

FILED

AUG 25 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SWENSON BUILDERS, INC.,)

Plaintiff-Appellee,)

vs.)

ROBERT J. SCHULTE,
CONSTRUCTION COMPANY, INC.,)

Defendant-Appellant.)

Filed August 25, 1981

1-161
2-65448

Appeal from Dubuque District Court. Karl Kenline, Judge.

Defendant-subcontractor appeals trial court's adverse judgment awarding plaintiff-contractor the cost of removing and replacing a basement foundation allegedly damaged by defendant while backfilling the foundation. Defendant also appeals the denial of his counterclaim for the cost of excavation and backfill work he did. **AFFIRMED.**

Wayne A. Norman, Jr., of Konzett, Norman, Lindahl & O'Brien of Dubuque, Ia., for defendant-appellant.

Michael J. Coyle, of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, Ia., for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant-subcontractor appeals trial court's adverse judgment awarding plaintiff-general contractor the cost of removing and replacing a basement foundation allegedly damaged by defendant while backfilling the foundation. Defendant also appeals the denial of his counterclaim for the cost of the excavation and backfill work he did. We affirm.

Plaintiff, a general contractor, subcontracted the excavation and backfilling work on the Robert Birkholz residence to defendant. Defendant excavated an area for the basement, and later backfilled around the foundation after the concrete had been poured, cured and braced.

When defendant's employee drove a crawler tractor parallel to the foundation walls on the soft soil he had just backfilled, the pressure caused the south and east walls to bow in and crack. Birkholz refused to accept the damaged foundation, so plaintiff removed it and replaced it at a cost of \$8,932.14.

Plaintiff brought this action at law, alleging defendant's negligence was the proximate cause of the bowed and cracked walls. Defendant denied negligence and counterclaimed for the cost of the work he had done. Trial was May 8, 1980, and plaintiff was awarded the cost of replacement, and defendant's counterclaim was dismissed. Defendant appealed.

L Sufficiency of Evidence.

Defendant is appealing a law action tried to the court, and, our review is only on errors assigned. Under this limited scope of review, the trial court's findings of fact have the effect of a special verdict and are equivalent to a jury verdict. Iowa R. App. P. 14(f)(1). If the findings are supported by substantial evidence and justified as a matter of law, they are binding upon us, the appellate court. Iowa R. App. P. 4.

The specific finding of fact called into question in this case is whether replacement rather than repair was necessary. The evidence should be construed in the light most favorable to the judgment of the trial court. McCune v. Muenich, 255 Iowa 755, 757, 124 N.W.2d 130, 131 (1963).

Birkholz testified that when he saw the new foundation of his home after the backfilling had been completed, he noticed that there were two cracks in the south wall,

starting two or three feet from the corners and going toward the center of the building; there was a crack on the east wall which went all the way through the wall and into the footings, and another crack in the east wall that appeared to also go down through the footings. Birkholz also testified that the entire southern wall of the foundation bowed in about three inches.

Having been a contractor himself, Birkholz was concerned about both the leakage and the strength of the foundation, and demanded that a new foundation be poured. He could see that one of the cracks which went through the footing was located where the major beam in the basement would be, and that is where the main weight of the house would rest.

Lyle Dimmer, the concrete contractor, testified that he would not accept foundation walls which were damaged like the Birkholz walls were. One of the partners of Swenson Builders, Inc., Bob Swenson, testified that he agreed that a new basement was necessary. An excavating contractor, Larry McDermott, testified the cracks he saw in the walls were not the typical expansion cracks one might find in concrete, but rather were breaks in the wall and were spread open on the inside because of the bowing.

Defendant's expert testified that even if the cracks in the foundation were repaired, the basement would always look like there were cracks in the wall and it might leak. Defendant's expert did not testify how the three inch bow in the fifty-four foot long south wall could be repaired. The finding that replacement was necessary is supported by substantial evidence.

II. Measure of Damages.

Defendant asserts that allowing recovery based on replacement costs reflects the court's use of an improper measure of damages. The trial court did not label its theory behind allowing replacement costs, but defendant argues that the award represents the court's use of the "value" approach rather than the "cost" approach.

When there is a breach by defective construction, the injured party can get a judgment for damages which is measured by the reasonable cost of reconstruction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste. Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972).

The validity of the measure of damages used by the trial court depends not on what

approach was used, but rather on whether or not replacing the Birkholz foundation was unreasonable economic waste. As mentioned previously, we think the findings of the trial court were supported by substantial evidence. We give credence to the lower court's finding that replacement was necessary and affirm the court's award of the cost of replacement.

III. Value of Subcontractor-Defendant's Work.

If defendant substantially performed his contract with plaintiff, he would be able to recover the value of the work he did on the Birkholz home.

Defendant refers us in his brief to Huffman v. Hill, 245 Iowa 935, 938, 65 N.W.2d 205, 206 (1954), which states that a technical, exact and perfect performance is not necessary. If there is substantial performance the builder is entitled to the contract price less reasonable damages on account of slight defects in performance.

Cracks going through the foundation and footings of a new basement, and a three inch bow in the wall are not slight defects. The defendant's work was completely redone. The trial court's finding that defendant had not substantially performed his contract is supported by the evidence.

AFFIRMED.