

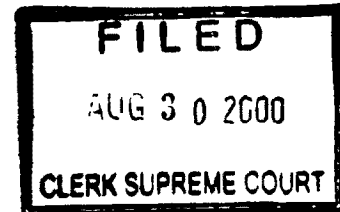
IN THE COURT OF APPEALS OF IOWA

No. 0-398 / 99-1027
Filed August 30, 2000

PICKWICK COMPANY, INC.,
Plaintiff-Appellee,

vs.

INFRA-RED TECHNOLOGIES, INC.,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Plaintiff-appellee, Pickwick Company, Inc., sued defendant-appellant Infra-Red Technologies, Inc., on a number of theories after a painting system defendant sold plaintiff allegedly did not meet plaintiff's expectations. Defendant counterclaimed seeking the balance due on the contract for purchase. Following a jury verdict for the plaintiff awarding actual and punitive damages defendant brings this appeal contending, among other things, that (1) there was not substantial evidence of fraud; (2) evidence as to loss profits was speculative; (3) there was insufficient evidence to support the award of punitive damages; (4) there was not substantial evidence of express warranty; and (5) it was entitled to judgment on its counterclaim. **AFFIRMED IN PART AND REVERSED IN PART.**

Robert S. Hatala of Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, and **Don R. Lolli** of Swanson, Midgley, Gangwere, Kitchin & McLarney, L.L.C., Kansas City, Missouri, for appellant.

Leonard T. Strand of Simmons, Perrine, Albright & Elwood, P.L.C., Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

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SACKETT, C.J.

Plaintiff-appellee, Pickwick Company, Inc., sued defendant-appellant Infra-Red Technologies, Inc., on a number of theories after a painting system defendant sold plaintiff allegedly did not meet plaintiff's expectations. Defendant counterclaimed seeking the balance due on the contract for purchase. Following a jury verdict for the plaintiff awarding actual and punitive damages defendant brings this appeal contending among other things that (1) there was not substantial evidence of fraud; (2) evidence as to lost profits was speculative; (3) there was insufficient evidence to support the award of punitive damages; (4) there was not substantial evidence of express warranty; and (5) it was entitled to judgment on its counterclaim. We agree with defendant there is no support for an award of punitive damages. We affirm on all other issues.

Plaintiff, located in Cedar Rapids, Iowa, manufactures sheet metal parts for other companies to use in their products. In August of 1994 plaintiff contracted with Case Corporation to manufacture for Case shields for combines. The shields were to be made of steel tubing and perforated sheet metal. The agreement between plaintiff and Case provided plaintiff would supply the parts in painted form according to Case's specifications. At the time of contract plaintiff was not equipped to paint the shields according to these specifications. Consequently plaintiff began shopping for the equipment necessary for it to do the required painting.

After talking to several vendors plaintiff was contacted by a representative of defendant. Following lengthy negotiations an agreement was made in which defendant agreed to install a system that plaintiff believed would meet its needs.

The relationship between the two parties after purchase was not satisfactory. Plaintiff contended the equipment was not installed in the promised time frame or manner and it never performed as promised. On May 7, 1996, plaintiff sued defendant. Its petition was amended three times. Plaintiff contended in the third amendment to its petition that the promised system was not promptly installed, the system installed was defective and defendant refused to cure the defects. Plaintiff alleged that (1) defendant breached a January 9, 1995, contract; (2) breached an express warranty; (3) breached an implied warranty of fitness for a particular purpose, (4) breached an implied warranty of merchantability; (5) tortiously interfered with plaintiff's existing contract with Case; (6) and made fraudulent representations in making the sale. Defendant counterclaimed seeking payment for the balance due on the contract.

The case was tried to a jury. The jury answered a number of interrogatories finding against the defendant on plaintiff's claims for breach of contract, breach of express warranty and fraud.¹ The jury awarded plaintiff actual damages of \$16,500 for excess installation costs, \$51,500 for the difference between payment and market value, \$28,300 for cost of redesigning the system, \$163,000 for lost profits, for a total of \$309,000 in actual damages. The jury also awarded plaintiff an additional \$50,000 in punitive damages. The jury rejected defendant's counterclaim.

Defendant first contends there was not substantial evidence to support the submission of fraud. Plaintiff's claim of fraud is that during December of 1994 or January of 1995 defendant represented to it that the painting equipment it

¹ The jury found against plaintiff on its claim of intentional interference.

proposed to sell plaintiff would automatically paint the parts plaintiff sought to paint with no manual touchup painting necessary.

Defendant contends there was not substantial evidence to support the submission of this claim. Plaintiff, while conceding that defendant preserved error on this issue, alleges the instruction and subsequent jury finding was supported by substantial evidence.

The trial court instructed the jury that for plaintiff to succeed on its fraud claim it was required to prove by clear, convincing and satisfactory evidence that:

1. The Defendant in December 1994, or and/or January 1995, made a representation to Plaintiffs that the painting equipment that Defendant proposed to sell Plaintiff would automatically paint 11 particular parts, with no manual touch up painting necessary.
2. The representation was false.
3. The representation was material.
4. The Defendant knew the representation was false.
5. The Defendant intended to deceive Plaintiffs.
6. The Plaintiffs acted in reliance on the truth of the representation and were justified in relying on the representation.
7. The representation was a proximate cause of the Plaintiffs' damage.
8. The amount of damage.

The instruction given properly instructed on the law. *See Hyler v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996), *McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995); *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 565 (Iowa 1987). The question being whether the necessary evidence was introduced to support the giving of the instruction.

The first three elements require that a material misrepresentation must have been made. A misrepresentation may occur when one with superior knowledge, dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the

transaction. *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996); *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984).

Defendant contends no representation was made in that plaintiff was never assured the system would paint the parts automatically with no manual painting necessary. Plaintiff contends the representations were made. Plaintiff claims defendant admitted it gave a warranty which plaintiff contends was a representation for purposes of its fraud claim and which the jury was instructed plaintiff had to prove was false.

Plaintiff contends the evidence shows the system sold was not capable for painting the shields without manual painting. Plaintiff further contends the testimony of Steve Wilcoxon supported a finding that the representations when made were false. Plaintiff relies on the language in four letters written after defendant made a formal quote on the equipment it was recommending to plaintiff as support for its position that the representation was made.

On December 21, 1994, plaintiff sent defendant a letter to serve as its purchase order. The letter indicated it was an order for specified equipment at total cost of \$134,564.00 with certain specified conditions including the following:

4. "On installation the entire system is warranted for fitness of use on the eleven part numbers, using the material specified, with no manual painting."

Defendant in a December 27, 1994, letter written by the Director of its Finishing Process Group Steve Wilcoxon responding to modifications in Plaintiff's purchase order (letter) dated December 21, 1994 said:

4. "Warranty is acceptable pending actual spray out of the [11] part numbers addressed in your purchase order. Spray out to be conducted at the Deimco facility located in Marshalltown, IA. If in the future you would change coatings or coating suppliers it would

be advisable to conduct spray out testing prior to the introduction of a new coating into the system."

On December 28, 1994, plaintiff responded to defendant's December 27, 1994 letter and in reference to the warranty said:

4. "On installation the entire system is warranted for fitness of use on the eleven part numbers, using the material specified, with no manual painting. Should the spray-out not be successful we have the right to cancel the order with a full refund and no penalties."

On January 9, 1995, defendant again in a letter written by Steve Wilcoxon responded to items in plaintiff's December 21, 1994 letter and as to item 4 said:

"System to be warranted for performance on the products we discussed. We have attempted to enlarge the product window as much as possible without adding additional expense to the booths. The 30" X 72" opening is the largest we can accommodate with the existing equipment."

The January 9, 1995, letter written by the defendant concluded with the following paragraph:

"Walt, we have set in motion ordering of the components necessary to complete your system. We would appreciate any assistance you could give, in releasing the down payment check."

Defendant contends the exchange in these letters fails to prove that it warranted the equipment would paint eleven particular parts with no manual touchup painting necessary.

The representation to be fraudulent must be proven by substantial clear, convincing and satisfactory evidence. Plaintiff's December 28th letter sets out the warranty it claims was made. While the defendant's responsive letter of January 9th does not reiterate the specific warranty in the terms used by the plaintiff, it also does not disclaim it is giving such a warranty and indicates it is ordering the parts. Consequently, the jury could infer from this correspondence

that defendant in accepting the plaintiff's purchase order gave the specific warranty plaintiff claims. We reject defendant's argument on this point.

Defendant next contends there was not substantial evidence the representation was false at the time it was made. Plaintiff contends that Wilcoxon admitted he had no belief on January 9, 1995 the system would perform as represented after it was installed in plaintiff's business. Plaintiff further contends Wilcoxon admitted he had no way of knowing if the system could perform as promised.

To provide sufficient evidence to prove the representation is false it is necessary to establish that the representation was false at the time it was relied upon. *Hagarty v. Dysart-Geneseo Community Sch. Dist.*, 282 N.W.2d 92, 95 (Iowa 1979). A fraudulent misrepresentation claim also requires that the defendant knew the representation was false (scienter), and that the defendant intended to deceive the plaintiff. See *McGough*, 526 N.W.2d at 331-32. Scienter is knowledge of the falsity of a material representation. *Hylar*, 548 N.W.2d at 871. It can be proved by showing that the defendant had actual knowledge of the falsity, possessed reckless disregard for the truth, or falsely stated or implied that the representations were based on personal knowledge or investigation. *Id.* Intent to deceive is closely related to scienter, and the same general analysis applies. *Id.*; *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 155 (Iowa 1984).

Steve Wilcoxon, the author of the two letters referenced above, was to testify that there were things he did not know about how the system would function on January 9, 1995 when the last referenced letter was written. And

when specifically asked, he admitted he did not really have any idea how the equipment was going to work when it was all actually crammed into the tiny space at plaintiff's plant.

Wilcoxon's testimony supports a finding that when defendant accepted the purchase order subject to plaintiff's specified warranty it did so with reckless disregard for the truth and falsely implied that the representations were based on personal knowledge or investigation. We find no basis to reverse on this issue.

Defendant contends there is not clear and convincing evidence of an intent to deceive to induce plaintiff to purchase the equipment. A false statement innocently but mistakenly made will not establish intent to defraud, but when recklessly asserted, it will imply an intent to defraud. *Beeck*, 350 N.W. 2d at 155; *Grefe v. Ross*, 231 N.W.2d 863, 867 (Iowa 1975). There must also be clear and convincing evidence of defendant's intent to deceive plaintiff to induce it to buy the equipment. See *Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987).

Defendant contends Wilcoxon's statements were no more than a reasonable belief that the equipment would adequately spray paint the Case parts. The defendant contends Wilcoxon's statements were not reckless statements. The defendant argues the fact Wilcoxon could have been more careful in making further inquiry if is not sufficient to prove recklessness. Scienter and intent to deceive may be shown when the speaker has actual knowledge of the falsity of his representations or speaks in reckless disregard of whether those representations are true or false. *Beeck*, 350 N.W.2d at 155. The question becomes whether Wilcoxon's conduct was sufficiently reckless to permit implication of the elements of scienter and intent. *Garren v. First Realty, Ltd.*,

481 N.W. 2d 335, 338 (Iowa 1992). The fact that Wilcoxon could have been more careful by making further inquiry is insufficient to prove he acted in reckless disregard of the truth. See *id.*; *B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976).

Defendant also contends there was no intent to deceive. It advances Wilcoxon believed the equipment would work. Defendant contends there is not substantial clear and convincing evidence to support a finding there was an intent to deceive or fraudulently induce plaintiff to purchase the equipment.

We have determined Wilcoxon's testimony supports a finding the representation was given recklessly with disregard for the truth and falsely implied the representations were based on personal knowledge or investigation. Plaintiff introduced expert testimony that the equipment sold was not capable of painting the case and there was no feasible way to modify the system to do so. We reject defendant's argument on this issue.

Defendant next contends plaintiff was not justified in relying on a representation that the painting equipment defendant proposed to sell would automatically paint eleven particular parts without the necessity for manual touchup. The standard we use in addressing this contention is whether the complaining party, in view of its own information and intelligence, had a right to rely on the representations. *McGough*, 526 N.W. 2d at 332.

Plaintiff's president testified he advised the first representative of defendant who contacted plaintiff that plaintiff was not knowledgeable about industrial painting equipment and the equipment would not have been purchased without the warranty. There is substantial evidence defendant represented it had

expertise in the field of painting systems and plaintiff was justified in relying on that expertise. There is no basis to defendant's contention that plaintiff was not justified in relying on defendant's representations.

Defendant next contends even if there is substantial evidence to support a finding of fraud, there was not substantial evidence to support a finding that plaintiff was damaged by defendant's fraudulent acts.

Plaintiff must introduce substantial evidence to establish by clear, satisfactory and convincing proof that it was injured and damaged by defendant's fraud. See *City of McGregor v. Janett*, 546 N.W.2d 616, 619 (Iowa 1997); *McGough*, 526 N.W. 2d at 331. Plaintiff is entitled to damages only if the damages resulted from plaintiff's reliance on the defendant's false representations and there was sufficient evidence introduced to support the award. See *Cornell*, 408 N.W.2d at 379.

There was evidence the system sold did not paint a single shield to Case's specifications and that it was not capable of doing so. Plaintiff introduced the necessary evidence to prove it was damaged by defendant's fraud.

Defendant next contends there is no evidence that plaintiff even if they had not had the painting problem would have been able to realize the profit on their contract with Case. Plaintiff contends had defendant's representations as to the abilities of the system they sold been true, plaintiff would have earned profits on the painting.

To prevail defendant must show there was not sufficient evidence to submit the issue to the jury. *Tredrea v. Anesthesia & Analgesia P.C.*, 584 N.W. 2d 276, 280 (Iowa 1998). The issue is would plaintiff have earned a profit on

painting had defendant's representations been true. *Midwest Home Distributor, Inc. v. Domco Indus., Ltd.*, 585 N.W. 2d 735, 739 (Iowa 1998). Damages for lost profits cannot be too speculative. See *Kansas City Life Ins. Co. v. Hullinger*, 459 N.W. 2d 889, 897 (Iowa App. 1990); *Jamison v. Knosby*, 423 N.W.2d 2, 6 (Iowa 1988). The plaintiff is required to establish the amount of claimed damages with a degree of reasonable certainty though mathematical precision is not required. See *Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W. 2d 739, 746 (Iowa 1977).

In Iowa we recognize two measures of damages for fraud cases: (1) benefit of the bargain plus consequential damages and (2) out of pocket expenses. *Midwest Home Distributor, Inc.*, 585 N.W. 2d at 739; *Cornell*, 408 N.W.2d at 380. Each measure of damages has a different purpose. *Midwest Home Distributor, Inc.*, 585 N.W. 2d at 739. The purpose underlying the benefit-of-the-bargain rule is to put the defrauded party in the same financial position as if the fraudulent representations had in fact been true. *Id.*

The jury here was instructed on the benefit of the bargain rule. A reasonable jury could have concluded from the evidence that had defendant's statements been true and had the eleven parts been painted without touchup by the system defendant sold plaintiff, plaintiff would have benefited financially. See *id.* We find no basis to reverse on this issue.

Defendant next claims plaintiff was not entitled to punitive damages. Generally, a breach of contract, even if intentional, is insufficient to support an award of punitive damages. *Seastrom v. Farm Bureau Life Ins. Co.*, 601 N.W.2d 339, 348 (Iowa 1999); see also *Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd.*, 514 N.W.2d 912, 916 (Iowa 1994). An award of punitive

damages for breach of contract is only upheld when the breach (1) constitutes an intentional tort, and (2) is committed maliciously, in a manner that meets the standards of Iowa Code section 668A.1(1997). *Seastrom*, 601 N.W.2d at 348. That statute requires proof by a preponderance of clear, convincing, and satisfactory evidence, that the defendant's conduct amounted to a willful and wanton disregard for the rights or safety of another. *Magnusson Agency v. Public Entity Nat. Company-Midwest*, 560 N.W.2d 20, 29 (Iowa 1997).

Conduct that establishes a willful and wanton disregard for the rights or safety of another will support an award of punitive damages. *Wilson v. IBP, Inc.*, 558 N.W. 2d 132, 142 (Iowa 1996), *cert. denied*, 522 U.S. 810 118 S.Ct. 52, 139 L. Ed. 2d 17 (1997). An actor is considered to have intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. See *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 771 (Iowa 2000); *Fell v. Kewanee Farm Equip. Co.*, 457 N.W. 2d 911, 919 (Iowa 1990).

Punitive damages must be proved by the preponderance of clear, convincing and satisfactory evidence. Iowa Code § 668A.1(1)(a); *Jones v. Lake Park Care Center*, 569 N.W.2d 369, 378 (Iowa 1997). Punitive damages are not automatically awarded just because there is fraud. See *State Savings Bank v. Allis-Chalmers, Corp.*, 431 N.W.2d 383, 387 (Iowa App. 1988); *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 214 (Iowa 1980).

For punitive or exemplary damages to be awarded the defendant's actions must have been characterized by malice or willful disregard of the plaintiff's

rights. *Larson v. Great West Cas. Co.*, 482 N.W.2d 170, 174 (Iowa App. 1992); see also *Sandhorst v. Mauk's Transfer, Inc.*, 252 N.W.2d 393, 399 (Iowa 1977). An award of punitive damages is appropriate only when a party acts with actual or legal malice. See *Barnhouse v. Hawkeye State Bank*, 406 N.W.2d 181, 184 (Iowa 1987). Actual malice is shown by such things as personal spite, hatred, or ill will. *Parks v. City of Marshalltown*, 440 N.W.2d 377, 379 (Iowa 1989). Legal malice is established by showing wrongful conduct committed with a willful or reckless disregard for the rights of another. *Id.* A jury to award punitive damages must find "the conduct . . . from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code section 668A.1(1)(a) (1997). Conduct is willful and wanton when the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. See *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990) (quoting Prosser & Keeton on Torts § 34, at 213 (5th ed. 1984)). An award of punitive damages is not appropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue. See *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 613, 623 (8th Cir. 1983) (applying Iowa law).

There is no direct evidence of malice. Nor was the defendant's conduct so improper as to raise an inference of malice. See *C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy, Inc.*, 412 N.W.2d 593, 599 (Iowa 1987); see also *Kimmel*, 339 N.W.2d at 383-84 (holding an award to vendors of punitive damages for fraud and breach of a fiduciary duty by a real estate agent in

allowing its representative to assume dual relationship in a property purchase was not supported even though there was evidence the broker had knowledge its representative was a risky buyer). There was evidence defendant made reckless statements, but there is no evidence at the time they were made defendant harbored any ill will or malice towards the plaintiff. Nor is there evidence it was intentionally done in disregard of a known or obvious risk so great that it was highly probable that harm would follow. There was no evidence defendant's actions were accompanied by a conscious indifference to the consequence of its action. Rather the evidence shows defendant was too anxious to sell a painting system it hoped would serve the plaintiff's needs. Failing to find clear and convincing evidence to support the award of punitive damages we reverse that portion of the verdict.

Defendant contends the district court abused its discretion in failing to grant a new trial and a judgment notwithstanding the verdict. Our review of the district court's denial of a motion for new trial depends on the ground asserted in the motion and the ruling made by the court. *See Vaughan v. Must, Inc.*, 542 N.W. 2d 533, 542 (Iowa 1996).

We review district court rulings on motions for judgment notwithstanding the verdict for the correction of errors at law. Iowa R. App. P. 4; *Magnusson Agency v. Public Entity Nat'l Company-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. Iowa R. App. P. 14(f)(2); *Magnusson*, 560 N.W.2d at 25. The motion must stand or fall on the grounds raised in the motion

for directed verdict. *Magnusson*, 560 N.W.2d at 25. We review district court rulings on motions for new trials for abuse of discretion. Iowa R. App. P. 14(f)(3).

A new trial may be granted if the jury awards inadequate or excessive damages. *Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa App. 1997). The question is whether the verdict effected substantial justice between the parties. *Id.* at 126.

Defendant contends the award of \$16,500 for excessive installation costs based on defendant's breach of contract is not supported by the evidence and should be reduced to \$7,257.00 or a new trial should be granted. Defendant also contends the award for redesigning the system is excessive. There was evidence that plaintiff incurred costs in excess of those awarded. We affirm on this issue.

Defendant also contends it was entitled to judgment on its counterclaim seeking the balance due on the contract for purchase. The jury rejected defendant's counterclaim. We hold there is substantial evidence to support the jury's decision on the counterclaim. Evidence is substantial to support a jury verdict if reasonable minds would find it adequate to reach the same conclusion. *Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999); *Shams v. Carney*, 518 N.W.2d 366, 369 (Iowa 1994). No erroneous application of law as to the counterclaim is apparent. We therefore affirm jury's decision on the counterclaim.

We have considered the other issues raised by defendant and find them to be without merit.

AFFIRMED IN PART AND REVERSED IN PART.