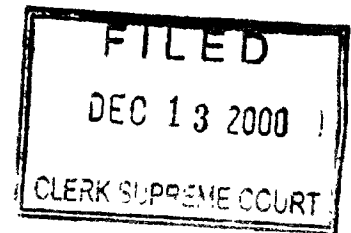


IN THE COURT OF APPEALS OF IOWA

No.0-664 / 00-0381
Filed December 13, 2000



RICHARD J. AUGUSTIN and LINDA A. AUGUSTIN,
Plaintiffs-Appellants,

vs.

LOMBARDI'S, INC., an Iowa Corporation, VERNON H. LOMBARDI AND
KATHLEEN LOMBARDI,
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, Robert J.
Curnan, Judge.

Plaintiffs, as purchasers of certain real estate, appeal following a judgment in their action against the sellers for fraudulent misrepresentation, negligent misrepresentation, and breach of contract. They contend the court's award of only \$500 in damages is inadequate as a matter of law. **AFFIRMED.**

A. John Arenz and Rodney T. Carroll of O'Connor & Thomas, P.C.,
Dubuque, for appellants.

William A. Conzett, Dubuque, for appellees.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Plaintiffs-appellants Richard and Linda Augustin contracted to purchase real estate. They brought this suit seeking damages for breach of promise and misrepresentation after they did not receive all they thought they purchased. The district court found breach of contract and negligent misrepresentation. Plaintiffs appeal contending the damages awarded by the district court were not adequate to compensate them for their loss. We affirm.

In February of 1982, plaintiffs entered into an installment real estate contract to purchase various parcels of real estate including a gas station, convenience store, tavern and ballroom together with certain personal property from defendants-appellees Lombardi's, Inc., an Iowa Corporation. Defendants Vernon H. Lombardi and Kathleen Lombardi are the successors in interest to the corporation. In December of 1998 plaintiffs sued contending defendants had (1) fraudulently and or negligently misrepresented the location of the property and (2) had breached the terms of the contract. The district court heard the evidence and found both breach of contract and negligent misrepresentation and awarded plaintiffs damages of \$500. Plaintiffs on appeal raise a number of challenges to what they claim was an inadequate award of damages made by the district court.

The focus of the dispute is an underground septic system and underground fuel tanks included in the sale. Unknown to any of the parties at the time of sale, the tanks and septic system were not buried on property sold but were on adjacent land subject to a highway easement in favor of the state and owned by St. Catherine's Church. Plaintiffs did not learn the tanks and septic system were not on the property they purchased until March 10, 1992, when an

employee of the Iowa Department of Transportation told them of the problems. The State ultimately abandoned its easement and plaintiffs purchased the property on January 7, 2000 from St. Catherine's Church for \$500.00.

Plaintiffs contend the damage award is inadequate, that it does not place them in the position they would have been had there been no breach of contract or misrepresentation. They contend the award should have been between \$80,000 and \$100,725. The defendants contend that awarding plaintiffs the \$500 they paid St. Catherine Church for the property is fair and adequate compensation when the Iowa Department of Transportation paid the cost of platting, subdividing and recording.

We review a case tried at law in the district court on errors assigned. Iowa R. App. P. 4; *Atwood v. City of Des Moines*, 485 N.W.2d 657, 659 (Iowa 1992). The trial court's findings of fact have the effect of a special verdict, Iowa R. App. P. 4, and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); *Claus v. Whyle*, 526 N.W.2d 519, 523 (Iowa 1994). When the district court tries the cases without a jury and denies recovery because a party has failed to sustain its burden of proof on an issue, we will not interfere unless we find the party carried its burden as a matter of law. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995); *Whiteaker v. State*, 382 N.W.2d 112, 114 (Iowa 1986) (citations omitted). A party is found to have carried such a burden only when the evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn. *Schmitz*, 528 N.W.2d at 115.

An inadequate damage award merits a new trial as much as an excessive one. *Witte v. Vogt*, 443 N.W.2d 715, 716 (Iowa 1989). We review a challenge of

inadequate damages to correct an abuse of discretion. *Id.* Should the verdict be manifestly inadequate, we consider the refusal of the district court to grant a new trial an abuse of discretion that is subject to reversal. *Id.* Similarly, the refusal to grant an additur can be an abuse of discretion when the verdict is inadequate. *Kerndt v. Rolling Hills Nat. Bank*, 558 N.W.2d 410, 417 (Iowa 1997). The question of whether damages in a particular case are inadequate turns on the particular facts of the case. *Witte*, 443 N.W.2d at 716. If uncontroverted facts show the amount of the verdict bears no reasonable relationship to the loss suffered, the verdict is inadequate. *McHose v. Physician & Clinic Services, Inc.*, 548 N.W. 2d 158, 162 (Iowa App. 1996). Though it may be hard to ascertain the amount of a loss precisely, the wronged party is not penalized because of this difficulty. See *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990). Overly speculative damages cannot be recovered. *Olson v. Nieman's, Ltd.*, 579 N.W.2d 299, 308 (Iowa 1998); *Jamison v. Knosby*, 423 N.W.2d 2, 6 (Iowa 1988).

Before considering plaintiffs' challenges to the total amount of the damages we need to address the plaintiffs' contentions that the district court erred in several particulars. Plaintiffs contend the court should have awarded them damages for the loss they suffered as a result of lost financing. The rate of interest on the purchase contract between the parties was nine percent. Plaintiffs contend that just before they learned of the problem with the location of the tanks and septic system they were negotiating with a lender to refinance the contract for a six percent interest rate. Plaintiffs contend that after they told the lender about the problem the lender withdrew the refinancing promised and they were forced to continue paying interest at nine percent. As a result plaintiffs paid

nearly \$56,000 in additional interest. The district court considered this portion of the plaintiffs' claim, but rejected it. The district court found the only evidence supporting this claim for damages came from plaintiff Linda Augustin. The court indicated the record contained no documents or other testimony supporting Linda's testimony. The district court said it had problems with Linda's credibility as to damage evidence, and the district court found her testimony alone did not show that the claim for loss of financing was supported by the preponderance of the evidence.

We cannot say the district court erred in rejecting Linda's testimony as not being credible. We give weight to the credibility assessments of the district court. See *Carroll Area Child Care Center, Inc. v. Carroll County Bd. of Review*, 613 N.W.2d 252, 253-54 (Iowa 2000); Iowa R. App. P. 14(1)(7). The evidence is not so overwhelming that the only reasonable inference to be drawn there from is the one plaintiffs urge. See *Schmitz*, 528 N.W. 2d at 115. Plaintiffs did not carry their burden of proof as a matter of law on this issue. See *id.*

Plaintiffs also claim the district court abused its discretion in failing to award them damages for certain out of pocket expenses in the amount of \$13,500. The district court rejected this claim finding there was not a bill for legal fees and the court could not accept the plaintiffs' unsupported testimony that they incurred \$13,500 in legal fees to get the State to abandon its easement. The district court reasoned that it had been known for some years that the State realized the problem and eventually intended to abandon the property. The district court did not abuse its discretion in denying damages on this claim.

Next the plaintiffs contend the district court abused its discretion in not awarding them damages after they sold a portion of their parking lot they contend was worth \$10,000 to the State for \$190. The district court found no evidence supporting the \$10,000 valuation. The court further reasoned the amount of \$190 was set by condemnation and the plaintiffs did not appeal from that award. The district court did not abuse its decision in denying damages on this claim.

Plaintiffs also contend that the district court should have awarded them \$18,000 for letting St. Catherine's Church use their ballroom as a concession for the church's allowing them to purchase the property where the tanks and septic tank were located for only \$500. The only evidence supporting this element of damage was the testimony of Linda, which the district court chose not to believe. We affirm the district court on this issue.

Looking at the evidence as a whole we are unable to say that as a matter of law it supports a damage award of \$80,000 to \$100,750.

AFFIRMED.

Miller, J. specially concurs; Zimmer, J. concurs.

MILLER, J. (concur specially)

I concur in the affirmance of the trial court's decision, but write separately to point out additional facts that support the trial court's rejection of certain damage claims and our affirmance of the trial court.

There were clear contradictions in the plaintiff Linda Augustin's testimony concerning the claim for damages for lost financing. The contract between the parties provided for nine percent interest and the contract was to be paid off by a balloon payment on February 1, 1992. The plaintiffs had the right to prepay all or part at any time without penalty. On or about November 1, 1991 they extended the contract for three years, to February 1, 1995, at the same nine percent interest rate. On direct examination Linda Augustin testified that when the contract was entered in 1982 nine percent was a favorable rate, but by the time the plaintiffs were reconsidering refinancing in 1991 rates had fallen in 1991 and nine percent was no longer a favorable rate. However, on cross-examination she testified that when they were considering refinancing the contract in 1991 they decided not to do so because the bank rate was as much, if not more than, the nine percent the defendants wanted in order to extend the contract. This contradiction supports the trial court's finding of a lack of credibility and rejection of this item of claimed damages.

The plaintiffs claimed out of pocket expenses, largely attorney fees, related to the breach of contract and negligent misrepresentation. However, the evidence showed that any such fees and expenses had been incurred over a period of eight years and had been incurred not only for securing abandonment of the ground in which the tanks and septic system were located, but had also in

part been incurred for seeking to have the proposed right-of-way for highway reconstruction moved, and had also in part been incurred for negotiating and settling a condemnation by the State of a portion of the plaintiffs' parking lot. As noted by the trial court, the plaintiffs did not show or attempt to show what portion of the \$13,500 related to the breach of contract and negligent misrepresentation. The amount of any award of fees and expenses would thus have been based on speculation and conjecture.

The plaintiffs claim they sustained damages when, as a result of a condemnation proceeding, they lost property worth \$10,000 and received only \$190. Certain evidence seems to suggest they in fact received \$2500 rather than \$190. However, how much they in fact received did not need to be decided because, more importantly, whatever amount they received was the result of their own voluntary settlement of the condemnation proceedings. They cannot have been damaged by not receiving more than they did, because their voluntary settlement in effect acknowledged they were not entitled to more.

The plaintiffs claim \$18,000 in damages based on the fact that for eighteen years beginning in 1982 they allowed the parish to which they had belonged for twenty years, St. Catherine's, to use their facilities two times each year for fundraising activities, use for which they would normally charge \$500 each time. They reason that their purchase of property from St. Catherine's thus cost them not only the \$500 they in fact paid, but also \$18,000 in good will. Any award of damages must be based on those damages having been proximately caused by an act or omission of another, here the defendants' breach of contract, negligent misrepresentation, or both. The plaintiffs had no knowledge of any

such breach or misrepresentation until 1992. The breach or misrepresentation thus cannot have caused them to allow St. Catherine's to use their facilities from 1982 through 1991. Further, they make no claim or showing that their allowing St. Catherine's to use their facilities in 1992 and thereafter was the result of the facts they discovered in early 1992. There is thus no substantial evidence that the alleged damage of \$18,000 was proximately caused by the defendants' breach of contract or negligent misrepresentation.

Zimmer, J. joins this special concurrence.