

IN THE COURT OF APPEALS OF IOWA

No. 0-255 / 09-1554
Filed May 26, 2010

RANDALL E. LOWE AND CHERYL S. LOWE,
Plaintiffs-Appellants,

vs.

JIMMIE L. MYERS AND DIANA D. MYERS,
Defendants-Appellees.

Appeal from the Iowa District Court for Tama County, Robert E. Sosalla,
Judge.

Plaintiffs appeal from a district court ruling on their claims alleging the
defendants failed to disclose certain problems with the property the plaintiffs
purchased from them. **AFFIRMED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellants.

Patrick C. Galles of Correll, Sheerer, Benson, Engels, Galles & Demro,
P.L.C., Cedar Falls, for appellees.

Heard by Vaitheswaran, P.J., Doyle, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

DOYLE, J.

This case arises from the sale of an 1880s farmhouse with a leaky basement. The buyers of the house, Randall and Cheryl Lowe, appeal from a district court ruling on their claims alleging the sellers, Jimmie and Diana Myers, failed to fully disclose certain problems with the house. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

During a torrential downpour in May 2004, the Lowes were sitting in the living room of the house they purchased from the Myers in April 2002 when they heard a loud noise. They then felt the house quiver. The Lowes went into the basement to investigate and discovered a large crack had appeared in the west wall. Water was pouring in through the crack and coming up through already existing cracks in the concrete floor.

After the storm, the Lowes hired a home inspector who observed the foundation of the home was constructed with limestone, which typically results in moisture problems. The inspector noted the west wall of the basement had a vertical and horizontal crack, which he believed resulted from “excessive water pressure and the structural weight of the original limestone foundation.” He also observed cracks in the floor that he suspected were caused by water pressure from under the slab. Finally, he noted the north wall of the basement was leaning. The inspector summarized:

All interior walls [of the basement] are showing signs of water seepage. At some point in the past, a water proofing paint was applied to the interior concrete and block surfaces, which appears to be an attempt to solve the water seepage problems in the basement. . . . There is a good chance that the water proofing

actually added to the problem by holding the water back and thus increasing the hydrostatic pressures behind the walls. This increase in pressures eventually cracked the concrete surfaces and allowed the free flow of water into the basement.

He believed

the wall movement and failure has been worsening over a long period of time. The history of water seepage has slowly eroded the soil under and behind the limestone walls. This has caused the interior walls, that were not built with any load bearing capabilities, to fail. All of the affected walls will need to be re-built or replaced. An adequate drainage system will also need to be installed to prevent any future water seepage. Due to the scope of the failure, a complete basement replacement appears to be needed. Further evaluation from a structural engineer is needed.

A structural engineer examined the basement in August 2004. His report states, "A horizontal crack was observed approximately 1'-6" up from the base of the concrete block wall at the southwest and west walls of the basement. According to Mr. Lowe these cracks occurred immediately after the heavy rain." He further observed "the top of the foundation is tilting in approximately 1-inch" along the north wall. There were "many cracks observed in the basement floor slab-on-grade. It appeared that the majority of the cracks have been there prior to the recent heavy rains although it is likely that new cracks have developed."

His report concluded:

The southwest and west walls with visible opened horizontal cracks along the base of the wall have failed and need to be repaired. . . .

Although no cracks were observed in the north wall of the foundation, there does appear to be movement occurring in the structure. The foundation wall was observed to be tilting in at the top at mid-span of the wall. . . . Removal and replacement of this wall should be considered to minimize further damage to the structure.

. . . .

Consideration should also be given to removal and replacement of the cracked floor slab to help minimize the potential for groundwater to enter the structure during heavy rains.

In summary, portions of the basement walls have failed but not collapsed. Recent heavy rains appear to have contributed to some of the failure by increasing the exterior horizontal wall pressure.

The Lowes hired a contractor to repair the basement. The contractor lifted the house, removed the old limestone walls, and poured a new foundation. The Lowes also added a geothermal heating and cooling system, a bedroom with an egress window, a half-bath, a family room with a fireplace, and heated floors to the previously unfinished cellar-like basement. During the renovations, the Lowes discovered the septic system for the house was illegal because it discharged into a ditch. They consequently upgraded to a new septic system.

The Lowes filed suit against the Myers in March 2006, alleging the following theories of recovery: (1) violation of Iowa Code chapter 558A (2005), (2) fraudulent misrepresentation, and (3) breach of contract. They asserted the Myers “failed to disclose a problem with the foundation walls other than the Northeast wall that had created conditions for and caused water leakage and flooding in the basement of the home.” They further asserted the Myers “failed to disclose that the septic system for the home was dumping sewage into the ditch in front of the home.” The Lowes sought \$83,832.12 in compensatory damages and \$85,000 in punitive damages, plus attorney fees and court costs.

The case proceeded to a bench trial, following which the district court entered a ruling denying all of the Lowes’ claims as to the basement of the home, but granting their chapter 558A and breach of contract claims as to the septic system. The court found the Myers failed to exercise ordinary care in

determining and disclosing whether the septic system met code requirements. The court awarded the Lowes \$5740 in compensatory damages for the septic system replacement and denied their claim for punitive damages. The Lowes appeal.

II. Scope and Standards of Review.

The parties agree this case was tried as a law action. We accordingly review for errors at law. Iowa R. App. P. 6.907; *Hammes v. JCLB Props., L.L.C.*, 764 N.W.2d 552, 555 (Iowa Ct. App. 2008). The district court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a). 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). Evidence is not insubstantial simply because it would have supported contrary inferences. *Id.*

III. Discussion.

A. Chapter 558A.

The Lowes first claim the district court erred in failing to find the Myers did not fully disclose the true condition of the basement as required by Iowa Code chapter 558A and that the Myers' nondisclosure was the proximate cause of their damages. We disagree.

Chapter 558A is Iowa's Real Estate Disclosure Act. See *Jensen v. Sattler*, 696 N.W.2d 582, 585 (Iowa 2005). It requires persons who are interested in transferring real estate to deliver a written disclosure statement to prospective buyers. Iowa Code § 558A.2(1). 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 the disclosure requirements of chapter 558A

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 Myers gave a written disclosure statement to the Lowes, which stated in relevant part:

1. BASEMENT/FOUNDATION: Has there been known water or other problems? yes (x) . . . N.E. corner. There was no gutter. Have wtr proof walls and put up gutter.

. . . .
21. Other Items: Are you as the Seller aware of any of the following:

. . . .
4. Physical problems such as: Settling, flooding, drainage or grading problems? yes (x) . . .

. . . .
If the answer to any of the above is yes, please explain. . . .
See no. 1 above and 21(4). Some settling of N. wall. Reinforced N. wall with new wall & bracing.

The Lowes argue this statement was not accurate because the Myers had actual knowledge of water problems elsewhere in the basement, not just the northeast corner.¹ The district court rejected that argument, finding the “only seepage [the

¹ We observe the Lowes do not argue the Myers failed to exercise ordinary care in disclosing the condition of the basement on the disclosure statement. See *Jensen*, 696 N.W.2d at 587 (“[A] seller can be liable for something less than a knowingly

Myers] experienced for a considerable period of time was that in the northeast corner, which they disclosed.” Substantial evidence supports this finding.

The Myers purchased the house from Terry and Rebecca Brase in June 1999. Terry Brase testified at trial that they “had water in the basement. It’s a one hundred year old farmhouse basement. But . . . we had done several things to try to keep it dry, and for the last period of time . . . we felt we were successful.” He stated that during the last two years he lived in the house, water would typically come in at the northeast corner of the basement. According to Brase, “there was always some water possibly standing or running through there until about the last six months, and that’s . . . when we felt we . . . pretty much had the problem licked.” In an email to Randall Lowe in January 2005, he further explained:

So on the northeast corner of the house, we had a problem with getting the water away from the house. I extended the downspout drain, tried to build up the foundation and put the outside gray insulation covering. This took care of the problem with water that last summer we were there. . . .

Jimmie Myers testified he had water in the basement only two or three times during the two-and-a-half years he lived in the house. He stated the water came from the northeast corner of the basement. He also noticed the northwest corner of the house was settling some. In an attempt to remedy those problems, Jimmie constructed what he characterized as a “support wall” along the north wall of the basement, which he then sealed with fiber bond² to both strengthen

inaccurate disclosure, i.e., if the seller ‘fails to exercise ordinary care in obtaining the information’ to be put on the disclosure form” (quoting Iowa Code § 558A.6(1)).

² Fiber bond is a product that can be used to help “reduce moisture like a waterproof paint as well as help structurally tie things together and reinforce it.”

the wall and keep water out. He also applied fiber bond to all the other walls in the basement, added a gutter on the northeast corner of the house, and redirected the water from the downspouts. He believed those measures, which he performed shortly before placing the house for sale in October 2001, solved the water problem in the basement.

The Lowes point to the support wall Jimmie built along the north wall of the basement and the fiber bond he applied to all of the basement walls as evidence that he and his wife knew other parts of the basement leaked water. As the district court concluded, the simple answer to this argument is that the Myers disclosed both of those things on the disclosure statement they provided to the Lowes.

In addition, Randall Lowe testified he and his wife walked through the house on three different occasions and examined the basement. He recalled having a conversation with Jimmie on one of those occasions during which Jimmie told him “there was some water leakage in the northeast corner, but that had been remedied.” Randall testified that about a month after they moved in, water leaked into the basement from the northeast corner. Like the other owners before him, he tried to remedy the problem by replacing the gutters on the house, moving the downspouts to a different location, and adding some fill dirt in the northeast corner. He also put waterproofing paint on the walls. He testified those efforts were successful in holding back the water until the storm in May 2004.

The foregoing testimony supports the district court’s finding that the water problem in the basement when the Myers lived there was limited to the northeast

corner, which was disclosed to the Lowes. While there is some conflicting evidence on this issue, “[e]vidence is still substantial even though it would have supported contrary inferences.” *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys.*, 526 N.W.2d 284, 287 (Iowa 1995); see also *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805, 808 (Iowa 1978) (“In evaluating sufficiency of evidence, we view it in its light most favorable to sustaining the court’s judgment. We need only consider evidence favorable to the judgment, whether or not it is contradicted.”).

We also find sufficient evidence supports the district court’s determination regarding causation, which it found to be the “greater shortcoming in the plaintiffs’ evidence.” The damages sought by the Lowes resulted from the failure of the west and southwest walls in the basement. Those walls failed because, as the home inspector opined, the waterproofing agent applied to the walls “held the water back . . . thus increasing the hydrostatic pressures behind the walls. This increase in pressures event[ually] cracked the concrete surfaces and allowed the free flow of water into the basement.” The Myers told the Lowes they had waterproofed the walls in the basement. In addition, like the district court found,

the evidence does not show that during the term of the Myers’ ownership of the house the Myers observed any changes in the [west and southwest] walls that would reasonably lead them to believe that the walls had any structural defects that would result in failure. The walls continued to appear the same as when they purchased the property.

Jimmie Myers testified that when he purchased the house there was a crack on the west wall. He did not see any signs, as he did with the north wall, that the west wall was structurally unsound. He also did not experience any

water leaking from the west or southwest walls of the basement during his occupancy of the home, nor did the Lowes. Further, the Lowes had an appraisal and home inspection performed before purchasing the house, neither of which revealed any apparent defects in the basement foundation.

The experts that testified at trial explained the weakening of the walls' structure does not necessarily display itself on the interior side of the walls. The home inspector's report states:

[T]he wall movement and failure has been worsening over a long period of time. The history of water seepage has slowly eroded the soil *under and behind* the limestone walls. This has caused the interior walls, that were not built with any load bearing capabilities, to fail.

(Emphasis added.) A mason that examined the home similarly opined:

In the time since the sale to Mr. and Mrs. Lowe, the basement of the house has developed more water problems. This could be due to changing groundwater conditions or other environmental factors. It has been my experience that groundwater is always fluctuating. It frequently changes pressure and direction, which can be caused by a variety of disturbances and/or natural causes.

We find this case is distinguishable from *Sedgwick v. Bowers*, 681 N.W.2d 607 (Iowa 2004), *overruled on other grounds by Jensen*, 696 N.W.2d at 588, and *Hammes v. JCLB Properties, L.L.C.*, 764 N.W.2d 552 (Iowa Ct. App. 2008), which the Lowes cite in support of their argument on causation. The sellers in both of those cases failed to disclose any problems with water in the basements of their homes. See *Sedgwick*, 681 N.W.2d at 609; *Hammes*, 764 N.W.2d at 554. That was not the case here.

We also reject the Lowes' argument the Myers knew, while the Lowes did not, that the basement walls were structurally weak because they were made

from limestone. Randall Lowe admitted at trial that he knew the basement foundation was constructed with limestone prior to purchasing the house.

For the foregoing reasons, we affirm the district court's ruling denying the Lowes' chapter 558A claim as to the water problems in the basement. This brings us to their fraudulent misrepresentation claim.

B. Fraudulent Misrepresentation.

The Lowes appear to be challenging the district court's denial of their fraudulent misrepresentation claim only as it relates to the water problems in the basement.³ To prove that claim, the Lowes needed to establish the following elements by a preponderance of clear, satisfactory, and convincing proof: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) reliance, and (7) resulting injury and damage. *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa Ct. App. 1997). The failure to disclose a material fact known to the person who has a legal duty to inform another person of the matter can also constitute fraud. *Id.*

We find no error in the district court's denial of this claim for the reasons already discussed. As detailed above, there is sufficient evidence supporting the court's determination that the Myers disclosed all the water and structural

³ They argue,

As additional circumstantial evidence of the Myers' attempt to hide the true condition of the basement, is the fact that they were silent about the legality of the septic system, which the trial court found that the Lowes failed to show that this failure was knowing or conducted with the intent to deceive the Lowes.

The Lowes end their argument at that point and do not go on to assert the court erred in dismissing their fraudulent misrepresentation claim regarding the septic system. We will therefore confine our analysis to the water problems in the basement. See *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) (“[O]ur review is confined to those propositions relied upon by the appellant for reversal on appeal.”).

problems in the basement they were aware of. See, e.g., *id.* at 626 (denying fraudulent misrepresentation claim where seller testified he did not know about any sewer problems “and consequently disclosed none”). We accordingly affirm on this claim as well.

C. Breach of Contract.

The Lowes next claim the district court erred in dismissing their breach of contract claim, which was premised on the contention that the disclosure statement was incorporated into their purchase agreement with the Myers. See, e.g., *In re Estate of Kokjohn*, 531 N.W.2d 99, 101 (Iowa 1995) (discussing the doctrine of incorporation by reference). In addressing this theory of recovery, the district court stated:

Accepting, however, that the seller’s disclosure statement is a part of the purchase agreement, I find that it adds nothing further to the plaintiffs’ case. Incorporating the disclosure statement into the contract does not alter the requirements or application of the analysis of whether the Myers complied with the requirements of chapter 558A and, hence, the contract. Therefore, I incorporate my reasoning from the chapter 558A division of this ruling into the breach of contract claim. To the extent I found that the Myers failed to comply with chapter 558A [as to the septic system], I also find that they breached their contractual obligations to the Lowes. Once more, I find that their damages are in the amount of \$5,740.00.

We find no error here.

We decline to address the Lowes’ claim regarding attorney fees for the Myers’ breach of contract as to the septic system, because it does not appear that this claim was ruled upon by the court. “When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Because the Lowes did not file a

posttrial motion requesting a ruling on this unresolved issue, the error was not preserved for our review. *Id.*

D. Punitive Damages.

Finally, the Lowes claim the district court erred in failing to award them punitive damages. As we have denied all of the Lowes' claims with respect to the Myers' disclosures of water in the basement, we examine this issue only as it relates to their failure to exercise ordinary care in disclosing the status of the property's septic system. The court denied punitive damages for that failure, finding:

As stated previously, the Myers failed the requirements of chapter 558A as it relates to the septic system. However, simply put, the evidence falls far short of any finding that they did so with either actual or legal malice. The Myers' error was one of omission rather than commission. They failed to exercise ordinary care to determine the status of the septic system. Clearly, from the evidence, they were not aware of their obligation to do so. Under these circumstances, I do not find punitive damages are warranted.

The Lowes argue punitive damages may be awarded for "acts of omission." Regardless, they must show "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." Iowa Code § 668A.1(1)(a). Willful and wanton conduct occurs when an

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.

Kiesau v. Bantz, 686 N.W.2d 164, 173 (Iowa 2004). Substantial evidence supports the court's determination that the Myers' conduct in failing to ascertain

and disclose the legality of the septic system did not rise to that level. See *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000) (stating punitive damages serve as a form of punishment and mere negligent conduct is not sufficient to support a claim for punitive damages). We accordingly affirm the court's judgment on this issue as well.

IV. Conclusion.

We conclude substantial evidence supports the district court's ruling denying the Lowes' chapter 558A, fraudulent misrepresentation, and breach of contract claims seeking recovery for the water problems in the basement of the house. We further conclude the court did not err in denying the Lowes' claim for punitive damages. We decline to address their claim regarding trial attorney fees, as it was not preserved for our review. The judgment of the district court is accordingly affirmed.

AFFIRMED.