

**IN THE COURT OF APPEALS OF IOWA**

No. 9-137 / 07-0858  
Filed May 29, 2009

**XAY FONG,**  
Plaintiff-Appellant/Cross-Appellee,

**vs.**

**ALL LOTS, L.L.C. and JOHN DAVIS,**  
Defendants-Appellees/Cross-Appellants.

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Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Plaintiff appeals the court's ruling ordering a remittitur and denying plaintiff's request for attorney fees. Defendants appeal the court's denial of their motions for mistrial and judgment notwithstanding the verdict. **AFFIRMED.**

Jeanne K. Johnson and Ta-Yu Yang, Des Moines, for appellant.

Michael D. Ensley of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellee.

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

**SACKETT, C.J.**

Plaintiff-appellant Xay Fong sued defendants All Lots, L.L.C. (All Lots) and John Davis on a number of theories for damages he claimed he sustained as a result of a real estate transaction. A jury found plaintiff proved fraudulent misrepresentation against defendants All Lots and Davis and that he was entitled to actual damages of \$7,428.84 and punitive damages of \$75,000. The district court ordered a new trial unless plaintiff accepted the reduced amount of \$30,000 as punitive damages and denied plaintiff's request for attorney fees. Plaintiff challenges the reduction of punitive damages and the district court's refusal to award him attorney fees. Defendants on cross-appeal contend that their motions for judgment notwithstanding the verdict and mistrial should have been granted. We affirm.

**I. BACKGROUND.**

All Lots is a limited liability company that was formed by John Davis and Christine Frank. In August of 2002, Dennis Blume conveyed to All Lots by quit claim deed, property at 1800 7th Street in Des Moines. Blume had purchased the property, which had an old house on it, at a tax sale. The City of Des Moines had declared the property a public nuisance and notified its owner, Blume, to remedy, within thirty days, some forty-seven violations itemized on a list attached to the public nuisance notice, as well as to vacate the property and put a placard near the dwelling saying it was "unfit for human habitation." The notice further advised that the failure to correct the violations would result in legal action.

All Lots put a sign on the house asking for inquiries from prospective purchasers. Plaintiff, a Laotian immigrant with a limited knowledge of the English language, telephoned All Lots and was referred to Davis. The men met and ultimately made an agreement for plaintiff to buy the property for \$10,000. Some \$6000 would be paid by cashier's check. The balance was to be secured by a mortgage to All Lots to draw interest at 14.373 percent per annum. A written document encompassing the agreement was signed. The document contained language relating that the property was sold as it was shown, the building was a public nuisance, and it was necessary to comply with city requirements before the building could be occupied. All Lots also completed a disclosure statement requesting information as to both known and unknown problems. All Lots answered "unknown," indicating they had not lived in the house and had no knowledge of repairs and replacements, and that it warranted nothing as the house was sold "as is" and it was a public nuisance. However, absent from the materials given to the plaintiff was the notice of public nuisance and the itemized list of code violations.

The City of Des Moines subsequently sued plaintiff for abatement of the public nuisance and plaintiff filed a cross-claim against All Lots, Davis, and Blume.<sup>1</sup> Motions for summary judgment were filed by Blume, All Lots, and Davis. The motions were sustained. Appeal was taken to this court. We found that there was a genuine issue of material fact with regard to plaintiff's claim of fraudulent misrepresentation and that the district court erred in granting summary

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<sup>1</sup> The City of Des Moines and Blume are no longer parties to the litigation.

judgment. See *Fong v. All Lots, L.L.C.*, No. 04-0670 (Iowa Ct. App. Oct. 26, 2005).<sup>2</sup>

The case went back to the district court. A trial was held and the jury returned the verdicts set forth above. Following the verdicts, plaintiff's attorney made an application for common law attorney fees in the amount of \$29,250. Plaintiff contended the fees were justified because the opposing party's conduct exceeded the willful and wanton disregard for the rights of another and rose to the level of oppression. The district court entered a judgment on March 7, 2007, in favor of plaintiff and against defendants for \$7,428.84 and \$75,000. On March 26, 2007, having secured an extension of time to file such a motion, defendants filed a motion for judgment notwithstanding the verdict, or for a new trial, or in the alternative, that the court enter a remittitur.

On April 2, 2007, the district court filed an order denying the request of the plaintiff for attorney fees. The court found that while the defendant acted with disregard for the rights of the plaintiff, the conduct did not rise to the level of oppression or connivance to harass or injure another. The court denied defendants' motion for a mistrial, but ordered a new trial unless the plaintiffs accepted a remittitur.

## **II. PUNITIVE DAMAGES AND CONDITIONAL GRANT OF NEW TRIAL.**

Plaintiff contends the district court abused its discretion in reducing the punitive damage award and in conditioning the grant of a new trial on plaintiff's acceptance of a reduction in the punitive damage award. Defendants contend

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<sup>2</sup> An extensive rendition of the facts is contained therein.

the district court did not err in finding plaintiff's counsel's conduct prejudiced them, resulting in an excessive award of punitive damages and in conditioning the grant of a new trial on plaintiff's acceptance of a remittitur.

Iowa Rule of Civil Procedure 1.1004 sections (4) and (5) state:

On motion, the aggrieved party may have an adverse verdict . . . vacated and a new trial granted if any of the following causes materially affected movant's substantial rights:

. . .  
 (4) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

(5) Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property.

Rulings on motions for a new trial are reviewed for abuse of discretion.

*State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996); *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985). In ruling on motions for a new trial, the district court has broad, but not unlimited, discretion. Iowa R. App. P. 6.14(6)(c). The standard of review of a denial of a motion for a new trial depends on the grounds for new trial asserted in the motion and ruled upon by the court. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996). "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." *Id.* "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." *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). "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." *Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004).

In ruling on the motion for new trial, the court found there were such irregularities in the proceedings caused by the prevailing party such that the verdict did not effectuate substantial justice. The court specifically found plaintiff's counsel's conduct irregular and improper noting:

Despite ruling and admonition by this Court Plaintiff's counsel asked questions that were not allowed pursuant to the court's ruling on motions in limine. He regularly asked the defendant on the stand to provide documents (which plaintiff either failed to request or unsuccessfully sought during the discovery proceedings) and then made follow-up statements in front of the jury that defendant had not provided those documents "either." He improperly delved into the background of the defendant, in violation of the court's ruling on a motion in limine that such was irrelevant and prejudicial in view of defendant's involvement in the "witness protection program." In asking such questions he placed the Defendant in the position of having to state in front of the jury that "I cannot answer that question," the clear purview to the jury that Defendant was hiding information and failing to disclose information that might be damaging. During his questioning of witnesses, he [referring to counsel for plaintiff] would contribute his own statements and commentary on the evidence.

Additionally, notwithstanding the fact that closing arguments were not reported, the court cannot ignore and disregard the clearly volatile and post-prejudicial arguments of Plaintiff's counsel. Plaintiff's counsel, in rebuttal, in explaining to the jury why he was so personally emotionally involved in his client's case was because this case had been going on for four years, that "we" had offered to resolve it by offering to simply rescind the contract, but the Defendant refused. The court was shocked by such a blatant and improper argument. Plaintiff's counsel injected his personal beliefs and emotions in the argument, but moreover interjected settlement negotiations, in complete disregard to the court's ruling on Defendants' motion in limine to the contrary. Such argument was clearly overly prejudicial to the Defendants and suggested that the Plaintiff was even victimized more by the Defendants' refusal to negotiate.

The district court did not believe there would have been a different result if counsel had not so behaved. However, the court was not convinced the jury would have found punitive damages in the same amount; rather, the award for those damages would have been substantially less and the court therefore reduced the punitive damages to \$30,000.

Prior to trial, the defendants filed a motion in limine seeking to prevent the plaintiff and his witnesses and counsel from mentioning or making inference to the following during the trial:

- (1) Any reference to prior or current litigation involving All Lots or Davis.

The district court determined in its ruling evidence of the defendants' involvement in cases concerning public nuisance matters was admissible but sustained the objection as to other litigation.

- (2) Any reference to previous names used by John Davis.

The district court sustained this objection.

- (3) Any reference to John Davis's criminal record or any reference to his participation in the witness protection program.

The district court sustained this objection.

- (4) Any reference to settlement negotiation in this matter.

The parties agreed on this.

- (5) Any reference to newspaper articles mentioning or referring to All Lots, L.L.C or John Davis.

This objection was sustained.

The district court basically decided that plaintiff's attorney sought to introduce matters in the record that should have been excluded under the district

court's ruling on the motion in limine. Plaintiff argues generally that, (1) the questions were not in direct violation of the motion in limine ruling, and (2) his questions and comments need be taken within the context of the entire record. The district court's findings on this issue are supported by the record.<sup>3</sup>

If a verdict is the result of passion and prejudice, a new trial should be granted, but if the verdict is merely excessive because it is not supported by sufficient evidence, even in the absence of passion and prejudice, justice may be effectuated by ordering a remittitur of the excess as a condition for avoiding a new trial. See *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632, 659 (Iowa 1969). The district court found that plaintiff's counsel violated the motions in limine, made prejudicial arguments, interjected his own opinions, and interjected settlement negotiations. The court did not believe there would have been a different result but that the punitive damages would have been less had plaintiff's counsel not so acted. The court did not order a new trial but rather reduced the punitive damages. The district court did not err in granting the remittitur.

### **III. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.**

On cross-appeal, the defendants contend the district court erred in failing to grant their motion for judgment notwithstanding the verdict. The defendants asserted in their motion for judgment notwithstanding the verdict, as they do here, that the district court should not have submitted fraudulent misrepresentation, fraudulent nondisclosure, and punitive damages to the jury.

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<sup>3</sup> The plaintiff does not challenge the district court's ruling on the motion in limine and we need not determine whether it was correct and do not do so.



Defendants claim the district court committed legal errors. Consequently, our scope of review is for errors at law. Iowa R. App. P. 6.4. A judgment notwithstanding the verdict must stand or fall on the grounds stated in the motion for directed verdict. *Watson v. Lewis*, 272 N.W.2d 459, 461 (Iowa 1978). On appeal, our review is limited to those grounds. *Id.*

When considering a motion for judgment notwithstanding the verdict, the district court must view the evidence in the light most favorable to the party against whom the motion is directed and we review the district court's ruling in the same manner. *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990). The principles that apply to ruling on a motion for directed verdict also apply when ruling on a motion for judgment notwithstanding the verdict. *Id.* A party moving for a directed verdict is considered to have admitted the truth of all evidence offered by the other party, as well as every favorable inference that may fairly and reasonably be deduced from it. *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000). The focal question is whether there is substantial evidence to support the claims. *See id.* If there is, the denial of the motion for judgment notwithstanding the verdict should be affirmed. *Id.* If there is not, we should reverse. *See Valadez v. City of Des Moines*, 324 N.W.2d 475, 477-78 (Iowa 1982). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Briggs v. Bd. of Dirs. of Hinton Cmty. Sch. Dist.*, 282 N.W.2d 740, 743 (Iowa 1979).

**A. Fraudulent Misrepresentation and Nondisclosure.** Defendants contend there was not a preponderance of clear, satisfactory, and convincing

evidence to support the elements of fraudulent misrepresentation namely, (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent, (6) justifiable reliance, and (7) resulting injury. They argue that plaintiff had an opportunity to read the residential disclosure statement but did not do so; consequently, the statements there cannot form the basis for a fraudulent representation. The district court recognized the argument but found the premise here was not so simple. The court considered evidence that defendants knew that plaintiff had a limited understanding of English, both oral and written, and further found sufficient evidence was presented as to what transpired during the transactions between the parties to support the submission. It noted the evidence showing the extent of the property's problems and the ramifications were known by the defendants and were withheld from the plaintiff. We agree with these findings and the reasoning of the district court. The defendants were aware of the notice of public nuisance and the itemized list of code violations, as well as the city's warnings stated therein; yet, failed to relay the information to the plaintiff or include it in the disclosure statement.

It does not appear that the district court addressed the defendants' claim that their actions were not a proximate cause of the plaintiff's damages. Consequently, it is not preserved for our review.

**B. Punitive Damages.** Defendants contend there is not clear, convincing, and satisfactory evidence that defendants' conduct constituted willful and wanton disregard for the rights or safety of another to justify a punitive damage award.

Iowa Code section 668A.1 (2003) provides:

1. In a trial of a claim involving the request for punitive or exemplary damages, the court shall instruct the jury to answer special interrogatories . . . indicating all of the following:

a. Whether, 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.

b. Whether the conduct of the defendant was directed specifically at the claimant . . . .

“Willful and wanton” in the context of this statute means that,

[t]he 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.

*Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990). Punitive damages serve “as a form of punishment and to deter others from conduct which is sufficiently egregious to call for the remedy.” *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991). Mere negligent conduct is not sufficient to support a claim for punitive damages. *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 256 (Iowa 1993). Such damages are appropriate only when actual or legal malice is shown. *McClure*, 613 N.W.2d at 231; *Schultz v. Sec. Nat’l Bank*, 583 N.W.2d 886, 888 (Iowa 1998).

Actual malice is characterized by such factors as personal spite, hatred, or ill will. *Schultz*, 583 N.W.2d at 888. Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another’s rights. *Id.* Merely objectionable conduct is insufficient to meet the standards of section 668A.1. *Hockenberg Equip. Co. v. Hockenberg’s Equip. & Supply Co. of Des*

*Moines, Inc.*, 510 N.W.2d 153, 156 (Iowa 1993); *Beeman*, 496 N.W.2d at 255.

To receive punitive damages, plaintiff must offer evidence of defendant's persistent course of conduct to show that the defendant acted with no care and with disregard to the consequences of those acts. *Beeman*, 496 N.W.2d at 255.

Substantial evidence supported the jury's finding that the defendants' conduct was willful and wanton under this record, furnishing an adequate basis for an award of punitive damages.

#### **IV. MOTIONS FOR MISTRIAL.**

Defendants contend the district court should have granted their two motions for mistrial that they contend were made during trial. Defendants contend that, (1) error was preserved, and (2) plaintiff's counsel engaged in misconduct and improper questioning during the trial by commenting *on numerous occasions* as to answers provided by witnesses; testifying on his view of the evidence while purporting to ask questions; requesting defendant provide him documents during trial as part of his questions to Davis which gave the appearance he was hiding documents; making statements Davis had not provided him documents; and *continually* violating Iowa Rule of Professional Conduct 32:3.4(e) by commenting on his belief as to the credibility of defendant Davis.

While making these sweeping challenges, the defendants in this section of their brief have made little effort to point out to us where error on these issues was preserved and where the numerous and continual violations occurred. They make one reference to the transcript with no corresponding reference to the

appendix, and one reference to the appendix with no corresponding reference to the record. See Iowa R. App. P. 6.14(7) (requiring briefs citing portions of the record to refer to the pages of the appendix where those parts appear and requiring citations to transcripts to refer to both the appendix page and specific page of the transcript cited, and if the part of the record cited is not reproduced in the appendix, the brief shall cite the page of the part of the record involved). Such failures can lead to summary disposition of an appeal. See *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 239 (Iowa 1974). We are not bound to consider a party's position when the brief fails to comply with the Iowa Rules of Appellate Procedure. See *James v. Rosen*, 203 N.W.2d 256, 260 (Iowa 1972); *Olson v. Olson*, 180 N.W.2d 427, 429 (Iowa 1970).

In some situations as a matter of grace, we will determine the appeal supplying our own efforts to do so. See *Inghram*, 215 N.W.2d at 240. We grant that grace only to the extent we believe we can do so without assuming a partisan role and undertaking defendant's research and advocacy. See *id.* In doing so, we conclude the district court did not abuse its discretion in denying defendants' motions for mistrial.

#### **V. COMMON LAW ATTORNEY FEES.**

Plaintiff contends he is entitled to common law attorney fees. Defendants contend there was no basis to award common law attorney fees and the district court should be affirmed on this issue. 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. *Hockenberg Equip. Co.*, 510 N.W.2d at 158.

There is no such statutory or written contractual provision in this case. Therefore, plaintiff must find support for such an award under the common law. *See id.* Whether to grant common law attorney fees rests in the court's equitable powers. *Id.* Our review of this issue is therefore de novo. Iowa R. App. P. 6.4; *Hockenberg Equip. Co.*, 510 N.W.2d at 158.

To obtain common law attorney fees, a party must prove that the culpability of the opposing party's conduct exceeds the "willful and wanton disregard for the rights of another" standard required to prove punitive damages. *Hockenberg Equip. Co.*, 510 N.W.2d at 159 (emphasis supplied). The opposing party's conduct "must rise to the level of oppression or connivance to harass or injure another." *Id.* at 159-60. "Oppressive" conduct "denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Id.* at 159. "Connivance" is defined as "voluntary blindness [or] an intentional failure to discover or prevent the wrong." *Williams v. Van Sickle*, 659 N.W.2d 572, 579 (Iowa 2003). "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. Such conduct lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another.'" *Id.* The district court did not abuse its discretion in not awarding attorney fees.

## **VI. CONCLUSION.**

We affirm the district court. There was no abuse of discretion in the court's ruling granting a new trial unless the plaintiff agreed to a reduction of the punitive damages award. The record supports the court's conclusion that due to irregularities in the proceedings, the punitive damage award needed to be

reduced to effectuate justice between the parties. If within twenty days from the issuance of procedendo in this case, plaintiff files with the clerk of the Polk County District Court a remittitur of all punitive damages in excess of the amount established by the district court, the judgment of the district court should be affirmed. If the plaintiff does not file a remittitur, the district court shall set the case for a new trial. See *Kuta v. Newberg*, 600 N.W. 2d 280, 285 (Iowa 1999). The district court properly denied the defendants' motion for judgment notwithstanding the verdict. There is substantial evidence to support the jury's verdict on the issues of fraudulent misrepresentation. Likewise, there was sufficient evidence to support the jury's finding that punitive damages were warranted. We also find no abuse of discretion in the court's denial of defendants' motions for a mistrial or in its decision to deny plaintiff's request for attorney fees.

**AFFIRMED.**