FILED
SEP 28 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

| | | |
|---|---|---|
| **ALEX SCHMIDT,** | ) | |
| Plaintiff-Appellant, | ) | |
| vs. | ) | 282 |
| **RON DEFENBAUGH; CAPITOL OIL CORPORATION;** and **RADIUM PETROLEUM CO.,** | ) | |
| Defendants-Appellees, | ) | |
| and | ) | |
| **HYMAN FRIEDMAN; SWEET OIL CO., INC.; DALE SWEET; THOMAS OIL CO., INC.;and CLINTON HARLANDER,** | ) | 8-220<br>87-1097 |
| Third-Party Defendants. | ) | |

Appeal from the Iowa District Court for Black Hawk County (No. 55807) - Joseph C. Keefe, Judge.

Plaintiff appeals the trial court's refusal of damages for the cost of removing contaminated oil from his storage tank. **AFFIRMED.**

John S. Pieters, Waterloo, for the plaintiff-appellant.

H. Richard Smith, Randall H. Stefani, and Ronald L. Peeler, of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for the defendants-appellees.

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

283

**OXBERGER, C.J.**

The plaintiff, Alex Schmidt, operates a road oiling business that uses waste oil. He purchased a shipment of waste oil which proved to be contaminated with a hazardous chemical (PCB). Soon after Schmidt purchased the oil, pollution control authorities traced the oil to him and obtained a court order enjoining him from using the oil in his business. Plaintiff recovered a judgment for some of his damages from those who supplied him the contaminated oil. However, the court refused to award damages for the cost of removing the oil from his storage tanks. Plaintiff contends the district court erred by holding that his evidence was insufficient to permit an award of damages for the cost of removing the oil. We affirm.

Upon appeal in a law action tried to the court where the trial court denied recovery because of a party's failure to carry its burden of proof on an issue, our review is to determine whether the party carried its burden as a matter of law. Pohlman v. Ertl Co., 374 N.W.2d 253, 255-56 (Iowa 1985); Anthony v. State, 374 N.W.2d 662, 664-65 (Iowa 1985). The evidence in the party's favor must be so overwhelming that only one reasonable inference could be drawn. Anthony at 664-65 (citing Roland A. Wilson v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925 (Iowa 1976)).

The plaintiff attempted to prove his damages through the use of testimonial evidence. The plaintiff testified

as to his "best" estimate of the number of gallons of oil in the Fort Dodge tank and the sales managers from the Waste Management of Iowa testified as to the estimated cost per gallon to remove the contaminated oil at the time of trial.

It is the prerogative of the trier of fact to determine which evidence is entitled to belief. DeYarman v. State, 226 N.W.2d 26, 29 (Iowa 1975). The trial court consistently and repeatedly refused to award damages for removal of the oil citing the failure of the plaintiff to produce substantive evidence as to the damages. We find the evidence presented at trial as to the cost of removing the oil does not establish plaintiff's burden as a matter of law. Accordingly, we affirm the trial court's denial of an award of damages as to the removal of the oil from the Fort Dodge site.

**AFFIRMED.**