

**IN THE COURT OF APPEALS OF IOWA**

No. 1-873 / 11-0782  
Filed January 19, 2012

**CITY OF FOREST CITY,**  
Plaintiff-Appellee,

**vs.**

**HOLLAND CONTRACTING  
CORPORATION and EMPLOYERS  
MUTUAL CASUALTY COMPANY,**  
Defendants-Appellants.

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**HOLLAND CONTRACTING  
CORPORATION,**  
Third-Party Plaintiff-Appellant,

**vs.**

**JOHN FALLIS and WHKS & COMPANY,**  
Third Party Defendants-Appellees.

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Appeal from the Iowa District Court for Winnebago County, Bryan H.  
McKinley, Judge.

Defendants appeal the district court's ruling in favor of the plaintiff and third-party defendants, contending the district court erred in numerous respects, including finding Holland Contracting Corporation's work was defective in breach of contract. **AFFIRMED.**

Jeffrey D. Stone of Whitfield & Eddy, P.L.C., West Des Moines, for appellants.

David Swinton of the Belin McCormick, P.C., Des Moines, for appellee City of Forest City.

Jason M. Steffens of Simmons Perrine Moyer Bergman P.L.C., Cedar Rapids, for appellees John Fallis and WHKS & Company.

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

**DOYLE, J.**

Defendants Holland Contracting Corporation and its surety, Employers Mutual Casualty Company, appeal the district court's ruling in favor of the City of Forest City and third-party defendants WHKS & Company and its employee, John Fallis, and against the defendants. Defendants contend the district court erred in numerous respects, including finding Holland Contracting Corporation's work was defective in breach of its contract with the City of Forest City. Upon our review, we affirm the ruling and judgment of the district court.

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

The following facts are undisputed: In 2003, Gaylord Wooge sought to develop a residential subdivision, known as the Prairie View Subdivision project, on property he owned. To that end, Wooge contracted with WHKS & Company, a civil engineering firm, to provide its professional services on the project, including surveying and master planning; platting; and street and utility design on the subdivision project. The contract was later amended to add that WHKS would prepare a grading plan for the subdivision and establish "grades and elevations on the street" for the subdivision "for use in preparing the grading plan." John Fallis, a licensed professional engineer employed by WHKS, designed the plans and specifications for the project.

Wooge also entered into a contract with Holland Contracting Corporation in 2003, which stated Wooge intended to have grading, paving, and utility improvements in the Prairie View Subdivision constructed, referred to in the contract as "the Project," "in accordance with the Drawings, Specifications, Addenda, and other Contract Documents prepared by WHKS . . . ." Under the

contract, Holland agreed “to furnish all the necessary labor, materials, equipment, tools and services necessary to perform and complete in a workmanlike manner all work required for the construction of the Project, in strict compliance with the Contract Documents.” Holland obtained performance and maintenance bonds from Employers Mutual Casualty Company (EMC) for the project, guaranteeing Holland’s work against defects in workmanship and materials during the construction and for a period of four years following acceptance of the work, with Wooge and the City of Forest City (the City) as obligees.

In 2004, Wooge sold the property and subdivision project to John and Mary Farus. The Faruses acquired and were assigned all of the existing contracts Wooge had executed for work regarding the Prairie View Subdivision.

Grading was performed on the project, and the pavement was later completed in the fall of 2004. Holland performed all of the agreed-upon work itself, with the exception of paving work that was subcontracted out to a third party not part of this case.

In early 2005, the pavement showed evidence of cracking, along with rising manhole boxouts. The City requested Holland complete repairs, including replacing the manhole boxouts and some concrete panels, which Holland completed. In December 2005, the City accepted the project. Thereafter, additional cracking appeared in the pavement, along with additional problems with rising manholes.

On January 29, 2010, the City filed its petition against Holland and EMC asserting “defects in the workmanship and/or materials encompassed by the

[bond became apparent,” and Holland had failed to remedy the defects. The City sought a judgment against Holland and EMC on the bond in an amount to compensate the City for the cost of rectifying the defects in Holland’s work.

Holland subsequently filed its answer denying the defects in its workmanship and/or materials, and it filed a counterclaim against the City alleging the City had breached an oral, an implied-in-fact, or an implied-at-law contract. Additionally, Holland filed a cross-petition against WHKS and Fallis, asserting the cause of the cracking and displacement of the manholes was the defective design and engineering services provided by WHKS and Fallis. Thereafter, the City amended its petition to assert claims against WHKS in the event Holland’s allegations against WHKS were accepted by the trier-of-fact.

A bench trial was held March 2, 2011. The trial, a classic battle of the experts, centered on the conflicting opinions of various experts. The City’s expert and WHKS’s expert, along with Fallis, opined the cracking of the pavement and problems with the manhole boxouts were the result of inadequate soil compaction by Holland. Holland’s expert opined the problems occurred due to an inadequate design by WHKS and Fallis.

After hearing the evidence and reviewing the exhibits, including depositions, the court on April 21, 2011, entered its ruling in favor of the City, specifically finding the City had proved by a preponderance of the evidence Holland “failed to adequately compact the soil in the utility trench dug by Holland, which subsequently caused the concrete poured on top of the trench to crack as a result of inadequate compaction.” The court dismissed the City’s claims against WHKS and Fallis.

The court found Holland failed to prove that WHKS and Fallis breached the standard of care applicable to their services, specifically disagreeing with Holland's expert's opinion that WHKS's and Fallis's surface and subsurface drainage design were the primary causes for the poor performance of the pavement in the subdivision. The court thus dismissed Holland's third-party claims against WHKS and Fallis.

The court dismissed Holland's cross-claims against the City. The court found no separate oral, implied-in-fact, or implied-at-law contract for the repair work.

The court entered judgment in favor of the City and against Holland in the amount of \$95,252. The court's ruling stated: "In the event [Holland] fails to satisfy this judgment in favor of the City within [thirty] days, then in that event judgment will be entered in favor of the [City] against the surety, [EMC]."

Holland and EMC now appeal.

## ***II. Discussion.***

On appeal, Holland challenges the district court's findings that (1) Holland's work was defective as to compaction, (2) WHKS and Fallis did not breach the applicable standard of care, and (3) the City did not breach its contract with Holland, asserting these three findings were not supported by substantial evidence. Additionally, EMC contends the district court erred in finding it "liable on its performance bond until such time as judgment is entered against Holland." We address their arguments in turn.

**A. Cause of Pavement Cracking and Manhole Issues.**

Holland first asserts the district court's findings concerning the cause of the pavement cracking and manhole issues were not supported by substantial evidence, essentially arguing its expert's opinion was the correct one. However, we do not review the evidence de novo. Rather:

Our review is for correction of errors at law. The district court's findings of fact are binding on us if supported by substantial evidence. When a party argues the district court's ruling is not supported by substantial evidence, we view the evidence in the light most favorable to the judgment. When a reasonable mind would accept the evidence as adequate to reach a conclusion, the evidence is substantial. *Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding.*

*Fischer v. City of Sioux City*, 695 N.W.2d 31, 33–34 (Iowa 2005) (internal citations and quotation marks omitted) (emphasis added).

Here, the issue boiled down to a battle of the experts. In such cases, the weight to be assigned the testimony of each witness is within the province of the fact-finder. See *In re Estate of Hagedorn*, 690 N.W.2d 84, 88 (Iowa 2004) (“The reasonableness of the defendant’s actions was the proper subject of expert testimony and ultimately was for the jury’s assessment.”) The district court, the fact-finder in this bench trial, had the opportunity to view the witnesses and assess their credibility. After doing so, the district court found WHKS’s expert, engineer Richard Ransom, “to be the most credible” of the three experts who testified “based upon his breadth of experiences and convincing testimony.” The court found Ransom’s opinion that the soil was inadequately compacted was also supported by the testimony of the City’s expert and Fallis. The court further

found that the location of the cracking of the pavement, based upon a survey, was “consistent with the experts’ observations and opinions, and provide[d] independent corroboration as to the causation between the location of the cracking and the filling and compaction of the utility trench.” The district court accepted the City’s, WHKS’s, and Fallis’s evidence over Holland’s evidence. Although one may draw different conclusions from the differing opinions, the district court was free to resolve the conflict in the testimony in favor of the City. Thus, substantial evidence supports the district court’s findings that Holland failed to adequately compact the soil in the utility trench dug by Holland, which subsequently caused the concrete poured on top of the trench to crack as a result of inadequate compaction. We find no error and affirm on this issue.

***B. Holland’s Third-Party Claims against WHKS and Fallis.***

Next, Holland contends substantial evidence does not support the district court’s finding Holland failed to prove WHKS and Fallis breached the applicable standard of care. We disagree.

Again, the issue boiled down to a battle of the experts. On this issue, the court specifically found fault with Holland’s expert’s opinion that WHKS’s and Fallis’s surface and subsurface drainage design were the primary causes for the poor performance of the pavement in the subdivision, explaining:

As to [Holland’s expert’s] conclusions of inadequate surface drainage, the court concludes that if that in fact was the cause it would be prevalent throughout the subdivision. Again, the court notes there are specific areas in the subdivision that did not demonstrate pavement cracks, such as the entrance on the south end of the division, the two small cul-de-sacs on the southwest and the northeast corner of the subdivision, and those areas are in common because utilities are not located beneath those areas.



Further, as was pointed out by a number of witnesses, pavement movement is common in Iowa due to a freeze-thaw cycle; however, if the backfill under the pavement is adequately compacted, the movement of the pavement sections will be uniform and not crack.

The district court again accepted the City's, WHKS's, and Fallis's evidence over Holland's evidence. Although one may draw different conclusions from the differing opinions, substantial evidence supports the district court's findings that Holland failed to prove WHKS and Fallis breached the applicable standard of care. We find no error and affirm on this issue.

***C. Holland's Breach-of-Contract Cross-Claim against the City.***

Holland contends the district court erred in finding Holland failed to prove the existence of an implied-in-fact contract between it and the City. "Quantum meruit recovery based on an implied-in-fact contract is normally reviewed for correction of errors at law." *Iowa Waste Sys., Inc. v. Buchanan Cnty.*, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000).

Here, the court found

the actions taken by Holland were done as a result of the standard of practice to go through a "punch list" before the City would accept the plat. The Court noted from the testimony of Byron Ruiter, the contractor must complete the items specified on the punch list in order to obtain final payment for its work from the owner.

Further, there is no evidence as to a written or oral contract under Holland's theory of contractual relations, and the court finds that there was never a meeting of the minds or actions taken which would give rise to a contractual relationship between the City and [Holland] when in fact the work being done by [Holland] was to satisfy its previous contractual obligation with the developer of the subdivision.

The court specifically finds that there is no breach of oral contract, implied-in-fact, or implied-at-law [contract].

Upon our review, we find that conclusion is supported by substantial evidence.

The evidence shows the City had no obligation whatsoever to accept the work. Charles Holland, the owner of Holland, testified neither he nor anyone else on behalf of Holland made any contract with the City that the City would pay Holland for the repairs made to the project prior to the City's acceptance. Furthermore, Mr. Holland testified Holland performed the repair work prior to the City's acceptance so the City would, in fact, accept the project as complete and so Holland could receive the full payment from the owner. The evidence failed to establish there was any agreement or contract between Holland and the City for the City to pay Holland separately for the repair work it performed prior to the acceptance of the project by the City. Accordingly, we find no error and affirm on this issue.

***D. EMC.***

Finally, EMC contends the district court erred in ruling that "in the event Holland 'fails to satisfy this judgment in favor of the City within 30 days' then judgment would be entered in favor of the City against [EMC]." EMC asserts this is error because "until a judgment is entered against Holland, EMC cannot be held liable under the bond." We find no merit in this argument.

The district court's ruling on April 21, 2011, specifically entered judgment in favor of the City and against Holland in the amount of \$95,252. Clearly judgment was entered against Holland by the district court. As the district court's ruling provided, EMC would be become liable as Holland's surety in the event Holland failed to pay the judgment within thirty days. We find no error and affirm on this issue.

***III. Conclusion.***

In this classic battle of the experts, we find no reason to disagree with the district court's credibility findings. Upon our review, we find no error upon those issues raised, and we accordingly affirm the ruling and judgment of the district court.

**AFFIRMED.**