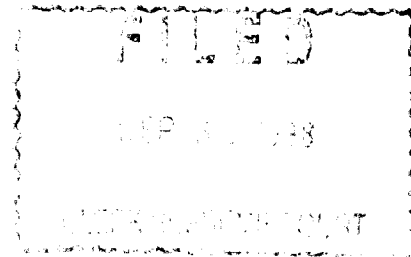


IN THE COURT OF APPEALS OF IOWA

No. 8-403 / 97-0866
Filed September 30, 1998

**CEDAR VALLEY CORP., Individually
and ex. rel. IOWA CULVERT
BUILDERS, INC. and IOWA
CULVERT BUILDERS, INC.,**
Appellees,



vs.

**IOWA DEPARTMENT OF
TRANSPORTATION and
STATE OF IOWA,**
Appellants.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The defendants in tort and contract action appeal from the district court's judgment for the plaintiffs awarding damages on subcontractor's claims for extra compensation for the performance of additional work caused by the pooling of water at a highway construction site. **AFFIRMED.**

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant Attorney General, and Mark Hunacek, Assistant Attorney General, for appellants.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellees.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

The rains of '93 have again caused problems between contracting parties. The Department of Transportation appeals from the trial court's denial of motions for directed verdict and judgment notwithstanding the verdict on breach of contract and negligence claims. Because we find Iowa Culvert offered substantial evidence to support each element of its claims, submission of the issues to the jury is affirmed and the jury verdict is upheld.

I. Background Facts & Proceedings.

Cedar Valley entered into a contract with the Iowa Department of Transportation to complete a Polk County highway construction project. Cedar Valley subcontracted with Iowa Culvert Builders, Inc. to complete the building of a culvert included within the project. Iowa Culvert's bid was \$102,949.

The Department and Cedar Valley contracted to comply with all state regulations effective in Iowa. Thus, the conduct of the parties is governed, in part, by the general requirements and covenants for highway construction set out in the Iowa Administrative Code. Iowa Admin. Code r. 761-125.1-125.2 (1997). The Code includes standard specifications by which the Department, contractors, and subcontractors must abide.

The culvert construction plans did not provide any drainage for the area where the culvert was to be built. Heavy rainfall during the summer of 1993 caused eight to ten feet of water to pool at the construction site. The culvert was completely

covered by water. The Department ordered Iowa Culvert to pump the water out of the site. Iowa Culvert claimed expenses in excess of \$147,000 pumping out the water.¹

The Department refused to pay for Iowa Culvert's extra expenses because it did not consider the pumping "extra work" as defined by the contract. The Department also based its denial on the ground Iowa Culvert did not notify the Department engineer in writing of Culvert's intention to request extra compensation.

Cedar Valley, on behalf of Iowa Culvert, and Iowa Culvert filed an action against the Department and the State asserting claims of breach of contract, breach of implied warranty, and negligence.

The case was tried to a jury. At the close of the plaintiff's evidence, and again at the close of all evidence, the Department moved for directed verdict. Both motions were overruled. The jury found in favor of Iowa Culvert on its breach of contract and negligence claims. The jury assigned thirty-seven percent fault to Iowa Culvert and sixty-three percent to the Department. Iowa Culvert was awarded \$92,800 in damages.

The Department filed a motion for judgment notwithstanding the verdict and motion for new trial. The district court denied all post-trial motions. The Department appeals.

¹ The concepts of impracticability/consideration/pre-existing duties were not litigated.

II. Scope of Review.

Denial by the trial court of a motion for directed verdict is reviewed for correction of errors of law. *Spaur v. Owens-Corning Fiberglass Corp.*, 510 N.W.2d 854, 858 (Iowa 1994). The evidence is viewed in the light most favorable to the nonmovant and it is determined whether sufficient evidence existed to warrant submission of the issues to a jury. *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684 (Iowa 1990). To grant a directed verdict, a trial court must find the evidence, when considered in the light most favorable to the opposing party, is insufficient as a matter of law to sustain the allegations brought. *Nash v. Schultz*, 417 N.W.2d 241, 243 (Iowa App. 1987). The trial court is vested with considerable discretion in determining whether evidence is sufficient to submit the issue to the jury. *Oberreuter v. Orion Industries, Inc.*, 398 N.W.2d 206, 209 (Iowa App. 1986).

We also consider whether reasonable minds could differ on the issues in controversy. *Spaur*, 510 N.W.2d at 858. If they could, the issue should be submitted to the jury. *Schiltz v. Cullen-Schiltz & Assoc., Inc.*, 228 N.W.2d 10, 17 (Iowa 1975). To successfully resist a motion for directed verdict, the plaintiffs must show merely there is evidence sufficient to submit the question to the jury; they do not need to prove their claims. *Id.*

A motion for judgment notwithstanding the verdict pursuant to Iowa Rule of Civil Procedure 243 must stand on the grounds raised in the movant's motion for directed verdict. *Lamb v. Manitowoc Company, Inc.*, 570 N.W.2d 65, 67 (Iowa

1997). When reviewing the district court's denial of a judgment notwithstanding the verdict, we again look to see whether the evidence was sufficient to generate a jury question. *Id.* at 68. “[I]f there is no substantial evidence in support of each element of plaintiff's claim, a . . . judgment notwithstanding the verdict in defendants’ favor is appropriate.” *Id.* (citations omitted). If reasonable minds could have differed on an issue, it was appropriate to submit the issue to the jury and the jury’s verdict should be upheld. *Id.*

III. Cedar Valley’s Standing to Bring Suit on Behalf of Iowa Culvert.

One of the Department’s grounds for directed verdict was Cedar Valley did not have standing to bring suit against the Department on behalf of Iowa Culvert. Iowa Culvert did not bring suit as a third-party beneficiary. The contract between Cedar Valley and the Department provided there were no third-party beneficiaries to the contract.²

It has been accepted by many jurisdictions, including the United States Supreme Court, that a prime contractor can bring suit on behalf of the injured subcontractor. *See United States v. Blair*, 321 U.S. 730, 737-38 (1969); *Schiavone Const. Co., Inc. v. Triborough Bridge & Tunnel*, 619 N.Y.S.2d 117, 118, 209 A.D.2d 598 (1994); *Tyger Const. Co., v. Commonwealth of Virginia*, 435 S.E.2d 669 (1993). We accept this principle and hold Cedar Valley had standing to bring suit against the

² This is an express statement of intent, in light of our appellate courts recognizing third-party beneficiary contract concepts in contracts involving subcontractors. *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 223 (Iowa 1988).

Department on behalf of Iowa Culvert. The fact the contractor is the only person legally bound to perform his contract with the Department implies the right to recover for amounts wrongfully withheld; whether the services were performed by the contractor or a subcontractor.

IV. Submission of Breach of Contract Claim to the Jury.

The Department alleges the undisputed evidence shows it did not breach its contract with Cedar Valley by refusing to pay Iowa Culvert for extra work. For this reason, the Department contends it was error to submit the breach of contract claim to the jury.

The crux of the Department's argument is Iowa Culvert did not do "extra work" as defined under the contract, and even if Iowa Culvert did extra work, they waived any entitlement to payment because they did not give the Department notice of the extra work.

Iowa Culvert argues the Department is in breach of the contract because the Department ordered Iowa Culvert to do the extra work. Written notice is not required when extra work is ordered.

To resolve the issues raised by the parties it was necessary to interpret the following contract provisions:

1104.04 EXTRA WORK. The Contracting Authority reserves the right to order the performance of work of a class not contemplated in the proposal but which may be considered necessary to complete satisfactorily the work included in the

contract. Such extra work will be paid for as provided in 1109.04B.

1109.04 PAYMENT FOR WORK PERFORMED.

B. Extra work. Extra work ordered by the Engineer, of a quality or class not covered by the contract, will be paid for either at an agreed price or on a force-account basis.

1109.12 DISPUTED CLAIMS FOR EXTRA

COMPENSATION. In any case where the Contractor deems that extra compensation is due him for extra compensation [and the extra work is] not ordered by the Engineer . . . the Contractor shall notify the Engineer in writing of his intention to make claim for such extra compensation before he begins the work on which he bases his claim. . . .

[I]f such notification is not given, . . . the Contractor thereby agrees to waive the claim for extra compensation.

The trial court held it could not rule, as a matter of law, these provisions barred the plaintiff's claim for extra compensation but, rather, questions of fact were generated as to whether Iowa Culvert was entitled to extra compensation.

The construction and legal effect of a contract are always a matter for the court. *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993). Interpretation of the words of a contract is also a matter for the court to decide. *Id.* This is true unless determining what the words mean is dependent upon extrinsic evidence or a choice between two reasonable inferences from the extrinsic evidence. *Id.* "Extrinsic evidence is admissible as an aid to interpretation when it throws light on the parties' situation, antecedent negotiations, the attendant circumstances, and the objectives the parties were trying to attain." *Id.* (citing *Taylor*

Enter., Inc. v. Clarinda Prod. Credit Ass'n, 447 N.W.2d 113, 115 (Iowa 1989)). As a general rule, questions of performance or breach are for the jury. *Id.*

In the present case, it was disputed whether extra work was performed as defined under the contract. This necessitated an interpretation of the definition of “extra work” and required evaluation of extrinsic evidence, including witness testimony, change of work order forms, and numerous letters between the parties. Whether the Department breached the contract was dependent upon whether pumping water from the site was contemplated by the original proposal, whether work was ordered by the Department engineer, and whether Iowa Culvert’s extra work was necessary to complete the job satisfactorily.

Iowa Culvert offered substantial evidence proving they performed extra work as defined by the contract. The Department presented evidence they did not. However, the Department did not prove extra work was not performed as a matter of law and reasonable minds could have differed on whether extra work had been performed. Under these circumstances, the trial court did not err in submitting the breach of contract issue to the jury. The denial of the Department’s motions regarding the interpretation and breach of contract issues are affirmed.

V. Submission of Negligence Claim to the Jury.

The Department alleges it owed no duty to design the culvert with an open ditch for use during the construction of the culvert to prevent flooding. The Department also alleges it had no duty to inform the contractor of potential pooling

of water at the site. Because no duty was owed, the Department argues, Iowa Culvert's negligence claim must fail as a matter of law. Based on these arguments, the Department alleges the trial court erred in not granting the Department's motions for directed verdict and judgment notwithstanding the verdict on the negligence claim.

Generally, questions of negligence and proximate cause are for a jury; it is only in exceptional cases they may be decided as matters of law. *Timm v. Clement*, 574 N.W.2d 368, 371 (Iowa App. 1997). To establish negligence, the Iowa Culvert had to prove the Department owed a duty, breached the duty, the breach was the proximate cause of damage to the plaintiffs, and that actual damage occurred. *Id.*

A design engineer may be held liable for negligence in failing to exercise the ordinary skill of the profession in drafting plans and specifications or in supervising construction work. *Shepherd Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612, 615 (Iowa 1991). An engineer's potential for liability extends beyond privity of contract. *Id.* The Department had a duty to prepare the plans for the building of the culvert in accordance with proper engineering standards.

The plaintiff's evidence that the Department breached its duty was sufficient to submit the question to the jury. Iowa Culvert offered expert testimony that the plans in question, by not providing for an open ditch outlet or placing a notation on the plans to apprise the contractor there was no drainage, were not in accordance with proper engineering standards. Iowa Culvert also offered substantial evidence of the

other elements of its negligence claim, proximate cause, and damages. Under these circumstances, the trial court did not err in denying the Department's motion for judgment notwithstanding the verdict and allowing the jury's verdict to stand. The trial court correctly denied the Department's motions.

AFFIRMED.