

IN THE COURT OF APPEALS OF IOWA

No. 0-711 / 90-363

FILED

FEB 26 1991

CLERK SUPREME COURT

STEVE DLOUHY and CHERYL DLOUHY,

Plaintiffs-Appellants/Cross-Appellees,

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vs.

H. DALE CLOYED d/b/a CLOYED CONSTRUCTION COMPANY,

Defendant-Appellee/Cross-Appellant.

H. DALE CLOYED d/b/a CLOYED CONSTRUCTION COMPANY,

Counterclaimant/Cross-Appellant.

vs.

STEVE DLOUHY and CHERYL DLOUHY,

Defendants to Counterclaim/Cross-Appellees.

Appeal from the Iowa District Court for Pottawattamie
County, Keith E. Burgett, Judge.

Both parties appeal following a jury trial in this
breach of contract and tort action arising out of the
construction of a new house. **AFFIRMED.**

F.E. Ebersold of Smith, Peterson, Beckman & Willson,
Council Bluffs, for appellants.

John W. Kocourek of Peterson Law Offices, Council
Bluffs, for appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Plaintiffs Steve and Cheryl Dlouhy appeal a judgment entered for defendant H. Dale Cloyed following a jury trial denying them relief on their breach of contract and negligence claims. Plaintiffs also appeal a damage award in favor of defendant on his counterclaim for breach of contract and unjust enrichment. Plaintiffs allege numerous errors with respect to jury instructions, submission of the counterclaim, and alleged irregularities in the proceedings. Defendant cross-appeals, alleging the trial court erred in failing to award attorney fees and in failing to find that the damage award was inadequate. We affirm.

I. Dlouhys approached Dale Cloyed, who was doing business as Cloyed Construction Co., with rough sketches of a home they wished to build in Council Bluffs. Cloyed, who was related by marriage to Mrs. Dlouhy, underbid the other estimate Dlouhys had received by \$2,000. In September 1986 Cloyed submitted and Dlouhys accepted a proposal which the parties agree constituted a contract. The relevant portions of the contract specified what was included in the \$94,000 contract price, extended a one-year warranty, promised completion "in a workmanlike manner according to standard practices," and required that "deviation from [the] specifications involving extra costs will be executed only upon written orders, and [would] become an extra charge over and above the estimate."

Cloyed worked predominantly with Mrs. Dlouhy, who frequented the work site. They agreed on the positioning of the house, and during construction they altered several specifications. Although it appears Mrs. Dlouhy participated in or made the decisions to deviate from specifications involving extra costs, Dlouhys never issued written orders. Cloyed completed construction of the house in April 1987 and, along with the grader, made various recommendations for proper drainage. Dlouhys did not follow these recommendations.

Council Bluffs received a large amount of rainfall on May 26, 1987. Water and mud flooded part of Dlouhys' basement. The parties dispute how water entered the basement. At Dlouhys' request, Cloyed cleaned the basement and replaced the dirt that had washed away from the yard. Dlouhys claim that this flooding has been a persistent problem and that Cloyed has refused to correct it and other problems with the house.

Dlouhys sued alleging negligence and breach of contract. Cloyed counterclaimed for the deviations involving extra costs (the "extras"). A jury returned verdicts in favor of Cloyed on both claims and awarded him \$5,600. Both parties appeal. Dlouhys attack the sufficiency of the jury instructions, submission of the counterclaim, and alleged irregularities. Cloyed challenges the award as insufficient and asks for attorney fees.

We review for errors of law. Iowa R. App. P. 4. For clarity, we address the issues in an order slightly different than that in which they were raised.

II. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission to the jury of issues that have no support in the evidence is error. W.T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. L. R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). Conversely, failure to submit issues that are supported by substantial evidence also is error. See Borough, 191 Iowa at 1223, 184 N.W. at 323; see also Miller, 246 N.W.2d at 301. A corollary to these rules is that the trial court has a duty to ensure that the jury understands the issues it must decide. Clinton Land Co. v. M/S Assocs., Inc., 340 N.W.2d 232, 234 (Iowa 1983); McDivitt v. Des Moines City R. Co., 141 Iowa 689, 697-98, 118 N.W. 459, 463 (1909). In fulfilling these duties, the trial court must "instruct with reasonable fullness on pleaded issues supported by substantial evidence." Clinton Land Co., 340 N.W.2d at 234. "The sufficiency of the evidence to warrant submission of a pleaded issue to the jury is decided by giving the evidence the most favorable construction it will reasonably bear in favor of the party

urging submission." Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972); Campbell v. Martin, 257 Iowa 1247, 1251, 136 N.W.2d 508, 511 (1965).

A second corollary is that the trial court has a duty to ensure that the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). In evaluating this, we must read all of the instructions together, not piecemeal or in artificial isolation. Id.; Clinton Land Co., 340 N.W.2d at 234. We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law. Sanders, 421 N.W.2d at 522 (citing Adam v. T.I.P. Rural Elec. Co-op, 271 N.W.2d 896, 900-01 (Iowa 1978)).

A. Plaintiffs contend that the trial court erred in failing to submit an instruction on the issue of Cloyed's alleged negligence. The court submitted the breach of contract issue alone after finding the negligence and contract issues had merged into one theory.

Without enmeshing ourselves too deeply in the fine distinctions of when contract and tort actions are appropriate, see generally W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts § 92 (5th ed. 1984), it appears plaintiffs could maintain either type of action. See Mid-Country Meats, Inc. v. Woodruff-Evans Constr., 334 N.W.2d 332, 336 (Iowa App. 1983). Generally, if plaintiffs' negligence theory was supported by substantial evidence, they were entitled to an instruction having

"reasonable fullness" on that issue. Clinton Land Co., 340 N.W.2d at 234. The trial court may, however, determine as a matter of law whether the duty upon which the negligence claim is predicated is established in or is the same as the contractual duty. See Porter v. Iowa Power & Light Co., 217 N.W.2d 221, 228 (Iowa 1974) (citing W. Prosser, Prosser on the Law of Torts § 37, at 206 (4th Ed. 1971)). Given this and reading all of the instructions together, Sanders, 421 N.W.2d at 522, we find the instructions as a whole are sufficient to convey the applicable law. Id. We hold that the trial court did not err.

B. Plaintiffs contend that the trial court erred in failing to submit an instruction on the issue of Cloyed's alleged breach of implied warranty of habitability. Cloyed argues that the ruling was correct because there was not substantial evidence to support the claim.

Under Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972), breach of the implied warranty of habitability "must be of such substantial nature as to render the premises unsafe or unsanitary, and thus unfit for habitation." Although the supreme court has indicated that "[t]his will usually be a fact question," id., plaintiffs do not appear to have presented substantial evidence to present a fact question. Bane, 181 Iowa at 739, 165 N.W. at 43-44. Defendant, on the other hand, has presented much evidence showing that the house was habitable and that the basement needed cleaning. We hold that the trial court did not err.

C. Plaintiffs contend that the trial court erred in submitting an instruction on the issue of Cloyed's substantial performance of the contract. As in Moore's Builder & Contractor v. Hoffman, 409 N.W.2d 191, 195 (Iowa App. 1987), the builder pleaded substantial performance in response to the homeowner's claims for various breaches of express and implied warranties. We held in Moore's Builder that it was error to instruct the jury that the homeowner's claims were barred by substantial performance. Id. If the jury had determined that Cloyed was in breach of contract, the jury could have allowed Cloyed to recover for the work completed, decreased by the cost of remedying defects. See id. (quoting Vance v. My Apartment Steak House, Inc., 677 S.W.2d 480, 482 (Tex. 1984)). Here, Cloyed showed by substantial evidence "that the owner can live comfortably in the house, or that the value to the owner is very nearly as great as it would have been had exact performance been rendered." Id. (quoting 3A A. Corbin, Corbin on Contracts § 702 (2d ed. 1960)). In fact, he showed the house was of much greater value than plaintiffs paid for it. Under the doctrine of substantial performance, Cloyed could have had a judgment against him despite the value of the house, but he likewise could recover part consideration if he had failed to perform completely. Id.

III. Plaintiffs contend that the trial court erred in finding that they had failed to prove damages. We find this argument without merit. The issue of damages was

submitted to the jury. The jury returned a verdict awarding plaintiffs no damages. The trial court did not err in restating this finding in its entry of judgment.

IV. We next address the issues pertaining to Cloyed's counterclaim. Cloyed sought recovery for the "extras" installed in the Dlouhy house. As we have already noted, Mrs. Dlouhy and Cloyed deviated from specifications, but Dlouhys never issued written orders. Later, Mrs. Dlouhy presented Cloyed with a lien waiver, asking that Cloyed complete it so that Dlouhys could make final financial arrangements with their bank. The document states: "This is written evidence to American Title Insurance Company and its Agent, Title Guaranty Company, that there are no unpaid bills for material or labor furnished for the construction, erection, and/or repairs or improvements of the [Dlouhy house]." The document also states that Cloyed agreed "to fully indemnify [the title companies] against any and all possible payments and expense of legal action in regard to public improvements or mechanics liens resulting from unpaid bills"

A. Plaintiffs contend that the trial court erred in failing to find as a matter of law that Cloyed had waived his rights to additional compensation. Plaintiffs also contend that the trial court erred in failing to find as a matter of law that Cloyed was estopped to pursue his counterclaim. We consider these assignments of error together.

Although we agree that the agreement constituted a binding waiver with respect to the title companies, Williams v. Stroh Plumbing & Elec., Inc., 250 Iowa 599, 601, 94 N.W.2d 750, 752 (1959) (defining waiver), material issues as to its effect on Cloyed's relationship with plaintiffs remain. Even if we assume the agreement is an admission, plaintiffs misinterpret the law. The supreme court has indicated that it is difficult to carry the burden to establish waiver as a matter of law, id. (citing Ruble v. Carr, 244 Iowa 990, 993, 59 N.W.2d 228, 230 (1953)), but this does not say that if there is an "admission" the burden is carried. Furthermore, the authorities cited by plaintiffs speak only to admissions between adverse parties.

Here the key issue was whether the agreement, which makes no mention of plaintiffs, was binding between Cloyed and plaintiffs. The existence of a lien waiver agreement between plaintiffs and Cloyed and Cloyed's intent were material facts in issue. Id. at 602-03, 94 N.W.2d at 753 (existence of waiver a question of fact). There was substantial evidence in the record to support the fact that Cloyed did not intend to waive his rights with respect to plaintiffs. We hold plaintiffs were not entitled to judgments as a matter of law on waiver grounds. For these same reasons, we also hold that plaintiffs were not entitled to judgments as a matter of law on estoppel grounds.

B. Plaintiffs contend that the trial court erred in failing to find as a matter of law that there was no contract to pay for certain items provided by Cloyed. We agree with plaintiffs that the ultimate question was whether the parties modified their agreement to allow alterations without written orders. On this subject we stated in Central Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa App. 1986):

A written change order requirement . . . is not of the essence of the contract, but is a detail in the performance. Berg v. Kucharo Construction Co., 237 Iowa 478, 489, 21 N.W.2d 561, 567 (1946). This type of requirement can be waived by the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards the requirement, and a promise to pay for the extra work, orally requested by the owner and performed in reliance thereon. Id. at 488, 21 N.W.2d at 567.

Whether the plaintiffs had knowledge of, agreed to, or acquiesced in the extra work were material facts in issue, and Cloyed offered substantial evidence in support of his contention that the contract had been so modified. We hold the trial court did not err in refusing to find as a matter of law that there was no contract for the extras.

C. Cloyed, on cross-appeal, contends that the award was inadequate. We find nothing in the record to indicate that this issue was raised before and ruled on by the trial court. Cloyed made no motions for a new trial under rule 244(d) or 244(e). We generally will not address issues not raised before the trial court. Shill v. The Careage Corp.,

353 N.W.2d 416, 420 (Iowa 1984). Even so, assessment of damages is primarily the fact-finder's function, and we will not interfere except in the most compelling circumstances. Olsen v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975); see also Fetters v. City of Des Moines, 260 Iowa 490, 149 N.W.2d 815 (1967); Holmquist v. Volkswagen of Am., Inc., 261 N.W.2d 516 (Iowa App. 1977).

V. Plaintiffs contend they are entitled to a new trial because of alleged irregularities. Iowa R. Civ. P. 244(a). Specifically, they attack the preparation by defense counsel of a judgment entry converting the jury verdict into a judgment. We find nothing in the record to indicate that this issue was raised before and ruled on by the trial court. Plaintiffs made no motion for a new trial under rule 244(a). We will not address issues not raised before the trial court. Shill v. The Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984).

VI. Cloyed, on cross-appeal, contends that the trial court erred in failing to award him attorney fees. Cloyed's claim is predicated on "plaintiffs' overall unreasonableness" and is made pursuant to Iowa Rule of Civil Procedure 80(a). Under Mathias v. Glandon, 448 N.W.2d 443, 445 (Iowa 1989), we review for an abuse of discretion. Although sanctions for violations are mandatory, "whether a violation has occurred is a matter for the court to determine, and . . . involves matters of judgment and degree." Id. at 445-46. As we have said

elsewhere, the trial court is in a superior position to determine whether sanctions will further the ends of deterrence. Dull v. Iowa District Court, ___ N.W.2d ___, 1990 WL 251199, at 2 (Iowa App. 1990) (quoting Cooter & Gell v. Hartmax Corp., 110 S. Ct. 2447, 2460, 110 L. Ed. 2d 359, 381 (1990)). Having examined the record, we find that the trial court did not abuse its discretion in denying sanctions.

VII. For the foregoing reasons, we find that the trial court did not err. We therefore affirm the judgment and the award.

Costs shall be taxed one-half to each party.

AFFIRMED.