FILED
SEP 6 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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JAMES R. DAVIS,

Plaintiff-Appellee/ Cross-Appellant,

vs.

NICHOLAS O. DURIAN and ARLENE K. DURIAN,

Defendants-Appellants/ Cross-Appellees.

Filed September 6, 1984

4-221
83-1295

Appeal from the Iowa District Court for Mahaska County - Richard J. Vogel, Judge.

Defendants appeal from the amount of the judgment awarded plaintiff in this suit arising out of a contract for construction of a house. On appeal, defendants assert that (1) trial court did not properly calculate the amount of damages awarded plaintiff; and (2) plaintiff attempted to practice an extrinsic fraud upon the court by failing to produce certain documents in response to an order to produce. On cross-appeal, plaintiff asserts that the damages awarded him should have been larger, at least in part because he should have been awarded profit on the work. AFFIRMED AS MODIFIED.

Greg A. Life, Oskaloosa, for defendants-appellants/cross-appellees.

James Q. Blomgren and Jeanne K. Johnson of Clements, Blomgren & Pothoven, Oskaloosa, for plaintiff-appellee/cross-appellants.

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

PER CURIAM

The plaintiff, Jim Davis, contracted with the defendants, Nicholas and Arlene Durian, in the spring of 1979 to construct a house. Construction was commenced immediately and continued until early June at which time the Durians told Davis to stop work until they were able to arrange for additional financing. At that time, the excavating had been done, the footings and basement walls were poured, and sand was ordered for the garage and basement floors. Durian paid Davis $16,000 for the work that had been completed at that time.

In October of 1979, Durian asked Davis to begin work again and to pour the garage and basement floors and to start framing the house. In December, Davis presented Durian with a bill for $23,981.13, which he claimed he was owed under the contract entered into in May. Durian refused to pay, stating that the original contract was no longer in force and that he did not owe that much. Davis stopped work and the Durians hired other people to complete the house.

Davis sued for breach of contract and the Durians counterclaimed. The trial court found that the original contract was no longer in force, but that the Durians did owe Davis for the work he had done between October and December. The court awarded Davis $6,345.94, which represented the costs of materials and labor. This was later modified, leaving a judgment balance against the Durians for $5,733.02.

On appeal the Durians seek to have the judgment further modified or to have the case remanded for a new trial. They assert: (1) trial court did not properly calculate the amount of damages awarded to Davis; and (2) Davis attempted to practice an extrinsic fraud upon the court by failing to produce certain documents in response to an order to produce.

On cross-appeal, Davis asserts that the damages awarded him should have been larger, at least in part, because he should have been awarded profit on the work.

Our standard of review in this case is on assigned error. Iowa R. App. P. 4 (1983). The findings of fact in a law action are binding upon the appellate court if supported by substantial evidence. Iowa R. App. P. 14(f) (1983).

I. Calculation of Damages. It is within the discretion of the trial court to vacate a decision and to grant a new trial if a party's substantial rights have been materially affected by a mistake of fact of the court. Iowa R. Civ. P. 244(h) (1983). See also, Haase v. Hub-Co. Credit Union, 253 Iowa 1202, 1204-05, 115 N.W.2d 880, 881-82 (1962). "In ruling upon motions for a new trial the trial court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. P. 14(f)(3) (1983).

In this case, the trial court entered a judgment for Davis in the amount of $6,345.94. This was broken down as follows:

1.	Materials:	J.W. Concrete	1,212.92
		Joss Rental	24.72
		Brown & Son Sand	308.14
		Carroll Lumber	898.10
		Hawkeye Lumber	7,690.89
			10,135.73
2.	Less what Durians paid to release mechanic's lien on property		(5,548.79)
			4,586.94
3.	Plus labor		2,088.00
			6,671.94
4.	Less cost to replace shingles		326.00
			6,345.94

The Durians made alternative motions for a judgment nov, a new trial, or to vacate or modify the judgment. The court modified the judgment by eliminating the J W. Concrete bill. This left a judgment balance against the Durians for $5,733.02.

It appears that the trial court made a mathematical error in computing the Hawkeye Lumber bill. In the ruling modifying the original judgment, the court stated that "the Hawkeye Lumber figures were arrived at by adding the post June, 1979, ticket amounts from the tickets introduced into evidence and deducting

credits given." In doing this, we arrive at a figure of $7,129.03, a difference of $561.86. We also find that the Durians should receive credit for $499.75 for tools wrongfully charged to the Durian account on the Carroll Lumber bill. Davis acknowledged during the trial that these tools should not have been charged to the Durian job site. Finally, the judgment should also be reduced by $1,311.00 for a payment of $2,524.00 which the Durians made in December. This payment was made to cover the cost of pouring the basement floors. The trial court only gave the Durians credit for $1,212.92, the amount of the J. W. Concrete bill. With these credits, the judgment is reduced to $3,458.49. All of the court's other findings are supported by the record and are affirmed.

II. Fraud in Failing to Produce Documents. A court may modify or vacate a final judgment because of irregularity or fraud practiced on the court. Iowa R. Civ. P. 252(b) (1983). Where fraud is asserted as grounds for vacating a judgment, it must be extrinsic fraud; that is, the conduct of the prevailing party prevented a fair submission of the controversy. Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 353 (Iowa Ct. App. 1982). A finding of such fraud would be "justified only by the most egregious misconduct and would have to be supported by clear, unequivocal and convincing evidence. At the very least, it would require a showing of fault, willfulness, or bad faith . . ." Miller, 328 N.W.2d at 353.

The Durians allege that Davis fraudulently concealed from the court five tickets from Hawkeye Lumber evidencing $2,192.35 in credits. These tickets were not introduced at trial and the Durians asked the court to consider them in the post-trial motion.

It does not appear that Davis acted willfully or in bad faith in not introducing the tickets at the trial. The failure to introduce these was more likely attributable to his record-keeping system, or lack thereof, than to any fraudulent intent.

The determination of whether to hear evidence in conjunction with a post-

trial motion is within the discretion of the trial court. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). A party seeking a new trial on the basis of newly-discovered evidence must establish:

> (1) That the evidence was discovered following trial and before judgment,
>
> (2) that it was not such as could have been discovered before the conclusion of the trial in the exercise of due diligence,
>
> (3) that it must be material to the issue, not merely cumulative or impeaching, and
>
> (4) that such evidence will probably change the result if a new trial is granted.

Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 353 (Iowa Ct. App. 1982); Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972).

This case was commenced in July, 1980, and it was not until March, 1983, that the Durians requested production of documents. They were well aware that many of the materials were ordered from Hawkeye Lumber Co. It appears that these tickets could have been discovered before the conclusion of the trial if due diligence had been exercised. We affirm the trial court's refusal to grant a new trial on the basis of this newly-discovered evidence.

III. Cross-Appeal - Increasing the Award to Include Profit. When there is no agreement as to the amount of compensation to be awarded, the law implies a promise to pay a reasonable value of the services rendered and materials furnished. Olberding Const. Co., Inc. v. Ruden, 243 N.W.2d 872, 875 (Iowa 1976). The Iowa Supreme Court has recognized that profit may be included in the recovery if there is evidence to support such a claim. McDonald v. Welch, 176 N.W.2d 846, 849 (Iowa 1970).

The sole evidence offered to establish that profit should be awarded was Mr. Davis' testimony that there would be a fifteen percent mark-up. There is no indication that this is customary in the trade or that this figure was arrived at by

prior dealings of the parties. See Drake v. Block, 247 Iowa 517, 522, 74 N.W.2d 577, 580-81 (1956) (the reasonable value to be awarded is based upon a comparison with some other established or stable fact such as custom in a certain trade or conduct of the parties) The record does not indicate any additional evidence which would support increasing the judgment to account for profits.

The judgment of the trial court is affirmed as modified. The judgment is reduced to $3,458 49 to account for credits which the Durians should have received. Court costs on appeal shall be assessed to the plaintiff.

AFFIRMED AS MODIFIED