IN THE COURT OF APPEALS OF IOWA

No. 7-022 / 96-0139

WILLIAM M. BRIGGS and LINDA BRIGGS,
Plaintiffs-Appellees,

vs.

IKO MANUFACTURING, INC.,
Defendant-Appellant,

and

HAWKEYE LUMBER COMPANY,
Defendant.

Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson, Judge.

Defendant manufacturer appeals from a judgment entered upon a jury verdict in plaintiffs' favor in an action for breach of warranty concerning allegedly faulty shingles. **REVERSED.**

Randall C. Stravers of Pothoven, Blomgren & Stravers, Oskaloosa, for appellant.

Thomas G. Ross of Thomas G. Ross Law Office, Des Moines, for appellees.

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

STREIT, J.

Defendant manufacturer appeals from a judgment entered upon a jury verdict in plaintiffs' favor in an action for breach of warranty alleging faulty shingles.

In the Spring of 1994, William and Linda Briggs bought shingles made by IKO Manufacturing, Inc. from Hawkeye Lumber Company. They were told the shingles had a twenty-year warranty. The Briggses installed the shingles on the roof of their home.

During the shingling process, the shingles began to bubble, curl, and shed their ceramic particles. Briggs contacted Hawkeye, which told him to put the rest of the shingles on. The problems worsened after the shingling was completed. IKO sent an investigator to look at the Briggses' shingles. The investigator concluded the shingles were "bubbling, not buckling" and questioned whether the problem was caused by improper attic ventilation. IKO eventually issued a flat denial and refused to remedy the problem.

On December 12, 1994, the Briggses filed a petition against IKO and Hawkeye seeking damages based on theories of fraudulent and negligent misrepresentation, breach of contract (only against Hawkeye), and breach of warranty. The breach of warranty claim alleged IKO and Hawkeye breached express and implied warranties that the shingles would not bubble, curl, fail to seal, or drop ceramic granules.

The matter proceeded to a jury trial. At the close of the plaintiffs' case, defendants made motions for directed verdict as to all counts of the petition. As to the breach of warranty claim, IKO argued the only viable claim would be the written, express warranty, and there was no evidence of manufacturer defect which has resulted in leaks or wind damage covered by the warranty.[1]

The trial court dismissed the fraudulent and negligent misrepresentation counts, but overruled the motions as to the breach of contract and breach of warranty counts. The court clarified its ruling by indicating the breach of warranty claim still applied to Hawkeye on a fitness for particular purpose and breach of express warranty claim. The court indicated it would delay deciding whether an implied warranty claim still applied to IKO.

At the end of all evidence, the Briggses withdrew their claims of implied warranty and fitness for particular purpose or implied warranty of merchantability claims. IKO renewed its motion for directed verdict to Briggses' claim for breach of

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[1] IKO provided a Limited Warranty that contained a three-year warranty for replacement of shingles which, due to a manufacturing defect, have resulted in leaks. After three years, the shingles were warranted for pro-rata replacement cost of materials only. The warranty also contained a five-year warranty for free replacement shingles blown off as a result of wind gusts up to fifty-four miles per hour. The warranty also contained the following clause:

> ALL IMPLIED WARRANTIES, INCLUDING MERCHANTABILITY AND FITNESS, ARE HEREBY EXCLUDED. TO THE EXTENT THAT ANY IMPLIED WARRANTY MAY NOT BE EXCLUDED AS A MATTER OF LAW, ANY SUCH IMPLIED WARRANTY, INCLUDING MERCHANTABILITY AND FITNESS, IS LIMITED TO THE DURATION OF THIS WARRANTY.

express warranty. The district court overruled the motion. The jury returned a verdict of $8000 in Briggses' favor against IKO.

IKO appeals. It contends the district court erred in (1) overruling its motions for directed verdict on the breach of warranty claim, (2) failing to set forth the specific warranties which were allegedly breached in its jury instructions, (3) instructing on damage specifications which were not supported by the evidence, and (4) allowing expert testimony without proper foundation regarding the experts' qualifications.

I. Directed Verdict. IKO contends the district court erred in failing to grant its motions for directed verdict on the breach of warranty claim. The issue was properly preserved. Standard of review is on error. Iowa R. App. P. 4.

IKO contends in support of its argument, the Briggses failed to present a claim to the jury based on the express written warranty. It was undisputed the express warranty said the shingles would be free from defects which would result in leaks and from blowing off the roof under certain circumstances. IKO claims the Briggses failed to present any evidence as to a breach of those warranties.

When considering the propriety of a motion for directed verdict, the court views the evidence in the light most favorable to the opposing party. Iowa R. App. P. 14(f)(2). The trial court has a duty to submit any issue supported by substantial evidence. *Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 176 (Iowa 1990).

The IKO shingles bubbled. There was moisture underneath the shingles when Briggs took them off the roof -- a poor omen of leaks to come. The warranty against defects resulting in leaks or wind damage was for twenty years. If there was moisture under the shingles, plaintiffs do not have to wait until damage occurs to the roof and home from actual leakage to submit a claim for breach of warranty. A jury question exists whether the bubbling problem is a manufacturing defect and moisture found constitutes a leak which is protected against under the warranty. We find there was substantial evidence to submit the issue of breach of warranty to the jury.

II. Jury Consideration of Damages. IKO claims the court erred in instructing the jury on items two, three, and four of the damages instruction on the breach of warranty claim.[2] The issue was properly preserved for appeal by objection from defendant's counsel. Review of jury instructions is on error. Iowa R. App. P. 4.

Item four allowed for damages caused by "injury to the person, which may include plaintiff, William M. Briggs' past pain and suffering." Plaintiff argues Iowa Code section 554.2714(3) specifically itemizes as a proper element of damages in a proper case, incidental, and consequential damages. Iowa Code section

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[2] The jury was instructed it may award damages for breach of warranty including:
1. Reasonable cost of shingles to repair or replace the damage or defective shingles;
2. Reasonable value of total cost to plaintiffs to repair or replace all shingles on the entire roof;
3. Other incidental and additional damages that you find associated with defendant.
4. Injury to the person, which may include plaintiff, William M. Briggs' past pain and suffering.

554.2715(2)(b) defines consequential damages to include, "injuries to person or property *proximately resulting* from any breach of warranty." (Emphasis added). We find the district court erred instructing the jury on these personal pain and suffering damages.

Generally, questions of negligence and proximate cause are for the jury; it is only in exceptional cases that they can be decided as a matter of law. Iowa R. App. P. 14(f)(10). Even when facts are undisputed, if reasonable minds might draw different inferences from them, a jury question is engendered. Iowa R. App. P. 14(f)(17); *see also Bandstra v. International Harvester, Co.*, 367 N.W.2d 282, 285 (Iowa App. 1985).

William Briggs testified the turmoil over the defective shingles caused his ulcers to worsen, caused an increase in his medication dosage, and increased his blood pressure. Briggs is essentially claiming mental anguish incident to breach of contract. Normally such damages are not recoverable. 22 Am.Jur.2d Damages Sec. 195, at 275-76 (1965) ("recovery for mental anguish is not, as a general rule, allowed in actions for breach of contract"); 25 C.J.S. Damages Sec. 69 (1966). In a narrow area such damages are recoverable. Restatement (Second) of Contracts Sec. 353, Comment a (1981):

> Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure. There are, however, two exceptional situations where

> such damages are recoverable. In the first, the disturbance accompanies a bodily injury. In such cases the action may nearly always be regarded as one in tort, although most jurisdictions do not require the plaintiff to specify the nature of the wrong on which his action is based and award damages without classifying the wrong. See Restatement Second, Torts Secs. 436, 905. In the second exceptional situation, the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.

The present case is a commercial, contractual dispute over roofing shingles and does not present evidence which would bring it within the narrow ambit of section 353. *Bossuyt v. Osage Farmers Nat. Bank*, 360 N.W.2d 769, 777-778 (Iowa 1985).

There is no evidence, other than William Briggs' testimony, to support the claim that the shingle problem was the proximate cause of his increased health problems. We determine, as a matter of law, there is no proximate cause between the alleged defective shingles and plaintiff's health complaints.

Such an item of damage was severable. The trial court's failure to use a separate line in the verdict form for such damage prevents us from merely deleting it.

See Drake v. Block, 247 Iowa 517, 74 N.W.2d 577 (1956); *Bossuyt v. Osage Farmers Nat. Bank*, 360 N.W.2d 769, 778 (Iowa 1985).

We have considered appellant's contentions as to the other items of damage and find them to be without merit. We reverse the trial court and remand for a new trial.

III. Specificity of Jury Instructions. IKO maintains the court erred in refusing to set forth the specific warranties alleged to have been breached in its marshaling instruction. Over IKO's objection, the district court gave a marshaling instruction on breach of express warranty which did not set forth the express warranty involved.

Trial procedure requires that a plaintiff identify the specific acts or omissions relied on to generate a jury issue. *Rinkleff v. Knox*, 375 N.W.2d 262, 266 (Iowa 1985). Jury instructions should be formulated so as to require the jury to focus on the specification or theory of recovery that finds support in the evidence. Id.; *Fuches v. S.E.S. Co.*, 459 N.W.2d 642, 644 (Iowa App.1990); *Bigalk v. Bigalk,* 540 N.W.2d 247, 249 (Iowa 1995). We believe this applies in a breach of warranty action. *See Guidichessi v. ADM Milling Co.*, 554 N.W.2d 563, 565 (Iowa App. 1996). Jury instructions marshaling the law about breach of warranty should identify what specific defect occurred that was alleged to be covered under the warranty. The instructions herein failed to identify the particular complaint being urged by plaintiffs.

Plaintiffs purchased the shingles to be used to make a roof that does not leak. Defendant furnished an express warranty against manufacturer defects in the shingles resulting in leaks or wind damage. The plaintiffs allegedly did not get such a roof. They ended up with bubbling shingles that allowed moisture underneath, most likely to cause leaks. In the event of a new trial, the court should submit jury instructions that are more specific on what specific breach of express warranty is alleged to have occurred.

IV. Expert Testimony. Mr. Hubert Conrad and Mr. Elmer Heckethorn testified the problems with the roof were caused by the shingles themselves, rather than anything to do with the construction or application. IKO argues the court erred in allowing these witnesses to testify as experts without any showing they were qualified to give expert testimony on defects in shingles. We believe a proper foundation was laid.

> This state adheres to a liberal policy concerning the admissibility of opinion testimony. Such evidence will be admitted if it is of a nature that will aid the jury and is based upon special training, experience, or knowledge with respect to an issue in controversy. The admissibility of opinion testimony, lay or expert, has not been distilled into district rules. Rather, it rests in the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal unless manifest abuse of that discretion causing prejudice to the complaining party is shown.

Bandstra, 367 N.W.2d at 288 (citations omitted).

The record reveals Herb Conrad has been doing carpentry work for all his life. Since 1990 he has put on four or five roofs a year. Conrad was a neighbor of William Briggs and a local contractor who had given Briggs some initial direction on how to put the shingles on the roof. He also looked at the Briggses' roof after the shingles started bubbling. He said Briggs correctly laid the shingles on the roof.

Elmer Heckethorn has worked construction his whole life and has been in the roofing business for twenty-two years. Briggs called him to give an estimate on the cost to reshingle the entire roof. Heckethorn noticed the shingles were turned up on the ends and were rough. He did not think there was a ventilation problem with the roof.

We find it was within the court's discretion to allow these witnesses to testify as to the condition of the roof and opine why the shingles bubbled. Sufficient factual foundation existed to support the opinions given by Conrad and Heckethorn. Both witnesses had knowledge and expertise that would aid the jury.

REVERSED.