

IN THE COURT OF APPEALS OF IOWA

No. 4-212 / 93-1187

FILED

SEP 16 1994

CLERK SUPREME COURT

**HERBERT L. NELSON and
TANYA S. NELSON,**

Plaintiffs-Appellants,

vs.

DUANE F. HUGHES,

Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury
County, Michael S. Walsh, Judge.

Plaintiffs appeal from the district court's decree
determining they were not entitled to rescission of a real
estate contract for the purchase of residential property
from the defendant. **AFFIRMED.**

Paul W. Deck, Sioux City, for appellants.

Timothy W. Shuminsky, Sioux City, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HABHAB, J.

On September 18, 1991, plaintiffs, Herbert and Tanya Nelson, and defendant, Duane Hughes, entered into a real estate contract for the sale to the Nelsons of Hughes' modular home placed on a site near Sargent Bluff. Just prior to the sale, Tanya Nelson had made a brief inspection of the property determining that it appeared to be adequate but was unable to check the water and the heat because the electricity had been turned off. The Nelsons claim that Hughes made certain promises regarding the property but Hughes claims that the Nelsons bought the property as is. The real estate contract contained the standard provision for Hughes as the seller to deliver to the Nelsons as the buyers for their examination an abstract of title showing merchantable title. The abstract was never delivered to the Nelsons.

The Nelsons claim after they moved into the home, in September 1991, they discovered the home had various defects including rusty water, inadequate heating, fiberglass insulation in the living areas, and the failure to have a parking pad in violation of zoning ordinances allegedly rendering the property uninhabitable. The Nelsons paid the downpayment of \$3,000, but only made one monthly payment of \$409.18.

The Nelsons filed a notice of rescission and eventually moved out of the home in January 1992. Hughes ultimately resold the property to another family. In February 1992,

the Nelsons filed a petition seeking rescission of the real estate contract on the basis of the various defects in the house and Hughes' failure to deliver an abstract according to the contractual terms. Hughes filed an answer and a counterclaim seeking damages for the Nelsons' breach of contract.

The case proceeded to a trial before the court. On May 20, 1993, the district court entered an order determining plaintiffs failed to prove defendant breached the terms of the real estate contract resulting in any damages. The court also determined plaintiffs failed to prove defendant fraudulently misrepresented the premises on the terms of the contract or to establish that rescission was appropriate. The court specifically found the plaintiffs failed to show that the failure to provide an abstract caused any damages to the Nelsons. The court did grant defendant judgment against plaintiff for two monthly payments amounting to \$818.36 plus interest but otherwise overruled defendant's counterclaim. The Nelsons filed an Iowa Rule of Civil Procedure 179(b) motion on May 31, 1993. On July 9, 1993, the district court denied the motion.

On August 9, 1993, the Nelsons filed a notice of appeal.¹

1. The parties failed to provide a transcript to this court. The appendix is limited to the pleadings, exhibits, and trial court rulings. We note appellant's counsel, in several instances, argues facts in his brief which cannot be supported since no transcript was provided.

The Nelsons argue three factual issues were disregarded by the district court. The Nelsons contend the district court disregarded a statement made by Hughes after a notice of rescission had been served that the dwelling was "completely remodeled and ready for occupancy." They argue a zoning ordinance requiring the installation of a concrete parking pad was similarly disregarded. Finally, the Nelsons argue the district court disregarded Hughes' failure to provide an abstract of title.

The district court made findings of fact regarding the zoning and abstract of title issues. In addition, the district court, in its findings, also acknowledged Hughes made a representation to Tanya Nelson that the house had been remodeled. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

The Nelsons also argue a rescission should have been granted by the district court based on three arguments. First, they claim the district court mistakenly applied the doctrine of caveat emptor in requiring the Nelsons to make a thorough inspection of the dwelling. Second, the Nelsons argue Hughes violated a zoning ordinance which made it illegal to occupy the dwelling. Last, they contend Hughes breached the contract by not providing an abstract of title.

We first consider whether the district court applied the doctrine of caveat emptor. The district court's discussion, which the Nelsons argue is an application of the caveat emptor, was made as part of a discussion on whether the Nelsons were coerced into purchasing the property.² The district court was not imposing a duty upon the Nelsons to inspect the property; rather, the court was recounting the circumstances under which the sale took place. We find that the doctrine of caveat emptor was not being applied in this case.

We next consider the zoning violation. In an attempt to keep cars from being parked on the street, the county requires a parking pad be constructed for all buildings. Initially, Hughes failed to have a pad constructed for the dwelling in question. After notification from the county, a pad was later constructed, and a certificate of

2. The district court stated:

The evidence establishes that the plaintiffs had the opportunity to inspect the premises as thoroughly as they wished to inspect it had they wanted to do so. The Court finds that the plaintiffs were not coerced into purchasing the property without the opportunity to inspect it nor were they prevented from reasonably considering their decision to purchase it. The only pressures upon the plaintiffs or the defendant with regard to this agreement were the normal pressures felt by a buyer and seller in negotiating a purchase of property and the respective desire to purchase it on the one hand and the desire to sell it on the other hand. The plaintiffs purchased the property without potential cost of utilities, knowing that the premises was heated by electric heat and that the water came from a well.

compliance was issued in February 1992. The county, upon the Nelsons' request, told the Nelsons that Hughes had a permit which was to expire on January 16, 1992. If a parking pad was not built by that time, there would be a violation of the zoning laws. There was no violation of the zoning laws during the Nelsons occupancy of the dwelling since the permit did not expire until the day they moved out. Further, there was no violation up through the time the Nelsons notified Hughes of their intent to rescind the contract in a letter dated December 27, 1991.

Finally, we consider the failure of Hughes to provide a abstract of title. The district court acknowledged Hughes' failure to deliver an abstract was a breach of contract. However, the court found damages were not incurred and the extraordinary remedy of rescission was not available as a result of the breach. We agree. Rescission is an extraordinary remedy. Potter v. Oster, 426 N.W.2d 148, 151 (Iowa 1988). Before the remedy of rescission is available, there must be a showing the breach is substantial and goes to the heart of the contract. Id. As the district court found, we find Nelsons have failed to show any damage suffered due to Hughes' breach. Similarly, Nelsons have failed to show the breach rises to the level required for rescission to be an available remedy.

We conclude no grounds were raised which would provide

the necessary basis to make the extraordinary remedy of rescission available.

AFFIRMED.