

IN THE COURT OF APPEALS OF IOWA

No. 7-731 / 96-1473

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SCOTT L. NEWTON,

Plaintiff-Appellee,

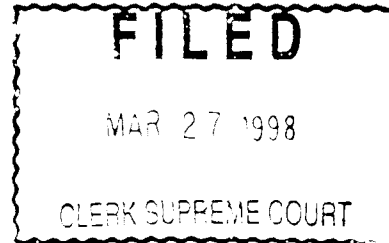
vs.

**SAM BAKERIS TRUST, ESTATE OF
DORIS BAKERIS, JOHN S. BAKERIS,
Individually and as Executor of the Estate of
DORIS BAKERIS, S. LOUIS BAKERIS, JR.,**

Defendants-Appellants,

**RID-A-PEST, LTD., SAM ALOIAN d/b/a
ALOIAN CUSTOM CARPENTRY,**

Defendants-Appellees.



**SAM BAKERIS TRUST, ESTATE OF
DORIS BAKERIS, JOHN BAKERIS,
S. LOUIS BAKERIS, JR.,**

Cross-Claimants/Appellants,

vs.

RID-A-PEST, LTD,

Defendant to Cross Claim-Appellee.

**SAM BAKERIS TRUST, ESTATE OF
DORIS BAKERIS, JOHN S. BAKERIS,
S. LOUIS BAKERIS, JR.,**

Cross-Petitioner,

vs.

**JUDITH KNUTSON d/b/a KNUTSON
REALTY COMPANY,**

Defendant to Cross Petition.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Defendants, Estate of Doris Bakeris and John S. Bakeris, individually and as
executor of the Estate of Doris Bakeris, appeal from the district court's judgment
granting plaintiff rescission damages in his action for breach of contract and
negligence. **AFFIRMED AS MODIFIED; REMANDED FOR JUDGMENT
ENTRY CONSISTENT WITH THIS DECISION.**

George B. Norman, Davenport, for appellants.

Theodore J. Priester, Davenport, for appellee.

Heard by Cady, C.J., and Sackett and Mahan, JJ.

MAHAN, J.

Defendants John S. Bakeris and the Estate of Doris E. Bakeris ("Bakeris") appeal a jury's decision finding them liable for fraud and breach of contract. The jury awarded plaintiff Scott Newton \$65,892. The trial court ordered Newton to quitclaim the property back to Bakeris. Defendants claim the trial court erred: (1) when it refused to enter a judgment notwithstanding the verdict ("JNOV"); (2) when it refused to grant a new trial; (3) when it instructed the jury; (4) in its judgment on the verdict; and (5) when it refused to dismiss Bakeris. We affirm as modified and remand for judgment entry consistent with this decision.

Prior to her death, Doris Bakeris lived in the residence which was owned by the Sam Bakeris Trust. Doris left the home to her sons, John and Louis, who were Doris's only heirs. At her death, Doris appointed John to be executor of her estate. John, who is also a realtor, listed the property on the Multiple Listing Exchange (MLS).

In October 1994, John and Newton, represented by real estate agent Judith Knutson, entered into a sales agreement. John delivered a disclosure statement informing Newton the property had been treated for termites in July 1994, three months earlier. As required by the sales agreement, Bakeris hired Rid-A-Pest to inspect the property. Rid-A-Pest reported visible evidence of previously treated infestation that was no longer active. Bakeris also hired Sam Aloian to inspect the

property for structural damage. Aloian found no structural damage due to termites. Aloian's report also indicated he repaired and replaced the stair landing and all trim.

The closing was held on November 22, 1994. Newton paid \$58,500 for the property in exchange for a Court Officer Deed. Newton took possession immediately after closing. Three days later a relative of plaintiff, who works for Orkin Extermination in Ohio, visited and discovered a live infestation of termites in several locations throughout the house. Newton contacted Rid-A-Pest, but they were unable to kill the termites after approximately ten visits. Newton hired Orkin Exterminating Company of Davenport and they were able to completely rid the home of termites at a cost of \$2800.

Newton also discovered termite damage in the underflooring structure, prompting him to hire contractors to further inspect the home. Bakeris also hired a contractor who determined the home needed \$38,200 in repair.

Newton dismissed the Sam Bakeris Trust and S. Louis Bakeris, Jr. He settled with Aloian for \$4300. Also, Rid-A-Pest, Ltd. and Judith Knutson d/b/a Knutson Realty Company are not part of this appeal.

I. JUDGMENT NOTWITHSTANDING THE VERDICT. Bakeris contends the trial court erred in refusing to grant their motion for JNOV. Newton claims Bakeris failed to preserve this claim for appeal.

There is nothing in the record before us to show the issues raised by Bakeris on appeal were presented to the district court. Issues must ordinarily be presented to

and passed upon by the trial court before they may be raised and adjudicated on appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995); *Peters v. Burlington N.R.R.*, 492 N.W.2d 399, 401 (Iowa 1992). We find Bakeris failed to preserve error on this issue.

II. MOTION FOR NEW TRIAL. Bakeris claims the trial court erred in denying the motion for a new trial. Newton claims Bakeris failed to preserve error on this issue. We find Bakeris failed to preserve error on this issue.

III. JURY INSTRUCTIONS. Bakeris contends the trial court erred when it issued the jury instructions. Newton claims Bakeris failed to preserve this claim for review. We find Bakeris also failed to preserve error on this issue.

IV. JUDGMENT ON THE VERDICT AND REFUSAL TO DISMISS. Bakeris contends the trial court erred in rendering an improper judgment on the verdict and failing to dismiss Bakeris from this action. Specifically, Bakeris contends the judgment should have been reduced by \$4300 representing the amount paid to Newton by Aloian. Bakeris also requests the judgment be clarified by specifying the real estate be free and clear of any and all obligations of Newton. Although Bakeris initially seeks a new trial, the above alternative relief is requested in the reply brief. We find this alternative relief is proper under the record.

We find the judgment on the verdict should be modified and reduced by \$4300 representing the amount paid to Newton by Aloian. We further find the judgment on

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the verdict should be modified to order Newton to quitclaim the property to Bakeris free and clear of any and all obligations entered into by Newton. All other requested relief by Bakeris is denied.

**AFFIRMED AS MODIFIED; REMANDED FOR JUDGMENT ENTRY
CONSISTENT WITH THIS DECISION.**