IN THE COURT OF APPEALS OF IOWA

No. 2-576 / 11-2101
Filed October 31, 2012

ADRIENN LANCZOS,
Plaintiff-Appellee,

vs.

LARRY WALKER and MONTE WALKER,
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

The defendants appeal from the denial of their motion for new trial and judgment notwithstanding the verdict following a jury verdict in favor of the plaintiff. **AFFIRMED AND REMANDED.**

Steven P. Wandro and Hristo A. Chaprazov of Wandro & Associates, Des Moines, for appellants.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Heard by Potterfield, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

First-time homebuyer, Adrienn Lanczos, sued sellers Larry and Monte Walker, alleging they failed to disclose multiple problems with the house she purchased from them. The jury found in favor of Lanczos on two of her claims, awarding her $66,500 in damages on one claim and nothing on the other. The Walkers filed a combined motion for new trial and judgment notwithstanding the verdict. The trial court denied the motion, and the Walkers appealed. We affirm.

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

Larry Walker was a real estate agent for thirty-three years. He owned several rental properties with his son, Monte, who was also a real estate agent. In August 2005, the Walkers entered into a purchase agreement with Adrienn Lanczos to sell one of their rental properties to her for $86,500. The agreement provided "that Sellers of real property have a legal duty to disclose Material Defects of which Sellers have actual knowledge and which a reasonable inspection by Buyers would not reveal."

In connection with that duty, the Walkers provided Lanczos with a "Seller Disclosure of Property Condition" form. Though the form required them to report known conditions affecting the property, Larry placed a large "X" over the text of the form and wrote, "Sellers never lived in property." The Walkers had, however, owned and maintained the house for at least thirteen years.

During a pre-sale walk through of the house, Larry did tell Lanczos the south foundation wall in the basement had been replaced. He also said there had been a drive-under garage that led down to the basement. And he informed her that the roof needed work. Other than those three items, Larry's verbal

disclosures about the condition of the house were limited to the remodeling he and Monte had done, which included new windows, air conditioner, and paint.

Lanczos took possession of the home in September 2005. That spring, she noticed wet spots on the basement walls and floors. After a particularly heavy rainfall one August, about a foot of water accumulated in the basement. With other rainfalls, Lanczos said there would be an inch or two of standing water in the basement. Water eventually began infiltrating the main level of the house, starting with the floor in the northeast corner of the master bedroom and spreading into the hallway walls and corners. In 2008, Lanczos noticed the wooden window sills were saturated with water and rotten. Mold spread throughout the house, despite Lanczos's continual battle against the water penetration.

Lanczos also had problems with the home's sewer system. She had to have the main line cleaned out the first month she lived there due to poor drainage. Those problems persisted until 2007 when she had the sewer line scoped and discovered it had collapsed about sixty feet away from the house. Lanczos excavated the sewer line and, in doing so, unearthed an abandoned septic tank. She also discovered an old concrete driveway leading into the basement where the drive-under garage had been, as well as cracks in the foundation of the home. Lanczos believed the buried driveway was the cause of the water problems in the basement, explaining that it acted as sort of a funnel.

Topping off these difficulties was the new air conditioner installed by the Walkers which, during her first summer in the home, Lanczos discovered leaked

Freon. After refilling the Freon once or twice, a repairman informed her that the unit had not been installed correctly.

Concerned with the amount of moisture in the home, Lanczos hired an indoor air quality specialist. He inspected the house in 2010 and determined it was completely contaminated with toxic mold. He advised Lanczos to contact a contractor to fix the areas where water was coming in and a mold remediation company to address the mold issues. Lanczos consulted a contractor, who quoted her a bid of $137,000 to repair the house. She had, at that point, spent an estimated $23,904.57 in her own time, labor, and materials attempting to address the problems herself.

Lanczos ultimately filed suit against the Walkers, alleging the following theories of recovery: (1) breach of contract, (2) violation of Iowa Code chapter 558A (2009), (3) fraudulent misrepresentation, and (4) negligent misrepresentation. In support of these claims, she asserted the Walkers failed to disclose several material defects with the house, "including the location of a septic tank on the property, plumbing problems, the presence of mold, and that there were physical problems such as settling, flooding, drainage and grading."

The case proceeded to a jury trial. At the close of evidence, the Walkers moved for a directed verdict. The trial court denied the motion, and the case was submitted to the jury. In a sealed verdict, the jury found against Lanczos on her fraudulent and negligent misrepresentation claims but determined she had proved her breach of contract and chapter 558A claims. The jury awarded her $66,500 in damages on the contract claim but nothing on the chapter 558A claim.

The Walkers filed a combined motion for new trial under Iowa Rule of Civil Procedure 1.1004(6) and judgment notwithstanding the verdict under rule 1.1003(2) challenging the sufficiency of the evidence supporting the verdict and damages. They additionally argued under rule 1.1004(5), (6), and (8) that the jury verdicts were inconsistent and contrary to law. The trial court denied the motion. This appeal followed.

II. Scope and Standards of Review.

We review rulings on motions for judgment notwithstanding the verdict and new trial based on the sufficiency of the evidence for errors at law. *See Easton v. Howard*, 751 N.W.2d 1, 4-5 (Iowa 2008); *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 87 (Iowa 2004).

The question of whether a verdict is inconsistent or contrary to law is also reviewed for errors at law. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006).

III. Discussion.

A. Sufficiency of the Evidence.

As related in the background facts, the standard form purchase agreement at issue in this case provided, "Sellers and Buyers acknowledge that Sellers of real property have a legal duty to disclose Material Defects of which Sellers have actual knowledge and which a reasonable inspection by Buyers would not reveal." The parties agree the legal duty to disclose material defects to which this agreement refers is based on the requirements of Iowa's Real Estate Disclosure Act found in chapter 558A of the Iowa Code. *See Longfellow v. Sayler*, 737 N.W.2d 148, 154 (Iowa 2007) (noting a statute may become part of a

contract under the doctrine of incorporation by reference). We accordingly follow the parties' lead and consider Lanczos's breach of contract and chapter 558A claims together. *Cf.* Iowa Code § 558A.7 (noting the duties imposed under chapter 558A "shall not limit or abridge any duty, requirement, obligation, or liability for disclosure created . . . under a contract between parties").

Section 558A.2(1) of the Act requires persons who are interested in transferring real estate to deliver a written disclosure statement to prospective buyers. The disclosure statement must include "information relating to the condition and important characteristics of the property . . . including significant defects in the structural integrity of the structure." *Id.* § 558A.4(1); *see also* Iowa Admin. Code r. 193E-14.1(6) (setting forth a sample disclosure statement). A person who violates these disclosure requirements

> shall be liable to a transferee for the amount of actual damages suffered by the transferee, but subject to the following limitations:
>
> (1) The transferor . . . shall not be liable . . . for the error, inaccuracy, or omission in information required in a disclosure statement, unless that person has actual knowledge of the inaccuracy, or fails to exercise ordinary care in obtaining the information.

Iowa Code § 558A.6(1).

"The plain and unambiguous language of the statute clearly indicates a seller can be liable for something less than a knowingly inaccurate disclosure, i.e., if the seller 'fails to exercise ordinary care in obtaining the information' to be put on the disclosure form." *Jensen v. Sattler*, 696 N.W.2d 582, 587 (Iowa 2005). The Act thus "places a limited affirmative duty upon sellers insofar as they must 'exercise ordinary care in obtaining the information.'" *Id.* (quoting Iowa Code § 558A.6(1)). This is consistent with the Act's further requirement that the

necessary disclosures be made in good faith, *see id.*, which includes "a reasonable effort . . . to ascertain the information." Iowa Code § 558A.3(1).

The seller disclosure form provided by the Walkers to Lanczos stated,

> Completion of this form shall satisfy the requirements of Chapter 558A of the Iowa Code which mandates the seller's disclosure of and information about the property the seller is about to sell. . . .
>
> Instructions to the Seller: (1) Complete this form yourself and *fill in all blanks*. (2) Report known conditions affecting the property. (3) Additional pages or reports may be attached. (4) If some items do not apply to your property, write NA (not applicable). (5) All approximations must be identified as approximations (AP). *If you do not know the facts*, *write UNKNOWN*.

(Emphasis added.)

Despite these clear instructions, and their duty to make the required disclosures in good faith, Larry Walker drew a large "X" across the form and wrote, "Sellers never lived in property." The Walkers testified they did this because "one of the basic things" they were taught as realtors "is if you have not lived in the property, to cross through and initial the fact that you haven't lived in the property. It was common practice." However, neither the form, nor chapter 558A, exempts non-occupying sellers from making disclosures about the property. *See Jensen*, 696 N.W.2d at 587 ("A seller must exercise ordinary care in obtaining this information *whether or not the seller lives on the property*." (emphasis added)). The form in fact instructs sellers to answer "unknown" to any question the seller does not have knowledge about.

Skirting the issue of their evasive approach to the disclosure form, the Walkers argue Lanczos did not present substantial evidence that they knew, or in the exercise of ordinary care could have discovered, "any water or moisture issues, mold infestation, water damage to the window sills, sewer issues, the

existence of a full abandoned septic tank, or Freon leaks in the air conditioning unit." We disagree, focusing as Lanczos does on the water and mold issues.

Though the Walkers never lived in the house, they owned and maintained the property as a rental for at least thirteen years. They extensively renovated the house during that time, tearing out drywall, replacing windows and cabinets, filling cracks in the foundation and siding, and painting inside and out. Yet the Walkers denied knowledge of any major problems with the home.

In contrast, Lanczos testified she began experiencing water issues in the basement just six months after taking possession. *See Doell v. Lachney*, 544 So.2d 519, 521 (La. Ct. App. 1989) (noting the "'appearance of certain types of defects within a relatively short time after purchase may lead to the reasonable inference that the defects existed at the time of the sale'" (citation omitted)). Those problems quickly spread throughout the house, with the formation of mold soon after. By Christmas of 2008, Lanczos noticed the wooden sills of the windows that had been newly installed by the Walkers were rotten. She testified:

> We maintained that property as it should be and it just kept coming through the walls, especially the water, the mold. We did all of the appropriate things you're supposed to do, so I guess I don't believe that all of these things showed up on our watch and it was something that we caused in three and a half years of living there.

In attempting to overturn the jury's verdict against them, the Walkers focus on Lanczos's admissions on cross-examination that she had no direct evidence showing they knew of these defects. It is well established, however, that circumstantial proof is equally probative as direct evidence. *See* Iowa R. App. P. 6.904(3)(p). Our task in reviewing the trial court's decision "is to determine if reasonable minds can differ on the issues presented when viewing the evidence,

both direct and circumstantial, in the light most favorable to the plaintiff, and giving to plaintiff every legitimate inference which may reasonably be deduced therefrom." *Thacker v. Eldred*, 388 N.W.2d 665, 670-71 (Iowa Ct. App. 1986). "If we find that reasonable minds can differ on the issues presented under that test, then a jury question is generated and it is appropriate to submit the issues to the jury and the verdict should be upheld." *Id.* at 671.

Although most of the evidence in this case was circumstantial, Monte Walker acknowledged at trial that "[t]here had been water probably in the basement at some time. I mean small trickles, but I wouldn't call it an issue." Indeed, two home inspections performed before the closing noted evidence of previous moisture in the basement. One inspection report warned that because the home was below grade, "there exists a vulnerability to moisture penetration after heavy rains." The jury could have inferred from these inspection reports that the Walkers knew of, or in the exercise of ordinary care could have discovered, water problems in the basement.

And while both Walkers denied having known about the buried concrete driveway leading into the basement, the jury could have reached the opposite conclusion based on exhibits entered into evidence by Lanczos. Those exhibits included photographs from the county assessor's website taken during the Walker's ownership of the house. Lanczos testified she believed the photographs showed a portion of the driveway before it was buried. She also pointed to the fact that the "assessor's site still had a garage listed during one of the transactions under their ownership." The Walkers discount this evidence and Lanczos's testimony that she thought the buried driveway was the cause of water

problems in the basement. But the jury, as the finder of fact, was free to accept or reject evidence on this or any other issue. *See Blume v. Auer*, 576 N.W.2d 122, 125 (Iowa Ct. App. 1997).

We also consider the testimony of a neighbor who had contemplated buying the house in 2001. He stated, "I peeked down in the basement when my wife was looking in the rooms and there was some black stuff on the wall. I'm not sure if it was mold or moisture, but I wasn't going to take the chance."

The Walkers' actions in preparing the house for sale are telling. When questioned by Lanczos's counsel, Larry admitted that before he painted the outside of the house in 2005, he sprayed it with a bleach and water solution. He agreed if there had been mold on the outside of the house that would have temporarily remedied the issue. But he maintained that he commonly used the bleach before painting exteriors of houses "to insure there is no growth which would cause paint to come off." Larry did not remember whether he used the same solution before painting the interior of the house, including the basement walls and floor. One of the home inspection reports specifically noted that "[p]ossible problem areas may not be identified if the interior wall and ceiling surfaces have been recently painted." The Walkers also testified there were cracks all over the siding of the house, which they repaired and painted over before listing the property for sale. *See Doell*, 544 So.2d at 521 (finding sufficient evidence that sellers knew or should have known roof leaked where they patched the roof and painted the dining room before the sale).

When asked why they did not disclose these problems to Lanczos, the Walkers maintained they were not required to do so. Monte, in particular, testified that had he actually completed the disclosure form, it

> would have been filled out absolutely entirely negative. There were no outstanding problems on the property that I would have had to address here because everything had been fixed.
>
> . . . .
>
> Q. Any known problems. You did not disclose in the form that the siding had cracked and you patched it and painted it, correct? A. This doesn't ask that.
>
> Q. Sir, yes or no? A. I'm sorry. I can't answer in that manner. This asked are there any known problems. There aren't any known problems. . . . Is there any known problems with the siding? The siding was repaired. There was no known problems with the siding.

The language of the disclosure form was not so limited, however. Though the siding question simply asked, "Any known problems?" the question about the basement and foundation asked, "*Has there been* known water or other problems?" (Emphasis added.) The end of the form, which both Walkers signed, stated: "The Seller has indicated above the *history* and condition of all the items." (Emphasis added.) We repeat the statute's requirement that "[a]ll information required by this section and rules adopted by the [real estate] commission shall be disclosed in good faith." Iowa Code § 558A.3(1); *see also Hammes v. JCLB Props., L.L.C.*, 764 N.W.2d 552, 555-56 (Iowa Ct. App. 2008) (discussing a violation of chapter 558A where sellers did not disclose what they characterized as a "one-time water incident" they purportedly fixed before selling the house).

Upon viewing the evidence in the light most favorable to Lanczos, and affording her all reasonable inferences that may fairly be drawn therefrom, we conclude the trial court correctly determined there was sufficient evidence to

submit the issue to the jury. *See Easton*, 751 N.W.2d at 5. We accordingly affirm the court's denial of the Walkers' motion on this ground and turn to their claims regarding the damages awarded by the jury.

B. Damages.

The Walkers challenge the jury's award of damages on several grounds,[1] the first being that an inconsistency exists between the jury's finding that the Walkers violated chapter 558A and its failure to award damages for that violation.

> It is fundamental that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if it is possible to do so. The test is whether the verdicts can be reconciled in any reasonable manner consistent with the evidence and its fair inferences, and in light of the instructions of the court. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.

Hoffman v. Nat'l Med. Enters., Inc., 442 N.W.2d 123, 126 (Iowa 1989) (internal citations omitted).

Lanczos argues the verdict was not inconsistent because the "jury properly concluded that any damages awarded in the [chapter 558A] failure to disclose count would be duplicative of the damages awarded under the breach of contract count." We agree.

Lanczos alleged four theories of recovery, with the same measure of damages applicable to each.[2] The jury was accordingly instructed, "A party cannot recover duplicate damages. Do not allow amounts awarded under one

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[1] We elect to bypass Lanczos's error preservation concern and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

[2] We note the jury instruction on damages actually addressed only three of Lanczos's four theories of recovery—breach of contract, chapter 558A failure to disclose, and fraud. We have been unable to find a jury instruction on the measure of damages for Lanczos's negligent misrepresentation claim, although that is of no importance to our analysis, as the jury did not find in favor of Lanczos on that claim.

item of damages to be included in any amount awarded under another item of damage." *See Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 770 (Iowa 1999) ("'A successful plaintiff is entitled to one, but only one, full recovery, no matter how many theories support entitlement.'" (citations omitted)); *Team Cent., Inc. v. Teamco, Inc.*, 271 N.W.2d 914, 925 (Iowa 1978) ("Duplicate or overlapping damages are to be avoided."). Consistent with that instruction, the jury awarded Lanczos damages on her breach of contract claim but nothing on her chapter 558A claim. *Cf. Hoffman*, 442 N.W.2d at 127 (rejecting plaintiffs' argument that jury's inconsistent verdict was an attempt to avoid duplicative damages where the jury was never instructed to avoid such damages).

We accordingly reject this claim and next consider whether, as the Walkers contend, the "total amount of damages awarded by the jury is contrary to Iowa law because it includes both benefit-of-the-bargain damages and out-of-pocket expenses." *See Midwest Home Distrib., Inc. v. Domco Indus. Ltd.*, 585 N.W.2d 735, 739 (Iowa 1998) (noting the "out-of-pocket-expense rule is an alternative measure of damages applicable when the benefit-of-the-bargain rule will not make the defrauded party whole").

The jury was instructed the measure of damages for Lanczos's breach of contract and chapter 558A claims was "the loss of the benefit of the bargain plus consequential damages; *or* out of pocket expenses whichever best provides the Plaintiff with the benefit of her contract." (Emphasis added.) The Walkers argue the benefit of the bargain rule was the appropriate measure of damages in this case. Under that rule, the Walkers assert Lanczos was entitled to only $56,500 in damages, not the $66,500 awarded by the jury, because she purchased the

property for $86,500 and claimed at trial it was only worth $30,000. *See id.* (noting in a fraudulent misrepresentation case that the "purpose underlying the benefit-of-the-bargain rule is to put the defrauded party in the same financial position as if the fraudulent representations had in fact been true"). Because the jury "awarded Lanczos $10,000 more than what she was entitled to," the Walkers assume the jury impermissibly considered her claimed out-of-pocket expenses of $24,904.57.

We conclude otherwise.[3] Lanczos did testify she believed the value of the house was "roughly equivalent to the land that it sits on, so about $30,000." However, she was then asked, "Do you think the land—that's the value of the house now, about $30,000?" Lanczos responded, "The land as per the assessor is around $21,000." The difference between that amount and the purchase price of the house is $65,500, which is within $1000 of the jury's award. We further note the jury heard from a contractor who testified it would cost $137,000 to repair the house. This quote was based on the contractor's determination that the house was in such a state of disrepair that he would "have to strip down the house to the studs." From this testimony, the jury could have inferred the house was worth even less than what Lanczos had estimated. *See Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007) ("In considering a contention that the jury verdict is excessive, the evidence must be viewed in the

[3] Our conclusion in this regard disposes of the Walkers' related claim that the jury impermissibly considered overly speculative evidence on Lanczos's asserted out-of-pocket expenses. We note, in any event, this argument goes more to the weight of that evidence than its admissibility, which the Walkers seem to be challenging by arguing that the "jury should not have considered any evidence regarding estimated time and labor." *See, e.g.*, *Vasconez v. Mills*, 651 N.W.2d 48, 57 (Iowa 2002).

light most favorable to the plaintiff."); *see also Hammes*, 764 N.W.2d at 558 (noting if the "'uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated'" (citation omitted)).

We end by noting the assessment of damages is traditionally a jury function, with which we are loathe to interfere. *See Triplett*, 742 N.W.2d at 602; *see also Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975). The real question in most cases is the amount and sufficiency of the evidence to support the award made. *Olsen*, 229 N.W.2d at 742. We take a broad view of the evidence in answering this question. *Hammes*, 764 N.W.2d at 558. Where, as here, "the verdict is within a reasonable range as indicated by the evidence we will not interfere with what is primarily a jury question." *Olsen*, 229 N.W.2d at 742; *see also Hawkeye Motors, Inc. v. McDowell*, 541 N.W.2d 914, 918 (Iowa Ct. App. 1995) (noting "precision is not required" in fixing damages). We accordingly conclude the jury's award of damages was supported by substantial evidence and affirm the judgment of the district court.

IV. Appellate Attorney Fees.

Lanczos seeks appellate attorney fees pursuant to a provision in the parties' purchase agreement stating, "If Sellers fail to fulfill this Agreement, Buyers shall have the right to . . . proceed by an action at law or in equity, and if Buyers prevail, then Sellers agree to pay costs and reasonable attorney fees."

It is established that a contract clause authorizing payment of attorney fees permits an award of appellate fees. Iowa Code § 625.22; *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982). However, we prefer that the district

court make the determination of an appropriate award, following an evidentiary hearing. *Bankers Trust Co.*, 326 N.W.2d at 278; *see also Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 23 (Iowa 2001). We accordingly remand for that limited purpose.

AFFIRMED AND REMANDED.