FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD W. CLAUSSEN and
LINDA S. CLAUSSEN,

Plaintiffs-Appellees,

vs.

RICHARD BOND and
JOYCE BOND,

Defendants-Appellants.

Filed October 18, 1979

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2-62539

Appeal from Dubuque District Court - L. John Degnan, Judge.

Sellers appeal trial court's award of damages to buyers in an action for breach of express warranty in sale of real property. AFFIRMED.

William A. Conzett of Conzett, Norman, Lindahl & O'Brien, Dubuque, Iowa, for defendants-appellants.

Leo A. McCarthy of Dubuque, Iowa, for plaintiffs-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendants-appellants, Richard and Joyce Bond, appeal from trial court's judgment awarding plaintiffs-appellees, Richard and Linda Claussen, $2,700 in actual damages for breach of an express warranty due to leakage of water into the basement of the home plaintiffs purchased from defendants. On appeal, defendants contend: 1) the evidence was insufficient to support trial court's findings that statements made by them constituted an express warranty that the house was free from any problems with water leakage and such statements were misrepresentations of facts which induced plaintiffs to purchase the house; 2) the evidence failed to support the award of $2,700 in damages to the plaintiffs; and 3) the trial court should have found, as a matter of law, the proximate cause of the damage was the result of unusual climatic conditions over which defendants had no control. Plaintiffs cross-appeal, asserting trial court erred: 1) in dismissing Division I of their petition that prayed for damages in the amount of $30, plus costs and reasonable attorney fees, for breach of contract; and 2) in failing to award punitive damages in their breach of warranty action. We affirm as to all issues.

On June 20, 1977, plaintiffs took possession of a house in Dubuque they had purchased from defendants for $118,000. Prior to purchase, plaintiffs had viewed and inspected the house on at least three occasions and had noted the presence of two sump pumps in the basement, an absence of gutters on the house, and a sloping hillside next to the house which they feared might cause drainage problems. According to plaintiffs' testimony at trial, inquiry of defendants revealed drainage problems existed during the first year after the house was built, but that there were no problems thereafter. Defendant Richard Bond, an engineer and general contractor for several houses, explained the steps he had taken to correct the problem, which included the installation of sump pumps and construction of a drain tile field around the house. He also explained he did not believe in gutters and the steps he took regarding drainage made them unnecessary. Plaintiffs further testified they were assured by both defendants there had been no recurrence of problems of drainage or leakage after the first year and, in reliance on these assurances, purchased the house and moved into it. On July 17, 1977, after a particularly heavy rainfall over a three day period, during which time plaintiffs were out of Dubuque, plaintiffs discovered water throughout the basement. After removing the saturated carpet from the basement bedrooms, they discovered evidence of deterioration and rot, as well as splicing, in various deteriorated areas of the carpet.

Plaintiffs thereafter filed suit seeking damages for breach of warranty, due to their reliance on oral representations given by defendants as to the lack of water problems, and breach of contractual promises to make certain repairs to the house before they moved into it. Following a trial to the court, plaintiffs were awarded $2,700 in actual damages, but were denied punitive damages. That portion of their petition alleging breach of contract for failure to make repairs was dismissed.

I. Scope of Review. Our review of this action tried to the court at law is on assigned error only. Trial court's findings of facts are equivalent to a jury verdict and will not be disturbed on appeal if supported by substantial evidence and justified as a matter of law. Northrup v. Foster, 204 N.W.2d 889, 890 (Iowa 1973); Iowa R. App. P. 4. We will not weigh the evidence or pass on the credibility of witnesses. Thomas Truck & Casting Co. v. Buffalo Casting & W. H. Corp., 210 N.W.2d 532, 536 (Iowa 1973); Northrup v. Foster, 204 N.W.2d at 890. The findings of trial court are to be liberally construed and, in case of ambiguity, construed to uphold rather than defeat the judgment. Hammer v. County of Ida, 231 N.W.2d 896, 900 (Iowa 1975).

II. Warranty. Trial court ruled the evidence was sufficient to show statements of the defendants had constituted a warranty the house had no water problems that had not been corrected by defendants. Where realty is involved, common law principles of warranty apply. Dittman v. Nagel, 43 Wis. 2d 155, 160-61, 168 N.W.2d 190, 193 (1969);[1] Markman v. Hoefer, 252 Iowa 118, 123, 106 N.W.2d 59, 64 (1960). It is not necessary that the words "warranty" or "guaranty" be used. Carleton D. Beh Co. v. City of Des Moines, 228 Iowa 895, 990, 292 N.W. 69, 71 (1940); Borg v. Downing, 221 Wis. 463, 466, 266 N.W. 182, 184 (1936); Barnes v. Love, 141 Iowa 263, 264, 119 N.W. 613, 614 (1909). "Any positive statement or affirmation of fact and not of opinion as to the quality or condition of the thing sold made by the seller in the course of negotiations . . . so understood and relied upon by the buyer, constitutes a warranty." Barnes v. Love, 141 Iowa at 264, 119 N.W. at 614. See also Jackson v. Buesgens, 290 Minn. 78, 81, 186 N.W.2d 184, 186 (1971).

We conclude there is sufficient evidence to support a finding that defendants expressly assured plaintiffs all water problems had been corrected and that, in fact,

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[1] The court in Dittman noted that there is little case law involving express warranties of quality in sale of real estate. 43 Wis. 2d at 160, 168 N.W.2d at 193.

there had been none for the five years prior to the sale. We also find there is sufficient evidence in the record to support trial court's finding that plaintiffs relied on the assurances of the defendants.

III. Damages. Defendants also contend plaintiffs' evidence was insufficient to support trial court's award of $2,700 damages.[2] "Plaintiffs may recover if there is proof of a reasonable basis from which the amount of damages can be inferred or approximated." DeWaay v. Muhr, 160 N.W.2d 454, 460 (Iowa 1968).[3]

Plaintiffs testified the total cost of repairs related to the water problem would be $2,700; they installed gutters at the cost of $240, replaced carpet and tile in the basement, and obtained an estimate of $1,300 as the cost for making permanent repairs to the leaking wall. From the record, it does not appear any itemized statements or estimates were presented to the court, although the plaintiffs testified all costs were itemized and available. Further, defendants did not challenge this testimony as to the cost of repairs or diminution in value of the house due to the need for such repairs. See Jackson v. Buesgens, 290 Minn. 78, 82, 186 N.W.2d 184, 186 (1971). We find trial court did not err in determining there was sufficient evidence to support an award of damages to plaintiffs in the amount of $2,700.

IV. Proximate Cause. An affirmative defense that injury or damages resulted from an act of God must be specifically pleaded, see Young v. Marlas, 243 Iowa 367, 376, 51 N.W.2d 443, 448 (1952), and must be established as a matter of law. Id. In their Answer and Counterclaim, defendants maintain "any water leakage . . . occurred as a result of unusual climatic conditions over which these defendants had no control."[4] It is well known that extreme weather conditions in Iowa are inevitable and usually are deemed acts of God. Staples v. City of Spencer, 222 Iowa 1241, 1244, 271 N.W. 200, 202 (1937) (quoting Ritchie v. City of Des Moines, 211 Iowa 1026, 1035, 233 N.W. 43, 47 (1931)). To preclude recovery, however, an act of God must be the sole and proximate cause of

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[2] Defendants challenge only the sufficiency of plaintiffs' proof of damages; they do not challenge the measure of damages utilized by trial court.

[3] In the sale of personal property, the measure of damages for action for breach of warranty is the difference between the actual value of the property at the time of the transaction and the value it would have had if the representations had been true. B & B Asphalt Co. v. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976); W. & W. Livestock, Inc. v. Dannler, 179 N.W.2d 484, 488 (Iowa 1970).

[4] App. p. 6.

the injury or damage. Young v. Marlas, 243 Iowa at 376-77, 51 N.W.2d at 448. It has been determined above that the evidence was sufficient to show leakage problems in the basement had existed and had never been corrected satisfactorily. Even given an unusually heavy rainfall immediately prior to July 17, 1977, it was apparent damage or leakage could occur under less extreme conditions.[5] The trial court committed no error when it did not find unusual climatic conditions to be the proximate cause of the damages sustained.

V. Cross-Appeal.

A. Breach of Contract. In Division I of their petition, plaintiffs alleged defendants breached their contract with plaintiff in failing to repair the stereo speaker system and in failing to repair a hole in the patio screen door before plaintiffs moved into the house. Plaintiffs subsequently made these repairs at a cost of $27. After hearing the evidence, which included testimony of defendant, Richard Bond, that he had repaired the speaker system and that plaintiffs were to let him know when the screen was repaired so he could "make it right," trial court dismissed Division I. We find no reason to disturb this ruling on appeal; Division I was not "inadvertently overlooked" as contended by plaintiff, but was referred to specifically in the trial court's judgment and decree.

B. Punitive Damages. Trial court found defendants were not guilty of fraud and that no exemplary or punitive damages were supported by the record. "Punitive damages are never allowed as a matter of right; when malice is shown or when a party acts with wanton and reckless disregard of the rights of others, punitive damages may be allowed." Engel v. Vernon, 215 N.W.2d 506, 517 (Iowa 1974). See also Meyer v. Nottger, 241 N.W.2d 911, 922 (Iowa 1976). The allowance of such damages is discretionary. Sebastian v. Wood, 246 Iowa 94, 101, 66 N.W.2d 841, 845 (1954). Trial court found no intentional concealment in defendants' statements, but rather misrepresentations of facts that induced plaintiffs to purchase the house. As such, trial court did not abuse its discretion in denying plaintiffs' prayer for punitive damages in this case.

Judgment of trial court is affirmed as to all issues.

AFFIRMED.

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[5] Plaintiff Richard Claussen testified that he placed a garden hose along the south basement wall "and within twenty minutes had 12 gals. [sic] of water in the basement that I had to clean up with a shop-vac." App. p. 92, ll. 19-21.