FILED
FEB 23 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT SAMUEL RASMUSSEN and **BETTY LOUISE RASMUSSEN,**	)	
Plaintiffs-Appellants,	)	Filed February 23, 1983
vs.	)	
CENTRAL STATES WATERPROOFING CO.,	)	2-413 2-67601
Defendant-Appellee.	)	

Appeal from Polk District Court - Ray Hanrahan, Judge.

Plaintiffs appeal from the judgment for defendant in their suit alleging breach of contract, negligence, and breach of implied warranty of fitness for a particular purpose. REVERSED AND REMANDED.

Robert A. Wright of Wright & Wright, Des Moines, for plaintiffs-appellants.

Gary Fishbaugh of Hilton, New York, for defendant-appellee.

Heard en banc.

DONIELSON, J.

Plaintiffs appeal from the judgment for defendant in their suit alleging breach of contract, negligence, and breach of implied warranty of fitness for a particular purpose. On appeal, the plaintiffs contend that the trial court's findings of fact and conclusions of law are not supported by the evidence, and that the trial court erred by applying the incorrect burden of proof to plaintiffs' claims. We reverse and remand.

Our scope of review in this law action tried to the court is on assigned errors. Iowa R. App. P. 4.

I.

In September, 1978, plaintiffs, Robert and Betty Rasmussen, entered into a contract with defendant, Central States Waterproofing Co., to waterproof the Rasmussen's basement so that it could be made into a family room. The work was performed in April, 1979, for the contract price of $2,509. Robert Rasmussen asked when he would be able to carpet the basement and was told that he could do so in late July. The carpet was laid, panelling installed, and various furnishings were put into the basement room in late July. Shortly thereafter, water seeped through the basement walls and severely water-damaged the items which had been installed.

The plaintiffs filed this lawsuit against the defendant, alleging breach of contract, negligence in performing the work, and breach of an implied warranty of fitness for a particular purpose. The lawsuit was tried to the court. The court ruled in defendant's favor, finding that plaintiffs failed "to establish beyond a reasonable doubt" any of their claims. Plaintiffs then instituted this appeal.

We are unaware of any arguments of defendant as it has elected not to file a brief in this appeal. We note that "[t]he failure to file an appellee brief does not entitled petitioner to a reversal as a matter of right but does provide a basis for

sanctions." State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 209 (Iowa 1982). In the present controversy, we limit our analysis to the controverted rulings of the district court as raised by plaintiffs.

II.

The plaintiffs contend the evidence does not support the trial court's findings that they had failed to prove negligence, breach of contract, or the existence and breach of an implied warranty of fitness for a particular purpose. They also contend the trial court erred by using the phrase "beyond a reasonable doubt" in stating the plaintiffs' burden of proof. We agree with plaintiffs.

Plaintiffs introduced evidence that they had informed defendant that they intended to use the basement as a family room, that they were going to put panelling and carpeting in the basement, and that the basement had to be waterproof for this purpose. Plaintiffs' expert witness testified that plaintiffs' home requires structural supports to correct the water leakage problem, a job which is apparently outside the scope of defendant's usual work. At the conclusion of the trial, the court made no specific findings of fact. Its entire ruling consisted of the following three conclusions of law:

CONCLUSIONS OF LAW

> 1. As to each count of their claim, the burden is on the plaintiffs to establish beyond a reasonable doubt the material allegations of that claim. They have failed to do so as to any count.
>
> 2. Defendant is entitled to judgment in its favor on all of Plaintiffs' claims and for costs.
>
> 3. Defendant's counsel is directed to prepare a judgment entry, submit the same to the Plaintiffs' counsel for approval as to form and to the Court for signature.

The following principles guide our review:

> The trial court's findings of fact have the effect of a special verdict. When the trial court denies recovery because of a party's failure to carry his burden on an issue,

> we will not interfere unless we find the party carried his burden as a matter of law. The evidence in the party's favor must be so overwhelming that no other reasonable inference could be drawn. On review we examine the evidence in the light most favorable to the judgment.

Kurtenbach v. Tekippe, 260 N.W.2d 53, 54-55 (Iowa 1977) (citations omitted). Here, the court made no separate findings of fact. Iowa Rule of Civil Procedure 179(a) provides, in part:

> (a) The court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law; and direct an appropriate judgment. No request for findings is necessary for purposes of review.

The purpose of this rule is to advise counsel and the court, on appeal, of the basis for the trial court's decision. Berger v. Amana Society, 254 Iowa 1036, 1040, 120 N.W.2d 465, 467 (1963). When, as in this case, the findings are insufficient to meet this purpose, the aggrieved party may move the court, pursuant to rule 179(b), to have the findings enlarged. No motion was made in the instant case and we are unable to say, reviewing the record, that the evidence in plaintiffs' favor is "so overwhelming that no other reasonable inference could be drawn" but that plaintiffs have carried their burden as a matter of law. However, we also cannot say that the evidence does not establish plaintiffs' claim by a preponderance of the evidence.

Iowa Rule of Appellate Procedure 14(f)(6) reiterates the well-established rule that the burden of proof in civil cases is to be "measured by the test of preponderance of the evidence." Here, the court placed the burden on plaintiffs to establish their claims "beyond a reasonable doubt." On this review, we are not precluded from determining whether the court applied "erroneous rules of law which materially affected its decision." Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 186-87 (Iowa 1974); see also Kurtenbach v. Tekippe, 260 N.W.2d at 55. Since the trial court erroneously applied a greater burden of

proof than was necessary for plaintiffs to establish their claims, we must reverse its decision and remand to the trial court for its findings of fact and conclusions of law on the question of defendant's liability under the correct burden of proof.

REVERSED AND REMANDED.