IN THE COURT OF APPEALS OF IOWA

No. 0-090 / 09-0833
Filed April 21, 2010

KIM BECKER and PAMELA MORGAN,
Plaintiffs-Appellees/Cross-Appellants,

vs.

JAY LONGINAKER, MARVIN PENNING,
and TRI-VALLEY BANK
f/k/a RANDOLPH STATE BANK,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Fremont County, J.C. Irvin, Judge.

Defendants appeal the district court's denial of their motion for a judgment notwithstanding the verdict or new trial. Plaintiffs cross-appeal, seeking trial and appellate attorney fees. **AFFIRMED ON CONDITION AND CASE REMANDED WITH INSTRUCTIONS.**

Janice M. Woolley of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O, Omaha, Nebraska, for appellants.

A. W. Tauke & Dustin P. Kreifels of Portor, Tauke, & Ebke, Council Bluffs, for appellees.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DOYLE, J.

Defendants Tri-Valley Bank, Jay Longinaker, and Marvin Penning appeal the district court's denial of their motion for a judgment notwithstanding the verdict or new trial. They argue the damages awarded by the jury, both actual and punitive, were excessive, duplicative, improper, and contrary to law. Additionally, defendants assert that the district court erred in allowing plaintiffs to inquire into attorney-client privileged matters, and that they were prejudiced by the plaintiffs' actions in referring to attorney-client privileged matters. Plaintiffs Pamela Morgan and Kim Becker cross-appeal, seeking trial and appellate attorney fees. We affirm on condition and remand the case to the district court with instructions.

***I. Background Facts and Proceedings*.**

Plaintiffs and sisters Pamela Morgan and Kim Becker grew up raising and showing horses. In their adult life, both plaintiffs raised, showed, and bred horses as a side business and hobby.

In 1997 Morgan purchased a tract of land in Fremont County, Iowa. In purchasing her land, Morgan obtained a loan from defendant Tri-Valley Bank (the Bank), formerly known as Randolph State Bank. At that time, defendant Jay Longinaker was the Bank's executive vice president and chief lending officer, as well as a partial owner. Prior to his employment at the Bank, Longinaker practiced law for thirteen years. Defendant Marvin Penning was the Bank's loan officer.

Morgan's loan was secured by a mortgage on her real estate. Additionally, Morgan entered into a security agreement with the Bank granting

the Bank a security interest in Morgan's horses, among other things, to secure all of her debts, liabilities, and obligations with the Bank. She subsequently obtained a second mortgage on the real estate from a private third-party. In 2003, Morgan refinanced her loan with the Bank, and she re-entered into the security agreement with the Bank.

In approximately 2005, Morgan fell behind on her real estate taxes. She received additional funds from the Bank to pay the taxes, which became a third mortgage on the real estate. At some point that year, Longinaker and Penning visited Morgan's farm to see her horses. Penning later filed a report indicating that Morgan had twenty horses worth $43,750.

Thereafter, Morgan defaulted on her mortgage with the Bank. In May 2006, the Bank filed a petition to foreclose the mortgage without redemption and waiving any right or claim to a deficiency judgment against Morgan. On January 3, 2007, the district court entered a decree of in rem foreclosure, ordering a foreclosure sale of Morgan's real estate. The decree stated that the Bank waived any deficiency in its judgment.

Just prior to the sheriff's sale, Morgan moved herself and her horses to Becker's property, which adjoined Morgan's foreclosed property. A sheriff's sale of Morgan's real estate was held in July 2007. The second mortgage holder purchased the property; the Bank did not place a bid. After applying the proceeds of the purchase price to the liens against the property, there remained a $7990 deficiency on the Bank's loans.

Ultimately, the Bank's loan committee determined it wanted to collect the deficiency from Morgan. The loan committee included Longinaker, then

president of the Bank, and Penning, then vice-president of the Bank. In approximately August 2007, the Bank allegedly mailed a "Loan Account Inquiry" to Morgan at Morgan's old address. The inquiry statement showed information about Morgan's loan such as a current balance and payoff amount. On the bottom of the inquiry statement was a handwritten note indicating that Morgan owed the Bank $8615.07 plus per diem after the foreclosure proceeds were applied to her loan. Morgan allegedly did not receive the inquiry statement, and she did not pay the Bank the amount it asserted she owed.

The Bank's loan committee then decided to "repossess" Morgan's horses in an attempt to satisfy the money it claimed Morgan still owed. Penning contacted Becker to ascertain where Morgan's horses were being kept. On September 13, 2007, Longinaker and Penning entered Becker's property and took possession of fifteen horses. Eleven of the horses taken were owned by Morgan, and the other four horses were owned by the Beckers. Longinaker and Penning loaded the horses onto trailers and transported them to secret locations.

Plaintiffs discovered that their horses were missing around 5:30 p.m. on the evening of the 13th. Becker found that her fence between her property and Morgan's former property had been cut down. Becker reported the missing horses to the sheriff and learned the horses had been repossessed by the Bank and Longinaker. Becker's husband called Longinaker at home and demanded that the Beckers' horses be returned. Longinaker told Becker's husband that he would exchange the Beckers' four horses for four of Morgan's horses, but would not tell him where the horses were. Becker and Morgan then drove around that night looking for their missing horses but were unable to locate them.

The next day both plaintiffs stayed home from work to recover their horses. Morgan spoke to Longinaker on the phone around 9 a.m. to find out what was going on. Longinaker demanded she pay the Bank $7990 to satisfy the amount the Bank claimed was still due. Longinaker offered to exchange the Beckers' four horses for four of Morgan's horses. Morgan said she did not believe she still owed the bank money and that she would have her attorney call the Bank.

Morgan related her conversation to Becker, and Becker offered to use her own funds to pay the amount demanded by the Bank to return their horses. Becker called Longinaker back and asked for the exact amount Morgan owed. Becker advised Longinaker she would be bringing in a check for the amount demanded by Bank, and she requested that the Bank provide her with a release stating Morgan was completely released of any and all other obligations that she owed the Bank.

Morgan and Becker went to the bank and met with Penning. Becker tendered a check for $7990 to the Bank, and Penning then presented to Morgan and Becker documents titled "Agreement," drafted by Longinaker, for their signatures. In addition to the release language requested by Becker, the agreement contained a paragraph stating:

> Pam Morgan and Kim Becker hereby unconditionally release [the Bank], it's officers, employees and any third parties acting on behalf, or independent contractors working for said bank, from any and all liability for any acts, omissions, or occurrences from the beginning of time, up to and including the date of this agreement, and further releases without limitation any liability for any trespassing or seizure of any horses in Fremont County, Iowa on September 13th, 2007, and for their subsequent return at any later date.

The plaintiffs refused to sign the agreement with the additional language. Penning called Longinaker, who was at another bank branch, and gave Becker the phone. Becker spoke with Longinaker, and Longinaker told her she and Morgan had to sign the agreement or he would not release their horses. After discussing the matter for a period of time, Longinaker eventually agreed to tell the plaintiffs where their horses were being kept. By approximately 10:30 p.m. on September 14, 2007, Morgan and Becker had recovered all of their horses.

On December 24, 2007, Morgan and Becker filed their petition at law, amended in November 2008, asserting claims against defendants for conversion and civil extortion (Count 1) and intentional infliction of emotional distress (Count 2). Additionally, Becker asserted a claim against defendants for trespass upon her land (Count 3). Defendants answered, denying the claims and asserting various affirmative defenses and counterclaims.

In July 2008, plaintiffs filed a motion for partial summary judgment as to their conversion claims against defendants and to defendants' counterclaims. Defendants resisted, asserting they were entitled to enforce all of their remedies including enforcement of the security interest in all collateral for the indebtedness of Morgan to the Bank. The Bank claimed it

> did not attempt to obtain the entry of a deficiency judgment or to enforce any "deficiency" following the real estate foreclosure. Rather, by taking action to gain possession of the horses at issue in this action, [the Bank] was enforcing its rights in the personal property collateral Morgan pledged for said loans from [the Bank].

In support of its resistance, the Bank attached the affidavit of Longinaker, in which Longinaker stated, in relevant part:

> [N]one of the defendants have ever sought entry of or enforcement of a deficiency judgment against [Morgan] at any time.
>
> . . . .
>
> [I]n early September 2007 there remained an unpaid indebtedness due [to the Bank] secured by said horses in the approximate amount of $8,100.00. Fearing that the horses would be sold and the proceeds not applied to the debt, *and after consultation with outside counsel*, it was decided to take possession of said horses.

(Emphasis added.) The court granted plaintiffs' motion, finding judgment should be entered in their favor on their conversion claims and that defendants' counterclaims should be dismissed. The court specifically found:

> Defendants [did] not dispute that [the Bank] foreclosed on the mortgage it had with Morgan and waived the right to a deficiency in the foreclosure action. . . .
>
> . . . [T]hrough the foreclosure, [the Bank] exhausted the full measure of remedy available to it against Morgan. Because [the Bank] cannot seek foreclosure of a mortgage in one action, and in a later one ask for a personal judgment against Morgan, Morgan is entitled to judgment as a matter of law. Accordingly, the court holds defendants' taking of [plaintiffs'] horses was wrongful.
>
> The wrongful taking of [plaintiffs'] horses amounted to a conversion thereof because defendants intentionally exercised control over the horses. . . . [Plaintiffs] are entitled to the reasonable and necessary expenses incurred in maintaining this action, as these are proper damages in a conversion action.
>
> In addition, defendants intentionally exercised control over Becker's $7990.00. The exercise of control over this money so seriously interfered with Becker's right to control the money that defendant may justly be required to pay the full $7990.00. In addition, Becker is entitled to the reasonable and necessary expenses incurred in recovering the $7990.00, including expenses incurred in preparation for trial, as these are proper damages in a conversion case.

In December 2008, plaintiffs filed a motion for preliminary ruling on waiver of attorney–client privilege. Plaintiffs sought to discover defendants' communication(s) with Mark Swanson, the Bank's attorney who handled the foreclosure of Morgan's real estate, based on statements in Longinaker's

affidavit, attached to defendants' partial summary judgment resistance, and Longinaker's answer to an interrogatory, which stated that he did discuss the decision to take plaintiffs' horses "with legal counsel for [the Bank] which discussions are subject to the [a]ttorney-[c]lient privilege." Defendants resisted, asserting they had not waived attorney-client privilege. The court found that the affidavit and the answer to the interrogatory did not provide a realistic basis upon which to find defendants knowingly and voluntarily waived the privilege.

Prior to trial, plaintiffs filed a motion in limine seeking to prohibit defendants from asserting the defendants had a good-faith belief in their actions based upon the advice of counsel, because plaintiffs had been unable to pursue the necessary discovery for preparation of their defense against defendants' good-faith defense. Plaintiffs' motion noted that said counsel would not be available as an impeachment witness at the trial because he would be out of state. Defendants resisted, asserting they had not waived the attorney-client privilege. Because the attorney would not be available during the trial, the court found that, although defendants had not waived their privilege, plaintiffs were allowed to depose the attorney in the event that such evidence became later admissible. The court did not find that the deposed testimony would be admissible. Plaintiffs then deposed the attorney.

Thereafter, the matter proceeded to jury trial. Morgan testified she was frantic and sickened when she learned the horses were missing; she was in disbelief and shock, then panic and fear. She testified she was very upset she had involved her family in the matter and that her sister was really upset. She testified, based upon her experience in buying and selling horses, her eleven

horses were worth a total value of $64,000. Morgan testified that her horses did not sustain any physical injuries, but they were very stressed out, frenzied, agitated, and very upset after the incident. She testified the horses were extremely nervous and "spooky" after the incident, and remained agitated for a number of months after the incident. She testified the youngest stallion and his father "just absolutely hate[d] each other" after the incident, and it took close to a year to get them to settle down. She testified she had to miss one day of work.

Becker testified her four horses taken by the Bank were worth a total value of $40,000. She testified she was personally traumatized after her horses were taken. She testified her horses did not sustain any physical injuries, but they were extremely stressed and agitated after their return. She testified she earned $211 a day, and Morgan earned $150 a day. She also testified it cost $50 to replace the downed fence. Becker's husband testified that the plaintiffs were very upset after the horses were taken, and he had to miss a day of work as well.

Plaintiffs then called Longinaker as an adverse witness. On their direct examination of Longinaker, the following exchange occurred:

> Q. And did you consult outside counsel to inquire as to whether you could repossess the horses? A. I don't recall ever talking to anyone.
>
> . . . .
>
> Q. So you did talk to an attorney? A. At some point, I probably did, yes.
>
> Q. And did you follow that attorney's advice? A. Yes.
>
> Q. And what was the advice that he gave you?
>
> [DEFENSE COUNSEL]: Object on the basis of attorney[-] client privilege.
>
> [THE COURT]: Sustained.
>
> Q. Do you call on attorneys to get an opinion about what to do? A. From time to time.
>
> Q. And on this particular case, you weren't sure what to do; is that correct? A. I guess that's a fair statement, yes.

> Q. And so you sought the advice of an attorney as to what to do in this case? A. I sought some input from someone else.
>
> Q. And who was it you called? A. Mark Swanson.
>
> . . . .
>
> Q. And my question is then did you follow his advice? A. Yes.
>
> Q. So are you telling me Mr. Swanson said you could go ahead and take those horses?
>
> [DEFENSE COUNSEL]: Object. Attorney[-]client privilege.
>
> [THE COURT]: Sustained.
>
> Q. So on the basis of what Mr. Swanson said, the bank made the decision to repossess the horses? A. Not necessarily on the basis of what Mr. Swanson said; on the basis of what he said and my own legal research.
>
> . . . .
>
> Q. So is it your testimony then that you're going to use the attorney[-]client privilege to prevent us from asking you about whether Mr. Swanson told you that you could or could not take the horses?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Same objection.
>
> [THE COURT]: Sustained.
>
> Q. Is that right?
>
> [DEFENSE COUNSEL]: Same objection.
>
> [PLAINTIFFS' COUNSEL]: Oh, I'm sorry. I'm sorry. Okay.
>
> [THE COURT]: Sustained.
>
> Q. Did you seek any written opinion from any—from Mr. Swanson?
>
> [DEFENSE COUNSEL]: Same objection, Your Honor.
>
> [THE COURT]: No. Overruled as to that question.
>
> A. No. I did not.
>
> Q. And is it your statement to the jury that you can't remember if you talked to [Mr. Swanson] or if maybe Mr. Penning talked to him? A. Correct.
>
> Q. So the bank decided to go out and take the horses? A. We decided to repossess the horses under the Uniform Commercial Code.

He further testified he intended to collect twenty-six of Morgan's horses pledged in the security agreement, which Morgan had previously stated were worth $46,000, to satisfy the $8000 the Bank claimed Morgan owed. Morgan testified he only took fifteen horses, thinking those were the only horses belonging to Morgan. He testified he did not intend to take the Beckers' horses.

Longinaker also testified they did not cut the Beckers' fence to gain entry to the property.

Plaintiffs also called Penning as an adverse witness. On plaintiffs' direct examination, plaintiffs similarly questioned Penning as to whether attorney advice was sought prior to defendants' taking of plaintiffs' horses and whether or not defendants followed the attorney's advice. The court sustained all questions related to the substance of the attorney's communications to defendants.

At the end of plaintiffs' case-in-chief, outside the presence of the jury, plaintiffs sought admission of Mark Swanson's deposition into evidence. Plaintiffs again argued that Longinaker's testimony constituted a waiver of attorney-client privilege and that Swanson's deposition was admissible as impeachment. Defendants resisted, and the court ruled that at that time, defendants had not waived their attorney-client privilege.

In defendants' case-in-chief, plaintiffs again cross-examined Longinaker about whether their decision to take Morgan's horses was based upon the advice of counsel. Longinaker again testified he followed the advice of Swanson, but the court sustained defense counsel's objections to the questions concerning the substance of Swanson's advice.

Evidence was also presented as to defendants' income and net worth. Longinaker's individual tax return, which was jointly filed with his spouse and included her income, was admitted into evidence. Longinaker testified regarding his and his wife's income on the tax return. Additionally, Longinaker's 2006 and 2007 balance sheets were admitted into evidence, showing his personal net worth to be approximately nine million dollars. Longinaker also testified as to the

Bank's income, and the Bank's 2008 "Uniform Bank Performance Report" was admitted into evidence. The report showed the Bank's net income in September 2008 was $272,000.

The matter was then submitted to the jury. The district court having already found all three defendants were liable for conversion, the jury awarded compensatory damages to Becker in the amount of $12,990 and to Morgan in the amount of $5900. The conversion damages were broken down as follows:

	Kim Becker	Pamela Morgan
Expenses incurred to recover horses, including:		
Amount paid for release of horses:	$7,990.00	not applicable
Travel Expenses:	$500.00	$250.00
Loss of Wages:	$400.00	$150.00
Injury to horses:	$1,100.00	$2,500.00
Past mental pain and suffering:	$3,000.00	$3,000.00
	$12,990.00	$5,900.00

The jury found Longinaker and the Bank liable to Becker for trespass and awarded her $50 in damages. The jury found Longinaker and the Bank liable for extortion as to both plaintiffs and awarded them $10,000 each for their past mental pain and suffering. The jury did not find any of the defendants liable for intentional infliction of emotional distress. The jury found Longinaker personally liable for punitive damages, awarding Becker $80,000 and Morgan $55,000 in punitive damages. Additionally, the jury found the Bank liable for punitive damages, awarding Becker $25,000 and Morgan $25,000 in punitive damages. The jury found the value of the Beckers' four horses to be $30,000 and Morgan's eleven horses to be $40,000.

Following trial, defendants filed a motion for judgment notwithstanding the verdict or a new trial, raising numerous issues. Plaintiffs resisted and also filed

an affidavit for allowance of attorney fees. The court subsequently denied both motions.

Defendants now appeal. They argue that the damages awarded, both actual and punitive, were excessive, duplicative, and contrary to law. Additionally they assert that the district court erred in allowing plaintiffs to inquire into attorney-client privileged matters and that they were prejudiced by the plaintiffs' actions in referring to attorney-client privileged matters. Plaintiffs cross-appeal, seeking trial and appellate attorney fees.

II. Defendants' Appeal.

A. Actual Damages.

Defendants contend they are entitled to reversal of the damage awards or a new trial because the awards were excessive, duplicative, and contrary to law.

> The standard of review of a denial of a motion for new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court. If the motion and ruling are based on a discretionary ground, the trial court's decision is reviewed on appeal for an abuse of discretion. We review the district court's denial of a motion for a new trial based on the claim a jury awarded excessive damages for an abuse of discretion. An abuse of discretion occurs when the court's decision is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree.

WSH Props., L.L.C. v. Daniels, 761 N.W.2d 45, 49 (Iowa 2008) (internal quotations and citations omitted). An award that is flagrantly excessive or unsupported by the evidence may be set aside or altered on appeal. *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969).

The assessment of damages is peculiarly a jury, not a court, function. *Gorden v. Carey*, 603 N.W.2d 588, 590 (Iowa 1999). A jury's decision should be

disturbed only for the most compelling reasons. *Rees v. O'Malley*, 461 N.W.2d 833, 839 (Iowa 1999). A jury award should be reduced or set aside

> only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice, or other ulterior motive; or (4) is lacking in evidentiary support.

Id. (citation omitted). In reviewing claims of excessive damages, we view the evidence in the light most favorable to the plaintiffs. *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). The verdict must not be set aside merely because the reviewing court would have reached a different conclusion. *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988).

***1. Conversion Damages*.**

***a. Lost Wages*.**

Defendants contend the damages awarded to Becker for lost wages exceeded the amount claimed to be lost by Becker and thus lacked evidentiary support. We agree.

> Conversion damages are intended to compensate the wronged party for a loss sustained because property was wrongfully taken. Thus, the primary principle to be applied in awarding damages for loss of property through conversion is that the owner should be compensated for the actual loss sustained.

18 Am. Jur. 2d *Conversion* § 116, at 225 (2004). Here, the jury awarded Becker $400 in lost wages; however, her testimony was that she had lost wages in the amount of $211. Therefore, the jury's greater award of damages for Becker's lost wages lacks evidentiary support.

Although we have concluded the jury's award of damages for Becker's lost wages lacks evidentiary support, we may still exercise our inherent power to

order a remittitur as a condition to avoid a new trial. *WSH Props., L.L.C.*, 761 N.W.2d at 52 (citing *Miller v. Young*, 168 N.W.2d 45, 52-53 (Iowa 1969); *In re Ronfeldt's Estate*, 261 Iowa 12, 28, 152 N.W.2d 837, 847 (1967)). We conclude Becker's damage award for lost wages on her conversion claim should be reduced to $211, the actual amount she lost in wages.

***b. Injury to Horses*.**

Additionally, defendants argue the damages awarded for injury to the horses lacked evidentiary support as there were no physical injuries to the horses and emotional damages are not recoverable in Iowa. We agree and find the jury's awards of $1100 to Becker and $2500 to Morgan for injury to their horses lack evidentiary support.

"A horse is a horse, of course, of course," [1] which is why a horse cannot recover damages for emotional distress. Under Iowa law, the "'damage resulting from injury to an animal is the difference in value before and after the injury.'" *Nichols v. Sukaro Kennels*, 555 N.W.2d 689, 692 (Iowa,1996) (quoting *Miller v. Economy Hog & Cattle Powder Co.*, 228 Iowa 626, 641, 293 N.W. 4, 11 (1940)). Both Becker and Morgan testified that their horses did not sustain any physical injuries. Although plaintiffs testified that their horses sustained mental or emotional injuries following their illegal taking, neither plaintiff offered any evidence that her horses' value had decreased after the incident. Consequently, we find the jury's award of damages to Becker and Morgan for injury to the horses in their conversion to lack evidentiary support. We therefore conclude

[1] Jay Livingston, *Mister Ed* (words and music by Jay Livingston & Ray Evans), from *Mister Ed* (CBS 1961-66).

that plaintiffs' damage awards for injury to their horses on their conversion claims should be reduced to zero.[2]

***c. Plaintiffs' Past Mental Pain and Suffering*.**

Defendants next argue that the damage awards to plaintiffs for their past mental pain and suffering on their conversion claims were excessive.[3] The jury awarded each plaintiff $3000 for their past mental pain and suffering against the Bank and Longinaker. Although another jury or court could have reached a different conclusion in the amount to award plaintiffs, viewing the evidence in a light most favorable to plaintiffs, we do not find the jury's awards to be flagrantly excessive. Here, defendants illegally converted plaintiffs' horses. Plaintiffs testified as to their mental and emotional states following the defendants' taking of their horses. We conclude their testimony, when supported by the facts of the defendants taking their horses illegally, was sufficient evidence of the plaintiffs' past mental pain and suffering. We therefore decline to reduced or set aside that damage award.

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[2] *See also Oberschlake v. Veterinary Assocs. Animal Hosp*., 785 N.E.2d 811, 814-15 (Ohio Ct. App. 2003) (holding that plaintiff pet owners could not recover on a claim for the emotional distress of their miniature poodle "Poopi," explaining that "[a]lthough Poopi was obviously directly involved in the incident, a dog cannot recover for emotional distress—or indeed for any other direct claims of which we are aware. We recognize that animals can and do suffer pain or distress, but the evidentiary problems with such issues are obvious. As a result, the claims on Poopi's behalf were also not viable.").

[3] No objection was made to the submission of the mental pain and suffering instruction and it stands as the law of the case. *State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009).

***2. Civil Extortion Damages*.**

***a. Lack of Evidentiary Support*.**

Defendants first argue that the damage awards upon plaintiffs' civil extortion claims lack evidentiary support, asserting that the facts do not support plaintiffs' claims for civil extortion. We disagree.

Defendants do not challenge the jury instructions on the civil extortion or conversion claims, and they have therefore become the law of the case. *See Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 14 (Iowa 1990) ("The jury rejected the qualified privilege defense as set out in the court's instructions which, without objection, must be considered to be the correct law."). Under the instructions, to recover on their claims of civil extortion, plaintiffs were required to prove:

> 1. One or more of the defendants, with the purpose of obtaining for themselves or another, anything of value, threatened to commit the public offense of theft;
> 2. The threat was communicated to and directed toward plaintiffs;
> 3. The defendants' actions were the proximate cause of plaintiffs' damages;
> 4. The amount of damages.

The instructions further explained:

> A person commits the public offense of theft when the person takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
>
> No person who takes, obtains, or controls property, is guilty of theft by reason of such act if the person reasonably believes that the person has [the] right, privilege, or license to do so, or if the person does in fact have such right, privilege, or license.

"The jury, as the finder of fact, is free to accept or reject evidence on . . . any . . . issue." *Blume v. Auer*, 576 N.W.2d 122, 125-26 (Iowa Ct. App. 1997). Viewing the evidence in the light most favorable to plaintiffs, the record

would allow a reasonable jury to conclude the Bank and Longinaker were liable for civil extortion. Here, the Bank had no right to collect plaintiffs' money since it waived a deficiency judgment against Morgan, and it had no business dealings with Becker. Nevertheless, the Bank, at Longinaker's direction, took possession and control of Becker's money with the intent to deprive her thereof. Similarly, the Bank, at Longinaker's direction, threatened to take possession and control of Morgan's money with the intent to deprive her thereof. Defendants testified as to their asserted good-faith belief to take or threaten to take plaintiffs' money; however, the jury, based upon its verdict, clearly rejected defendants' defense. We conclude there was sufficient evidence to conclude the Bank and Longinaker were liable for civil extortion.

***b. Duplicative Awards*.**

Defendants argue plaintiffs' compensatory damage awards upon plaintiffs' extortion claims are duplicative of their compensatory damage awards for past mental pain and suffering on their conversion claims. It is true that "[d]uplicate or overlapping damages are to be avoided." *Team Central, Inc. v. Teamco, Inc*., 271 N.W.2d 914, 925 (Iowa 1978) (citations omitted). However, the jury was instructed that a "party cannot recover duplicate damages" and that it should not "allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage." We presume the jury followed the court's instructions. *State v. Piper*, 663 N.W.2d 894, 915 (Iowa 2003).

While plaintiffs' conversion claims were based exclusively on defendants' taking of their horses, their civil extortion claims were based upon defendants' demands of money from plaintiffs. Thus, plaintiffs' claims are separate and

distinct wrongs, and the jury permissibly could have found separate damages on those grounds. We conclude the compensatory damages awarded in this case address two separate and distinct wrongs and do not constitute double recovery.

***c. Excessive Awards*.**

Defendants argue that the damage awards upon plaintiffs' extortion claims were excessive. Again, although another jury or court could have reached a different conclusion in the amount to award plaintiffs, viewing the evidence in a light most favorable to plaintiffs, we do not find the jury's awards to be flagrantly excessive. We agree with the district court that "[t]he amount awarded is not excessive considering the value of the horses and the amount of money demanded by defendants." Here, defendants demanded plaintiffs pay them $7990 for the return of the horses. Plaintiffs testified as to their mental and emotional states following the Bank's actions. We conclude their testimony, when supported by the facts of the defendants taking their horses and then demanding money for their release, was sufficient evidence of the plaintiffs' past mental pain and suffering. We therefore decline to reduced or set aside that damage award.

***B. Punitive Damages*.**

Defendants next contend that the punitive damages awards were improper, excessive, and duplicative. "We review an award of punitive damages for correction of errors at law." *Wolf v. Wolf*, 690 N.W.2d 887, 893 (Iowa 2005). However, "[a]ppellate review for excessiveness [of the punitive damages award] is de novo." *Id*. at 894.

***1. Impropriety of Awards*.**

Defendants argue plaintiffs failed to prove defendants' conduct constituted a willful and wanton disregard for plaintiffs' rights. We disagree.

Iowa Code section 668A.1 (2007) governs the award of punitive damages.

> Punitive damages may only be awarded when the plaintiff has shown "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). Willful and wanton conduct is shown when an
>
> > "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, and which thus is usually accompanied by a conscious indifference to the consequences."
>
> *Kiesau v. Bantz*, 686 N.W.2d 164, 173 (Iowa 2004) (quoting *Vlotho v. Hardin County*, 509 N.W.2d 350, 356 (Iowa 1993)). Punitive damages serve as a form of punishment, and as such, mere negligent conduct is not sufficient to support such a claim. *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230-31 (Iowa 2000). Punitive damages are only recoverable when the defendant acted with actual or legal malice.

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525, 528-29 (Iowa 2007). Merely objectionable conduct is insufficient. *See Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153, 156 (Iowa 1993); *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 255 (Iowa 1993).

The district court concluded:

> The bank made no effort to identify or segregate the horses or take any other precautions to avoid the unfortunate event that actually occurred. The evidence supports [the jury's] conclusion that the defendants' actions were in total disregard of the rights of Kim Becker, who they knew to have had horses on the property. In support of their disregard of her rights, the Bank was unwilling to immediately proceed to return the horses of Kim Becker upon

> discovering their mistake and error but rather held them for additional collateral of Pamela Morgan.
>
> [T]he bank failed to take into consideration that a waiver of deficiency judgment means that the note had been cancelled and that a cancelled note is considered paid and satisfied. It is also without question and it is basic fundamental law that a creditor is not entitled to any additional collateral once the obligation of a note has been satisfied. The Bank chose to ignore this basic requirement of the law to make up their deficiency from the foreclosure sale.

We agree. Viewing the evidence in a light most favorable to plaintiffs, we believe a reasonable fact finder could find "by a preponderance of clear, convincing, and satisfactory evidence [that] the conduct of the defendant[s] from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). We therefore conclude the jury's award of punitive damages was not improper.

***2. Duplicative Awards*.**

Longinaker argues that the punitive damages awards against him and the Bank were duplicative, as he was a partial owner of the Bank. We disagree.

> There is no doubt that when there are two defendants, there may be separate and different punitive damage awards. This is true because the purpose of such damages is to punish the wrongdoer rather than to compensate the victim. The amount necessary to punish one may be entirely inadequate to "hurt" the other.

Team Central, Inc., 271 N.W.2d at 925.

Although Longinaker, a partial owner of the Bank, was involved in the decisions that led to the taking of plaintiffs' horses and demanding money, evidence at trial was that the Bank's loan committee, which did not consist solely of Longinaker, made the decision to collect the deficiency remaining on Morgan's loans. Thus, the Bank was alleged to have independently committed a wrong

against plaintiffs, and we find the jury's lesser award of punitive damages against the Bank contemplates this consideration. Moreover, an independent punitive damage award against the Bank in this circumstance supports the very purpose of punitive damages. Accordingly, we find that the jury's punitive damages awards against Longinaker and the Bank are not duplicative.

***3. Excessive Awards*.**

In determining whether the punitive damages award was excessive, we consider three guideposts:

> (1) the degree of reprehensibility of the [defendants'] misconduct; (2) the disparity between the actual or potential harm suffered by the [plaintiffs] and the punitive damages award; and (3) the difference between the punitive damages awarded by the [trier of fact] and the civil penalties authorized or imposed in comparable cases.

Wolf, 690 N.W.2d at 894 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 1520, 155 L. Ed. 2d 585, 601 (2003)). Because punitive damages are intended to punish and deter, *see Beeman*, 496 N.W.2d at 255, of these factors, the degree of reprehensibility of defendants' conduct is the most important. *See Wolf*, 690 N.W.2d at 894.

In determining reprehensibility, the court considers a number of factors including whether the harm caused was physical as opposed to economic, the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, the conduct involved repeated actions or was an isolated incident, and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id*. On our de novo review of the record, we find all of these factors were established in the evidence. Here, defendants harmed plaintiffs by

taking their horses and demanding money from them without any basis for such demand, causing damages to plaintiffs. The harm was not a mere accident.

We next consider the disparity between the actual harm and the punitive damage award. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm Mut. Auto Ins. Co.*, 538 U.S. at 426, 123 S. Ct. at 1524, 155 L. Ed. 2d at 606. The United States Supreme Court has indicated that "[s]ingle-digit multipliers are more likely to comport with due process" than larger ratios. *Id*. at 425, 123 S. Ct. at 1524, 155 L. Ed. 2d at 608.

Becker's actual damages, as modified above, were $21,751, and Morgan's actual damages, as modified above, were $13,400. The jury awarded Becker punitive damages in the amount of $80,000 against Longinaker and $25,000 against the Bank. The jury awarded Morgan punitive damages in the amount of $55,000 against Longinaker and $25,000 against the Bank. The punitive damage awards are single-digit multipliers, and we conclude the awards comport with due process. Although there is a disparity here between the compensatory and punitive damages award, the disparity is not such that it raises a suspicion of inflamed passions on the part of the jurors. Rather, the amount of the punitive damages award reflects the jury's determination that conduct like defendants' should be deterred by a measure of punishment in an amount greater than the actual damages caused.

Finally, we are to consider the disparity between the punitive-damage award and the civil or criminal penalties authorized or imposed in comparable cases. *See id*. "The existence of a criminal penalty does have bearing on the

seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility." *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 428, 123 S. Ct. at 1526, 155 L. Ed. 2d at 608.

Here, criminal theft, set forth in Iowa Code sections 714.1 and .2, provides that theft of property greater than $10,000 in value is a class "C" felony. "A class 'C' felon, not an habitual offender, shall be confined for no more than ten years, and in addition shall be sentenced to a fine of at least one thousand dollars but not more than ten thousand dollars." Iowa Code § 902.9(4). Criminal extortion is a class "D" felony. Iowa Code § 711.4(7).

> A class 'D' felon, not an habitual offender, shall be confined for no more than five years, and in addition shall be sentenced to a fine of at least seven hundred fifty dollars but not more than seven thousand five hundred dollars.

Id. § 902.9(5).

Although the punitive awards were higher than the possible criminal fines, we do not find the punitive damages were grossly excessive. The amount of the possible criminal damages is far less than plaintiffs' actual damages. Moreover, the Bank cannot serve jail time for its actions.

Longinaker also argues the jury may have unfairly included his spouse's income when determining his income. However, we find his argument to be without merit. Longinaker testified as to his and his wife's income as set out his tax return. He also testified as to his personal net worth. We find no reason to conclude the jury included his spouse's income in the determination of the

punitive damage awards. Upon our de novo review, we affirm the jury's punitive damages awards.

***C. Attorney-Client Privilege*.**

Defendants next argue that the district court erred in allowing plaintiffs to inquire into attorney-client privileged matters, and that they were prejudiced by plaintiffs' actions in referring to defendants' attorney-client-privileged communications. We review "standard claims of error in admission of evidence for an abuse of discretion." *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." *Id*.; s*ee also* Iowa R. Evid. 5.103.

Although the court allowed plaintiffs' to depose the Bank's foreclosure attorney, the court expressly ruled that the deposition was not admissible at that time. Furthermore, the deposition was never admitted into evidence, and the plaintiffs' motion for the admission of the deposition was made outside the presence of the jury. As the deposition was not admitted into evidence, defendants cannot have been prejudiced by plaintiffs' actions concerning the deposition.

Similarly, although plaintiffs' asked defendants questions about their attorney-client-privileged communications, the court sustained all objections to questions concerning the substance of the communications. Defendants testified numerous times that they relied on the advice of counsel prior to taking plaintiffs' horses, but defendants never testified as to the substance of what the advice was. Thus, defendants were never required to waive their attorney-client

privilege, nor was their testimony impeached by plaintiffs' questions. If anything, defendants had the benefit of asserting reliance on the advice of counsel without the jury ever learning what that advice was. We accordingly find no abuse of discretion.

III. Plaintiffs' Cross-Appeal.

Plaintiffs cross-appeal, seeking trial and appellate attorney fees. "Whether to grant common law attorney fees rests in the court's equitable powers. Our review of this issue is therefore de novo." *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003) (internal citations omitted).

A. Attorney Fees for Conversion.

"Generally, a party has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award." *Id.* "Courts have recognized a rare exception to this general rule, however, 'when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Hockenberg Equip. Co.,* 510 N.W.2d at 158 (citation omitted). Additionally,

> in conversion cases, the reasonable and necessary expenses incurred in recovering the property are a proper element of damage. [89 C.J.S. *Trover & Conversion* § 174, at 650 (1955)]; 18 Am.Jur.2d *Conversion* § 117, at 231 (1985). In such cases, the expense of recovery is a "further pecuniary loss" recoverable under the Restatement rule. *See* Restatement (Second) of Torts § 927(2)(b) (1977).

State v. Taylor, 506 N.W.2d 767, 768 (Iowa 1993).

Plaintiffs plow new ground maintaining that attorney fees are reasonable and necessary expenses incurred in recovering converted property. No Iowa

case has expressly addressed this issue.[4] Additionally, other jurisdictions are split on the issue. *See* 18 Am. Jur. 2d *Conversion* § 131, at 252-53 (2004).

Upon our review, we conclude that although reasonable and necessary expenses incurred in recovering converted property may be awarded as damages, attorney fees are not so recoverable in the absence of a statutory or written contractual provision allowing such an award. Because there is no statute or written contractual provision allowing such an award, we find the district court did not err in failing to award attorney fees to plaintiffs on their conversion claims.

***B. Common Law Trial Attorney Fees*.**

Plaintiffs contend that defendants acted in bad faith, vexatiously, wantonly, or for oppressive reasons, such that common law attorney fees should be awarded. We disagree.

In denying plaintiffs' motion, the district court concluded:

> In [*Hockenberg Equip. Co.*, 510 N.W.2d at 158], the court noted the culpability for common law attorney fees exceeds the culpability required for punitive damages. At trial in this case, the jury awarded plaintiffs punitive damages. However, the court finds plaintiffs did not prove defendants' conduct exceeded the punitive damages standard and rose to the level of oppression or connivance. In support of this conclusion, the court points to the jury's determination that plaintiffs failed to prove their claims of intentional infliction of emotional distress. A finding of intentional infliction of emotional distress required plaintiffs [to] prove the following: the defendant[s] acted outrageously; the defendant[s] intentionally caused emotional distress or acted with reckless disregard of the probability of causing emotional distress; the plaintiff[s] suffered severe or extreme emotional distress; and, the defendant[s'] outrageous conduct was a proximate cause of the emotional distress. The intentional infliction of emotional distress

[4] Our supreme court has stated that expenses of litigation are "not similar to attorney fees in a civil case." *State v. Bonstetter*, 637 N.W.2d 161, 168, n.2 (Iowa 2001).

> standard (requiring "outrageous conduct" and "reckless disregard") is akin to the language used by the *Hockenberg* court (requiring "oppressive conduct" and "connivance"). Had the jury found in favor of plaintiffs on the claim of intentional infliction of emotional distress, it would likely follow that plaintiff[s] met the high standard envisioned by the *Hockenberg* court. Absent such a finding, the court determines common law attorney fees are not appropriate.

We agree with the district court's assessment. *See also Fennelly v. A-1 Mach. & Tool Co*., 728 N.W.2d 163, 181 (Iowa 2006) ("A plaintiff seeking common-law attorney fees must prove that the culpability of the defendant's conduct exceeds the punitive-damage standard."); *Wolf*, 690 N.W.2d at 896 (same). We therefore affirm the ruling of the district court.

***C. Appellate Attorney Fees*.**

Plaintiffs also request appellate attorney fees. As stated above, a party generally has no claim for attorney fees unless a statute or contractual term allows for such award. *Hockenberg Equip. Co.*, 510 N.W.2d at 158. Plaintiffs cite no authority for an award of appellate attorney fees, and we award none.

***IV. Conclusion*.**

For all of the foregoing reasons, we conclude Becker's lost wages damages on her conversion claim should be reduced to $211, and we conclude Morgan's and Becker's injury-to-horse damages on their conversion claims should be reduced to zero. We affirm the district court in all other respects, and we decline to award appellate attorney fees. If within twenty days from the issuance of procedendo in this case, plaintiffs file with the clerk of the Fremont County District Court a remittitur of all damages in excess of the amount established by this court, the judgment of the district court should be affirmed. If

the plaintiffs do not file a remittitur, the district court shall set the case for a new trial. *See WSH Props., L.L.C.*, 761 N.W.2d at 52.

AFFIRMED ON CONDITION AND CASE REMANDED WITH INSTRUCTIONS.