

IN THE COURT OF APPEALS OF IOWA

No. 7-335 / 96-0666

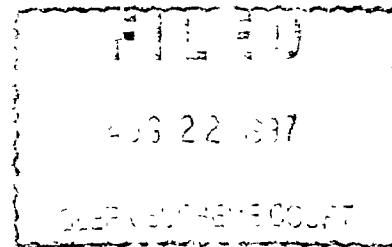
**MARTIN R. BIELENBERG and
BARBARA J. BIELENBERG,**

Appellants,

vs.

**IOWA DEPARTMENT OF
TRANSPORTATION, JON ALLEN,
and RICHARD VERCHOTA,**

Appellees.



Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh,
Judge.

Plaintiffs appeal from the district court's ruling dismissing their action against
defendants for damages caused by the cleaning of a highway ditch. **AFFIRMED.**

Gregory N. Lohr of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for
appellants.

Thomas J. Miller, Attorney General, David A. Ferree, Special Assistant
Attorney General, and Mark Hunacek and Carolyn J. Olson, Assistant Attorneys
General, for appellees.

Considered by Sackett, P.J., Huitink, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

HAYDEN, S.J.

Martin and Barbara Bielenberg appeal from the district court's findings of fact, conclusions of law, and judgment dismissing their action against the Iowa Department of Transportation (DOT) and two of its employees. Bielenbergs asserted causes of action based on negligence, nuisance, trespass, and condemnation without compensation. Following a court trial, the district court granted judgment in favor of DOT and its employees. Bielenbergs appeal. We affirm.

Bielenbergs own an acreage in Woodbury County, Iowa. The acreage fronts Old Highway 75 on one side, and a house is located between 200 and 250 feet from the highway. A ditch runs parallel to the highway on each side. Bielenbergs have the acreage for sale and are renting it until it is sold.

On June 21, 1993, Martin Bielenberg observed a DOT crew working in the ditch near his property. He phoned defendant Joe Allen, a DOT employee. Allen explained the crew was working on a ditch cleaning project. Allen testified the water in the ditch was not flowing and was backing up to the north of Bielenbergs' property. He testified the condition posed a danger to the traveling public because if a car overturned in the ditch the occupants could drown. Martin Bielenberg demanded DOT cease work on the ditch but DOT refused after it verified water flowed south through the ditch.

The district court found the ditch lay within the State's highway right-of-way and DOT did not trespass on Bielenbergs' property. The court ruled Bielenbergs had

not met their burden of proving negligence, or that any negligence was a proximate cause of any damages. The court also ruled Bielenbergs failed to meet their burden of proving DOT condemned their property without compensation.

I. Scope of Review

Our review is for correction of errors at law. Iowa R. App. P. 4. The district court's findings of fact carry the force of a special verdict and are equivalent to a jury verdict. *Id.*; *Papenheim v. Lovell*, 530 N.W.2d 668, 671 (Iowa 1995). We are bound by the court's factual findings if substantial evidence supports them. *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 632 (Iowa 1990).

Evidence is substantial if reasonable minds would find it adequate to reach the same findings, even if we might draw a contrary inference. *Frontier Properties Corp. v. Swanberg*, 488 N.W.2d 146, 147 (Iowa 1992). The possibility of drawing two inconsistent conclusions from the same body of evidence does not prevent a finding from being supported by substantial evidence. *Baty v. Binns*, 354 N.W.2d 777, 780 (Iowa 1984); *see also Papenheim*, 530 N.W.2d at 671 (holding evidence is not insubstantial merely because it would have supported contrary inferences).

When determining whether evidence is substantial, we view the evidence in the light most favorable to upholding the district court's judgment. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995). We do so whether the evidence is contradicted or not, and we do not weigh the evidence or pass on the credibility of witnesses. *Carson v. Mulnix*, 263 N.W.2d 701, 705 (Iowa 1978).

When, as in this case, the district court denied recovery because a party did not meet its burden of proof, the judgment will stand unless we find the party carried its burden as a matter of law. *Falczynski*, 533 N.W.2d at 230. We will so find “only when evidence is so overwhelming that only one reasonable inference on each critical fact issue can be drawn.” *Id.*

II. Lack of Notice

Bielenbergs contend they were entitled to notice of the ditch cleaning project. They allege the failure of DOT to provide notice violated notice provisions of Iowa statutory law and denied them due process guaranteed by the Iowa and United States constitutions. We do not address this issue because error has not been preserved.

When the district court does not rule on an issue properly raised, a party must file a rule 179(b) motion asking the court to rule on the issue in order to preserve an issue for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). Filing a motion in these circumstances is “essential.” *Rouse v. Union Twsp.*, 530 N.W.2d 714, 717 (Iowa 1995). The motion is necessary because issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal. *Benavides*, 539 N.W.2d at 356. Bielenbergs raised the issue of notice before the district court, but the court did not resolve the issue. The failure to file a rule 179(b) motion prevents Bielenbergs from raising this issue on appeal.

III. Proximate Cause

The district court made a significant factual finding Bielenbergs failed to prove any water in the ditch, even if it pooled to some extent, was the source of water percolating into the crawl space beneath the house. The court also found DOT did not alter the flow of water or cause water to pool in the ditch in such a way as to damage Bielenbergs' property. If substantial evidence supports these findings, Bielenbergs' claims for negligence and nuisance fail. *See Bickford v. American Interinsurance Exch.*, 224 N.W.2d 450, 455 (Iowa 1974) (holding actionable negligence must be a proximate cause of any injury or damage done).

We hold substantial evidence supports the district court's finding Bielenbergs failed to prove proximate cause. Evidence indicated water from rain and snow saturated the soil around the house and percolated into the crawl space. Before DOT started the project, Bielenbergs ran a hose from a sump pump to the ditch to drain the crawl space. Bielenbergs explored installing a drainage system that would route water toward the ditch. Defendant Rick Verchota, a DOT employee and engineer, observed stagnant water pooled in the ditch before DOT began the ditch cleaning project. Verchota testified the project did not change the natural course of drainage and reduced the amount of water in the ditch.

Verchota testified even if water pooled in the ditch, it would not flow into the crawl space. He explained the ditch was three feet deep and the crawl space was four and one-half feet deep, but over two hundred feet separated the two. He reasoned any

water seeping out of the ditch would flow downward and would not be able to enter the crawl space due to the distance between them. Neighbors who had ditches running along their property did not claim any increased water damage after the project. Witnesses established the area received significantly more rainfall than in past years.

Viewing the evidence in the light most favorable to DOT, we determine substantial evidence supports the district court's findings. Bielenbergs have not established they are entitled to judgment as a matter of law.

IV. Inverse Condemnation

Bielenbergs alleged DOT in effect took their property without complying with statutory law addressing condemnation and without paying compensation. Bielenbergs premised their claim on a diminution in value of the property. The district court found there was no credible evidence the house depreciated in value, and this finding is supported by substantial evidence.

We affirm the district court. Costs on appeal are taxed to Bielenbergs.

AFFIRMED.