

IN THE COURT OF APPEALS OF IOWA

No. 6-954 / 06-0184
Filed February 28, 2007

BOBBIE PIKE,
Plaintiff-Appellee,

vs.

**DOUGLAS KENNEDY, a/k/a DOUG KENNEDY,
AND BRICK-N-BLOCK, INC.,**
Defendants-Appellants.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

The defendants appeal from the district court's judgment in favor of the
plaintiff following a civil bench trial. **AFFIRMED IN PART, REVERSED IN PART
AND REMANDED.**

Jeanne K. Johnson, Des Moines, and Timothy M. Duffy, Des Moines, for
appellant.

Kyle T. Reilly of Thomas J. Reilly Law Firm, P.C., Des Moines, for
appellee.

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

VOGEL, J.

Defendants Douglas Kennedy and his business, Brick-N-Block, Inc., (together referred to as Kennedy) appeal from the district court's judgment in favor of the plaintiff, Bobbie Pike, following a bench trial on her civil claim for damages for breach of a construction contract.

I. Background Facts and Proceedings.

Pike contacted Kennedy in the fall of 2002 regarding construction of a new basement for her existing home on East 24 Street in Des Moines. Kennedy, sole-owner and operator of a masonry business, went to her home to view the site and determine the work necessary for the job. Pike's basement had some concrete and tiling improvements from previous remodels, including at least one brick and tile wall, but was mostly an unfinished dirt basement. The staircase leading to the basement consisted of cinder blocks stacked on dirt carved out in a stair-like fashion. The ceiling was extremely low, and the basement floor was not level. Pike testified that she explained to Kennedy that she wanted to make the basement into liveable space for a family recreational room or for a roommate. Pike arranged with Kennedy to have four windows put in, two egress and two regular, which was later expanded to three egress and one regular window. Kennedy submitted a bid to Pike that would include dirt removal, installation of a full basement with footings, walls, a newly-lowered floor, and windows. The proposal totaled \$32,048 for tiling, backfill, and all labor and

materials. The parties signed a one-page contract¹ which consisted of an acceptance by Pike to the written bid proposal. Kennedy began the work in the spring of 2003. The written contract is silent as to waterproofing the basement, and Kennedy testified that he neither performs waterproofing of basements nor was aware of Pike's expectation that her basement would not retain water.

As Kennedy's work on the basement progressed, he encountered several problems that, according to the city inspector, needed to be addressed, including having to replace several beams in the floor joist system and pour pier pads (concrete squares) every six feet to support jacks needed to keep the basement ceiling in place. Those items were not part of the original bid and written contract. When Pike inquired as to why she did not see a water sealing, black tar substance on one completed wall, Kennedy assured her that he preferred a more commonly used material called Sure-Lock or Sure-Wall to seal the walls. Kennedy finished the basement in August 2003, but he told Pike she would need to hire a carpenter to build a stairway and finish the windows. Pike was not satisfied with the condition of the basement, as she observed several gaps between walls and the windows, under the back door, and between the

¹The terms of the contract are:

We hereby propose to furnish the materials and perform the labor necessary for the completion of . . . Remove and replace all block wall and replace with new footings and block crawl space. Walls will be 42" first footing, all others will be full. We will remove floor in basement area and 8" of dirt. Then repour new 4" floor. Price includes labor and materials, 4 windows, sump tub only, tile gravel backfill and clean up=\$17,640.00. Remove all dirt in crawl space areas on south and east of home, install full basement walls and new floor to match other. Price includes labor mat and permit=\$14,408. Total \$32,048. All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner.

foundation of the house and the tops of the basement walls, allowing light to peer through the gaps. After a rainstorm in November 2003, several inches of water also collected in the basement. Pike testified that the new basement has continued to have problems with water seepage and resulting damage.

Pike brought suit against Kennedy and Brick-N-Block in December 2004, alleging breach of contract for the construction of the basement and claiming damages for loss of the value of the premises, lost time and wages to deal with the breach of contract, and expenses incurred due to deficient construction, including increased utilities, additional inspections, labor, and materials to evaluate the deficiencies. Kennedy asserted affirmative defenses that Pike failed to mitigate her damages, failed to plead a specific damage amount pursuant to Iowa Code section 691.18 (2003), and that some of her claimed damages were not properly recoverable for breach of contract. The parties proceeded to a bench trial in November 2005. Both parties presented expert testimony regarding the quality of workmanship of the construction of the basement. Pike submitted additional evidence of two bids to waterproof the basement, ranging from \$4189 to \$6480. The district court issued its ruling in December 2005, finding Kennedy breached the implied warranty that the basement would be fit for its intended purpose of a living space. The court granted Pike damages of \$6060 for installation of a drainage system and two back-up, battery operated sump pumps. Other damages were denied. Kennedy filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to reconsider and modify the ruling, which the district court denied. Kennedy appeals.

II. Scope and Standards of Review.

Our scope of review in this case is for correction of errors at law. Iowa R. App. P. 6.4; *Teggatz v. Ringleb*, 610 N.W.2d 527, 529 (Iowa 2000). The trial court's findings of fact are binding if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a). Substantial evidence is such quantity and quality of evidence that a reasonable person could accept "as adequate to reach the same findings." *Reiss v. ICI Seeds, Inc.*, 548 N.W.2d 170, 173 (Iowa Ct. App. 1996). "Evidence is not insubstantial merely because it could support contrary inferences." *Id.* at 173. We construe the trial court's findings of fact broadly "to uphold, rather than defeat, the judgment" and will not reweigh the evidence or second-guess the trial court's explicit or implicit findings of witness credibility. *Id.*

III. Issues on appeal.

Kennedy contends on appeal that the district court erred by (1) finding he had breached an implied warranty, (2) considering extrinsic evidence to add to the terms of the written contract, and (3) assessing damages for additional battery-operated sump pumps. Pike maintains that evidence sufficiently supports the district court's conclusions and award of damages.

Breach of an Implied Warranty. At trial, Pike alleged that Kennedy breached the implied warranty when he failed to construct and waterproof the basement in a workmanlike manner for its intended use as a living space. She did not argue a breach of the express terms of the written contract, but of the implied warranty. For implied warranty claims, "[i]n a construction contract it is implied that the building will be erected in a reasonably good and workmanlike manner and that it will be reasonably fit for the intended purpose." *Moore's*

Builder and Contractor, Inc., 409 N.W.2d at 195 (citing *Kirk v. Ridgway*, 373 N.W.2d 491, 493 (Iowa 1985)). Pike's expert, Lew Ross, testified as to numerous flaws in the construction of the basement, with "substandard" workmanship. He also testified that a basement intended to be a living space should be watertight.² Des Moines City Inspector, Robert Mezera, testified that while the city code requires waterproofing of all foundations, the city's building code was "a book of minimums," not requiring some sealing of apparent gaps. From his many inspections during the building process, he was not aware of any water problems. In his testimony he added that had he known water was coming in, he "would have called the contractor to meet me out there . . . to see if we could figure out the problem."

Kennedy produced expert testimony, supporting his position that his work on the basement had been well performed, that most basements in Des Moines leak and that waterproofing is a separate component from constructing a basement. Although Kennedy contends Pike and her experts were not credible, the credibility of witnesses is peculiarly the responsibility of the fact finder to assess. *Estate of Hagedorn ex rel. Hagedorn v. Peterson*, 690 N.W.2d 84, 88 (Iowa 2004). By finding that the basement was not constructed in a workmanlike fashion for use as a living space, the district court implicitly found more credible Pike's testimony that she discussed her intentions for the use of

² Ross testified that Pike's expectation to use the basement as living space would have required leveling of the foundation and other remodeling work that was not specified in the terms of the contract. Kennedy claims this undermines the implied warranty for fitness of purpose that flows from that express contract. However, not every detail ultimately performed by Kennedy or required by the city building code was specified in the contract. For example, the Sure-Lock/Sure-Wall sealant, installation of the pour-pads and jacks, the types of windows, and the replacement of the basement ceiling joists and beams.

the basement with Kennedy during the initial evaluation and prior to the written bid proposal. The trier of fact, here the district court, has the prerogative to determine which evidence is entitled to belief, as it is in a better position to evaluate the credibility of witnesses; thus, factual disputes depending heavily on such credibility are best resolved by the district court. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). While the timing of the communication of certain information is in dispute, Kennedy did admit in questioning by the court that he knew Pike wanted to use the basement for living space. The question before us is not whether the evidence supports a contrary conclusion, as urged by Kennedy, but if it supports the conclusion actually made. *Id.* We agree with the district court that the evidence is sufficient to support a finding of breach of the implied warranty for workmanship and fitness for the intended purpose and affirm on this issue.³

Parol Evidence. Kennedy next argues that the district court improperly considered extrinsic evidence of the parties' pre-contract conversations to alter the terms of the written agreement. The district court specifically stated in the rule 1.904 ruling that it did not reform or modify the contract, but considered the conversations as relevant to the implied warranty and Kennedy's knowledge of the particular purpose intended by Pike for the use of the basement. We affirm on this issue.

³ Kennedy requests that we adopt a specific definition of "good and workmanlike manner" as set forth by case law he cites from other jurisdictions, as Iowa has not adopted a specific definition of the term. We decline to do so.

Damages. Finally, Kennedy asserts that the district court erred by awarding \$1800 worth of damages to Pike for two backup, battery-operated sump pumps. We conclude this damage item is not supported by the evidence submitted during trial. There was no evidence that Pike had sump pumps previously installed that were damaged as a result of the breach of warranty. The original bid only called for “sump tub only,” implying that Pike was responsible for separately purchasing the necessary equipment. We therefore reverse the award of \$1800 of damages for the battery-operated backup sump pumps. We remand to the district court for reentry of an order on damages consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Huitink, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (dissents in part)

I dissent in part. I do not believe plaintiff proved the necessary elements to show an implied warranty. I would reverse and dismiss.