denying plaintiffs' relief, except we award plaintiffs $350 for the submersible well pump; we reverse that judgment entered on defendants' counterclaim.

AFFIRMED IN PART AND REVERSED IN PART.