

AUG 30 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FRED T. STIMSON,

Plaintiff-Appellant,

vs.

**IRA PAUL SMITH, IRENE SMITH, and
Ira Paul Smith and Irene Smith d/b/a
WESTBORO ELEVATOR,**

Defendants-Appellees.

Filed August 30, 1983

3-225
2-69417

Appeal from Page District Court - J. C. Irvin, Judge.

Plaintiff appeals from the judgment on his claim for damages resulting from a bad check written by defendants, operators of a grain elevator. **AFFIRMED IN PART AND REMANDED.**

Richard G. Davidson of Davidson & Bailey, Clarinda, Iowa, for plaintiff-appellant.

Charles Coulter of Stephens, Millhone, Coulter & Biggs, Clarinda, Iowa, for defendants-appellees.

Bernard W. Gorman, Tarkio Missouri, for defendants-appellees.

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

SCHLEGEL, J.

Plaintiff appeals from the judgment on his claim for damages resulting from a bad check written by defendants, operators of a grain elevator. The trial court awarded the plaintiff judgment in the amount of the check, but denied exemplary damages and did not award interest.

Plaintiff claims the trial court should have awarded him interest from the date of the petition. He also claims he was entitled to exemplary damages on account of 1) defendants' admission that they did not have money in the bank to cover the check at the time it was written, 2) defendants' account was overdrawn in an amount in excess of \$100,000 for more than a month before writing the check, and 3) defendants were in violation of Iowa law by operating as a grain dealer in Iowa without proper licenses and bonds.

Defendants operated an elevator in Westboro, Missouri. Plaintiff made an agreement to sell certain soybeans to defendants on the provision that defendants would pay for the same thirty days after delivery. The deferred payment agreement increased the price by five cents per bushel. The soybeans were delivered on June 1, 1982. On June 28, 1982, defendant, Ira Smith, wrote plaintiff a check in the amount of \$8,878.47, in payment for the soybeans. Upon presentation, the check was returned for insufficient funds. There was evidence that defendants' account had been seriously overdrawn for an extended period when the check was drawn. It also appears that defendants did not have an Iowa grain dealer's license.

This case was tried to the court, resulting in a judgment for plaintiff for the amount of the check. The trial court held that there was insufficient evidence to support plaintiff's claim for exemplary damages. The trial court further made no award of interest.

This being an ordinary action at law, our scope of review is on assigned error only. Iowa R. App. P. 4. The trial court's findings of fact, if supported by

substantial evidence, have the force of a special verdict. Iowa R. App. P. 14(f)(1). We view the evidence in the light most favorable to the judgment. Muchmore Equipment, Inc. v. Grover, 315 N.W.2d 92, 101 (Iowa 1982); Nora Springs Cooperative Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976).

I. Plaintiff first claims that he should have been awarded interest at the rate of 10% from the date of the filing of the petition in this action. We agree.

Interest on judgments is allowed pursuant to Iowa Code § 535.3 (1981), which provides in pertinent part:

Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless . . . , which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

Such interest is allowed as a matter of right, and should be entered even when not prayed for. Oskaloosa Food Products Corp. v. Aetna Casualty and Surety Company, ___ N.W.2d ___ (Iowa 1983). Accordingly, plaintiff was entitled to 10% per year interest on the judgment from the date of the filing of the petition in this case. It was error for the trial court to fail to include such interest in the judgment entered herein.

II. Plaintiff claims the trial court was in error in failing to award exemplary damages in addition to the judgment entered for the amount of the check.

At the outset, it is noted that the amount awarded as a judgment was awarded by the court in the following language, as a part of its findings of fact, contained in its "Judgment Order": "7. That Defendants breached their contract and Plaintiff is entitled to judgment in the amount of Eight Thousand Eight Hundred Seventy-Eight and 47/100 (\$8,878.47) Dollars." From this language, it is apparent that the trial court considered the judgment entered herein to be for breach of contract. Because of our further ruling herein, it is not necessary for us to decide whether this is a breach of contract case where, as held by the Iowa

Supreme Court, punitive damages are not recoverable. Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 919 (Iowa 1979). The trial court found that: "8. There is insufficient evidence to support Plaintiff's claim for exemplary damages." We believe that such finding was supported by the record herein. The evidence did not meet the requirements of the guidelines set out in Muchmore Equipment, 315 N.W.2d at 100, as follows:

From the above cases there emerge these guiding principles:

- (1) Punitive damages cannot be recovered for breach of contract;
- (2) Punitive damages may be recovered when the breach also constitutes an intentional tort, or other illegal or wrongful act, if committed maliciously;
- (3) It is sufficient if the malice is only legal malice, that is, committed or continued with a willful or reckless disregard of another's rights;
- (4) The intentional tort or other illegal or wrongful act may occur at the time of and in connection with the breach; but
- (5) A wrongful act in this context is not committed merely by breaching a contract, even if such act is intentional.

Plaintiff had the burden of proof on the elements of exemplary damages. The trial court found that he had failed to sustain that burden. Seldom does a party having the burden sustain it as a matter of law. Johnson v. Svoboda, 260 N.W.2d 530, 536 (Iowa 1977). The court could reasonably find that the evidence of the condition of the checkbook balance in this case did not satisfy plaintiff's burden of proof that the act of giving a check, drawn on an account having insufficient funds was, even though arguably illegal, done maliciously.

We affirm the trial court's refusal to award punitive or exemplary damages, and we remand the case to the district court for the sole purpose of the award of interest on the judgment entered by the trial court, at the rate of 10% per year from the date of the filing of the petition in this case.

AFFIRMED IN PART AND REMANDED.