

IN THE COURT OF APPEALS OF IOWA

DAVID GARST,)

Plaintiff-Appellee,)

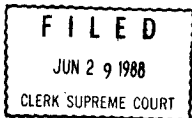
vs.)

LAKE PANORAMA ASSOCIATION, et al.,)

Defendants-Appellants.)

Filed June 29, 1988

7-551
87-306



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Appeal from the Iowa District Court for Guthrie County (No. 18775),
Peter A. Keller, Judge.

Defendants appeal a district court judgment awarding plaintiff \$105,000
in damages for conversion of a sewer line. **AFFIRMED.**

John P. Dollar of Seery & Dollar, Des Moines, for defendants-appellants.

James B. Smith of Shirley, Smith, Shirley & Powell, Perry, for plaintiff-
appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

Defendants Lake Panorama Association (LPA), Sunset Ridge Owners Association, Inc., and Sunset Ridge, Ltd., appeal the trial court's judgment on the jury verdict awarding the plaintiff, David Garst, actual damages in the amount of \$105,000. Garst sued the defendants for conversion of a sewer line which he owned. The sewer line runs across plats K & M, Lake Panorama subdivision, Guthrie County, Iowa. Garst is the owner of Lake Enterprises, Inc. (LEI) and of an easement through which the sewer line runs. We affirm.

Defendants appeal the judgment of the district court stating that (1) the damage award is excessive and not sustained by sufficient evidence, (2) that such award is based on misleading testimony, and (3) that the jury instructions were incorrect, inadequate, and failed to address the central issue of the case. We affirm the judgment of the district court awarding \$105,000 in actual damages to the plaintiff.

Defendants concede that a conversion of the sewer line occurred in their motion for a new trial and again on appeal. The defendants argue that the jury award is excessive and is not supported by substantial evidence. The district court has broad discretion in determining whether to grant a new trial. Thompson v. Rozeboom, 272 N.W.2d 444, 446 (Iowa 1978). Such ruling will only be disturbed on appeal if there is a clear abuse of that discretion. Id. There must be substantial evidence in the record to sustain a verdict. Volkswagon Iowa City, Inc. v. Scott's Incorporated, 165 N.W.2d 789, 793 (Iowa 1969). The reviewing court must view the evidence in a light most favorable to the verdict in assessing damages. Beek v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 164 (Iowa 1984).

The jury found the conversion to be partial and temporary. They were instructed as follows:

Where, the conversion does not result in the total loss or destruction of the plaintiff's property, the loss of the plaintiff would be the value of what was wrongfully taken. Further, where the taking was not permanent, but only involved a partial usage of the plaintiff's property for a certain period of time, the measure of damages would be the value of the benefit received by the defendant by way of its wrongful action. This would be comparable to the fair rental of the property, or a sum for which such benefit could be sold to a willing buyer.

(Emphasis added.)

Plaintiff's expert, Mr. Llewellyn Slade, testified at length that the value of the sewer line was \$158,000 in 1978, and that at the time of the conversion, the value would have further increased because the development in the area was extensive. Defendants offered no evidence to rebut this. Rather, defendants produced evidence regarding sewer rental fees in the town of Panora and argued that a fair rental value could be extrapolated from this amount of approximately \$2,500. The jury's award was well within the limits set by the evidence. The jury is not compelled to accept the defendants' estimate of damages just because it is an estimate of rental value. The last sentence of the instruction is set in the alternative. We see no compelling reason to disturb the jury's assessment of damages. We find the jury award of \$105,000 is not excessive and is supported by substantial evidence.

Defendants argue that the damage award in question was based upon evidence which was erroneous as a matter of law; specifically, that Mr. Slade testified he based his valuation of the property upon the fact that Mr. Garst had monopoly rights to the sewer service in the subdivision. Incorrect or flawed bases used to arrive at an opinion go to the weight of the evidence, and as such are subject to argument rather than a motion to strike. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 165-66 (Iowa 1984). The jury is then able to weigh the evidence in light of that argument. We find no error in the jury's verdict in considering this testimony nor was the court under any legal duty to strike the testimony in question.

Finally, the defendants argue that the jury should have been instructed that the defendants acted legally when they disconnected the Garst sewer from the treatment plant and destroyed the lift system and built their own new sewer alongside the Garst sewer. They argue that this was material to the case because it directly relates to the total taking of the Garst sewer line.

The jury is to be instructed on those issues which have been pled and substantially proven in the case before them. Hoekstra v. Farm Bureau Mutual Insurance Co., 382 N.W.2d 100, 107 (Iowa 1986). The plaintiff pled and submitted substantial evidence regarding the conversion. The jury found that the conversion was partial and temporary. They did not find a total taking. The legality of building a new line is not relevant to the conversion of the old one.

We affirm the district court's judgment on the verdict awarding the plaintiff David Garst \$105,000 in actual damages.

AFFIRMED.