

IN THE COURT OF APPEALS OF IOWA

No. 5-075 / 93-1890

GENE A. EVENS, SR. and ELSIE F. EVENS,

Plaintiffs-Appellants/Cross-Appellees,

vs.

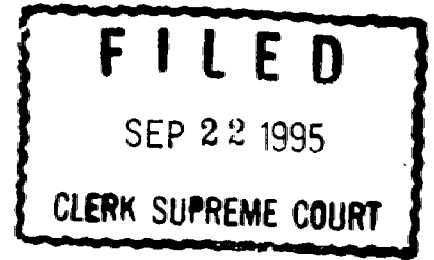
**FRIEDLEY LINCOLN MERCURY, INC. and MAZDA MOTOR OF
AMERICA, INC.,**

Defendants-Appellees/Cross-Appellants,

and

FORD MOTOR CREDIT COMPANY,

Defendant-Appellee.



Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan,
Judge.

Plaintiffs and defendants appeal trial and post-trial rulings. **AFFIRMED.**

Gerald J. Kucera of the Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

James E. Walsh, Jr., Christy R. Liss, and Kellyann M. Lekar of Clark, Butler,
Walsh & McGivern, Waterloo, for appellees Friedley Lincoln-Mercury and Mazda Motor
of America

Thomas R. Pence of Irvine & Robbins, Cedar Rapids, for appellee Ford Motor
Credit.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

DONIELSON, C.J.

The plaintiffs, Gene and Elsie Evens ("Evens"), appeal eight trial and post-trial rulings of the district court. Defendants Friedley Lincoln-Mercury, Inc. ("Friedley") and Mazda Motor of America, Inc., ("Mazda") have cross-appealed and raise two additional arguments. We affirm on all issues.

The Evens purchased a vehicle from Friedley in May 1989. The purchase of the vehicle was financed by defendant Ford Motor Credit Company ("Ford"). When they purchased the car the Evens also purchased a "Mazda Full Circle Service Shield" service agreement. In early 1991 the Evens' vehicle would not start. Mazda determined the vehicle's engine had been damaged due to the owners' failure to perform routine maintenance, and it refused to cover the repair of the engine under the service agreement.

The Evens obtained the repair of the engine through a second financing arrangement with Friedley. This second contract was financed by, and subsequently assigned to, Ford. Shortly after the engine was repaired, the Evens began to have transmission problems with the vehicle. They refused to make any payments on the engine financing contract and were in default on the original contract for the purchase price of the vehicle. Ford sent the Evens notices of their right to cure and repossessed the vehicle in January 1992. After the vehicle was repossessed, the Evens informed Ford they had property inside of the auto which they wanted

returned. Ford claimed there were no possessions in the vehicle. The Evens' auto was sold at auction on May 27, 1992, for \$1,800.

The Evens filed suit claiming breach of the service contract by Friedley and Mazda and wrongful repossession and conversion by Ford. Friedley and Ford filed counterclaims seeking judgments for the breach of the Evens' vehicle financing and engine financing contracts.

The jury returned a verdict finding Friedley and Mazda had breached the service contract when it refused to cover the engine repair under the Mazda Full Circle Service Shield service agreement. It awarded the Evens \$2,150 in contract damages from Friedley and \$15,300 in contract damages from Mazda. It also awarded the Evens \$1,000 in punitive damages from Friedley and \$3,000 in punitive damages from Mazda.

The jury found against Ford on the wrongful repossession/conversion claim and awarded the Evens \$3,300 in actual damages and \$2,700 in punitive damages. The jury found in favor of Friedley on its counterclaim and awarded it \$2,574.57. While the jury verdict indicated the jury found Ford's repossession of the vehicle was lawful; it found the subsequent sale of the car was not done in a commercially reasonable manner, and Ford was denied recovery on its counterclaim for a deficiency judgment.

All of the parties filed post-trial motions, and in ruling on those motions the trial court ordered the following:

- 1) Ford's motion for a new trial would be granted if the Evens did not accept a remittitur of the award against Ford from \$3,300 to \$400 (plus interest);
- 2) Mazda's motion for a new trial would be granted if the Evens did not accept a remittitur of the award against Mazda from \$15,000 to \$2,574.57;
- 3) The punitive damage awards against all defendants were set aside;
- 4) The Evens' \$2,150.00 award for actual damages against Friedley was set aside;
- 5) The court denied the Evens' request to set aside the \$2,574.57 judgment entered against them on Friedley's counterclaim; and
- 6) Ford's request for a new trial or judgment notwithstanding the verdict on its claim for a deficiency judgment was denied.

I. PUNITIVE DAMAGES - FRIEDLEY AND MAZDA.

The jury awarded the Evens \$1,000 in punitive damages against Friedley and \$3,000 in punitive damages against Mazda. The district court concluded there was no evidence of actual or legal malice to support the awards. It granted Friedley's and Mazda's requests for judgments notwithstanding the verdict and set aside the awards of punitive damages. In reviewing a motion for a judgment notwithstanding the verdict, we consider whether the evidence, taken in the light most favorable to the nonmoving party, shows the movant was entitled to a directed verdict at the close of all the evidence. *McGough v. Gabus*, 526 N.W.2d 328, 334 (Iowa 1995). When reviewing such a ruling, we look to see whether the evidence on an issue was sufficient to generate a jury question. *Id.*

A breach of contract alone, even if intentional, will not form the basis of punitive damages. *Berryhill v. Hatt*, 428 N.W.2d 647, 656 (Iowa 1988). Rather, the breach must also constitute an intentional tort, or other wrongful act, committed with legal malice, that is with willful or reckless disregard for another's rights. *Id.* "Tortious conduct after the breach of a contract, no matter how malicious or inexcusable, will not form the basis for recovery of punitive damages for a breach of contract." *Parks v. City of Marshalltown*, 440 N.W.2d 377, 379 (Iowa 1989).

The Evens appear to argue the trial court could not set aside the punitive damage awards when it had previously refused the defendants' requests to direct a verdict on the issue and had submitted it to the jury. The Evens cite no authority in support of this proposition, and, in fact, it is not consistent with our supreme court's approval of the "Uhlenhopp rule." *See Reed v. Chrysler Corp.*, 494 N.W.2d 224, 228-29 (Iowa 1992). Under the Uhlenhopp rule, directed verdicts are discouraged and trial courts are advised to allow the submission of issues to the jury and to later grant a motion for judgment notwithstanding the verdict if a defendant is entitled to judgment as a matter of law. The prior denial of a directed verdict and the submission of an issue for consideration by the jury does not preclude a later grant of a motion for judgment notwithstanding the verdict.

A review of the record reveals the Evens had only breach of contract claims against Friedley and Mazda. There was no evidence of any intentional tort or other

wrongful act committed with legal malice or with a willful or reckless disregard for another's rights. While the Evens' briefs set forth numerous allegations of allegedly wrongful conduct by the defendants in the handling of their service contract, none of the allegations rise to the level of an intentional tort. The trial court was correct in setting aside the punitive damages awards entered against Friedley and Mazda.

II. PUNITIVE DAMAGES - FORD MOTOR CREDIT COMPANY.

The jury awarded the Evens \$2,700 in punitive damages against Ford. The trial court granted Ford's motion for judgment notwithstanding the verdict and set aside the judgment. The Evens had brought wrongful repossession and conversion claims against Ford. The jury rejected the argument that the repossession had been wrongful. The trial court found an award of punitive damages for the alleged conversion of the Evens' property would be speculative in nature.

While punitive damages may be awarded in actions for conversion, the conversion **must** have been characterized by malice or a willful disregard of a plaintiff's rights. *Larson v. Great West Casualty Co.*, 482 N.W.2d 170, 174 (Iowa App. 1992). The Evens introduced no evidence to indicate Ford acted maliciously or in a willful disregard for their rights. The trial court was correct in finding the Evens' evidence was insufficient to support an award of punitive damages against Ford.

III. BREACH OF CONTRACT DAMAGES - FRIEDLEY AND MAZDA.

The jury awarded the Evens \$15,300 in breach of contract damages against Mazda and \$2,150 in contract damages against Friedley. The trial court found the verdicts were excessive, duplicative and not supported by the evidence. It set aside the judgment against Friendly and reduced the judgment entered against Mazda to \$2,574.57.

The Evens claim the damages awarded by the jury were appropriate because “[i]t is clear that the jury felt that Mazda Motor of America, Inc. was responsible for the loss of the car while Friedley Lincoln-Mercury, Inc. was responsible for the value of the engine.” The jury found Friedley and Mazda had breached the Mazda Full Circle Service Shield service agreement and were obligated to make the engine repairs. However, the Evens were only entitled to recover the value of the engine repairs (\$2,574.57) once, and the inclusion of that amount in the awards entered against both Mazda and Friedley was duplicative. The trial court was correct in setting aside the award entered against Friedley.

The jury was instructed¹ the measure of damages for the breach of the service agreement was to be an amount which would place the Evens in as good a position as if the contract had been performed. The jury was further instructed the damages

¹ Jury instruction number 15

it awarded **had** to have been reasonably foreseeable and it could consider the costs to replace the engine.

The Evens claim the jury could have based its award of \$15,300 in damages upon their loss of the "benefit of the bargain," and they cite the purchase price of the car and the finance charge payments as evidence of their damages. An award of \$15,300 was clearly not supported by the evidence and appears to have been based on figures taken from defendants' exhibit A--the original retail installment contract under which the Evens purchased the car. The amount of damages necessary to put the plaintiffs in as good as position as they were before the 1991 breach of the service contract do not require that the plaintiffs be returned to the position they were in at the time of their 1989 acquisition of the car.

The Evens claim Mazda should be liable for the value of the car because it was foreseeable they would lose it if Mazda did not honor the service agreement and replace the engine. Such damages were not foreseeable or recoverable in this contract action. The trial court did not err in ordering a remittitur of the award of damages entered against Mazda.

IV. VALUE OF CONVERTED PROPERTY.

The jury awarded the Evens \$3,300 against Ford for the value of personal property which the Evens claimed was in their vehicle at the time of its repossession. In its post-trial motions Ford asserted this verdict was excessive and

moved to have the award reduced. The trial court concluded the property had a value of no more than \$300 to \$400, and it found the verdict was clearly excessive and unsupported by all of the credible evidence. It ordered the plaintiffs to accept a remittitur of the verdict from \$3,300 to \$400 (plus interest) or it would grant Ford's motion for a new trial. *See* Iowa R. Civ. P. 250. The Evens claim the jury's award was appropriate.

In ruling upon motions for a new trial, the district court has broad but not unlimited discretion in determining whether a verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(7). When reviewing an argument that a verdict is excessive, the evidence must be viewed in the light most favorable to the plaintiffs. *See Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 869 (Iowa 1994). We interfere with the jury's function when a damage award is flagrantly excessive and lacking in evidentiary support. *See id.* If a verdict fails to do substantial justice between the parties, we must either grant a new trial or require a remittitur. *Id.*

A review of the record reveals the plaintiffs testified their lost tools had a value of \$300 and their leather coat was worth only a \$100. They offered no evidence to support a finding that the property located in the repossessed vehicle had a value of \$3,300. There was clearly no evidence to support the jury's award of \$3,300 for the property, and we find no error in the order for remittitur.

V. FRIEDLEY'S COUNTERCLAIM.

The Evens claim the trial court erred in not requiring Friedley to show the vehicle had been sold in a commercially reasonable manner before it could recover on its counterclaim for the breach of the engine replacement contract. The jury instructions had required Ford to make such a showing before it could recover on its claim for a deficiency judgment on the vehicle financing contract.

Under Iowa law a secured party seeking a deficiency judgment must prove compliance with the Uniform Commercial Code requirements for the disposition of collateral. *General Elec. Capital Corp. v. Vashi*, 480 N.W.2d 880, 881 (Iowa 1992). The failure to dispose of collateral in a commercially reasonable manner may deprive the secured party of a deficiency judgment. *West Des Moines State Bank v. Ralph's Distributing Co.*, 516 N.W.2d 801, 802 (Iowa 1994); *see also* Iowa Code § 537.5103(1) (1993). The key issue in this case is whether Friedley disposed of the collateral, thus subjecting its right to collect a judgment to the terms of Iowa Code section 554.9504.

The evidence offered at trial revealed Friedley initially entered into the engine financing contract with the Evens, and it held a junior lien interest in the Evens' vehicle. However, all of Friedley's interests in the Evens' car and the engine financing contract were assigned to Ford. Ford sent the Evens notices to cure with respect to both the vehicle purchase and engine replacement contracts. The

vehicle was repossessed by Ford in conjunction with the Evens' default on both contracts.

In case of the Evens' default on the engine financing contract, Friedley was obligated to reimburse Ford for the balance outstanding on the engine contract. On May 13, 1992, two weeks before the sale of the Evens' vehicle by Ford, Friedley satisfied the engine contract debt to Ford. At the time of that "charge-back" to Friedley, Friedley resumed its role as a junior lienholder and had the right to commence its own collection procedures. That a senior lienholder had already initiated a repossession and subsequently sold the collateral in a commercially unreasonable manner did not negate Friedley's right as a junior lienholder to collect a judgment.

Friedley would lose its right to a deficiency judgment only if it, or an agent acting on its behalf, had disposed of the Evens' car in order to satisfy Friedley's security interest and had done so in a commercially unreasonable manner. The Evens claim the sale of their car was done by Ford on Friedley's behalf. However, after the charge-back Ford no longer had an interest in enforcing the engine contract, and the testimony of Ford's representative establishes the Evens' vehicle was sold solely to satisfy Ford's security interest in the vehicle financing contract. Under these circumstances, the trial court was correct in requiring only Ford, and not Friedley, to prove the sale of the Evens' vehicle was done in a commercially reasonable manner.

VI. JURY INSTRUCTION NO. 28 - RIGHT TO CURE.

The Evens claim the trial court erred in not instructing the jury that Ford had to prove by a preponderance of the evidence its notices of right to cure were received by the Evens. The Evens had requested jury instruction number 28 state, "The creditor has the burden to prove by a preponderance of the evidence that the notice was received." The trial court did not err in refusing this requested instruction.

The Iowa Code requires a creditor to give notice of a right to cure, and such notice is satisfied when the creditor mails the notice to the consumer. Iowa Code §§ 537.5110(2), 537.5111(3) (1993). "Proof that a document was properly mailed raised a presumption that it was received." *Montgomery Ward, Inc. v. Davis*, 398 N.W.2d 869, 870 (Iowa 1987); *see also Liberty Mutual Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 857 (Iowa 1984) (where statute provides notice may be given by mail, service is ordinarily accomplished by depositing properly addressed and stamped notice in the mail).

The Evens cite no persuasive statutory or case law authority to support their requested instruction. Given the facts of this case, and the presumption that mailed notice is received, we find the trial court did not err in refusing the Evens' requested instruction.

VII. PLAINTIFFS' MOTION FOR DIRECTED VERDICT.

The Evens claim their motion for directed verdict challenging the counterclaims should have been granted. The Evens claimed the repossession of their vehicle was rendered void when they were sent additional notices to cure after the repossession. They argue they were entitled to a dismissal of Ford and Friedley's counterclaims. The plaintiffs cite no authority in support of this position, nor do they cite evidence indicating how they were prejudiced by the receipt of additional notices. The trial court did not err in denying their request for a directed verdict on this issue.

VIII. TIMELINESS OF COUNTERCLAIMS.

The Evens claim the trial court erred in allowing Friedley and Ford to file their counterclaims. The pleadings deadline was August 9, 1993. Ford filed a counterclaim on August 5, 1993, and Friedley filed a counterclaim on August 9, 1993. Both counterclaims sought deficiency judgments because the Evens' car had not been sold for a sufficient sum to pay the outstanding balances on the vehicle and engine financing contracts.

The Evens claim the amendments changed the issues in the case and the defendants had failed to obtain the leave of court to file them. The trial court ruled on the Evens' motion on September 23, 1993. In its ruling the trial court found the filing of the counterclaims met the pleadings deadline and they were valid

counterclaims. Its ruling effectively treated the filing of the amendments as requests for leave of the court to amend, and it allowed them.

Leave to amend is to be freely given when justice so requires. Iowa R. Civ. P. 88. A trial court has considerable discretion in granting leave to amend, and we reverse only when a clear abuse of discretion is shown. *Porter v. Good Eavespouting*, 505 N.W.2d 178, 180 (Iowa 1993). We find neither the timing nor nature of the counterclaims warranted their exclusion in this case. We find no abuse of discretion in the trial court's allowance of these counterclaims.

IX. JURY INSTRUCTION - COMPENSATORY DAMAGES.

Mazda and Friedley claim the trial court erred in denying their requested jury instructions regarding the Evens' duties under the service agreement.² Jury instructions are reviewed to determine if they correctly state the law and are supported by substantial evidence. *Morgan v. Perlowski*, 508 N.W.2d 724, 729 (Iowa 1993). Reversal is warranted for refusing to give a particular instruction only when the error is prejudicial. *Id.*

Under jury instructions 9, 10, and 14, the jury was instructed that in order for the Evens to recover for breach of contract they had to prove they had done what

²The defendants also objected to the jury instructions which allowed for separate findings of damages against Friedley and Mazda. Their appeal on this issue is moot due to our affirmance of the trial court's decision to set aside the award of damages entered against Friedley.

the contract required of them or that their performance was otherwise rendered impossible by another party. A trial court does not err in refusing to submit a party's proposed instruction when its concepts are embodied in other instructions submitted to the jury. *See Kirk v. Union Pacific Railroad*, 514 N.W.2d 734, 738 (Iowa App. 1994). The essence of the defendants' requested instruction was conveyed in instructions 9 and 10, and the trial court did not err in refusing to give the proposed instruction.

X. FRIEDLEY/MAZDA'S MOTION FOR DIRECTED VERDICT.

In their cross-appeals Friedley and Mazda claim the trial court erred in failing to grant their motions for directed verdicts on the issue of punitive damages. Given our ruling in section 4 of this opinion, this issue is moot and we need not address it.

AFFIRMED.