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NOV 2 9 1990
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

No. 0-426 / 89-987

HOYT TATUM and ELEANOR TATUM,

Appellants,

vs.

TIMOTHY M. BRADBURY and BONNIE M. BRADBURY,

Appellees.

Appeal from the Iowa District Court for Floyd County, Paul W. Riffel, Judge.

Plaintiffs appeal a jury finding for the Bradburys. **AFFIRMED.**

Dennis L. Eaton, Des Moines, for appellants.

Gene Yagla and John A. Stitely of Lindeman & Yagla, Waterloo, for appellees.

Considered by Donielson, P.J., and Sackett, J., and Perkins, S.J.*

*Senior Judge from the Polk County District Court serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

In 1987 the Tatums operated a hardware store in a building in Nova Springs, Iowa. The Bradburys also operated a hardware store in a building adjacent to the Tatums. The two buildings shared a common wall.

On February 17, 1987, a fire occurred in the Bradbury building. The fire originated in the dumpster in the basement of Bradbury's store. Michael Keefe, an investigator for the state fire marshall's office, concluded the fire may have been caused by smoking materials disposed in the dumpster, but stated that other experts had disagreed with him. The fire apparently had broken out at approximately 7:45 P.M., roughly two hours after Timothy Bradbury had closed the store.

The Tatums sued the Bradburys for property damages resulting from the fire. They alleged the Bradburys were negligent in failing to properly dispose of flammable materials. The case proceeded to trial. Tim Bradbury testified he had worked in the basement for most of the day prior to the fire. He testified that several other people had come down to the basement during business hours, and any one of them may have deposited smoking materials in the dumpster.

Hoyt Tatum, the owner of the building adjacent to the Bradbury store, testified he believed his building was worth $100,000 before the fire. However, prior to the fire

the city had valued the building at $9,625. Tatum protested the valuation, and filed a protest with the board of review, stating that the building had a value of only $8,000.

At trial Steven Wendt, an appraiser, testified that using several different methods of valuation, he believed the building was worth between $8,000 and $18,000. Tim Bradbury testified Hoyt Tatum had offered the building for sale a month before the fire for $15,000.

The jury found that the Bradburys were not negligent. The Tatums appeal. They contend there was sufficient evidence to support a jury instruction on liability for common walls. Even though the Tatums' trial counsel failed to request such an instruction, the Tatums' appellate counsel contends this court should adopt the "plain error" rule and that error preservation was unnecessary. We affirm.

Because the present action was filed as a law action, our scope of review is for the correction of errors at law only. Iowa R. App. P. 4. We are bound by the fact-findings in a law action if they are supported by substantial evidence. Iowa R. App. P.14(f)(1).

The Tatums contend that in the present case their attorney's erred in failing to submit an instruction on the common wall doctrine was plainly evident from the record, and prejudiced his rights to a fair trial. We disagree.

Under Iowa law, when two buildings share a common wall there is a duty to contribute to the upkeep of the wall only in the proportion that their structure uses or is supported by the wall. See Howell v. Gross, 128 Iowa 569, 573-74, 105 N.W. 61, 62 (1905). Generally, either landowner may remove his building without liability for resulting damage to the other on giving proper notice, and using reasonable care to protect the party wall and his neighbor's building. 59A AM. JUR.2d Party Walls §60 (1987). The purpose of the giving of the notice is to enable the adjoining landowner to take his own precautions. Id. This rule governs even though the wall is exposed to the elements, is unsightly, or unprotected. Id. at § 61.

In the present case, the Tatums argue the above cited law should have been presented by trial counsel pursuant to a set of jury instructions that were never submitted for consideration. As such, the Tatums urge this court to adopt the "plain error" rule. The Tatums argue this error was so obvious and so prejudicial that even though no objections were made at the trial level, we may take notice of the error not assigned. We, however, decline to adopt such a rule here. The Iowa Supreme Court explicitly rejected the "plain error" rule in State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), stating "[n]o 'plain error' rule exists to allow appellate review of allegations * * *

without requiring preservation of error via timely and adequate objections at trial." Pursuant to Iowa Rule of Civil Procedure 196, any objections to giving or failing to give any instructions must be made in writing or dictated in the record before submission to the jury, otherwise no objections may asserted thereafter. It is therefore apparent, pursuant to the above-outlined authority, the Tatums may not now claim their trial counsel erred in failing to object to the failure to include the party wall doctrine in the jury instructions. See Champlin v. Walker, 249 N.W.2d 839, 842 (Iowa 1977).

Even if we were to find the Tatums had preserved error, we find no merit in their argument that the party wall doctrine applies to the facts of the present case. Our examination of the record reveals that Bradbury provided notice, hired professional excavators from Mason City, and personally supervised the removal of the building. It does not appear from the record that the wall in question was damaged by the fire. Further, we note Hoyt Tatum stated at trial his building had been worth $100,000 before the fire, yet the record reveals he had placed a value of only $8,000 on his building after the board of adjustment had valued the property at $9,625. Tatum has cited no authority to support his assertion that the party wall doctrine should be applied to the present case, nor has Tatum suggested what his proposed instruction should have provided. We

believe the trial court was correct in instructing only on the theory of negligence. We find no error sufficient to justify reversal of the jury verdict.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs without opinion.