

District Court, Douglas County, Nebraska

Patricia C. Tolliver and Betsye S. Manser, Co-Personal Representatives of the Estate of Frances L. Tolliver, Deceased, and Patricia C. Tolliver, Individually, and Betsye S. Manser, Individually,

Plaintiffs,

v.

Visiting Nurse Association of the Midlands, a Nebraska corporation, Tiki Mumm, R.N., and Hospice House, the Josie Harper Residence, a nursing health care provider, trade name for Harbor House, and Joint Venture,

Defendants.

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Hon. Sandra L. Dougherty

Plaintiffs' Brief Concerning
Damages for
Misrepresentation

I What is the purpose of damages in tort cases?

Nebraska's Supreme Court responds to tort cases presenting unusual damages with accommodating rules. Its decision in *Streeks v Diamond Hill Farms, Inc.*, 258 Neb. 581, 595-6, 605 N.W.2d 110, 121-2 (2000), fashioned a new remedy for the peculiar kind of misrepresentation and concealment present in that case. The Court did so because the purpose of tort damages is determinative of the rule measuring them in a case that does not fit nicely into conventional damages measuring rules:

This court recognizes that two goals of the American tort system are to minimize dangerous conduct and to provide compensation for those that suffer damages.

Baldwin v. City of Omaha, 259 Neb. 1, 13, 607 N.W.2d 841, 851 (2000).

The Court recognized and adhered to the principle that tort damages must compensate the victim “as nearly as money can do so” when announcing a new rule to measure damages in property damage cases involving damaged real estate:

We now believe that regardless of what may have been said by us in the past, we should now attempt to announce a rule which, to the extent possible, removes any confusion in this area. We see little benefit in attempting to fashion a new rule for every specific case as suggested by the author of the American Jurisprudence article. See 22 Am.Jur.2d *Damages* § 135 (1965). In attempting to choose which of the various rules should be adopted by this court, we must keep in mind the purpose of recovery in tort. In *Restatement (Second) of Torts* § 901 (1979) the authors explain the general principle embodied in the concept of recovery in tort by saying: “The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are: (a) to give compensation, indemnity or restitution for harms; (b) to determine rights;”

L Investments, Ltd. v. Lynch, 212 Neb. 319, 326, 322 N.W.2d 651, 655-6 (1982). The *L Investments* Court cited and quoted with approval *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 20-21 (Iowa 1975), where the Iowa Supreme Court observed:

“[T]he principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no injury or breach of duty, that is, to compensate him for the injury actually sustained”

II How do Damages work in Misrepresentation and Concealment cases outside the Product Vendor / Purchaser Area?

The law of torts recognizes that misrepresentation in an area intended to induce reliance likely to result in physical or emotional injury or pain entitles the innocent relying party to recover non-economic damages. *Restatement Second of Torts* § 557A, provides:

One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other.

The *Restatement Second of Torts* offers even more guidance on this issue in its § 311:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.

Restatement Second of Torts § 311. Nebraska recognizes that the law of torts has more purposes than solely compensating injured parties:

The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury.

Parrish v. Omaha Public Power Dist., 242 Neb. 783, 798, 496 N.W.2d 902, 913 (1992).

In the area of misrepresentation and concealment, Nebraska law requires flexible damages instructions. The State's first case recognizing negligent concealment so holds. *Streeks v Diamond Hill Farms, Inc.*, 258 Neb. 581, 595-6, 605 N.W.2d 110, 121-2 (2000), makes it clear that the measure of damages is not limited to pecuniary loss, or loss of the benefit of the bargain where concealment or misrepresentation causes different damages. There the Supreme Court found a purveyor of seed potatoes had a duty to speak upon learning of poor germination in a crop of seed potatoes sold to a longstanding customer known to rely on the seller. The Supreme Court assured that the basic compensatory purpose of tort damages would adapt to accommodate the loss proximately resulting from the misrepresentation or concealment. The Court held:

Nielsen claims the trial court erred by failing to give Nielsen's proposed instruction on the measure of damages using the "benefit of the bargain" rule. To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999). Nielsen's proposed instruction stated the measure of damages as the difference between the value of the seed Streeks expected to receive and the value of the seed actually received at the time of delivery.

The benefit of the bargain rule is an appropriate measure of damages when the fraud induces a party to enter a contract for sale of property. See, *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981); *Camfield v. Olsen*, 183 Neb. 739, 164 N.W.2d 431 (1969); *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964); *Rothery v. Pounds*, 150 Neb. 25, 33 N.W.2d 347 (1948); *Falkner v. Sacks Bros.*, 149 Neb. 121, 30 N.W.2d 572 (1948).

However, in the present case, we are not presented with a situation in which Streeks was fraudulently induced to enter into a contract with Nielsen. Because this action is not based on a fraudulently induced contract, the benefit of the bargain rule is not the appropriate measure of damages.

Nielsen has failed to show that his proposed benefit of the bargain instruction is a correct statement of the law warranted by the evidence in this case. Thus, failure to give this proposed instruction is not reversible error.

Similar flexibility is required in this case. Misrepresentations are proven. Francis Tolliver became a Hospice House patient because of them. She did not receive the expected care and suffered as a result. This occurred at the end of her life and thwarted her sole purpose for contact with the defendants: to get hospice care. This is an unusual case. Its damages component requires an instruction that implements the tort law's purpose, i.e., to compensate the victim as best money can do so.

III What Damages Does a Misrepresentation Cause?

Nebraska has no case law concerning deceit or misrepresentation as a proximate cause of pain and suffering. The *Restatement Second of Torts* helps to determine what the governing law is as Nebraska uses them broadly.:

A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction in reliance upon it if, but only if, the loss might reasonably be expected to result from the reliance.

Restatement Second of Torts § 557A . This resource points the direction in the trend of judicial decisions.

Damages in an action for fraud are generally limited to actual pecuniary loss; however, this rule is not without exceptions. Although a number of courts hold that damages for emotional distress are not available in an action for fraud, several others have asserted that such damages may be recovered. For example, in *Kilduff v Adams, Inc.*, 593 A2d 478, 11 ALR5th 957 (Conn 1991), an action for fraud, damages for emotional distress were allowed to be recovered upon a finding the defendant should have been aware that his conduct involved an unreasonable risk of causing emotional distress, and that the distress might result in bodily harm or illness.

While Nebraska has no reported case like this one involving pain and suffering as a direct, predictable consequence of misrepresentation, the State's general law of damages for fraud is instructive. In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he would have been in had the fraud not occurred. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb 403, 390 NW2d 487 (1986).

The law is trending toward widespread recognition that fraud does not occur only in the vendor-purchaser setting. A plaintiff alleging fraud may recover damages for emotional distress and mental anguish in Mississippi, now. *Sumler v. East Ford, Inc.*, 915 So 2d 1081 (Miss Ct App 2005). In neighboring Missouri, emotional

distress, to be compensable as damages for willful fraud, must be medically diagnosable and significant. *Fetick v. American Cyanamid Co.*, 38 SW3d 415 (Mo. 2001).

Here, Francis Tolliver became a Hospice House patient because she relied on misrepresented, and concealed, facts. But for her admission to Hospice House she would not have suffered pain for which her Personal Representatives now seek compensatory damages.

Conclusion

The jury should be instructed that compensatory damages can be awarded for pain and suffering Mrs Francis Tolliver suffered due to the defendants' misrepresentations. The Instruction should direct the jury to award damages for

“The physical pain and mental suffering Francis L Tolliver experienced while she was a patient at Hospice House and cared for by VNA. “

NJI Civil 2d 4.01(5).

Patricia C. Tolliver and Betsye S. Manser,
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Certificate of Service

On March 12, 2008 at 11:20 pm a true copy of Plaintiffs' Brief was delivered
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