FILED
OCT 27 1981
IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

J. RICHARD LONG,
Plaintiff-Appellee,
vs.
CEDAR VALLEY CORPORATION,
Defendant-Appellant.

Filed October 27, 1981

1-191
2-65273

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Defendant appeals from an adverse judgment in plaintiff's negligence action arising out of the defendant's construction of a tennis court for plaintiff asserting that the evidence was insufficient to support a finding that defendant was negligent. AFFIRMED.

Barton L. Schwieger of Schwieger, Parrish & McIntee, Waterloo, Iowa, for defendant-appellant.

W. H. Gilliam of Rapp & Gilliam, Waterloo, Iowa, for plaintiff-appellee.

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

Defendant, Cedar Valley Corporation, appeals from an adverse judgment in plaintiff, J. Richard Long's, negligence action arising out of the defendant's construction of a tennis court for plaintiff. Appellant fails to state expressly any issue, but the argument in appellant's brief appears to assert that the evidence was insufficient to support a finding that defendant was negligent. Within this argument, appellant also contends that there was insufficient foundation for plaintiff's expert witness to testify as to the cause of the damage to the tennis courts. We affirm.

Plaintiff contracted with defendant to construct a tennis court for plaintiff. Soon after laying of the asphalt, cracks developed on the surface which severely affected the court's usefulness. Plaintiff filed a petition on July 25, 1978, alleging that defendant had negligently and defectively layed the asphalt tennis court at his residence. Trial to the court commenced on January 22, 1980, and the court rendered its judgment in favor of the plaintiff on April 25, 1980. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Preservation of Error. Appellant failed to state any specific issue in his brief, as required by Iowa R. App. P. 14(a)(3). In this regard, we note that an appeal may be dismissed, on this court's own motion, with or without notice, for failure to comply with a rule of appellate procedure. Iowa R. App. P. 14. We have decided, however, in keeping with our policy to decide cases on their merits, that we will address the merits of this case. Defendant primarily argues that there is no substantial evidence to support trial court's judgment, but within this argument there surfaces a challenge to the sufficiency of the foundation for plaintiff's expert witness's testimony as to the cause of the damage to the tennis court. We will address this issue first.

Opinion evidence is not admissible, over a proper objection, where there has been no adequate foundation as to qualifications of the expert to testify on the matter in issue. Fischer, Inc. v. Standard Brands, Inc., 204 N.W.2d 579, 582 (Iowa 1973). In the present case, however, defendant made no objection at trial to plaintiff's expert witness's testimony. We thus find defendant waived any objection to the testimony. See Moose v. Rich, 253 N.W.2d 565, 569 (Iowa 1977).

The controlling principle of law is stated in E. Cleary, McCormick's Handbook on the Law of Evidence, § 54 (2d ed. 1972), as follows:

> [A] failure to make a sufficient objection to evidence which is competent waives any ground of complaint as to the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use of proof so far as it has probative value. The incompetent evidence, unobjected to, may be relied on in argument, and alone or in part may support a verdict or finding. This principle is almost universally excepted, and it applies to any ground of incompetency under the exclusionary rules.

This principle is explicitly supported by Iowa case law. See State v. Shurman, 205 N.W.2d 732, 735 (Iowa 1973). The testimony of plaintiff's expert thus remains in the record to support the issues of negligence and causation and must be considered by this court on review.

III. Substantial Evidence. Defendant argues that the record lacks substantial evidence to support trial court's judgment against him. In its brief, defendant summarizes the argument in the following manner: "The defendant asserts that a fair reading of his [plaintiff's expert witness] testimony presents nothing more than a mere ambiguity as to the possible causes of the cracks in plaintiff's tennis court." (emphasis added).

Trial court's findings of fact have the effect of a special verdict and are equivalent to a jury verdict; if supported by substantial evidence they are binding upon us and the judgment will not be disturbed on appeal. Iowa R. App. P. 14(f)(1). "A finding of fact is supported by substantial evidence if the finding may reasonably be inferred from the evidence." Briggs Transportation Co. v. Star Sales Co., 262 N.W.2d 805, 808 (Iowa 1978). The record is reviewed in the light most favorable to the judgment; and ambiguities are construed to uphold rather than defeat the judgment. Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977).

Having reviewed the record as a whole, construing all ambiguities to uphold the judgment, we conclude that evidence is more than adequate to permit the trier of fact to determine that defendant defectively and negligently prepared the asphalt base for the tennis court. Plaintiff's expert witness testified that he observed the construction of the tennis court from his property for approximately an hour and one-half and that he subsequently inspected the tennis court upon plaintiff's request. He testified that the soil in the area was a mixture of clay and sand, requiring the contractor, in construction of a tennis court, to take care and precaution in compacting such material and in removing the top soil. He testified that he observed no equipment for proper

compaction at the construction site, that layering of the material was too thick, that the material was uneven, that the chunks were huge, and that it was unlikely defendant could have obtained the appropriate density. He further testified that defendant did not follow the standards in the industry with respect to construction of tennis courts and that this court was nothing more than a big slab which would crack as the sub-base settled. We thus find substantial evidence to support trial court's judgment that the damage to plaintiff's tennis court was caused by defendant's negligent construction and affirm the judgment below.

AFFIRMED.