IN THE COURT OF APPEALS OF IOWA

No. 7-362 / 06-1288
Filed October 12, 2007

THELMA J. HOEPPNER,
Plaintiff-Appellee,

vs.

DON E. HOLLADAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals from the district court's rescission of a deed and award of punitive damages and attorney fees. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

James W. Affeldt and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper & Preacher, Bettendorf, for appellee.

Heard by Zimmer, P.J., and Eisenhauer, J, and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SCHECHTMAN, S.J.

The district court (1) rescinded a quit claim deed from the plaintiff to the defendant; (2) awarded $20,000 punitive damages to the plaintiff; and (3) assessed $4900 of plaintiff's attorney fees to the defendant. The defendant appeals these awards and further asks, in the event the rescission is affirmed, to restore the status quo and enter judgment for the sum forwarded by him to liquidate the mortgage upon the subject real estate.

I. SCOPE OF REVIEW.

This action was captioned at law, but docketed in equity. Rescission is an equitable remedy. *See City of Ottumwa v. Poole*, 687 N.W.2d 266, 268-69 (Iowa 2004). There was no agreement to try it at law. Our review is accordingly de novo. Iowa R. App. P. 6.4; *Fairfax v. Oaks Dev. Co.*, 713 N.W.2d 704, 706 (Iowa 2006). In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.14(6)(*g*).

II. BACKGROUND FACTS.

This is a classic "he says, she says" dispute. The plaintiff, Thelma Hoeppner (Thelma), and the defendant, Don Holladay (Don), gave widely differing accounts of the material events. The district court expressly found Don's testimony to be "not credible," "completely incredible," and "not believable." To these adjectives, this court would append "implausible" and "incredulous." Some of Don's contrary versions are noted.

In 2000, Thelma, then in her early fifties and a widow for eight years, had decided to sell her home in Davenport. She was considering downsizing and

moving to a smaller community. Real estate acquisition and disposition were foreign to her as she had lived in her home for over thirty years. Thelma phoned the department at John Deere where her deceased husband had worked to ask another co-employee for some insight and assistance. Don happened to answer. Upon learning of Thelma's plans, Don volunteered to help, boasting of his vast realty experience.[1]

Don, a divorcee and several years younger, lived in Wilton. He owned a farm and several other real properties in the area. His stops at Thelma's to assist progressed to almost daily sexual encounters.[2] Thelma trusted Don and fell in love.[3] Don allowed her to store some of her belongings in another house in Wilton, owned by him, to make her home less cluttered for viewing by prospective purchasers. Thelma stayed there intermittently, but continued to make Davenport her home.

Except for a short hiatus, this relationship continued into the spring of 2003. Thelma's house remained for sale for $90,000 without any takers. Don was controlling and dominant. They never lived together or spent any nights together. They only went out to eat but two times. Thelma wasn't permitted to visit his home or farm without express approval.

Shortly, they looked at a house on Jackson Street in Wilton with a realtor. Thelma liked the place. Don didn't like it, but made an offer on it which was rejected. A subsequent offer by Don of $76,000 was accepted, with cash settlement set for June 30, 2003, with Don as the sole purchaser.

---

[1] Don states he assisted Thelma because he promised her deceased husband he would do so, though he had not done anything in the eight-year interim for her.

[2] Don admitted to only about ten instances of sex in their near four-year relationship.

[3] Don denied any strong feelings for Thelma.

Sometime prior to the latter date, Don came to Thelma's home in Davenport with a shoebox represented to contain ninety-five stacks of $100 bills, ten in a stack. He said he was moving some money around between banks. Don remarked that "its not often that you see this much green." Don had his camera with him. He asked Thelma to pose at her dining room table with the stacks spread out before her. The resulting picture was an exhibit herein. Don left with the money returned to his shoebox.[4]

Don instructed Thelma to move her extra things from the other Wilton property to the one purchased by him. She started doing some repairs upon it. Don showed Thelma a quit claim deed to the Jackson Street property in Wilton with her name as grantee. He would not allow her to touch it. Its stated consideration was $90,000. Don assured her he would record it in Muscatine County.[5]

Thelma plausibly understood that she would trade her house in Davenport, which had a mortgage on it to more nearly equate values, for the newly acquired Wilton house. She believed she was then the record owner of both properties. Thelma did check with the County Recorder. Upon learning that her Wilton deed had not been recorded, she approached Don about that fact. He said "they must have lost it." Shortly, he assured her the deed had been in his

---

[4] Don testified that he left this money with Thelma, without any receipt, on June 13, 2003, continually requesting that Thelma sign a deed to the Davenport house, without avail for about seven weeks. He had no documentary proof of how this sum of money was accumulated, nor any showing of any use of this cash by Thelma in any amount. Nor proof that any bill, other than the top bill in each stack, was a $100 bill. The difference between the $95,000 and the $90,000 "purchase price" was not clear.

[5] Don denies the preparation of any such quit claim deed. He prepared his own deeds, so that there was no preparer (who would have been consulted for its preparation) to verify its existence.

attorney's office and that he would now record it. Sometime after the Wilton settlement date, on July 29, 2003, Don came to Davenport with a quit claim deed to the Davenport house with a stated consideration of $90,000. Thelma hesitated to sign it as she had nothing to show that the Wilton house was in her name. Don left irate and offended by her lack of trust in him. He returned within minutes. Don again assured Thelma that the deed for her Wilton residence had been recorded; "that something needed to be done in case one would die," and "this would save attorney fees and other expenses." She relied upon his assurances. Thelma accompanied Don to a notary public before whom she executed the quit claim deed to him. Don took the deed with him but waited until August 21, 2003, to record it.

Thelma vacated the Davenport home (though she continued to make the mortgage payments and pay the utilities) and moved to the Wilton home in the fall.[6] Once again she checked and discovered that the deed to her Wilton property was not recorded. When confronted about this fact, Don would leave or change the subject, but continually assured her that it was her property. Their relationship began to unravel. She threatened to move back to Davenport. Don, at some time, changed the locks. Thelma stopped making the mortgage payment. She continued to reside in Wilton, though Don entered the house without her knowledge or approval.

Thelma retained a lawyer in March 2004, who directed Don, by letter, to record the deed and provide an abstract immediately. Don responded, in writing,

[6] Don contends that Thelma was told that he was going to market the Wilton house in thirty to sixty days, which he reasoned was satisfactory to her as she would merely have a garage sale and "travel."

that he purchased the Davenport house for $90,000; he had agreed to let her stay in "my house on Jackson St. in Wilton," and "we have decided to split up and go our own ways." That same day, he sent Thelma a notice to vacate the Wilton home before May 1, 2004.

Thelma obtained a domestic protective order on May 26, 2004. Don filed a forcible entry and detainer action the same day on the Jackson Street house in Wilton. Two days later, this suit was filed. The magistrate declined to rule on the forcible entry and detainer. It deferred its issues of ownership and possession to the district court in this action. There was no appeal of that ruling. Don paid $13,473.70 to avoid foreclosure and to release the mortgage on the Davenport property on November 24, 2004. He conveyed it to a purported purchaser for $83,000 on July 15, 2005, again by quit claim deed. A quit claim deed to the subject Wilton house to Don's son was recorded on November 23, 2005, for a recited consideration of $70,000, but the house was still occupied by Thelma at the time of trial.

III. MERITS.

A. Rescission.

The district court concluded:

> The court finds that the Defendant misrepresented to the Plaintiff that the deed to the Wilton property had been filed. A reasonable person in the Plaintiff's position would consider this representation important in deciding to sign a deed to her property, and the Defendant knew she considered it important. Defendant's representation influenced the Plaintiff to enter into the transaction. The Defendant knew the representation was false, and by his actions he proved he had created a special relationship of confidence to the Plaintiff, and because of that she would in all likelihood be deceived.

When a party claims that she has been induced to enter into a transaction based upon the other party's misrepresentation, she may seek to avoid the contract by rescission using the misrepresentation as its basis. *Robinson v. Perpetual Servs. Corp.*, 412 N.W.2d 562, 568 (Iowa 1987). It also gives rise to a damage claim. *McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995). The elements for a tort claim for misrepresentation are well established: (1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent; (6) justifiable reliance; and (7) resulting injury or damage. *Hyler v. Garner*, 548 N.W.2d 864, 871 (Iowa 1996). The proof necessary for rescission is less demanding than the required proof for the tort of misrepresentation requesting damages. *Id*. When rescission is sought rather than damages, relief is obtainable without proof of scienter (knowledge of the falsity of a material misrepresentation) or pecuniary damages. *Id*. The "intent" in an equity action is "intent to induce the plaintiff to act or refrain from acting." *Id*.

Don first contends the court failed to rebut the presumption of validity of a duly executed and recorded deed, citing *Orud v. Groth*, 652 N.W.2d 447, 451 (Iowa 2006). However, *Orud* references the rebuttable presumption of delivery that arises from a recorded deed, as do the other cases cited, including *Klosterboer v. Engelkes*, 255 Iowa 1076, 1080, 125 N.W.2d 115, 117 (1963) ("A presumption of delivery arises from a recorded deed . . . ."). Delivery was not an issue, but rather the fraudulent inducement of its execution.

Don next contends Thelma's version of material events was not credible, the court's findings concerning his credibility were erroneous, and there was no proof of justifiable reliance. Upon our de novo review, we agree with the district

court. Thelma is clearly more believable. Her testimony is entitled to greater weight. Concerning the element of justifiable reliance, Thelma saw the deed. She was allowed to move her property into the Wilton house. It was a house she liked rather than Don. Don continually assured her the quit-claim deed to her was or would be recorded. Those facts, seasoned with Thelma's lack of business sophistication and their long-term relationship, supports the trial court's finding of justifiable reliance.

We conclude that Don's material representations to Thelma concerning the status of the quit claim deed to her for the Wilton property were false and were with the intent to induce her to execute and deliver the deed to her Davenport property. The remedies at law are inadequate. Rescission of that deed is affirmed.

IV. PUNITIVE DAMAGES.

A punitive damage award is appropriate if proven "by a preponderance of clear, convincing, and satisfactory evidence" that "the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668.1(1)(a) (2005). Their purpose is to punish the willful and wanton conduct and to deter the defendant and others from repeating similar conduct in the future. *Hamilton v. Mercantile Bank*, 621 N.W.2d 401, 407 (Iowa 2001). We should examine (1) the extent and nature of the outrageous conduct, (2) the amount necessary to deter such conduct in the future, (3) the relative size of the punitive damages award compared to actual damages, and (4) surrounding circumstances bearing on the relationship of the parties. *Id*. "Fraud is one of the recognized grounds for exemplary damages."

Holcomb v. Hoffschneider, 297 N.W.2d 210, 213 (Iowa 1980). "Punitive damages are always discretionary, and are not a matter of right." *National Bank & Trust Co. v. Campbell*, 463 N.W.2d 104, 108 (Iowa Ct. App. 1990) (quoting *Berryhill v. Hatt*, 428 N.W.2d 647, 656 (Iowa 1988)).

Rereading the facts as set forth in Division II, they are abundantly clear, convincing, and satisfactory evidence of willful and wanton disregard for the rights of Thelma and intent to divest her of her home for an adequate consideration. Don's conduct was directed specifically at Thelma, the plaintiff. Don's conduct, considering their relationship, was outrageous and designed to deceive. This type of nefarious conduct must be deterred.

Appellate review of punitive damages is de novo. *Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005) (citing *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)).

However, the appeal of an equity case only entitles an appellant to a de novo review of assigned errors, supported by analysis and authority. *Hyler v. Garner*, 548 N.W.2d at 870. Don's assigned error and argument, with cited authorities, is directed solely to the alleged error that the "evidence did not support an award of punitive damage because . . . Thelma's version of events is not believable." Nowhere did Don, as the appellant, contest the excessiveness or amount of the exemplary damages. Error on that issue was not preserved. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (noting "issues must be presented to and passed upon by the district court"). The award of $20,000 for punitive damages is affirmed.

V. ATTORNEY FEES.

Don asserts the trial court erred in allowing Thelma to recover $4900 of her attorney fees, absent any statutory or contractual premise, and "no findings to support an award of common law attorney fees." Our review of a common law attorney fee award is de novo. *Wolf*, 690 N.W.2d at 887.

No one contends there is a statute or contract that supports such an award. But there is an exception to the general rule that, absent a statute or contract, there can be no recovery for attorney fees. That "rare exception" arises when the defendant has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Miller v. Rohling*, 720 N.W.2d 562, 573 (Iowa 2006) (quoting *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1990)). "[A] plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the 'willful and wanton disregard for the rights of another'; such conduct must rise to the level of oppression or connivance to harass or injure another." *Hockenberg*, 510 N.W.2d at 159-60. "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives." *Id*. The standard for awarding common law attorney fees is higher than the statutory standard for punitive damages. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003).

Don stresses that the trial court did not make any factual findings to support an award of common law attorney fees. The trial court did lump common law attorney fees into its discussion and award of punitive damages. It clearly used the same standard, as after commenting on the willful and wanton disregard for Thelma's rights, it concluded, "This conduct must be discouraged.

Punitive damages in the amount of $20,000 are warranted together with the plaintiff's reasonable attorney fees of $4900, and costs of this action."

Accordingly, the trial court did not employ the correct standard for a common law attorney fee award. But the issue does not stop there. Determination of common law attorney fees lies within the equitable power of the court. *Hockenberg*, 510 N.W.2d at 158 (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 n.30, 95 S. Ct. 1612, 1621-22 n.30, 44 L. Ed. 2d 141,153 n.30 (1975)).

The trial court did find $4900 to be a reasonable attorney's fee. That finding was not the subject of any assigned error. Rather Don contends his conduct did not meet the oppressive standard as set forth in *Hockenberg*, to consider *any* common law attorney fees. We disagree. Upon our de novo review, Don connived to render Theresa homeless, without the ownership, or right to possession, to either the Davenport or Wilton home. Deprivation of a home for a widow in her mid-fifties with whom he had a physical relationship of a reasonably long duration, who trusted his word, and was deceived into believing that the Wilton home was hers, with or without him, is sufficiently vexatious, tyrannical, cruel, and oppressive to affirm the common law attorney fee award to Thelma.

VI. RESTORATION OF STATUS QUO.

"Restoring the status quo is the goal of the restitutionary remedy of rescission." *Potter v. Oster*, 426 N.W.2d 148, 152 (Iowa 1988). The remedy attempts to restore the parties to their positions at the time the contract was executed. *Id*. at 151.

In this matter, the targeted date is July 29, 2003, when Theresa, at Don's urging, signed and delivered the quit claim deed to her Davenport house to Don. At that time, there was a real estate mortgage on that property and perhaps some other accrued liens. The trial court determined that the $13,473.70 paid to the mortgagee was a "sunk cost" of Don's material misrepresentations, resulting in the forfeiture of his right to the return of that sum. Don asserts this as error and asks for judgment against Thelma for that figure. He further contends Thelma failed to respond to repeated "red flags." In *Kennedy v. Thomsen*, 320 N.W.2d 657, 660 (Iowa Ct. App. 1982), our court rejected such an "unclean hands" theory as lacking merit.

As a condition of rescission, the plaintiff must stand ready to restore the status quo. *Id*. The record shows that the lienholder was paid off on November 24, 2004. But the appropriate date is the date of the deed, July 29, 2003. "Parties are returned to the status quo when benefits received under the contract have been returned and liabilities incurred have been removed." *Hyler*, 548 N.W.2d at 874 (citing *Binkholder v. Carpenter*, 260 Iowa 1297, 1306, 152 N.W.2d 593, 598 (1967)). The issue of the correct sum to be paid by Thelma to Don to restore the status quo, as of the transaction date, is remanded to the district court for resolution and judgment.

VII. APPELLATE ATTORNEY FEES.

Thelma requests an award of appellate attorney fees of $5000, contending that justice requires its payment and Don's financial strength supports it. An award of attorney fees on appeal is not a matter of right, but rests within the

sound discretion of the court. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999). That request is denied.

VIII. CONCLUSION

Rescission of the quit claim deed executed and delivered to the defendant is affirmed. The punitive damage award of $20,000 is affirmed. On de novo review, common law attorney fees of $4900 is awarded, with statutory interest from this date. The issue of the restoration of the status quo is reversed and remanded to the district court for resolution. Costs of this appeal are taxed to appellant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.