IN THE COURT OF APPEALS OF IOWA

No. 9-580 / 88-1552

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JAKE ZOET,

Appellee,

vs.

CHIEF INDUSTRIES, INC.,

Appellant/Cross-Appellee,

and

UITTENBOGAARD CONSTRUCTION, INC.,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for O'Brien County, James L. McDonald, Judge.

Defendant, Chief Industries, Inc. (Chief), appeals a judgment of the trial court following a jury trial, finding Chief had been negligent and breached an implied warranty of fitness for a particular purpose in the design of plaintiff's cattle confinement facility. The jury awarded plaintiff $122,000, the costs incurred in repairing the structure's roof. Defendant asserts the trial court incorrectly instructed the jury on the issue of damages and erred in overruling its motion for a directed verdict. Cross-appellant Uittenbogaard Construction, Inc., contends: (1) if the trial court is found to have erred in instructing the jury on the measure of damages, a new trial should be granted limiting any assessment of damages to

Chief; (2) the trial court correctly overruled Chief's motion for a directed verdict; and (3) the trial court erred in overruling its motion for attorney fees and costs of litigation. **AFFIRMED.**

Richard J. Barry of Greer, Montgomery, Barry & Bovee, Spencer, for appellee Zoet.

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellee Uittenbogaard Construction.

Jill Thompson Hansen of Brown, Winick, Graves, Donnelly, Baskerville & Schoenebaum, Des Moines, for appellant.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

Chief Industries, Inc. ("Chief") is engaged in the business of manufacturing pre-engineered all-steel utility buildings. Uittenbogaard Construction Inc. ("Uittenbogaard") was a Chief products dealer, and erected numerous buildings pre-engineered by Chief. In 1975, Jake Zoet was in the market for a cattle confinement facility. Marvin Uittenbogaard, president of Uittenbogaard Construction, was contacted by Zoet regarding the possibility of constructing a cattle confinement facility.

Upon receiving Zoet's ideas regarding the dimensions for his cattle facility, Uittenbogaard made a trip to Grand Island, Nebraska, to meet with Chief's engineer, Ron Nall. Uittenbogaard suggested some changes in a comparable design already developed by Chief. Nall adopted Uittenbogaard's ideas, and with some sketches provided by Uittenbogaard, designed Zoet's cattle facility.

The first facility was erected in 1975, and a second was erected in 1976. In 1980, water began seeping through the roof purlins, which caused the all-steel material to rust. Due to the combination of moisture, dust, and gases from the manure pits beneath the pens, the corrosion increased to the point where the roof was likely to collapse. Zoet had the roof replaced at a cost of $122,000. Zoet subsequently sued both Chief and Uittenbogaard to recover damages for the deterioration of the roofs. Zoet alleged theories of negligence in design

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and manufacture, express warranty, and implied warranty of fitness for a particular purpose.

Chief filed a cross-claim against Uittenbogaard, alleging Uittenbogaard had designed and erected the buildings and Chief had made no warranties. Uittenbogaard filed a cross-claim against Chief, seeking indemnification and contribution from Chief in the event any judgment was rendered against it.

The case ultimately proceeded to trial. Both Chief and Uittenbogaard presented evidence attempting to show the other designed Zoet's facilities. Chief moved for a directed verdict, which the trial court denied except as to the theory of express warranty. The jury ultimately found both Chief and Uittenbogaard had warranted the facilities would be fit for a particular purpose, but only Chief had breached that warranty. The jury found Chief solely negligent. Damages of $122,000 were awarded against Chief. Uittenbogaard subsequently filed a motion for judgment on attorney fees and costs, which was denied by the trial court. Chief filed a motion for new trial, which the trial court denied. Chief has appealed and Uittenbogaard has cross-appealed from the trial court's adverse rulings.

Chief argues Instruction No. 33 incorrectly instructed the jury on the appropriate measure of damages. Chief additionally argues the trial court erred in overruling its motion for a directed verdict on the claims of negligence and implied warranty.

Uittenbogaard asserts if Instruction No. 33 is found on appeal to be erroneous, then a new trial should be limited to the issue of the amount of damages on Zoet's claim against Chief. Uittenbogaard additionally argues the trial court erred in denying its motion for attorney fees and costs.

I. **Damages.** Chief argues the trial court improperly instructed the jury on the appropriate measure of damages. It specifically argues Instruction No. 33 failed to take into account the benefit plaintiff obtained from the buildings.

The record reveals plaintiff's attorney attempted to elicit testimony regarding the fair market value of the property prior to replacement of the roofs. Chief objected to this line of questioning because it was "completely irrelevant since the proper measure of damages has nothing to do with the value before and after." Chief's attorney further stated: "This Plaintiff is seeking damages in the sum of $122,000 for the repair of his roof, and any testimony, opinion, or otherwise, with regard to the fair market value of the property is completely irrelevant, immaterial, and prejudicial."

Plaintiff explained to the court the purpose of the testimony was to prove the difference in value exceeded the cost of repair. Chief then agreed to stipulate the cost to replace the roofs ($122,000) had been less than the diminishment in fair market value occasioned by the deterioration of the roofs.

The trial court regarded Chief's stipulation to be a stipulation as to the appropriate measure of damages to be applied in the case. We agree. Based upon Chief's objection and stipulation, plaintiff was precluded from introducing any evidence on the value of the property prior and subsequent to repair. The record and the context of Chief's stipulation indicate it was a stipulation as to the measure of damages to be applied.

Chief advocates adoption of a "pro rata" approach toward damages. Under such an analysis, plaintiff's damages would be reduced in proportion to the amount of use he was able to derive from the defectively-designed building. This concept is simply a variation of the diminution of value analysis. See Shaw v. Bridges-Gallagher, Inc., 174 Ill. App. 3d 680, 687, 528 N.E.2d 1349, 1353 (Ill. App. Ct. 1988). We deem it would be inequitable to apply a damages analysis which would penalize plaintiff for utilizing the defective property without admitting accompanying evidence as to the actual value of the property and plaintiff's use thereof. As Chief objected to the admission of any evidence regarding the value of the property, we decline to consider application of the "pro rata" approach in this case.

II. **Directed Verdict.** Chief contends the trial court erred in overruling its motion for a directed verdict and in submitting plaintiff's claims on the theories of negligence and implied warranty of fitness for a particular

purpose. When considering a motion for directed verdict, we must consider the evidence in the light most favorable to the party against whom the motion is directed. Kurth v. Van Horn, 380 N.W.2d 693, 695 (Iowa 1986). If reasonable minds could differ on an issue under the evidence presented, it is properly submitted to a jury. Id. From this court's review of the record, it appears each element of plaintiff's claims was supported by substantial evidence. Id. In his case-in-chief, plaintiff presented expert evidence regarding the negligent design of the confinement facilities. Plaintiff presented evidence regarding reliance on Chief's expertise and Chief's knowledge of the purpose of the facilities. Plaintiff also presented sufficient evidence regarding Chief's role in designing the structures. The claims of implied warranty and negligent design were properly submitted to the jury, and the jury's findings were supported by substantial evidence.

III. **Attorney Fees.** In its cross-appeal, Uittenbogaard claims the trial court erred in overruling its motion for attorney fees and costs. The essence of Uittenbogaard's claim is that because its liability, if any, in this action could only have been secondary to Chief's liability, it should be allowed to recover from Chief for the costs of defending plaintiff's action.

Attorney fees are not ordinarily recoverable as part of the damages against an opposing party in litigation.

Turner v. Zip Motors, Inc., 245 Iowa 1091, 1098, 65 N.W.2d 427, 431 (1954). There is, however, a well-established exception to this rule.

> [I]f through the tort of A, B is in good faith involved in litigation with C, the exception comes into play, and B may then recover the reasonable value of his expense for employment of counsel, and other items, from A.

Id.

In Rauch v. Senecal, 253 Iowa 487, 112 N.W.2d 886 (1962), our supreme court recognized a limitation to the principle set forth in Turner.

> [I]f A is defending, in whole or in part, his own tort, he may not recover indemnity from another who may also have been claimed, or adjudged to have also been guilty of tortious conduct.

Id. at 491, 112 N.W.2d at 888.

The Rauch court recognized a distinction between charges of secondary and primary negligence and confined its holding to the proposition that a defendant who successfully defends against his own charges of primary negligence may not recover his expenses from a codefendant who is found liable for negligence. Id. at 493, 112 N.W.2d at 889.

In Peters v. Lyons, 168 N.W.2d 759, 770 (Iowa 1969), the supreme court adhered to the "primary-secondary" distinctions set out in Rauch. However, the court concluded the determination of recoverability of attorney fees did not rest on the pleadings, but must be based upon the facts of the case.

> [T]he determination of this matter as between indemnitor and indemnitee should not rest on the presence or absence of such pleading by a third party, who through an overabundance of caution or optimism alleges more (or less) than he can prove. The decision must be made on the facts as found by the trier thereof.

Id.

In Sweeny v. Pease, 294 N.W.2d 819, 821 (Iowa 1980), our supreme court appeared to retreat somewhat from its position in Peters when it stated "if the person seeking indemnity defended against even one charge of active or primary negligence, indemnity is barred." (Emphasis added.)[1] The Sweeny court distinguished charges of primary and secondary liability and held "[t]he crucial issue is whether the person seeking indemnity has participated in some manner in the conduct or omission which caused the injury beyond a mere failure to perform a duty imposed by law." Id. at 823.

It is not easy to harmonize the case law in this area, nor to apply it and determine a defendant's entitlement to attorney fees. From our review of the record, it is clear Uittenbogaard was charged with primary negligence--the failure to adequately design plaintiff's cattle confinement facilities. This liability was not merely secondary to

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1. While the concept of "active-passive" negligence was recently abandoned by our supreme court as one of the grounds for establishing indemnity, American Trust & Savings Bank v. United Fidelity and Guaranty Company, 439 N.W.2d 188, 190 (Iowa 1989), it does not appear this distinction has been rejected in the context of determining a defendant's liability for the attorney fees and expenses of a codefendant.

Chief's liability. Evidence revealed Uittenbogaard had a role, albeit a small role, in developing the plans for these facilities and for making recommendations regarding their design.

While Uittenbogaard was able to convince the jury of its lack of negligence, that does not negate the fact that it was specifically alleged to have negligently designed the facilities. The trial court properly declined Uittenbogaard's motion for attorney fees.

AFFIRMED.

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

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I would agree with the majority in all respects, except I would have allowed Uittenbogaard attorney fees and costs on their claim against Chief.