IN THE COURT OF APPEALS OF IOWA

No. 17-0050
Filed November 22, 2017

ALEX HEIDERSCHEIT,
Plaintiff-Appellee,

vs.

ERIC CHERNE and JENNIFER CHERNE,
Defendants-Appellants.

Appeal from the Iowa District Court for Delaware County, John J. Bauercamper, Judge.

Home sellers appeal from judgment in favor of home buyer. **REVERSED AND REMANDED.**

Hillary J. Friedmann of Friedmann Law Office, Guttenberg, for appellants.

Dan McClean of McClean & Heavens Law Offices, Dyersville, for appellee.

Considered by Danilson, C.J., and Tabor and McDonald, JJ.

MCDONALD, Judge.

Eric and Jennifer Cherne sold their home to Alex Heiderscheit in 2012. Heiderscheit had subsequent problems with the home and brought this action against the Chernes. The district court ruled in favor of Heiderscheit. The Chernes now appeal.

I.

The Chernes purchased the home at issue in 2004. They sold it to Heiderscheit in 2012. The parties were aware of potential problems with the home's septic system prior to completion of the real estate transaction. Several documents acknowledge those issues. A proposed purchase contract provided: "In the event the septic system needs to be replaced and repaired, seller will incur all expenses to have septic system brought up to Iowa Code." The inspection addendum to the purchase contract provided: "With written acceptance of said purchase contract, buyer shall require the seller to provide the results of a septic system inspection performed by a DNR certified inspector." Heiderscheit submitted a counteroffer to the proposed contract. His counteroffer provided: "Seller will assure septic meets current transfer standards and provide supporting certification at least ten days prior to closing or sooner if contractor can complete earlier." The Chernes submitted their own counteroffer in response, which provided: "Seller will not be required to provide results of a septic inspection by 4/25/12, as seller is aware that septic does not meet current transfer standards. Seller will assure septic meets current transfer standards and provide supporting certification, by replacing or repairing septic system, at least ten days prior to closing or sooner if contractor can complete earlier." Heiderscheit accepted this

counteroffer. The residential seller disclosure sheet provides: "Septic system installed. Maintenance of $165 every four years."

Pursuant to the purchase contract, the Chernes replaced the septic system prior to sale. The septic installation was completed on or about May 25, 2012, by Harter Custom Plumbing/Septic. Robb Harter, the owner of Harter Custom Plumbing/Septic, completed a time of transfer inspection report. The report provided the system was new and in good condition. The report also provided, "This report indicates the condition of the private sewage disposal system at the time of the inspection. It does not guarantee that it will continue to function satisfactorily." The parties completed the real estate transaction in June.

In March 2013, water and effluent leaked into the basement of the home and out of the ground surrounding the home. Heiderscheit hired several repair services. Eventually, a new septic system was installed. In 2015, Heiderscheit listed the home for sale and included this note on his real estate disclosure statement:

> Previous owner [i.e., the Chernes] had new septic installed prior to our closing in June of 2012, due to the old septic not meeting Iowa Code. In March 2013, the basement had standing water. We involved two septic companies and the Delaware County Sanitation Supervisor to find out what may be causing this. No justifiable reasons were found. We had a construction company come in and they dug a hole in the basement floor and found a broken pipe. They repaired and capped off the end and installed a new sump pump. During this process, it was discovered that the septic system was installed incorrectly. A brand new septic system was installed by Oasis Well and Pump in August/September 2015. No issues since!!

Elsewhere in the real estate disclosure statement he clarified the new sump pump was installed in 2013.

Heiderscheit brought suit against the Chernes in October 2015. The case proceeded to bench trial in September 2016. On September 7, the Chernes filed a trial brief in which they wrote, "It is unclear from plaintiff's Petition at Law which theory of recovery they are using to seek relief." The trial brief went on to discuss Iowa Code Chapter 558A (2015), which concerns real estate disclosure statements. On September 12, Heiderscheit filed a trial brief asserting the claim was for breach of contract. The case was thereafter tried without objection as a breach-of-contract claim.[1]

There is no dispute the septic system was incorrectly installed. At trial there was a dispute whether it was the incorrectly installed septic system that caused Heiderscheit's backup. Heiderscheit's witness, the Delaware County Sanitation Supervisor, testified when a septic system fails the water normally comes through the septic lines and does not come into the house. Heiderscheit called a sales representative for a septic system company who agreed. Evidence suggested the water here came through a floor drain, not the septic lines.

Several witnesses testified it would have been impossible to identify the faulty workmanship in installing the septic system prior to an incident with effluent backup. The Delaware County Sanitation Supervisor testified he observed the installation about halfway through and did not observe any issues with the installation.

[1] To the extent the Chernes argue this action was not one for breach of contract, their failure to object at the time of trial waived their claim. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

The contractor who installed the septic system testified the problems Heiderscheit was having were not due to a faulty installation. He testified 2013 was an excessively wet year and water could have gotten in the basement from that. He also testified Heiderscheit called him to discuss the issue and because Heiderscheit was still able to flush his toilet, he concluded the issue was not with the septic system. The contractor also testified that, although he did not have another contractor review his installation after he completed it, this was standard practice.

The district court found Heiderscheit had proved a breach of contract. The Chernes now appeal.

II.

Our review of law actions is for correction of errors at law. *See* Iowa R. App. P. 6.907; *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991). We are bound by the trial court's findings of fact that are supported by substantial evidence. *See Iowa Fuel & Minerals*, 471 N.W.2d at 862. "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000).

III.

The Chernes argue no breach occurred. This claim requires us to interpret the applicable contract. Contract interpretation is the process of determining the meaning of the words used by the parties to a contract. *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008). "Interpretation of a contract is a

legal issue unless the interpretation of the contract depends on extrinsic evidence." *Id.* Construction of a contract is always a legal question. *See id.*

To prove a breach of contract, Heiderscheit must prove (1) the existence of a contract, (2) the terms and conditions of the contract, (3) Heiderscheit has performed all the terms and conditions required under the contract, (4) the Chernes breached the contract in some way, and (5) Heiderscheit has suffered damages as a result of the Chernes' breach. *See Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). "A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Id.*

The Chernes challenge the fourth and fifth elements. They first argue they could not have breached the contract. They hired a licensed contractor to install a new septic system. The Delaware County Sanitation Supervisor visited the property and inspected the septic system installation about halfway through its installation. He approved the installation. The installer completed the Department of Natural Resources's time of transfer inspection report. From this approval, the Chernes argue, they could reasonably have inferred the installation met the standards set forth for transfer inspections in the Iowa Administrative Code. *See* Iowa Admin. Code r. 567–69.2.

The Chernes next argue Heiderscheit cannot prove damages resulting from the alleged breach which were in the contemplation of the parties. *See Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998) (requiring damages to have nexus to breach); *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994) (requiring damages to have been

reasonably foreseeable). The Chernes argue they had no ability to foresee this issue after a licensed contractor installed the septic system and the Delaware County Sanitation department approved the installation. They argue they performed their contractual obligations. They also argue water in the basement had no correlation to issues with the septic system.

We agree no breach occurred. The sellers had a contractual duty to "assure septic meets current transfer standards and provide supporting certification, by replacing or repairing septic system." They replaced the septic system. It met current transfer standards, per an inspector. They provided supporting certification. The purchase contract called for nothing more from the Chernes. The purchase contract did not create a guarantee the septic system would not fail. In concluding otherwise, the district court erred.

IV.

For the above-stated reasons, we reverse and remand for dismissal of the action.

REVERSED AND REMANDED.

Tabor, J., concurs; Danilson, C.J., dissents.

DANILSON, Chief Judge (dissenting).

I respectfully dissent. Both parties knew there were problems with the existing septic system before consummating the sale of the home. The language in the contract required that either the septic system be repaired or replaced. The Chernes chose to replace the septic system. The majority relies heavily upon the fact the Chernes obtained compliance with the transfer standards and provided supporting certification to conclude there was no breach.[2] But this requirement by itself implies the newly installed septic system was to be in good working order. Ultimately, Heiderscheit determined the septic system was not properly installed and did not properly treat fifty percent of the waste. I believe the contract language should be interpreted to imply a promise to provide a septic system in good working condition. The purpose of the provision was not to obtain proper certification but rather to require the sellers to provide a working septic system in compliance with the law. I would affirm the judgment in favor of Heiderscheit, but I would limit the damages to the cost of the replacement of a new septic system and the removal of the defective system. I am unable to conclude the breakage in the basement pipe was caused by the defective septic system. Thus, I would remand to fix the damages anew.

[2] Heiderscheit gained no benefit from the negotiated contract provision according to the majority. The old septic system was defective and the new septic system was defective.