

**IN THE COURT OF APPEALS OF IOWA**

No. 6-301 / 05-0404

Filed August 9, 2006

**WSH PROPERTIES, LLC,**  
Plaintiff-Appellee,

**vs.**

**CURT N. DANIELS and INDIAN  
CREEK CORPORATION,**  
Defendants-Appellants.

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Appeal from the Iowa District Court for Lucas County, John Lloyd, Judge.

Defendants appeal following a jury verdict and judgment entry in favor of plaintiff in an action for a writ of replevin. **REVERSED AND REMANDED.**

Curt Daniels, Chariton, pro se and for Indian Creek Corporation, appellants.

James Nervig of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**MILLER, J.**

Defendants Curt Daniels and Indian Creek Corporation appeal following a jury verdict and judgment entry in favor of plaintiff WSH Properties, LLC, which awarded the plaintiff damages in the amount of \$246,000 and possession of certain property the defendants removed from realty the plaintiff acquired under a tax deed. Because it appears the jury's verdict was the result of passion, we reverse and remand for a new trial.

**I. Background Facts and Proceedings.<sup>1</sup>**

Curt Daniels is the sole shareholder of Indian Creek Corporation (ICC). ICC owned certain real property located near Mingo, Iowa, which it used in the operation of a hog confinement facility. After ICC ceased paying taxes on the Mingo property, WSH Properties, LLC (WSH) obtained title to the Mingo property by valid tax deed. Sometime thereafter, Daniels entered onto the Mingo property and removed property used in the hog confinement operation, including headgates, tailgates, anchor posts, pen dividers, fenceline feeders, bowl drinkers, and farrowing crates, decks, and deck floors (disputed property).

WSH filed a petition for a writ of replevin, seeking return of the disputed property and damages for its detention. Daniels filed an answer denying he was a proper party, as well as a motion for summary judgment asserting ICC was the only proper party defendant as it was the one that had removed and was in possession of the disputed property. The plaintiff and the defendants also filed cross-motions for summary judgment in which each side asserted the right to

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<sup>1</sup> This matter has an extensive procedural history, which includes a petition for relief filed with the United States Bankruptcy Court and resulting stay, and an unsuccessful application for interlocutory appeal. We have limited our description of the background facts and proceedings to those events we find relevant to the issues in this appeal.

possession of the disputed property could be determined as a matter of law: WSH asserted the disputed property was part of the real estate, and ICC and Daniels asserted it was personal property and thus belonged to ICC.

The district court set all pending summary judgment motions for hearing. In its summary judgment ruling, the court ruled on three issues, only one of which is relevant to this appeal: whether the disputed property was subject to assessment and taxation as real property under Iowa Code section 427A.1 (2003) and thus title to the disputed property passed to WSH under the tax deed, or whether the disputed property was personal property that could not be acquired by virtue of the tax deed and thus belonged to ICC.<sup>2</sup> Determining the record contained disputed issues of material fact on this question, the court denied both summary judgment requests. The court stated the foregoing was the only issue raised by the defendants, and did not rule on Daniels's individual summary judgment motion. However the court did find, under the summary judgment record, that the disputed property "was removed and is presently stored at [Daniels's] farm here in Lucas County."

The matter proceeded to jury trial. The jury was instructed, without objection, that WSH's right to possession of the disputed property depended upon proof the property fell within certain descriptive categories. These instructions mirrored provisions of section 427A.1 regarding what property, other than land, could be assessed and taxed as real property. The jury returned a verdict that found WSH was entitled to possession of all the disputed property, found that the value of the various items of disputed property totaled \$299,850,

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<sup>2</sup> The court also found the defendants were entitled to a jury trial, and that their counterclaims should be stricken.

and found WSH was entitled to damages for wrongful detention of the disputed property in the amount of \$533,952.

Daniels and ICC moved for a new trial and for a judgment notwithstanding the verdict on a number of grounds, including an assertion that the jury's verdict was the result of passion or prejudice. The district court denied the motions, except to the extent they challenged the values the jury had set for the items of disputed property and the amount of the jury's damage award for wrongful detention. The court rejected the notion that the verdict was the result of prejudice against the defendants because they operated a hog confinement facility, Daniels was a criminal defense attorney, or the plaintiff had implied the defendants had vandalized the Mingo property. However, the court agreed that the jury's awards exceeded the permissible range of the evidence. It determined the evidence supported a total value for the disputed property of only \$120,000, and total wrongful detention damages of \$246,000.

The court accordingly denied the defendants' motions, provided that WSH would file a remittitur for amounts in excess of the foregoing. WSH agreed that the record supported the court's modifications, agreed to a remittitur, and elected to receive delivery of the disputed property rather than the value of that property. The court subsequently entered judgment in favor of WSH for damages in the amount of \$246,000 and possession of the disputed property.

The defendants appeal, raising four claims. First, they assert the district court erred in denying Daniels's individual motion for summary judgment because ICC was the only proper party to this action. Second, they assert the court erred in denying their motion for summary judgment regarding the right to

possession of the disputed property, because under chapter 427A the disputed property was the personal property of ICC. Third, they assert that, because the jury awarded ICC property to WSH, the verdict violated their right to due process. Fourth, and finally, the defendants assert the jury's damage award was the result of passion and prejudice, and should accordingly be set aside.

## **II. Scope of Review.**

An action for a writ of replevin is an ordinary proceeding. Iowa Code § 643.2 (2001). Accordingly, our review is for the correction of errors at law. Iowa R. App. P. 6.4; *Keppy v. Lilienthal*, 524 N.W.2d 436, 438 (Iowa Ct. App. 1994).

## **III. Denial of Summary Judgment.**

We have serious doubts that the defendants have properly presented and preserved their first two claims for our review. First, we note they have not complied with Iowa Rule of Appellate Procedure 6.14(1)(f), which requires a party, for each issue raised, to state how the issue was preserved for review and refer to portions of the record that reveal where the issue was raised and decided by the district court. This failure alone is sufficient to waive an issue. *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 866 (Iowa 2001). Moreover, it appears the district court never ruled on Daniels's individual summary judgment motion. Ordinarily, an issue may not be raised and determined on appeal unless it was raised before and decided by the district court. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995).

However, the defendants' claims that the district court erred in denying their summary judgment requests face a more pressing problem. Once the proceeding has been submitted for a trial on the merits, such denials merge with

the trial and are no longer appealable or reviewable. *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004). In other words, “determinations made in advance of trial concerning a genuine issue of material fact will not constitute grounds for reversal where a full trial is subsequently held and sufficient evidence is produced to sustain the claim.” *Klooster v. North Iowa State Bank*, 404 N.W.2d 564, 567 (Iowa 1987).

The defendants urge us to nevertheless consider their claim regarding the right to possession of the disputed property because it “was before the District court during the trial” and “was raised in Appellants['] Post-Trial Motion.” We presume the defendants are attempting to assert it was improper to submit WSH’s replevin claim to the jury because, as a matter of law, the disputed property was the personal property of ICC. Such an assertion could be cast as a claim the district court erred in denying the defendants’ motions for a directed verdict and for a judgment notwithstanding the verdict.<sup>3</sup> However, the defendants fall far short of articulating such a specific claim on appeal or supporting it with relevant authority, and failure by a party to state, argue or cite authority in support of an issue may, again, be deemed waiver of that issue. Iowa R. App. P. 6.14(1)(c).

For the reasons stated above, we could decline to consider either claim. However, even if the claims were properly before us and subject to review, we would conclude they are without merit.

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<sup>3</sup> Although not referred to by the defendants, the transcript reveals the defendants did move for a directed verdict at both the close of the plaintiff’s evidence and the close of all the evidence.

**A. Proper Party.** As stated above, the question of whether Daniels was a proper party to this proceeding is not before us on appeal. We note, however, that by the time of trial, if not sooner, it was undisputed that Daniels instigated removal of the disputed property from the Mingo facility, and that at least the majority of the disputed property was being stored on Daniels's farm in Lucas County. Thus, as the person in possession, Daniels was not only a proper but necessary party to this replevin action. See *Ryan v. Iowa Dist. Court*, 329 N.W.2d 658, 660 (Iowa 1983) ("The right to possession cannot be adjudicated unless the court obtains personal jurisdiction of the person in possession.").

**B. Right of Possession as a Matter of Law.** Again, as noted above, this matter is reviewable, if at all, as an assertion the district court erred when it denied the defendants' motions for a directed verdict. Error will be found only if WSH failed to present substantial evidence on each element of its claim. *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 641 (Iowa 2000); see also *Channon*, 629 N.W.2d at 859 (providing JNOV motion stands or falls on grounds in directed verdict motion). Review of this issue is limited to the elements as they were submitted to the jury on instructions to which the defendants did not object. See *Sullivan v. Wickwire*, 476 N.W.2d 69, 72 (Iowa 1991) ("[A]n instruction submitted to the jury without objection becomes the law of the case and will not be disturbed on appeal.").

Here, Instruction No. 10 informed the jury that WSH was entitled to possession of the disputed property if WSH proved the disputed property fell within one of two categories:

1. Buildings, structures, or improvements constructed on or in land, attached to land, or placed upon a foundation, whether or not attached to the foundation, or
2. Buildings, structures, equipment, machinery, or improvements which are attached to buildings, structures or improvements defined in paragraph 1.

Instruction No. 11 informed the jury that “attached,” as used above, meant any of the following:

1. Connected by an adhesive preparation.
2. Connected in a manner so that disconnecting requires the removal of one or more fastening devices, other than electric plugs.
3. Connected in a manner so that removal requires substantial modification or alteration of the property removed or the property from which it is removed.

Property is not “attached” if it is a kind of property which would ordinarily be removed when the owner of the property moves to another location. This determination is to be made in general, without taking into account the intent of the particular owner of the property.

The foregoing instructions were based on and consistent with section 427A.1’s definitions of property subject to assessment and taxation as real property. See Iowa Code § 472A.1(1)(c)-(d), (2), (3).

The defendants do not dispute that the property they removed from the hog confinement facility could be found to be an improvement, equipment, or machinery within the context of section 472A.1(1)(c) and (d), as reflected under either alternative in Instruction No. 10. Rather, they contend the court erred because the disputed property is not “attached” within the meaning of section 427A.1(2) and (3), as reflected in Instruction No. 11. There are two flaws in the defendants’ argument.

First, section 427A.1’s definitions of attachment are relevant only when “an ‘attachment’ determination is required in order to decide whether certain

property may be assessable.” *Western Outdoor Adver. Co. v. Bd. of Review*, 364 N.W.2d 256, 258 (Iowa 1985). The jury was instructed, in part, that WSH had a right to the disputed property if it proved the property constituted improvements constructed on land or placed upon a foundation. “Attachment” has no relevance to these definitions. Second, for the categories that require proof of “attachment,” attachment, or lack thereof, is a factual question. See *Rose Acre Farms, Inc. v. Bd. of Review*, 479 N.W.2d 260, 263 (1991).

The jury in this case was presented with conflicting evidence regarding whether the disputed property was of the type assessed as real property under section 427A.1, including whether it was “attached” to the realty. While the defendants are able to point to evidence in support of their position, so too can the plaintiff. When we review the record in the light most favorable to WSH, see *Channon*, 629 N.W.2d at 859, we must conclude that the physical nature of the disputed property and the realty on which it had been located, in connection with the remaining evidence, substantially supports a determination that the disputed property fell within one or more definitions under Instruction No. 10. Because a jury question was engendered on this issue, we cannot conclude the district court erred by refusing to rule, as a matter of law, that the disputed property was personal property belonging to ICC.

#### **IV. Jury Passion and Prejudice.**

We therefore turn to the defendants’ final claim in this appeal,<sup>4</sup> that the verdict in WSH’s favor was the result of passion and prejudice because “jurors don’t like hog farms or hog farmers,” and the defendants “were incorrectly seen

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<sup>4</sup> In light of the foregoing conclusion, we need not consider the defendants’ claim that they were deprived of personal property without due process of law.

by [the] jury as a large, polluting hog farmer.” We presume this is a claim the verdict should be set aside and a new trial granted because the verdict “raises a presumption it is the result of passion, prejudice or other ulterior motives . . . .” *Neumann v. Service Parts Headquarters*, 572 N.W.2d 175, 177 (Iowa Ct. App. 1997). Once again, we could decline to rule on this issue, because the defendants have again failed to state how the issue was preserved for review or refer to portions of the record that reveal where the issue was raised and decided by the district court. Iowa R. App. P. 6.14(1)(f); *Channon*, 629 N.W.2d at 866. However, the defendants’ failure in this regard has not hampered our review, as the record readily reveals this claim was made in the defendants’ motion for a new trial, and rejected by the district court in its ruling on the same. We will accordingly consider the merits of the contention.

The district court may grant a new trial when a party’s substantial rights have been materially affected by an excessive damage award that appears to have been influenced by passion or prejudice. Iowa R. Civ. P. 1.1004(4). The district court has broad but not unlimited discretion to determine if the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.14(6)(c); *Neumann*, 572 N.W.2d at 176-77. We accordingly review the court’s denial of the defendants’ new trial motion for an abuse of discretion. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996).

If the record does not provide substantial support for the jury’s award, but it does not appear the award was the product of passion or prejudice, then substantial justice may be effectuated by ordering a remittitur of the excess as a condition for avoiding a new trial; however, if the verdict is the result of passion or

prejudice, a new trial should be granted. See *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969); see also Iowa R. Civ. P. 1.1010(1); *Ezzone v. Riccardi*, 525 N.W.2d 388, 404 (Iowa 1994).

Here, it is clear the verdict is not supported by the evidence. As the district court recognized in its remittitur ruling, both the award for wrongful detention and the values set for the items of disputed property significantly exceed even the highest estimates and figures offered by the plaintiffs. Although the court found the verdict was not the result of prejudice against hog farmers, it also expressly found that

[a]n overall look at the damages awarded by the jury leaves the court with the abiding impression that the jury was simply angry with the defendants and sought to punish them accordingly. This led the jury to award damage amounts that exceeded the reasonable amounts supported by the evidence.

Even if there was no evidence the jury was prejudiced against hog farming operations, prejudice is not the only basis upon which a jury verdict may be set aside. A verdict may also be set aside if it appears to be the product of passion. Iowa R. Civ. P. 1.1004(4); *Neumann*, 572 N.W.2d at 177. The district court expressly found the verdict was the result of the jury's anger with the defendants and a desire to punish them by awarding excessive damages. In the face of such an explicit finding, fully supported by verdicts whose amounts greatly exceed any evidence, we conclude the court abused its discretion when it nevertheless denied the defendants' new trial request.

#### **IV. Conclusion.**

Because the jury's verdict was the result of passion, the district court abused its discretion when it denied the defendants' motion for a new trial. We

accordingly reverse the district court's judgment and remand for a new trial on all issues presented. See *Householder v. Town of Clayton*, 221 N.W.2d 488 493-94 (Iowa 1974) ("As a general rule, new trials will be granted as to the whole case and on all of the issues, and seldom on the issue of damages only, except where liability of a defendant is definitely established.").

**REVERSED AND REMANDED.**