

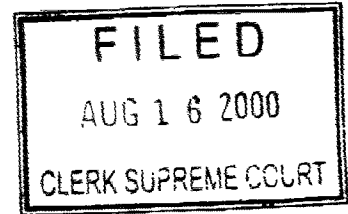
IN THE COURT OF APPEALS OF IOWA

No. 0-2007 / 98-0916
Filed August 16, 2000

REED CADILLAC-OLDS, INC.,
Plaintiff-Appellee/Cross-Appellant,

vs.

NOZEY HABHAB,
Defendant-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Webster County, Gary L.
McMinimee, Judge.

Defendant appeals following a verdict which awards the plaintiff damages for fraudulent misrepresentation and breach of contract in the sale of a used car. Plaintiff cross-appeals the actual and punitive damage amounts awarded as being inadequate. **DECISION AFFIRMED; JUDGMENT MODIFIED AND REMANDED.**

Keith Ferguson of the Ferguson Law Office, Dayton, for appellant.

Susan Bernau Staudt of Redfern, Mason, Dieter, Larsen & Moore, P.L.C.,
Cedar Falls, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Nozey Habhab (Nozey) appeals a verdict that awards the plaintiff, Reed Cadillac-Olds, Inc. (Reed), damages for fraudulent misrepresentation and breach of contract in the sale of a used car. Nozey contends the court erred in allowing Reed a judgment for actual damages, attorney fees, and punitive damages. Reed cross-appeals arguing the court's damage awards were inadequate as a matter of law. We affirm the decision, modify the judgment, and remand.

On August 16, 1991, Nozey purchased a rebuilt 1990 Cadillac Eldorado from Habhab's used cars (Habhab's) in Ames, Iowa, for \$5000. Habhab's is owned by Dave and William Habhab.¹ Habhab's business in 1991 consisted of sixty percent rebuilt vehicles and forty percent used cars. Habhab's purchased salvaged vehicles, which would be rebuilt either on or off the premises. Nozey was no stranger to the business and was aware Habhab's had purchased his Cadillac as salvage at an Illinois auction and had it rebuilt.² In addition, the Illinois title clearly indicated the vehicle had been salvaged. The Iowa Department of Transportation inspected the vehicle before and after it was rebuilt. Habhab's received "good title" to the vehicle on August 16, 1991, the same day it was purchased by Nozey.³

¹ William is Dave's son. Nozey is Dave's cousin, but also his father-in-law. Nozey is also William's grandfather. There is no allegation Habhab's was involved in any of Nozey's dealings with Reed.

² The evidence indicates Dave telephoned Nozey while the vehicle was on the auction block. Nozey requested Dave purchase the vehicle.

³ Both Habhab's and Nozey's title was branded with the letters "IL" meaning the vehicle had been on salvage in Illinois.

Approximately three and one-half years later, Nozey contacted Reed in response to an ad Reed had placed in the newspaper regarding a particular Cadillac it had for sale. After a number of phone call exchanges between Nozey and Andrew Rickert (Rickert), a salesman for Reed, it was agreed Rickert would meet Nozey in Iowa Falls to show him the car. William Heipl (Heipl), the sales manager for Reed, went to this meeting in order to appraise the vehicle Nozey would trade in. No title or registration was provided by Nozey at this meeting. Heipl did ask Nozey whether it had over \$3000 in damage or had ever been salvaged or rebuilt. Nozey responded, "No." No sale was made on this particular occasion.

Several days after this meeting, Reed called Nozey to inform him of a different Cadillac he might be interested in. After a series of phone communications between Rickert and Nozey, a price of \$27,995 was agreed upon for this 1994 Cadillac DeVille. Nozey was allowed a trade-in allowance of \$15,495 for his 1990 Cadillac Eldorado. On February 8, 1995, the parties met in Fort Dodge to conclude the transaction and exchange the vehicles.

Rickert took with him all the paperwork that had previously been completed by Heipl. During this meeting Rickert specifically went over the "Iowa Damage Disclosure Statement" with Nozey. The damage disclosure statement had two sections, and Nozey checked the "No" box to both. The two sections were as follows:

1. The motor vehicle sustained damage of \$3000 or more in at least one incident while I owned the described motor vehicle.
2. I have knowledge the motor vehicle was previously titled as salvage or rebuilt.

Nozey then signed the disclosure statement. A similar statement was signed on the same day by Nozey's wife, Mildred Habhab, with the same two "No" boxes checked.

The 1990 Cadillac Eldorado was brought back to Reed. Upon inspection, Barry Schlafman, the used car manager, noticed the car had obviously been hit pretty hard on the passenger side and had obviously been rebuilt. He and the used car mechanic noticed there was an over spray of paint and wires where they didn't belong and some of the parts had been welded.

A carfax showing the vehicle's title history was obtained by Schlafman. It indicated the vehicle had been totaled in Illinois and titled as salvage. In addition, the vehicle had been titled a number of times in both Illinois and Iowa. In a span of six months, this vehicle was registered in Iowa five times. Schlafman testified this was unusual and when it occurs it is usually because there is an attempt to lose the branding of the salvage title.

When the true history of the Cadillac Eldorado became apparent, Schlafman contacted Nozey. Nozey denied any knowledge of the vehicle being in an accident, having a salvage title, or being rebuilt. He refused to cancel the transaction and exchange the cars back. Nozey was also informed he would need to reimburse Reed for the extensive work that had been done on the vehicle to make it presentable for sale. Nozey refused.

In an attempt to mitigate its damages, Reed sold the 1990 Cadillac Eldorado to Perry and Barbara Miller with full disclosure of the vehicle's history.

The purchase price was \$15,995. However, problems surfaced with the vehicle almost immediately. Schlafman testified as follows:

I mean, it was one thing after another. Parts would break, electrical systems wouldn't work, sunroof wouldn't work, rattles, squeaks. The car was just an on-going nightmare, so the next thing I heard was that she had brought the car back to Reeds and they had traded her out of the car just to keep faith with the customer, just in good faith. You know, even though it is a salvage title car you still have to think about the customer's thought process about ever coming back to you. We gave her the impression that we reconditioned this car for resale and even though it had been rebuilt it was sellable. We didn't know the car was going to slowly disintegrate.

Schlafman further testified this was a common practice in the industry to keep customers happy. The Cadillac Eldorado was ultimately sold at an auction for \$5365. Reed had spent \$1,987.65 in repairs on the vehicle.

Reed filed a petition against Nozey alleging negligent misrepresentation,⁴ fraudulent misrepresentation, and breach of contract. A bench trial was held on February 24, 1998. The district court entered a judgment in favor of Reed against Nozey for actual damages in the amount of \$548 plus interest, punitive damages in the amount of \$1096 with interest, and attorney fees in the amount of \$5,886.68 with interest. Nozey appeals. Reed cross-appeals.

I. Standard of Review. Our review in this law action is for correction of errors at law. Iowa R. App. P. 4; *Flom v. Stahly*, 569 N.W.2d 135, 139 (Iowa 1997). We are bound by the district court's findings of fact if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1). We view the evidence in the

⁴ The district court dismissed the negligent misrepresentation claim.

light most favorable to the trial court's judgment. *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 689 (Iowa 1999).

II. Right to Recovery. The district court ruled Reed established its right to recovery for fraudulent misrepresentation by clear, satisfactory, and convincing evidence pursuant to Iowa Civ. Jury Instructions 810.1 (1994) and breach of contract by a preponderance of the evidence pursuant to Iowa Civ. Jury Instructions 2400.1 (1991). We agree.

The elements of fraudulent misrepresentation are (1) materiality, (2) falsity, (3) representation, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury and damages. *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996); *McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995). In addition to the factual background previously set out, Dave Habhab testified his father-in-law knew there was a previous salvage title on the vehicle. We conclude from our review of the facts there is overwhelming evidence of both fraudulent misrepresentation and breach of contract. We will, therefore, turn our attention to the issue of the proper measure of damages in this case.

III. Damages. The proper measure of damages in a fraudulent misrepresentation case is a compromise between the benefit of the bargain and out-of-pocket rules. *Clark*, 546 N.W.2d at 594; *Cornell v. Wunsch*, 408 N.W.2d 369, 380 (Iowa 1987). The damages are determined by finding "the difference between the value of what he has received in the transaction and its purchase price or other value given for it" Restatement (Second) of Torts § 549, at 108 (1977) (cited in *Cornell*, 408 N.W.2d at 380). Reed must establish its

damages with some reasonable certainty, and it will be allowed recovery if there is a reasonable basis in the record for inferring or approximating the amount of the damages. *Clark*, 546 N.W.2d at 594. Evidence of the purchase price and trade-in allowance is sufficient to support an assessment of damage. *Id.*

The district court awarded Reed actual damages in the sum of \$548 concluding any damages incurred by Reed after the Miller sale were not proximately caused by the misrepresentation. We disagree. In addition, the district court's award of damages allows Nozey to realize a monetary gain of \$2965 as a result of his actions.⁵ Finally, the district court award does not address the issue of Reed's mitigation of damages. In determining whether Reed properly mitigated damages, we note the burden is on Nozey to demonstrate any failure was unreasonable under the circumstances. *Kirk v. Union Pacific R.R.*, 514 N.W.2d 734, 737 (Iowa App. 1994). We conclude Nozey has failed in this burden. The evidence is clear Reed demanded Nozey take the car back. Nozey refused. Reed then attempted to repair and sell the vehicle with full disclosure to the Millers. It is true Reed took the car back at the request of the Millers, but such actions under the facts of this case can hardly be described as an unreasonable failure to mitigate damages.

Applying the damage rule as stated in *Clark* to the facts of this case, we conclude the proper award of actual damages is \$10,130, which is the difference between the trade-in allowance of \$15,495 and the net check from the auction

⁵ This figure is arrived at by deducting the purchase price and assessed damages from the trade-in allowance of \$15,495.

sale of \$5365. Reed is also entitled to damages of \$1,987.65 for repair to the vehicle and attorney fees of \$5,886.68.

We next turn our attention to Reed's request for punitive damages. Punitive damages are generally not allowed in fraudulent misrepresentation or breach of contract cases absent a showing of malice, fraud, or other illegal acts. *Clark-Peterson Co. v. Independent Ins. Assocs., Ltd.*, 514 N.W.2d 912, 916 (Iowa 1994). Evidence to support an award must be clear, convincing, and satisfactory and must establish a defendant's conduct amounted to a willful and wanton disregard for the rights of another. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 347 (Iowa 1999); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 771 (Iowa 1999). Our supreme court has adopted the following definition of "willful and wanton":

[T]he actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.

Revere Transducers, Inc., 595 N.W.2d at 771.

We agree with the district court Nozey's actions justify an award of punitive damages. We also conclude any award of punitive damages must comply with the due process clause's "general reasonableness" standard. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 658-59 (8th Cir. 1995). A proper assessment of the damages is left to the discretion of the court. *S & W Agency, Inc. v. Foremost Ins. Co.*, 51 F. Supp.2d 983, 994 (N.D. Iowa 1998). The factors used to determine the reasonableness of a punitive damage award are: (1) the harm

inflicted on a plaintiff; (2) the reprehensibility of defendant's conduct; (3) the likely potential harm to others, and (4) the wealth of the defendant. *Pulla*, 72 F.3d at 659. The district court awarded punitive damages of \$1096 based upon its award of actual damages. However, the award of actual damages was based on an improper measure of damages. We therefore conclude this matter should be remanded to the district court for a determination of the punitive damage issue in light of the facts of this case and the appropriate case law.

IV. Summary. We affirm the decision of the district court and modify the judgment to award Reed the sum of \$18,004.33 plus interest. We remand for a determination of the punitive damage award and entry of judgment consistent with this opinion.

DECISION AFFIRMED; JUDGMENT MODIFIED AND REMANDED.