

FILED
APR 26 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KENNETH DETMER AND BARBARA DETMER,

Plaintiffs-Appellees,

vs.

**CHARLES W. SANNER, DORIS C. WELCH,
AND MILES C. LUCHTENBERG,**

Defendants-Appellants.

) Filed April 26, 1983

) 2-528
2-68728

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Appeal from Polk District Court, Ray Hanrahan, Judge.

Defendants appeal from a judgment for plaintiffs in this equity action for damages caused by misrepresentations about a well delivering water to property they sold to plaintiffs. **AFFIRMED.**

Bruce E. Bergman of Davis, Baker & Bergman, Des Moines, for defendants-appellants.

Jon P. Sullivan of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for plaintiffs-appellees.

Heard by Oxberger, C.J., Donielson, Snell, and Schlegel, JJ.

OXBERGER, C.J.

Defendants appeal from a judgment for plaintiffs in this equity action for damages caused by misrepresentations about a well delivering water to property they sold to plaintiffs. We affirm the judgment of the trial court.

Defendants are real estate agents who were joint owners of a house located on 2.9 acres of land in Ankeny. The house was listed for sale, and plaintiffs went to look at it.

The water supply for the property came from a shallow well located near the boundary line. The tenant in the house remarked that at times the water pressure was insufficient to wash clothes. Plaintiffs were also informed that if a proposed county road were built, it would go over the location of the well, possibly necessitating construction of a new one if city water were not provided. This road was expected to be put in in two or three years.

Plaintiffs were evidently concerned about the quality of the well because their first offer to defendants was conditioned upon defendants' agreement to split the cost of a new well. This offer was rejected, and defendants told plaintiffs either that the well only needed one load of water per year, or that the well had only needed one load of water since defendants owned it. Whichever version of this statement was given to plaintiffs, it was undoubtedly untrue. Defendants had put at least three loads of water into the well within the three preceding months.

Plaintiffs claim that they were further assured by defendants that the well would need no more than one \$65 load of water per year, and that they would need it only if it was a dry year. Plaintiffs then made a second offer which made no mention of a new well. This offer was accepted, and plaintiffs took possession.

After taking possession, plaintiffs had to haul in water every three to four weeks. This continued for 20 months. During this period, plaintiffs were very

stringent about conserving water, but to no avail. Finally they gave up and had a new deep well drilled. They talked to several drillers, and were told that a shallow well could not be guaranteed to strike water, and that they would have to pay for it whether or not water was obtained. Each hole would have cost \$3,000 to \$4,000. The plaintiffs had a deep well drilled at a cost of \$9,430.

At the trial, only plaintiffs testified to the value of the property with a good well versus the value with the well it had. They testified that the value of the property was reduced by the cost of drilling a new well, or approximately \$10,000.

The trial court found that defendants had made representations that the well would need only one load of water per year, that the representations were false, and that plaintiffs relied upon them. The trial court found that the new deep well was a necessity and assessed damages of \$11,030: the cost of the new well plus the cost of the water hauled in.

On appeal, defendants argue two points. They argue that plaintiffs were not entitled to rely on the representations by defendants concerning the quality of the well, and therefore there was no fraudulent misrepresentation. Defendants also argue that plaintiffs did not prove their damages, since there was inadequate testimony going to the difference in property value between its condition as represented and its actual condition. Because this action is in equity, our review is de novo. Iowa R. App. P. 4.

The tort of fraudulent misrepresentation is composed of five elements. They are (1) a misrepresentation, (2) of a material fact, (3) made knowingly, (4) reliance, and (5) resulting damages. To recover damages for fraudulent misrepresentation, plaintiffs must establish each element of the tort by clear and convincing evidence. See Hall v. Wright, 156 N.W.2d 661, 66 (Iowa 1968).

I. Reliance

Among the elements plaintiffs must prove to recover for fraudulent misrepresentation is that they relied on the false representations made to them by

defendants. The fact that plaintiffs may have been negligent in relying upon representations made by defendants is generally not a bar to recovery for intentional fraud. See W. Prosser, Law of Torts § 108, at 716 (4th ed. 1971).

There are, however, some misrepresentations which may not justifiably be relied upon. "[W]here a plaintiff has equal information of certain knowledge as the defendants, he has no right to rely upon defendant's statements." Andrew v. Baird, 221 Iowa 83, 93 (1936). Furthermore, when a defect is obvious, a plaintiff may not close his eyes to it and justifiably rely on representations of defendant to the contrary. See Restatement (Second) of Torts § 541 (1971).

The standard for determining whether a plaintiff had a right to rely upon defendants' representations is a subjective one. It "depends not on what an ordinarily prudent person reasonably would do to protect his or her interests, but upon what the complaining party reasonably could be expected to do." Lockard v. Carson, 287 N.W.2d 871, 878 (Iowa 1980). A defendant who obtained the benefit of his bargain through fraud is not privileged to complain that a reasonable person would not have relied on his representations.

It is our opinion that there is sufficient evidence in the record to support the trial court's finding that the plaintiffs in this case had a right to rely upon the misrepresentations of defendants. The defects in the well were not patent or obvious, and the concerns which prompted plaintiffs to ask defendants to split the cost of a new well were assuaged by defendants' assurances that water shortages occurred no more frequently than once per year and could be taken care of with a \$65 load of water. Defendants' assurances were not contradicted by any observations made by plaintiffs prior to the closing. Absent this, we are unwilling to impose a duty upon plaintiffs to independently investigate the veracity of defendants' representations.

2. Proof of Damages

The general rule regarding damages for fraudulent misrepresentation is that a defrauded party may recover the benefit of his or her bargain. The benefit of the bargain is the difference between the market value of the property as represented and the actual market value of the property as delivered. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976).

In ascertaining the value of property, its owner is a competent witness to testify as to its market value. Likewise, he is competent to give his opinion on what the property would have been worth if it had been as represented. He may also state his opinion on the difference between the two values. (citations omitted).

Holcomb v. Hoffschneider, 279 N.W.2d 210, 213 (Iowa 1980).

In the case at bar, plaintiffs testified that the difference between the value of the property as represented and the value of the property as it was was, the cost of drilling a serviceable well. Defendants offered no evidence to contradict this testimony, but argue that plaintiffs testified that part of the difference in value is due to the fact that the well is not on their property.¹ A review of the testimony, however, indicates that plaintiffs' opinions concerning the diminution in value of the property were based on the lack of an adequate water supply rather than the location of the well. The trial court did not err in considering plaintiffs' opinions when it assessed damages.

¹Plaintiffs had filed a claim against defendants alleging fraudulent misrepresentation concerning the location of the well. This claim was dismissed, and damages arising thereunder are not recoverable.

Defendants cite Christy v. Heil, 123 N.W.2d 408 (Iowa 1963) for the proposition that the cost of plaintiffs' new well is an improper measure of damages. However, that case merely holds that it is improper to limit plaintiffs' recovery to the cost of drilling a new well when damages under the benefit of the bargain rule would be greater.

If recovery of their benefit of the bargain will not make plaintiffs whole, the court may allow additional damages. Mills County State Bank v. Fisher, 282 N.W.2d 712, 716 (Iowa 1979). Plaintiffs are certainly entitled to recover reasonable out of pocket expenses incurred directly as a result of defendants' wrongful conduct. Thus they are entitled to recover the cost of bringing water in for the old well.

Disregarding the fact that it is recoverable under the benefit of the bargain rule, the cost of drilling a new well is also recoverable as a reasonable out of pocket expense. Plaintiffs bargained for property with an adequate and reliable source of potable water. They did not receive what they bargained for, and had no alternative but to spend the money to drill a new well. A house with no supply of water is neither habitable nor marketable. The fact that plaintiffs replaced an old shallow well with a deep well is not pertinent here. Drilling a deep well was the only way plaintiffs could be assured an adequate and reliable source of water—an asset they had already bargained and paid for.

AFFIRMED.