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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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JOHN DUNKER,

Plaintiff-Appellee,

vs.

DUBUQUE MARINA, INC.,

Defendant-Appellant.

Filed March 31, 1987

NEW HARBOR DEVELOPMENT COMPANY, INC., d/b/a DUBUQUE MARINA,

Plaintiff-Appellant,

vs.

JOHN DUNKER,

Defendant-Appellee.

7-10
85-1883

Appeal from the Iowa District Court for Dubuque County (Nos. 44428 & 44607) - T. H. Nelson, Judge.

Plaintiff, in an action arising out of a billing dispute, appeals from judgment for defendant upon a counterclaim seeking damages on various theories arising out of plaintiff's interference with his use of a boat, asserting that the trial court's award of actual and punitive damages was unsupported by the evidence and excessive and that a failure to mitigate damages was shown. **AFFIRMED AS MODIFIED.**

Mary M. Schumacher of Roth & Schumacher, Dubuque, for Dubuque Marina.

A. John Arenz and Edmund J. Siegert of O'Connor & Thomas, P.C., Dubuque, for Dunker.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

PER CURIAM '78

On March 29, 1984, the appellant, Dubuque Marina, Inc., initiated the present action wherein it sought monies allegedly due for repairs made on a boat owned by appellee, John Dunker. Dunker followed with an answer and counterclaim which denied Dubuque Marina's allegations and sought actual and punitive damages allegedly resulting from Dubuque Marina's conduct. Dunker's counterclaim was lodged against both Dubuque Marina and Dan Nelson, President of Dubuque Marina's parent company, New Harbor Development Company, Inc. The claims were consolidated with a replevin action which had been filed by Dunker and were tried to the court on October 29, 1985. The district court denied Dubuque Marina's claim and entered judgment in favor of Dunker on his counterclaim. The court awarded Dunker $62,000.00 in actual damages and $5,000.00 in punitive damages. This appeal followed. Our review is limited to the correction of errors at law. Iowa R. App. P. 4.

The appellants' first contention is that the district court erred when it admitted into evidence a photocopy of a handwritten sale contract entered into by Dunker and a Florida purchaser. The object of the contract was the boat which provides the basis of this suit. Dunker alleged in his counterclaim that due to the appellants' conduct the sale was prevented and Dunker was consequently damaged. The appellants argue that the best evidence rule bars the admission of the photocopy as no explanation of the original's absence was made. We think the appellants fail to appreciate the provisions of Iowa Rule of Evidence 1003 which provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) under the circumstances, admission of the duplicate would be unfair." A photocopy is a "duplicate" within this rule. State v. Propps, 376 N.W.2d 619, 621 (Iowa 1985); Iowa R. Evid.1001(4). The appellants' objections to the evidence

at trial were that no reason had been given for the original's absence, that it contains hearsay, and that it is self-serving. These objections do not raise a genuine question as to the original's authenticity nor do the circumstances indicate it was unfair to admit the photocopy. The appellants' first contention is without merit.

The remainder of the appellants' arguments pertain to the propriety vel non of the district court's damages award and, assuming the award of damages appropriate, whether the amounts awarded were excessive. The appellants claim that Dunker should not be awarded damages for the profit lost when he was not able to sell his boat. The contract for sale was frustrated because Dunker was unable to deliver the boat to Florida by November 30, 1983, as provided for in the contract. On that date the boat was in the possession of the appellants, who would not release it to Dunker because of the billing dispute pending at that time. The appellants maintain that allowing an award for lost profits would provide Dunker with double compensation, as he presumably will realize the profit when the boat is sold.

As a result of the appellants' actions, Dunker was unable to realize profits from the contracted-for sale of his boat. He sought damages under a theory of conversion in order to compensate himself for these unrealized profits. The district court awarded Dunker those damages. Appellants dispute the question of damages, not liability. The general rule is that compensation for lost profits may be recovered in an action for conversion, where the loss is a proximate result of the defendant's act, and where the loss can be shown with reasonable certainty. 18 Am. Jur. 2d Conversion § 119 (1985). We think the loss of profit which Dunker suffered was proximately caused by Dubuque Marina's improper detention of his property and that the amount of the loss has been demonstrated adequately. We recognize the possibility that Dunker may realize additional

profit by selling the boat sometime in the future. We may also assume the possibility exists that Dunker will sell the boat at a loss or will not be able to locate a willing and able buyer. The record does not show, nor have appellants argued, that Dunker has been able to find a buyer. Any additional gain or loss to Dunker realized through a possible future sale of his boat will be the result of both the vicissitudes of the marketplace and appellants' wrongful prevention of the earlier sale. While our courts are not able to protect Dunker from the former factor, they possess the duty to compensate him for the latter factor. We think the district court did so correctly and, accordingly, we reject appellants' argument.

Likewise, we dismiss appellants' contention that if an award of lost profits is appropriate, the amount awarded should be the difference between the contracted-for sale price and appellants' estimate of fair market value, $110,000.00. This contention is based, as was appellants' first argument, on Dunker's ability to sell his boat for this estimated fair market price, a hypothetical which has not yet materialized. As a result of appellants' wrongful action, Dunker lost the difference between the contract price and the amount he had invested in the boat, not the difference between the contract price and appellants' hypothetical market price. When a conversion occurs, the injured party should receive full compensation for his or her actual losses. 18 Am. Jur. 2d Conversion § 117 (1985). For the same reasons which persuaded us to reject appellants' first argument, we reject the second.

Appellant's third attempt to attack the damages award maintains that Dunker should not have been awarded damages for loss of use of the property. Damages for the loss of use of converted property may be allowed in cases, such as the one at bar, where the property was returned to and accepted by the plaintiff. 18 Am. Jur. 2d Conversion § 118 (1985). The amount of loss is

fairly reflected by the rental value of similar property. Knaus Truck Lines v Commercial Freight Lines, 238 Iowa 1356, 1367, 29 N.W.2d 204, 210 (1947). Dunker testified that a reasonable rental value for his boat during the time he was denied the use of it would be from $1,500.00 to $2,000.00 per week. The district court selected the figure of $1,000.00. Dunker has not appealed this determination. We think the district court was correct in awarding damages in recognition of Dunker's loss of use of his property. In addition, we believe the district court acted within the allowable range of discretion in selecting the weekly rental figure.

We find merit, however, in appellants' argument that excessive loss of use damages were awarded. The damages in an action for conversion are measured by the sum of money necessary to compensate the plaintiff for all actual losses or injuries sustained as a natural and proximate result of the defendant's wrong. 18 Am. Jur. 2d Conversion § 117 (1985). No injured party, however, should receive more than has been lost as a result of a tortious act. Adams v Deur, 173 N.W.2d 100, 105 (Iowa 1969). The district court awarded Dunker loss of use damages for the period from mid-October to December 12, 1983, the date on which he recovered possession, in addition to allowing time to transport the boat to Florida, for a total of twelve weeks. We think, however, that the appellants' wrongful conduct resulted in Dunker losing the use of his property only from the beginning of the wrongful conversion in mid-October until November 30, 1983. On that latter date, were it not for the appellants' wrongful conduct, Dunker would have consummated the contracted-for sale of the boat. It would therefore be anomalous and improper, we think, to recognize through an award of damages both Dunker's loss of profits resulting from his inability to sell the boat and his loss of use resulting from his inability to use it after the contracted-for date of sale. The appellants' wrongful conduct caused Dunker's

loss of use of the boat from mid-October until November 30, 1983, and his inability to sell it on that date. We modify the district court's decree so as to award Dunker loss of use damages for the six-week period he was denied use of his property prior to its anticipated sale. Loss of use damages, therefore, shall be awarded in the amount of $6,000.00.

The appellants next contend that Dunker failed to mitigate his damages. All Dunker's damages could have been avoided, say the appellants, had Dunker simply paid the amount allegedly due for the earlier services rendered. We are not persuaded by this contention. The district court found against the appellants on their claim dealing with the underlying billing dispute. Dunker was not obliged to pay the amount appellants claim was due, and his refusal to do so does not constitute a failure to mitigate damage.

Finally, appellants maintain that the award of punitive damages is excessive. Recognizing that the proper amount of punitive damages to be awarded is a matter committed to the discretion of the trial court, Grefe v. Ross, 231 N.W.2d 863, 868 (Iowa 1975), we think the district court's award of punitive damages is proportionate to the actual damages suffered, and should not be disturbed. See Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979).

Costs are assessed four-fifths to the appellants and one-fifth to the appellee.

AFFIRMED AS MODIFIED.

Donielson, P.J., and Snell, J., concur; Sackett, J., concurs in part and dissents in part.

I concur in part and dissent in part. I concur with the majority in affirming the trial court's award of damages for Dunker's loss of use of the vessel. See Universal C.I.T. Credit Corp. v. Jones, 227 N.W.2d 473 (Iowa 1975). However, I would affirm the trial court's determination of 12 weeks loss of use, from date of defendant's wrongful detention of the vessel until Dunker recovered possession of the vessel pursuant to his replevin action on December 12, 1983. The 12 weeks is the entire period during which Dunker was deprived of his rightful possession of the vessel after he had made demand for the vessel's return. Flickinger v. Mark IV Apartments, Association, 315 N.W.2d 794, 797-98 (Iowa 1982); Barry v. State Surety Co., 261 Iowa 222, 224, 154 N.W.2d 98, 99 (1967).

I dissent on the majority's affirmance of the trial court on the damage award of $50,000 to Dunker for lost profits. Dunker has cast his petition as an action for conversion. Conversion is any unauthorized act which deprives an owner of his property permanently or for an indefinite time. Black's Law Dictionary 300 (5th ed. 1979). See 18 Am. Jur.2d Conversion §1, at 146 (1985). Conversion denotes the intentional exercise of control over another's property which so seriously interferes with that person's right to control it that the actor may justly be required to pay the full value of the property. Restatement (Second) of Torts §222A.

In the instant case, permanent control or disposition of the property in question has not occurred. The vessel was returned to Dunker under a writ of replevin on December 12, 1983. Damages recoverable in an action for conversion are reduced by the return and acceptance of the goods by the plaintiff prior to the beginning of the action. 18 Am. Jur.2d Conversion §126, at 236-37 (1985). Hence, recovery is reduced to a nominal sum or the amount of the intervening deterioration in value of the property. Id. In such circumstances the

plaintiff cannot recover the value of the property lost due to the conversion if he elects to demand return of the property. See Universal C.I.T. Credit Corp, 227 N.W.2d at 477. Conversely, if he elects a money judgment for the value of the property he is entitled to that and nothing more. Id. To require damages equal to the value of the property in addition to its return would amount to a windfall for the plaintiff. Likewise, in the instant case the $50,000 damage award to Dunker for lost profits is a windfall because he also has the vessel to sell a second time. If plaintiff proves lost profits should be awarded as special damages, the award should only be the difference between the fair market value of the property and the price of the sale lost during the period of wrongful detention. In the instant case, the trial court did not make any findings as to the fair market value of the vessel. Yet the trial court awarded the plaintiff lost profits erroneously based on the difference between Dunker's purchase price and his lost sale price.

I find there is insufficient evidence as to the fair market price of the vessel at the time Dunker filed the instant action. The statement that Dunker had a purchaser for the vessel at the price of $139,000 is not sufficient. Moreover, the trial court did not determine Dunker's purchase price to be the fair market value. Therefore, I would reverse the damage award for lost profits and remand for further proceedings.